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# PRESUMED UNFIT: THE DUAL BIND FACED BY PREGNANT AND PARENTING YOUTH IN FOSTER CARE

KARA R. FINCK\*

*Pregnant and parenting youth in foster care are subject to a range of laws, policies, and practices that expose the realities of a child welfare system structured to focus on surveillance instead of support and family regulation instead of family integrity. Informed by my experience representing foster youth who become parents, this Article considers how youth in care are presumed unfit to parent their children because of a history in foster care and their age. A youth's status as pregnant or parenting is weaponized to subject them to additional scrutiny, threats, and a shifting burden to justify their fundamental right to legal and physical custody of their children, free from state intrusion.*

*Recent studies show that youth in care are more likely to be accused of abuse and neglect and to have their child removed from their care than their counterparts who are not in foster care. This Article identifies state laws and agency practices that codify this increased level of supervision without providing the commensurate protections afforded to nondependent parents with a report of maltreatment or case in family court. Examples of these policies include social holds at hospitals, voluntary placement agreements with child welfare agencies, and targeted social service practices requiring foster youth to meet a higher burden to demonstrate their ability to parent and maintain custody of their child.*

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\* Practice Professor of Law and Director, Interdisciplinary Child Advocacy Clinic, *University of Pennsylvania Law School*. The Author wishes to extend her deep appreciation to all of the pregnant and parenting youth in foster care who have shared their story and exemplified strength in their fight for their family's unity, steadfastness in their unwavering love for their children and resolve in enforcing their rights as parents and youth in foster care. Thanks also to Bethany Callahan and the *Law Review* editors for their care, attention, and diligence with this Article.

*Ultimately, an interrogation of the child welfare system's treatment of pregnant and parenting youth leads us to consider who is seen as worthy and able to parent, and who is seen as needing to be scrutinized and policed in their parenting. This Article recommends the expansion of recent legislation enacting specific protections for pregnant and parenting youth in foster care, increased legal representation when pregnancy is disclosed, and services available without coercion or increased scrutiny.*

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#### INTRODUCTION

When Serena disclosed her pregnancy a couple of weeks before her eighteenth birthday to the foster care agency caseworker (hereinafter "caseworker"), she shared her goals to live independently and ensure that her child never spent any time in the same foster care system that had so significantly impacted her own life.<sup>1</sup> The caseworker counseled Serena that if she signed herself out of the foster care system, the agency would have no choice but to remove her child regardless of what plan she presented for her transition out of care. If she remained in foster care and did not abide by the agency's plan, then the caseworker would have no alternative but to make a report and request to file a case in family court. The caseworker created a service plan that included rules for where Serena could seek childcare for her son, when

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1. All client names and identifying details have been changed by the Author.

he could see a doctor, and who he could visit with on the weekends or overnight. Serena was placed at a mother-baby congregate care home, but the placement did not provide childcare for her son. The daycare identified by the agency was farther away from her high school, so she would rise two hours early to bring him to daycare and make it to school on time. When she requested to extend his hours in daycare so that she could continue playing on the high school softball team, the caseworker refused, stating that she should be spending more time with her child. When Serena took her son to the doctor, she had to remember to ask for proof of the appointment so that she could provide it to the caseworkers. If she wanted to visit with a friend or family member, she was required to inform the caseworkers of her whereabouts and, in some instances, provide contact information and secure child abuse clearances for the individuals whom she visited. Effectively, from the moment she learned she was pregnant, Serena's ability to make decisions for her child and family was curtailed by the child welfare agency even though there was never any formal report of maltreatment or case in family court involving her care for her son.

As Serena quickly discovered, there is a dual bind that pregnant and parenting youth in foster care or extended foster care between ages eighteen to twenty-one face because of their status as dependent youth.<sup>2</sup> While federal and state child welfare laws are aimed at protecting the safety and welfare of minors in foster care,<sup>3</sup> a youth's status as pregnant or parenting is often weaponized to subject foster youth to additional scrutiny, threats, and a shifting burden to justify their right to sole, legal, and physical custody of their children. As an attorney for both parents and children impacted by the foster care system, I have seen firsthand the scrutiny, misinformation, and threats clients who are pregnant, expecting, or parenting in foster care

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2. Throughout this Article, the terms "dependent parents" and "pregnant and parent youth in foster care" will be used interchangeably. The terms refer to minors in foster care who are pregnant, expecting, or parenting and nonminors who have consented to remain in extended foster care who are pregnant, expecting or parenting.

3. See *Foster Care Bill of Rights*, NAT'L CONF. ST. LEGISLATURES (Oct. 29, 2019), <https://www.ncsl.org/research/human-services/foster-care-bill-of-rights.aspx> [<https://perma.cc/E6BY-VBLP>] (discussing foster children's bills of rights enacted by states to define the rights of foster children); see, e.g., Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, §§ 111-115, 128 Stat. 1919, 1923-31 (2014).

experience.<sup>4</sup> I witnessed clients forced to consider the potential removal of their infant before they had even begun to parent their child simply because they were currently or previously in foster care. In some cases, child protective caseworkers have explicitly stated that any misstep or infraction on the part of the dependent parent would result in their infant being removed from their care, regardless of the law requiring there to be imminent risk of serious harm and judicial review of a removal of a child from their parent's care.<sup>5</sup>

This Article discusses the myriad policies and practices that target pregnant or parenting dependent youth and create systemic barriers to the full realization of their custodial rights to their children. This heightened scrutiny creates a culture of fear at the very moment a young parent is most in need of support and reinforcement in their ability to succeed as a parent. Furthermore, the constant threat of removal interferes with the young parent forming an attachment with their child and discourages the parent from seeking access to supportive services and programs.

The predicament faced by pregnant and parenting youth in foster care exemplifies the systemic failures of our child welfare system to support older youth as they transition out of the system.<sup>6</sup> Ultimately, targeting the very youth who are supposed to be protected and supported by the child welfare system when they become parents exposes the punitive nature of the child welfare system, which focuses on removal and regulation instead of family unity.

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4. While this Article will focus on the treatment of young mothers who are in care when they are pregnant or parenting, many of the same issues of increased surveillance and systemic disregard for basic parental rights are faced by fathers who are youth in the foster care system. There is also a considerable dearth of research on the outcomes for males in foster care who are parenting.

5. Benjamin R. Picker & Jonathan C. Dunsmoor, *Social Services and Constitutional Rights, a Balancing Act*, A.B.A. (Feb. 11, 2013), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2013/social-services-constitutional-rights-balancing-act> (noting due process principles typically require notice and a hearing prior to separating children from their parents, but a pre-deprivation hearing is not required if there is reasonable suspicion that a child is in imminent danger of serious harm).

6. *Black Children Continue to Be Disproportionately Represented in Foster Care*, ANNIE E. CASEY FOUND. KIDS COUNT DATA CTR. (Apr. 13, 2020), <https://datacenter.kidscount.org/updates/show/264-us-foster-care-population-by-race-and-ethnicity> [<https://perma.cc/2F86-MRNT>] (indicating Black children made up 23% of all children in foster care in the United States in 2018, yet only 14% of the total child population, whereas white children made up 44% of the foster care population but 50% of the nation's total child population).

Part I provides a brief overview of pregnancy and parenting among youth in foster care and the outcomes experienced by older youth in foster care, whether they are pregnant or parenting. Part II discusses the legal issues confronting pregnant and parenting youth in foster care, including the presumption that youth are entitled to custody of their children regardless of their age or status in foster care. Despite the legal presumption that biological parents retain custody of their children, this Part presents a range of formal and informal policies and practices that effectively curtail the custodial rights of pregnant and parenting youth in care. Examples of these limitations include the use of hospital holds, voluntary placements, and increased scrutiny of the youth's parenting decisions absent a report of suspected maltreatment and subsequent investigation or court review. Part III concludes by providing examples of legislation and agency policies that protect the custodial rights of pregnant and parenting youth in foster care and provide supportive services outside of the coercive and punitive sphere of the child welfare system.

#### I. AN OVERVIEW OF PREGNANT AND PARENTING YOUTH IN FOSTER CARE

National rates of pregnancy among adolescents have declined in recent years, but those rates have not declined for youth in foster care or extended foster care who still have higher rates of early pregnancy.<sup>7</sup> Studies of national data show that twenty percent of female youth in foster care give birth before age nineteen, and that rate increases for youth between ages nineteen and twenty-one.<sup>8</sup> In California, researchers found that one in four young women age seventeen or older who were in foster care had given birth at least once before the age of twenty.<sup>9</sup> The scope of youth who are pregnant or parenting in

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7. Andrea Lane Eastman et al., *Pregnant and Parenting Youth in Care and Their Children: A Literature Review*, CHILD & ADOLESCENT SOC. WORK J. (Jan. 11, 2019), <https://doi.org/10.1007/s10560-019-00598-8>.

8. Svetlana Shpiegel et al., *Factors Associated with First and Repeat Births Among Females Emancipating from Foster Care* 125 CHILD. & YOUTH SERVS. REV., Mar. 2021, Article No. 105977, <https://doi.org/10.1016/j.childyouth.2021.105977>.

9. Emily Putnam-Hornstein et al., *California's Most Vulnerable Parents: When Maltreated Children Have Children* (2013). A study of mothers from Manitoba, Canada found that "[a]dolescent mothers in the care of CPS are much more likely to have their child taken into CPS care. By separating a quarter of young mothers from their infant within the first week of life, and almost half before the child turns 2, the cycle continues." Elizabeth Wall-Wieler et al., *The Cycle of Child Protection Services Involvement: A Cohort Study of Adolescent Mothers*, 141 PEDIATRICS, June 2018, at 1, 6.

foster care is significant and warrants a targeted exploration of their experiences as pregnant or parenting individuals in the child welfare and family regulation system.

Outcomes for teen parents are well studied and include poor health, lower education achievement, and higher levels of behavioral health issues.<sup>10</sup> The increased risk of poor outcomes for teen parents is exacerbated for older youth in foster care or extended foster care.<sup>11</sup> Youth can “age out” of the foster care system, meaning that they can leave the foster care system at age eighteen or older depending on the state’s provision of extended foster care for youth after age eighteen.<sup>12</sup> Former foster youth who “age out” of the system are more likely to be homeless or without stable housing, unemployed, and lacking a high school or post-secondary education degree.<sup>13</sup> Therefore, older youth who are pregnant or become parents during their time in foster care face additional hurdles to ensuring that courts safeguard their best interests and agencies meet their specialized nonlegal needs.

Researchers examining the impact of early childbirth among females ages nineteen to twenty-one who are emancipating from foster care have noted a significant tension when “simultaneously negotiat[ing] the roles and responsibilities of new motherhood and ‘aging out’ of foster care.”<sup>14</sup> The child welfare system is legally required to provide placement and supportive services to ensure that older youth in foster care or extended foster care are ultimately able to live

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10. JENNIFER MANLOVE ET AL., *TEEN PARENTS IN FOSTER CARE: RISK FACTORS AND OUTCOMES FOR TEENS AND THEIR CHILDREN* 4 (2011).

11. See *First-of-its-Kind Data Track Troubling Outcomes of Youth Transitioning from Foster Care*, ANNIE E. CASEY FOUND. (Nov. 13, 2018), <https://www.aecf.org/blog/first-of-its-kind-national-data-track-troubling-outcomes-of-youth-transitioning> [<https://perma.cc/FSR8-Y24K>] (indicating youth who leave foster care at age eighteen without supportive adult connections and access to resources face “increased risk for homelessness, poverty, unemployment and other challenges”).

12. See, e.g., N.Y. Fam. Ct. Act §§ 1089, 1091 (McKinney 2021) (permitting youth to remain in or reenter foster care after age eighteen if they are found eligible by meeting the conditions of working, attending school, and consenting to the placement).

13. MARK COURTNEY ET AL., *FINDINGS FROM THE CALIFORNIA YOUTH TRANSITIONS TO ADULTHOOD STUDY (CALYOUTH): CONDITIONS OF YOUTH AT AGE 23 17–18, 27–28*, 46 (2020).

14. Shpiegel et al., *supra* note 8, at 2.

independently.<sup>15</sup> Older youth who are pregnant and parenting should be afforded those same services and supports, which are aimed at improving their financial means, educational stability, employability, and parenting capacity. While much of the literature on pregnancy in foster youth focuses on the risks and challenges, researchers have also identified the ways in which early pregnancy can increase resiliency, including a heightened sense of responsibility, desire to improve their condition for their child, and motivation to end the cycle of maltreatment.<sup>16</sup>

Nevertheless, for decades, child advocates have noted that “[t]he system treat[s] [expectant and parenting youth in care] in a manner that assure[s] their failure to become independent and to become successful parents [and] also fail[s] . . . to prevent a new generation of children from being raised in foster care.”<sup>17</sup> A critical analysis of the child welfare system’s failure to protect the custodial rights of parents who are in foster care is warranted.

## II. LEGAL ISSUES FACING PREGNANT AND PARENTING YOUTH IN FOSTER CARE

Youth in foster care who are pregnant or parenting retain the same rights as their non-dependent peers who are pregnant and parenting with regard to retaining legal and physical custody of their infants. As part of a parent’s right to custody of their child, it has long been held that “a parent’s desire for and right to ‘the companionship, care, custody, and management of his or her children’ is an important interest that ‘undeniably warrants deference and, absent a powerful countervailing interest, protection.’”<sup>18</sup> Indeed, the liberty interest is so fundamental that “the interests of parents in the care, custody, and control of their children—[are] perhaps the oldest of the fundamental

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15. See *What Available Support and Resources Are in Place for Youth Transitioning from Foster Care?*, CHILD.’S BUREAU (July 15, 2021), <https://www.acf.hhs.gov/cb/faq/foster-care7> [<https://perma.cc/U8RY-KDDF>] (noting federal law requires child welfare agencies to assist youth in developing transition plans and available federal resources to support transitioning youth, including vouchers for education and training, housing assistance, and health insurance coverage).

16. Eastman et al., *supra* note 7 (citing the review of parent resiliencies identified by researchers).

17. BETSY KREBS & PAUL PITCOFF, *BEYOND THE FOSTER CARE SYSTEM: THE FUTURE FOR TEENS* 79 (2006).

18. *Lassiter v. Dep’t of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 27 (1981) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).



liberty interests recognized by [the U.S. Supreme] Court.”<sup>19</sup> These rights are not limited or constrained by the parent’s age when the child is born since a parent’s status as a minor is not a sufficient basis by itself to remove or limit custodial rights.<sup>20</sup> Furthermore, a parent’s status as a dependent youth in foster care, whether a minor or adult, should neither be dispositive of their ability to parent nor activate a default presumption that the child is neglected.<sup>21</sup> When an infant is born to a youth placed in foster care, federal law mandates that the infant not be removed absent evidence of abuse and neglect, and the law specifically mandates that the new family should reside together in the placement.<sup>22</sup> Federal law allows for states to receive funding for the infant and the dependent youth without requiring that the dependent youth’s child be placed in foster care.<sup>23</sup>

Several jurisdictions have gone so far as to explicitly state that the parent’s status as a dependent minor is not grounds for their child to be found dependent. In one case, the Superior Court of Pennsylvania overturned a finding of dependency because “[t]he apparent reason for the action on the part of [the state] to adjudicate the child dependent was that [the infant] was born to a minor child who herself

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19. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

20. See CHILD WELFARE INFO. GATEWAY, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 1, 2 (2021), <https://www.childwelfare.gov/pubpdfs/groundtermin.pdf> [<https://perma.cc/8M2P-MSTL>] (noting that states establish statutory grounds for involuntary termination of parental rights, which are “specific circumstances under which it is determined that the child cannot be maintained safely in his or her home because of the risk of harm by the parent or the inability of the parent to provide for the child’s basic needs”).

21. This Article does not specifically discuss laws creating a separate standard or policy for infants born to parents with children currently in out of home placement or who are subject to court supervision as a result of a finding of abuse, neglect or maltreatment. For example, New York City’s Child Safety Alert 14 mandates that when a caseworker is informed that “a parent with a child in foster care is pregnant, the case worker assigned to oversee any siblings in foster care ‘must conduct an on-going assessment to determine whether it would be safe for the newborn to reside in the home.’” N.Y.C. COMM’N ON HUM. RTS. & HUM. RTS., *YOUR RIGHTS WHILE PREGNANT, BREASTFEEDING, OR CAREGIVING: A REPORT ON THE 2019 COMMISSION PUBLIC HEARING ON PREGNANCY AND CAREGIVER DISCRIMINATION* 14 (2019).

22. See 42 U.S.C. § 671(a)(15); 45 C.F.R. § 1356.21(b) (2020).

23. 45 C.F.R. § 1356.21(j) (“Child of a minor parent in foster care. Foster care maintenance payments made on behalf of a child placed in a foster family home or child care institution, who is the parent of a son or daughter in the same home or institution, must include amounts which are necessary to cover costs incurred on behalf of the child’s son or daughter.”).

was adjudicated dependent.”<sup>24</sup> The same Pennsylvania court that overturned a dependency finding simply because the parent of the child was in foster care also noted that pregnant and parenting youth in care are put in a bind: “on a visceral-level allowing Children and Youth Services (CYS) to exercise custody and control of [the infant] under these circumstances may seem advisable, and as a practical matter, if [the dependent parent] retains primary custody of [the infant], CYS will indirectly be involved in his care.”<sup>25</sup> A court in Alabama reversed a trial court’s decision to terminate the parental rights of a mother in state custody and concluded “[t]his case does not involve neglect or child abuse by the mother. In fact, the record indicates that the mother has expressed only love and concern for her child and that the child was placed in [state] custody solely because the mother herself had been placed in foster care.”<sup>26</sup> The reality remains that youth in care who are pregnant or parenting are implicitly scrutinized, regulated, and ultimately held to a higher standard as they begin to care for their children. Pregnant and parenting youth in care are routinely investigated by caseworkers without the minimal procedural protections provided under the law for investigations of maltreatment and, oftentimes, in the absence of a formal report of suspected maltreatment.

As a result of this scrutiny, another client decided to sign herself out of care at age nineteen when she discovered she was pregnant, precisely because she was terrified of the child welfare system being involved in her child’s life in any capacity. She sacrificed concrete services that she was entitled to as an older youth in foster care, including her monthly rent and stipend, to ensure against any agency supervision or court oversight of her child. As a young mother and former foster youth in California reflected, “I’m living in a constant state of fear that I could lose my kids because they might see me as an ignorant or uneducated mother. I fear them like an enemy, like they’re a monster in my closet.”<sup>27</sup>

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24. *In re Hall*, 703 A.2d 717, 718 (Pa. Super. Ct. 1997).

25. *Id.* at 718–19.

26. *R.F. v. State Dep’t of Hum. Res.*, 740 So. 2d 1093, 1095 (Ala. Civ. App. 1999); *see L.A.T. v. State Dep’t of Hum. Res.*, 588 So. 2d 471, 472 (Ala. Civ. App. 1991) (reversing the termination of the parental rights of a mother in foster care, noting the love and affection the mother demonstrated toward her child).

27. Jeremy Loudenback & Elizabeth Amon, *California Weighs Protections for Parenting Foster Youth*, IMPRINT (Sept. 21, 2021), <https://imprintnews.org/family/>

Pregnant and parenting youth in care are subject to increased supervision and expectations precisely because they are placed in the foster care system and subject to the oversight of the child welfare agency and its agents, including foster care agencies and social service providers.<sup>28</sup> In Illinois, researchers documented that 39% of the children born to mothers who were in foster care were investigated for maltreatment before the child's fifth birthday, with 17% of those reports substantiated and 11% placed in foster care.<sup>29</sup> In California, 53% of children born of mothers in foster care are reported to child protective services before age three, compared to 10% in the general population.<sup>30</sup> A study of young parents in New York City's foster care system highlighted that the initial report of maltreatment was made by the foster youth's caseworker, congregate care staff, or foster parent, and the allegations included violating curfew, taking the child to a non-approved location, and disregarding a suggestion made by the provider, such as where to seek child care.<sup>31</sup> A particularly striking study of mothers who were in placement in Manitoba County, Canada found that mothers who were in foster care when they gave birth were seven times more likely to have their children taken from their custody before age two than their non-dependent counterparts.<sup>32</sup> The higher rates of investigation presents the question of whether the higher rates of removal of infants born to foster children stem from a higher incidence of abuse and neglect or from the increased scrutiny and implicit assumption that youth in care will not be able to adequately parent their child because of their age and dependency status. States

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california-weighs-protections-for-parenting-foster-youth/59012 [https://perma.cc/A46H-FSV5].

28. See, e.g., Tara Grigg Garlinghouse, *Fostering Motherhood: Remedying Violations of Minor Parents' Right to Family Integrity*, 15 U. PA. J. CONST. L. 1221, 1246–53 (2013) (detailing the increased scrutiny and inappropriate separation and arguing that the disparate treatment violates the equal protection clause while concluding that “[f]amily integrity is dangled like a carrot on a stick in front of minor parents, a goal they may never fully be able to achieve”).

29. Amy Dworsky, *Child Welfare Services Involvement Among the Children of Young Parents in Foster Care*, 45 CHILD ABUSE & NEGLECT 68, 68, 72 (2015).

30. Loudenback & Amon, *supra* note 27; see also Andrea Lane Eastman & Emily Putnam-Hornstein, *An Examination of Child Protective Service Involvement Among Children Born to Mothers in Foster Care*, 88 CHILD ABUSE & NEGLECT 317, 322 (2019) (initially presenting California's statistics).

31. Rebecca Horwitz et al., *Protection v. Presentment: When Youths in Foster Care Become Respondents in Child Welfare Proceedings*, 45 CLEARINGHOUSE REV. 421, 426 (2012).

32. Wall-Wieler et al., *supra* note 9, at 1, 3.

and child welfare agencies would benefit from further study of the reasons for increased reporting on pregnant and parenting youth in foster care.

A. “Hospital Holds,” “Social Holds,” and Notifications to Child Protective Services

The bias against youth who are parenting in foster care operates at the very outset of their new status as parents through social or hospital holds that interfere with and constrain their custodial rights.<sup>33</sup> A “social hold” refers to when a hospital makes the decision to prohibit the mother from leaving with her newborn infant who is otherwise medically ready to be discharged to her care. In these situations, hospital staff may have initiated a report to child protective services alleging potential abuse, neglect, or maltreatment, or may be awaiting guidance from the county child welfare agency as to next steps in the infant’s custody.<sup>34</sup> Furthermore, foster youth in care who give birth may be targeted for drug tests during their hospital stay which then result in hospital and social holds.<sup>35</sup> As Dorothy E. Roberts, author and professor of Africana studies, law, and sociology at the University of Pennsylvania, noted, “[d]rug testing of pregnant people and newborns has long been implemented in racially discriminatory ways that put Black and Latinx families at higher risk for destructive state policing

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33. The terms “hospital holds” and “social holds” are colloquial in nature but are used to refer to the practice of a hospital that may be authorized by state statute to undertake measures to protect the safety of a minor when there is imminent danger to the child’s life, to prevent a biological parent from leaving the hospital with their infant without judicial oversight, court order, or immediate consultation with the child protective services agency. As one report noted about the practice of “social holds” in New York City, the hospital would be responsible for “separating new parents from their child immediately following birth while a report to the State Central Registry of Child Abuse and Maltreatment or an ACS investigation is pending.” N.Y.C. COMM’N ON HUM. RTS., *supra* note 21, at 23 n.179.

34. See, e.g., *Hospital Holds*, L.A. CNTY. DEP’T OF CHILD. & FAM. SERVS. (Jan. 24, 2022), [http://policy.dcfslacounty.gov/#Hospital\\_Holds.htm](http://policy.dcfslacounty.gov/#Hospital_Holds.htm) [https://perma.cc/ZDK4-9JBG] (noting a children’s social worker may place a hospital hold on a child without a court order when exigent circumstances are present that create a belief the child is at immediate risk of serious physical harm, sexual abuse, or physical abuse).

35. Michael Fitzgerald, *New York City to Investigate Hospital Drug Tests of Black and Latino New Mothers, Which Can Prompt Foster Care Removals*, IMPRINT (Nov. 16, 2020), <https://imprintnews.org/child-welfare-2/new-york-hospital-drug-tests-mothers-foster/49384> [https://perma.cc/E2Y3-MU63] (noting longstanding concerns among advocates about hospitals reporting parents for maltreatment based on a single positive drug test).

and punishment.”<sup>36</sup> My former client, who was previously in care, found herself in this precise situation when she gave birth at a New York City hospital. The hospital notified child protective services immediately after her infant’s birth and decided to place a social hold, restricting my client’s ability to bring her son home despite being medically cleared for discharge. While there was no identified or documented safety threat to the infant, the hospital held the child absent any judicial oversight or court order authorizing a temporary removal. When I contacted the general counsel for the hospital administrators, she stated that they were awaiting a decision from child protective services and therefore had no choice but to place the social hold on the infant. Their sole justification for reporting the infant to the agency was because the mother had previously been in foster care and currently had an older child in foster care. When challenged, the general counsel proceeded to minimize the impact of the social hold, stating that it would most likely be only a couple of days until everything could be sorted out, completely dismissing the mother’s presumptive right to custody and the significance of those first days of bonding between a mother and her infant. Effectively, the hospital assumed the role of child welfare agency, investigative caseworker, and family court judge by determining that there was sufficient evidence to temporarily intervene in the mother’s custody of her son and remove the infant in his first few days of life from his mother’s care. The impact of the social hold was not only disrupted attachment for the mother and infant during that critical first week, but practical limitations on the mother’s ability to nurse, visit, and ultimately bond with her son. Furthermore, the punitive nature of the action left my client feeling increasingly wary of a system that she already mistrusted regardless of what services or support it might offer her and her son.

Despite some policies recognizing the severe impact of a hospital hold on mother and child, the practice lacks the procedural protections normally associated with temporary removal, including notice and a judicial hearing. In Los Angeles County, the guidance for hospital holds makes clear that “placing a child on a hospital hold has

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36. Press Release, N.Y.C. Comm’n on Hum. Rts., *New York City Commission on Human Rights Launches Investigations into Three Major Private Hospital Systems’ Practices of Drug Testing Newborns and Parents* (Nov. 16, 2020), [https://www.nyc.gov/assets/cchr/downloads/pdf/press-releases/Hospitals\\_Press\\_Release\\_11-16-2020.pdf](https://www.nyc.gov/assets/cchr/downloads/pdf/press-releases/Hospitals_Press_Release_11-16-2020.pdf) [https://perma.cc/4KUE-8MRK].

the same effect as taking a child into temporary custody.”<sup>37</sup> The Los Angeles guidelines clarify that a hospital hold should only be sought when there is “immediate risk of serious physical harm, sexual abuse or physical abuse.”<sup>38</sup> In Oregon, caseworkers can target pregnant women after a screening during pregnancy by formally notifying a hospital about their concerns with regards to the mother’s actions or the unborn child’s safety.<sup>39</sup> The child welfare agency can provide a hospital screening note prior to the infant’s birth with the agency’s policy noting that

[w]hen the information gathered at screening does not constitute a report of abuse or neglect, but would if the expectant mother had given birth, the screener may alert hospitals where the child may be born. The use of hospital-alert letters increases the likelihood the department is contacted at the time of the birth.<sup>40</sup>

The child welfare agency effectively preempts the assessment of the mother and the infant once they are born, raising increased potential for child welfare involvement at birth and bias to attach to the determination. Pregnant and parenting youth in foster care are referenced as an intended population for the guidelines outlining case management protocols and responsibility as “[a] teen, currently in the custody of the Department (who may be residing in home or may be placed out of the home), is pregnant or has a new baby.”<sup>41</sup> Essentially the policy lumps together mothers who have a formal report of abuse or neglect and dependent parents who are merely residing in foster care when they give birth. The intensive guidelines for the caseworker in these situations include an investigation as part of the screening into the parents’ conduct prior to the birth, at birth, and at home in order to complete an assessment of safety.<sup>42</sup> This screening is an additional scrutiny placed on pregnant and parenting youth in foster care that their peers outside of the child welfare system do not undergo.

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37. *Hospital Holds*, *supra* note 34.

38. *Id.*

39. Off. of Child Welfare Programs, *Guidelines for Addressing Pregnancies and New Babies*, OR. DEP’T HUM. SERVS. 4, [http://www.dhs.state.or.us/policy/childwelfare/manual\\_1/i-ab2att1.pdf](http://www.dhs.state.or.us/policy/childwelfare/manual_1/i-ab2att1.pdf) [<https://perma.cc/P9RV-GSZ6>].

40. *Id.* at 3.

41. *Id.* at 1 (listing pregnant and parenting youth in foster care as a target group along with parents or caregivers alleged to be perpetrators, with open cases due to safety concerns, and against whom petitions for termination have been filed).

42. *Id.* at 2–3.

As another example of increased oversight, Minnesota law requires that any birth to a minor parent must be reported to social services within three days without requiring any allegation or suspicion of neglect, abuse or maltreatment.<sup>43</sup> The statute requires that “[t]he county social services agency shall contact any minor mother who does not have a case manager who resides in the county and determine whether she has a plan for herself and her child.”<sup>44</sup> The breadth and depth of the inquiry and subsequent plan is significant, with a focus on the following factors:

- (1) the age of the minor parent;
- (2) the involvement of the minor’s parents or of other adults who provide active, ongoing guidance, support, and supervision;
- (3) the involvement of the father of the minor’s child, including steps being taken to establish paternity, if appropriate;
- (4) a decision of the minor to keep and raise her child or place the child for adoption;
- (5) completion of high school or a commissioner of education-selected high school equivalency program;
- (6) current economic support of the minor parent and child and plans for economic self-sufficiency;
- (7) parenting skills of the minor parent;
- (8) living arrangement of the minor parent and child;
- (9) child care and transportation needed for education, training, or employment;
- (10) ongoing health care; and
- (11) other services as needed to address personal or family problems or to facilitate the personal growth and development and economic self-sufficiency of the minor parent and child.<sup>45</sup>

The Minnesota policy, while appearing to be benign for young parents on its face, effectively subjects them to state investigation and control over their custodial decision making simply because of their status as minors. The coercive nature of the policy is abundantly clear in later sections of the statute where it mandates that

[i]f the minor parent refuses to plan for herself and her child or fails, without good cause, to follow through on an agreed-upon plan, the county social services agency may file a petition . . . seeking an order for protective supervision . . . on the grounds that the minor

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43. MINN. STAT. ANN. § 257.33(2)(a) (West 2007).

44. *Id.*

45. *Id.* § 257.33(2)(a)(1)–(11).

parent's child is dependent due to the state of immaturity of the minor parent.<sup>46</sup>

In each state example, the consequence of the social hold is separating a child from their parent without judicial review or due process for the parent. Additional studies evaluating the extent and impact of hospital and social holds are warranted in light of the significant intrusion into the parent and child's custodial relationship and the disparate impact on pregnant parenting youth in foster care.

### B. *Voluntary Placements*

Voluntary placements refer to the agreement a parent and child welfare agency enter to place their child in foster care voluntarily and therefore without court oversight or process. Historically, voluntary placements were utilized to interfere with a dependent youth's parental rights without providing due process through judicial oversight of the agreements.<sup>47</sup> Child advocates exposed this insidious practice, recalling "[t]he rules . . . were clear: a girl in foster care who gave birth had to sign a voluntary placement agreement, a boilerplate contract prepared by the city, in which she gave custody of her child to New York City and State."<sup>48</sup> The practice entailed agency caseworkers persuading young mothers who were in care themselves to sign away their custodial rights in order to receive services for themselves and their infants.<sup>49</sup> Recent scholarship has highlighted the breadth of this unregulated practice of creating a shadow system that is not subject to

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46. *Id.* § 257.33(2)(c).

47. Prior to 1993, federal law required that children be placed in foster care for the state to receive reimbursement for the cost of the foster care placement, thereby creating an incentive to place children of dependent minors in foster care either voluntarily or through a removal so that the services would be reimbursed. This was remedied in federal legislation and state regulations so that children of dependent youth could live with their dependent parents, and both would receive support. *See, e.g., In re Tyriek W.*, 652 N.E.2d 168, 168–70 (N.Y. 1995) (noting also that the Law Guardian raised concerns that there would be a "lack of judicial supervision for this 'new class' of at-risk children, i.e., the children of children in foster care").

48. KREBS & PILCOFF, *supra* note 17, at 81.

49. *In re C.*, 607 N.Y.S.2d 1014, 1015–16 (Fam. Ct. 1994) (noting that courts were provided jurisdiction to review voluntary placement agreements to alleviate issues with agencies failing to return children to their parents' care at the end of the voluntary placement agreement, parents who were unaware of their legal rights under the voluntary placement, and children being "lost in the system; many were forgotten entirely").



judicial oversight for parents and children otherwise not involved in the child welfare system.<sup>50</sup>

Courts noted that despite the “voluntary” characterization of these placements, the practice retained coercive aspects as a result of the power imbalance between the child welfare agency and the young parent in foster care.<sup>51</sup> Caseworkers often served as gatekeepers, only allowing dependent parents to access services on the condition that they consent to agency supervision or placement of their child.<sup>52</sup> In recent years, this practice has been discouraged and, in some states, struck down because of the difficulty in ensuring the voluntary nature of a voluntary agreement, especially among youth who are minors and dependents in foster care.<sup>53</sup> As a New York court declared nearly three decades ago, “[o]ften the ‘voluntary’ nature of the agreement was a sham. A young mother might be deprived of the right to reenter her foster home until she signed the ‘voluntary’ agreement.”<sup>54</sup> In recognition of the unconscionable practice and its illegal interference in the custodial rights of dependent parents and their children, guidance was promulgated in New York stating that “[s]tate policy discourages voluntary placements by minor parents in particular. Children’s Services and its provider agencies should exercise extreme

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50. See, e.g., Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 STAN. L. REV. 841, 844, 847–48 (2020) (highlighting key differences between the hidden foster care and formal foster care systems which separate roughly the same number of children from their parents each year); see also Lizzie Presser, *How ‘Shadow’ Foster Care Is Tearing Families Apart*, N.Y. TIMES MAG. (updated Dec. 2, 2021), <https://www.nytimes.com/2021/12/01/magazine/shadow-foster-care.html> [https://perma.cc/6VEP-3DMB] (describing some safety plans as “basic agreements to mitigate risks to children in the home, but others stipulate that a parent move the child to live with a new caregiver. At least 35 states use safety plans in which parents and caseworkers identify a relative or friend or church member who can take children in while their parents try to address the agency’s concerns”).

51. See, e.g., Garlinghouse, *supra* note 28, at 1248–49 (detailing the practice, specifically in Florida and Illinois, of pressuring dependent mothers to voluntarily place their children).

52. See, e.g., *In re C.*, 607 N.Y.S.2d at 1016 (commenting on the practice of pressuring minor parents to place their children in care to receive support).

53. See *id.* at 1015–16 (commenting on the change in New York law giving courts jurisdiction to review voluntary placement agreements).

54. *Id.* at 1016.

caution when discussing voluntary placements with young mothers due to the difficulty these youth may face regaining custody.<sup>55</sup>

*C. Increased Scrutiny, Supervision and Service Contracts*

When I met Ashley, she was seventeen and preparing to give birth while working with a nurse home visitor through a nurse-family partnership program aimed at addressing her medical, behavioral, and social service needs. Ashley was focused on her prenatal care and graduating from high school but had been living in unstable situations with older friends since her aunt was no longer willing to care for her as her legal guardian. After multiple years in foster care as a child and without any other family members to provide her stable housing and care, Ashley prepared to go back into foster care, determined to maintain custody of her infant. As soon as she disclosed her pregnancy, she was informed that her history of running away from foster placements when she was a child would likely result in her infant being removed from her care. Ashley was ultimately placed in a mother-baby congregate care facility after she gave birth. The placement, geared towards adolescent mothers in foster care, required a two-week blackout period at the beginning of any placement where the youth was prohibited from leaving the facility, accessing their cell phone, or having visitors. The degree of scrutiny from both the agency responsible for ensuring her well-being as a minor without any family members available to care for her and the placement which is supposed to be her and her child's home in foster care was significant.

All aspects of the agency's supervision are outside of the mandates of the court since the infant is not in foster care or subject to court jurisdiction. Yet, the dependent parent is subject to the agency's directives and decisions in service plans and agency contracts. The heightened scrutiny and supervision begin upon disclosure of the dependent youth's pregnancy and continues throughout their time in foster care or extended foster care. Two other clients, Mia and Isabel, who were both mothers in extended foster care and enrolled at the same high school, faced similar scrutiny and supervision over their parenting decisions. Initially placed in a congregate care setting and then a supervised independent living placement—a one-bedroom apartment for themselves and their child—they had to navigate service

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55. N.Y.C. ADMIN. FOR CHILD.'S SERVS., GUIDE TO WORKING WITH YOUNG PARENTS IN OUT OF HOME CARE 15 (2013), [https://affcnny.org/wp-content/uploads/a\\_Guide-to-Working-with-Young-Parents\\_LR.pdf](https://affcnny.org/wp-content/uploads/a_Guide-to-Working-with-Young-Parents_LR.pdf) [<https://perma.cc/FX3W-R4DA>].

plans and contracts with the foster care agency that limited their parenting decisions. The contracts restrict a young person's activities and contain punitive consequences including withholding the monthly stipend or write ups of alleged infractions. In some instances, the contracts limit the travel and freedom of foster youth with children by dictating whether they are permitted to visit with friends, family, or extended relatives. The foster care agency caseworker for Mia required her to provide child abuse clearances for anyone that she would be visiting for an extended time or overnight if she brought her infant even though he was not placed in foster care. While parents not in care are permitted to exercise their rights to visit with family and friends with their infants, parenting youth in care are required to meet a higher burden. Their choices of who they see and where they travel with their children are subject to oversight, supervision, and veto.

Caseworkers wield an enormous amount of power over youth in foster care by controlling access to services and dictating which behaviors are reported to the child welfare agency and Family Court. For that reason, New York City's guide for caseworkers states that:

it is important that providers not threaten [young parents] with court proceedings or calls to Children's Services or the [State Central Register of Child Abuse and Maltreatment]. As with any other child in foster care, if a young parent breaks a group home or foster home rule, the disciplinary action should be appropriate to the infraction and not be used as an opportunity to discourage or undermine the young person's ability to parent or have custody of his or her child.<sup>56</sup>

Yet, those infractions of placement rules, which many would argue are to be expected from young adults as developmentally appropriate, are often used as a basis for presuming the parent unfit. The infraction becomes synonymous with unsafety for the infant and the threat of removal is marshalled to alter the behavior of the dependent parent.

This heightened scrutiny and oversight for pregnant and parenting youth in foster care is codified in statutes, policies, and child welfare manuals across the country. As one practice guide notes, "[s]ervices should be offered in the spirit of helping [dependent parents]."<sup>57</sup> However, that spirit of helping can quickly turn investigatory and punitive in nature given the imbalance of power between the dependent youth and the child welfare agency. In Washington,

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56. *Id.* app. B ("Mandated Reporting").

57. *Id.*

caseworkers are required to complete an Infant Safety Plan whenever a dependent youth gives birth, regardless of whether there is a report of suspected maltreatment.<sup>58</sup> Dependent youth who give birth are subjected to the same practice as mothers whose doctors identify them as “substance affected” and infants who are born with medically documented withdrawal symptoms as a result of prenatal exposure.<sup>59</sup> The policy requires the caseworker and youth to develop a safety plan including documentation of medical care, safe housing, safe sleep, routine child care, emergency child care, parenting support, and crisis planning.<sup>60</sup> Of course, parents who are not in the dependency system are not required to complete a plan of infant safe care before discharge from the hospital absent a report to child protective services alleging evidence of maltreatment beyond a parent’s age or whether they are in foster care.

In Georgia, the Division of Family and Children Services recently updated its policy for pregnant and parenting youth to ensure the delivery of services to the youth in care. The policy emphasizes that the “physical and legal custody of the child of a parenting youth remains with the parenting youth in foster care unless it is determined contrary to the safety of the child.”<sup>61</sup> As reviewed earlier, this is merely a recitation of settled law that parents’ custodial rights, regardless of their age or dependency status, are protected absent an immediate threat to the safety of the child.<sup>62</sup> While the policy purports to enforce the presumption of legal custody for pregnant and parenting youth in

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58. See WASH. STATE DEP’T OF CHILD., YOUTH, & FAMS., PLAN OF SAFE CARE, FORM DCYF 15-491 (rev. Aug. 2021) [hereinafter PLAN OF SAFE CARE], <https://www.dcyf.wa.gov/sites/default/files/forms/15-491.pdf> [<https://perma.cc/C3MP-NNER>] (instructing caseworker to develop and document a Plan of Safe Care “for all newborns born to a dependent youth”).

59. See *Infant Safety Education and Intervention Policy*, WASH. STATE DEP’T OF CHILD., YOUTH, & FAMS., (rev. Oct. 31, 2019), <https://www.dcyf.wa.gov/1100-child-safety/1135-infant-safety-education-and-intervention> [<https://perma.cc/PWP3-QHXY>].

60. PLAN OF SAFE CARE, *supra* note 58. Note that this plan of safe care is distinguished from the federal plan of safe care required when a newborn tests positive for drugs at birth. Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106a(b)(2)(B)(iii) (requiring state programs to include a plan of safe care for substance-affected newborns as a condition for funding eligibility). The Washington plan of safe care also differs from the plans in other states. See, e.g., 23 PA. STAT. AND CONS. STAT. § 6386(a) (West 2022) (bringing Pennsylvania into compliance with federal requirement for a “plan of safe care” for substance-affected newborns).

61. GA. DIV. OF FAM. & CHILD. SERVS., CHILD WELFARE POLICY MANUAL POLICY NO. 10.21 (2020) [hereinafter GA. WELFARE POLICY NO. 10.21].

62. See *supra* notes 18–21 and accompanying text.

care, it subverts that policy by requiring caseworkers to “[c]onduct a purposeful contact with the mother in foster care and child, within 24 hours of the birth.”<sup>63</sup> Caseworkers must conduct a safety assessment as part of this purposeful contact, which is otherwise only required when there is a present or impending danger to a child involved in an active child welfare case.<sup>64</sup> Indeed, despite the updated policy, pregnant and parenting youth are subjected to the same assessment, approach, and level of scrutiny as a case where there has been a report of child maltreatment. Effectively, the parent in foster care is no longer treated as the child, but rather as a parent who may be placing their child’s safety at risk merely because of their age and status of being a dependent youth and absent any of the formal protections or procedures invoked when there is a report of suspected maltreatment to the agency.

*D. Legal Representation and Child Welfare Agency’s Perceived Conflict of Interest*

Compounding the issues raised by practices targeting dependent parents, there are no clearly defined or mandated practices to ensure that a dependent parent’s rights are protected and enforced through the assignment of counsel once they disclose their pregnancy or give birth. While this mirrors the lack of quality representation for parents across the child welfare system, pregnant and parenting youth in care are uniquely in need of quality legal representation to protect their right to legal and physical custody of their child and to remain free of coercive state agency intervention into parenting decisions.

When Serena was notified that the agency had filed a petition alleging that her infant son was maltreated, I was not notified as her child advocate attorney until weeks after the initial report alleging maltreatment of her son. When I was eventually notified of the report of maltreatment and petition filed by the agency, the caseworker requested that I do not discuss it with Serena until later so that a plan could be put in place, not understanding the serious implications and necessary legal counseling that Serena needed to receive as soon as the report was made and certainly once the case was filed in Family Court. As both a child in foster care and a parent, Serena was confused about how the case against her son related to her status as a youth in extended foster care and the role of the agency caseworkers assigned

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63. GA. WELFARE POLICY NO. 10.21, *supra* note 61, r. 13(b) (i).

64. GA. DIV. OF FAM. & CHILD. SERVS., CHILD WELFARE POLICY MANUAL POLICY NO. 19.11 (2020).

to help her with services and supports. When she was appointed another attorney to represent her as a parent, she rightfully asked, “What’s the difference between you and them?” As the case progressed, she questioned why the caseworkers were talking about her behavior in the maternity group home instead of focusing on the fact that her son was healthy, safe, and developing appropriately. In case meetings that regularly happen outside of court, the caseworkers discussed how they were responsible for supervising both Serena and her son and therefore all parenting decisions were relevant to their planning and discussion.

As time progressed, Serena felt increasingly judged by the caseworkers and untrusting of their professed goal to provide her with services and resources to support her transition in extended foster care to independent living. With two different lawyers representing her in one case as a parent and in the other case as the “child” in extended foster care, she wondered why the other attorneys spent all their time talking about her behavior and attendance in school when they were supposed to be focused on whether her son was safe. Understandably, she wondered whether her family’s life would be better out of the child welfare system.

Pregnant and parenting youth in foster care are faced with a model of representation where their child advocate attorney or guardian ad litem is not able to represent them as a parent. As one author noted, the provision of legal services for youth in care varies from state to state and often permits the representative to only present the best interests of the minor to the court as opposed to the minor’s expressed wishes.<sup>65</sup> A national practice guide specifically recommended that

if the lawyer acts as a guardian ad litem (GAL) under a substituted judgment model then the lawyer should not also represent the client as a parent’s attorney. Since it is foreseeable that the client’s position as a parent may diverge from what the GAL believes is in his or her best interests as a youth in foster care, dual representation is inappropriate.<sup>66</sup>

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65. See Barbara Glesner Fines, *Challenges of Representing Adolescent Parents in Child Welfare Proceedings*, 36 U. DAYTON L. REV. 307, 314–17 (2011) (detailing the range of policies for providing representation to youth in care in the context of their status as a youth in placement and as a parent with a child who is under the jurisdiction of the Family Court).

66. Lisa Pilnik & Laura Austen, *Advocacy for Young or Expectant Parents in Foster Care*, 28 A.B.A. CHILD L. PRAC. 110, 111 (2009).

Confusion can result from a misunderstanding of whether the best-interests attorney appointed to the minor parent as a child should guide the representation of the attorney who is assigned to the infant's case.<sup>67</sup> As noted, significant conflicts of interest arise when a guardian ad litem or attorney for the child assumes representation of the minor as a parent. These potential conflicts are most serious in jurisdictions where the guardian ad litem is statutorily obligated to pursue the minor's best interest and may substitute their own judgments regardless of the minor's expressed thoughts. As a general matter, it is logical that "the teenager, as a parent, is entitled to zealous advocacy on her behalf, unobstructed by the opinion of her advocate."<sup>68</sup>

Recognizing the increased supervision and scrutiny in foster care, national practice guides recommend that lawyers representing pregnant youth in care "[a]dvice the youth that the child welfare agency may seek custody of the youth's child" and counsel the youth client on steps to retain custody, including "obtaining prenatal care, attending parenting classes, . . . [k]eeping records of all steps the youth has taken to be an appropriate parent, . . . [and c]onsider[ing] asking service providers to write letters sharing their positive observations of the client's parenting skills."<sup>69</sup> In my own practice, I often felt complicit in the system's abrogation of their presumptive custodial rights whenever I advised dependent parents in foster care to maintain detailed records of their prenatal care and any services they utilized. These were requirements and burdens that were not shared by their counterparts who were not in foster care. In many ways, I was advising my clients that since they were in foster care, they had the additional burden of proving their fitness to the child welfare agency or risk a presumption of unfitness when they gave birth or returned to their placement with their child. In addition to planning for their pregnancy and raising an infant, my clients in foster care had to reckon with the reality that their parental role was being scrutinized by the very system that was responsible for caring for them.

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67. Fines, *supra* note 65, at 322–23 (noting the questions raised in this posture as "[w]ho is in charge of decisions if there is both a GAL and an attorney for the child? May the GAL direct the attorney's representation? The answers to these questions are rarely clear in the law or even as a matter of common understandings among the attorneys in any given jurisdiction").

68. Sarah Katz, *When the Child Is a Parent: Effective Advocacy for Teen Parents in the Child Welfare System*, 79 TEMP. L. REV. 535, 552 (2006).

69. Pilnik & Austen, *supra* note 66, at 111.

This degree of preventive legal counseling was critical given the confusion and misinformation around the dependent parents' legal rights to custody and their child's legal status in foster care. In multiple cases, I had to educate my client about her right to custody after she had been misinformed by caseworkers that her children would automatically be placed in care and subject to the court's jurisdiction. Even well-meaning and supportive caseworkers would remind the dependent parents on their caseload that there was always the possibility that their children would be placed in care if they signed themselves out of foster care without a plan approved by the agency, did not abide by the rules of the placement, or were no longer eligible for extended foster care because they were not in school or working.<sup>70</sup> Implicitly, the system shifted the burden of proof. Instead of the state having to show imminent threat to the child, the dependent youth parent had to show preemptively that their child was safe to overcome the presumption that the dependent youth parent was not a fit parent.

In many ways, the child welfare agency and its actors are in direct conflict when they investigate and prosecute suspected maltreatment of a child born to a parent in their care. As the Center for the Study of Social Policy notes, "At the moment a child welfare agency files an abuse or neglect charge against a parenting foster youth, the child welfare agency—which is responsible for protecting, promoting and advocating for the best interest of the young parent—assumes a dual role of prosecutor and protector."<sup>71</sup> Yet, courts routinely allow this practice, and, at least in one state, this argument was summarily dismissed and the agency's ability to prosecute a permanent neglect proceeding against a dependent parent was upheld.<sup>72</sup> For the

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70. When children in foster care turn eighteen, many states allow them to remain in extended foster care as long as the nonminor dependent is eligible under the statute. In Pennsylvania, for example, nonminor dependents are eligible for extended foster care provided that they are enrolled in school, working eighty hours a month, participating in a program to remove barriers to employment, or unable to work or attend school because of a documented medical or behavioral health issue. *See* 42 PA. STAT. AND CONS. STAT. ANN. § 6302 (West 2022).

71. *Pregnant & Parenting Youth in Foster Care: A Case for Services and Quality Legal Representation*, CTR. FOR STUDY SOC. POL'Y, [https://cssp.org/wp-content/uploads/2018/08/Pregnant-and-Parenting-Youth-in-Foster-Care\\_Quality-Legal-Representation.pdf](https://cssp.org/wp-content/uploads/2018/08/Pregnant-and-Parenting-Youth-in-Foster-Care_Quality-Legal-Representation.pdf) [<https://perma.cc/CW8B-SPPV>].

72. *In re Ta Fon Edward J.B.*, 774 N.Y.S.2d 821, 822 (App. Div. 2004) (concluding that "[n]othing in the Family Court Act or the Social Services Law lessens, increases, or otherwise changes the responsibilities of either ACS or its contract agencies when



dependent parent who remains in care, the tension remains of how the system that is responsible for supporting and promoting their needs as a youth in care can also be acting against their right to remain with their children.

### III. PROTECTING THE CUSTODIAL RIGHTS OF PREGNANT AND PARENTING YOUTH IN FOSTER CARE

Recognizing the double bind that pregnant and parenting youth in care face and reaffirming a commitment to maintaining family integrity, recent legislation provides promising steps forward to protect the custodial rights of pregnant and parenting youth in care and disrupt the deleterious effects of the child welfare system in interfering formally or informally in their custody. Only a handful of states provide specific protections under the law or in their official policy guides to provide additional legal protections to pregnant and parenting youth in foster care.<sup>73</sup> Recent law builds on a history of protections enacted in California to ensure that pregnant and parenting youth in care are not subject to increased scrutiny and violations of their right to due process as part of a dependency action against them as a parent. In 2015, the California legislature stated that

a child of a minor parent or nonminor dependent parent shall not be considered to be at risk of abuse or neglect solely on the basis of information concerning the parent's or parents' placement history, past behaviors, or health or mental health diagnoses occurring prior to the pregnancy, although that information may be taken into account when considering whether other factors exist that place the child at risk of abuse or neglect.<sup>74</sup>

This enacts additional procedural protections requiring the court to maintain separate child and dependent parent records. The

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faced with caring for the offspring of a foster child"); *see also In re Lawrence Child.*, 768 N.Y.S.2d 83, 90 (Fam. Ct. 2003) (noting that "when a minor parent cannot take care of a child, it may be necessary for ACS to take steps to assert control over that child. While one may question the legislature's wisdom in permitting minor parents to be subjected to the process, an Article 10 proceeding may provide a means to that end . . . . Nonetheless, even though ACS has the authority to proceed against a minor parent in foster care pursuant to Article 10, it should recognize that a neglect finding has a significant deleterious impact upon the parent").

73. *E.g.*, CAL. WELF. & INST. CODE § 361.8(a) (West 2022). *But cf. supra* notes 63–64 and accompanying text (discussing Georgia's policy that, while seeming to protect a minor parent's rights after giving birth, effectively undermines the parent's independence).

74. WELF. & INST. § 361.8(a).

protections further prohibit disclosing information from the dependent parents' case to the child's court record without a court order confirming that the information is materially relevant to the child's case.<sup>75</sup> The legislation provides additional protections to ensure that pregnant and parenting youth are not treated differently because of their dependency status at every stage of their parenthood experience, from disclosure of pregnancy to birth.

The California law passed at the end of 2021 provides further protections for youth in care. It requires that attorneys for children in care be notified "[w]hen an agency receives a report . . . alleging abuse or neglect of the child of a minor parent or a nonminor dependent parent, the agency shall, within 36 hours, provide notice of the report to the attorney who represents the minor parent or nonminor dependent in dependency court."<sup>76</sup> The law also carves out an exception to the grounds for termination of parental rights noting it "does not apply if the only times the court permanently severed parental rights over any siblings or half siblings of the child were when the parent was a minor parent, a nonminor dependent parent, or adjudged a ward of the juvenile court."<sup>77</sup> The legislation goes one step further to mandate that

a social worker or probation officer shall use a strengths-based approach to supporting a minor or nonminor dependent parent in providing a safe and permanent home for their child, including when the social worker . . . is conducting an investigation. An investigation shall not be conducted for the child of a minor parent or nonminor dependent parent unless a report has been made.<sup>78</sup>

Finally, as a means of addressing practices of informal custody arrangements entered into by youth in care for their children, the law requires that

prior to a social worker or probation officer arranging any informal or formal custody agreement that includes a temporary or permanent voluntary relinquishment of custody by a parent who is a ward of the juvenile court or a dependent or nonminor dependent parent, or recommending that a nonparent seek legal guardianship of the child of a ward, dependent, or nonminor dependent parent,

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75. *Id.* § 825.5(a)–(b).

76. CAL. PENAL CODE § 11166.1(c)(1) (West 2022).

77. WELF. & INST. § 361.5(11)(B).

78. *Id.* § 361.8(b)(4).

the parent shall be advised of the right and have the opportunity to consult with their legal counsel.<sup>79</sup>

The comprehensive legislation addresses many of the issues facing pregnant and parenting youth in foster care through notification to counsel, provision of legal services, and clarity on the role of the caseworker assigned to a dependent parent.

All states should follow California's example by passing legislation that codifies explicit protections for pregnant and parenting youth in foster care from additional investigation or heightened scrutiny. Federal law should support this change by conditioning federal funding eligibility on states' adoption of these protective measures. Additionally, states must scrutinize their own child welfare agency policies and practices that may be seen as offering support to the dependent parent or pregnant youth but, in reality, subject them to greater oversight and risk of state intervention, as evidenced by the example in Georgia's written policy.<sup>80</sup> Finally, states should prohibit hospital holds and social holds absent access to emergency judicial review of the social hold as it infringes on a parents' right to physical custody of their child.

In order to address the social service issues and poor outcomes faced by pregnant and parenting youth in foster care, states should promulgate programs that encourage pregnant and parenting youth to access services without requiring a plan of safe care or service contract, which may have the unintended or intentional effect of increasing the supervision and scrutiny of their parenting. The Center for the Study of Social Policy recommended post-pregnancy supports including "[m]aintaining infants with their young parents and not opening a child welfare case on the infant unless there are specific safety concerns."<sup>81</sup> Of course, this is already possible through specific funding for older youth in extended care, which aligns with recommendations from other researchers who noted that "[y]outh remaining in extended foster care can access a range of supportive

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79. *Id.* § 361.8(c).

80. GA. WELFARE POLICY NO. 10.21, *supra* note 61 (purporting to support pregnant and parenting youth but requiring interventions that undermine the policy's stated goals).

81. CTR. FOR THE STUDY OF SOC. POL'Y, SEXUAL AND REPRODUCTIVE HEALTH OF YOUTH IN OUT-OF-HOME CARE: A POLICY AND PRACTICE FRAMEWORK FOR CHILD WELFARE 25 (2018).

services provided by the child welfare system, giving them a much needed safety net as they negotiate the transition to independence.”<sup>82</sup>

Furthermore, parents in foster care or extended foster care should be provided with the option of representation from an attorney or legal team utilizing an enhanced representation model once they disclose the pregnancy to the agency or the agency becomes aware of the youth’s pregnancy or parenthood. As studies have noted, the provision of legal representation for parents in dependency proceedings improves outcomes for children including less time in foster care and fewer unnecessary removals.<sup>83</sup> With the exception of California, there are limited legal resources available for dependent youth as parents prior to a case being filed or their child being removed from their care.

For far too long, pregnant and parenting youth in foster care have had to combat the perception and practice that simply being a young parent in foster care is an imminent risk to their children. The myriad policies and practices permitting interference with the custodial rights of pregnant and parenting youth in foster care merely on the basis of their age and status as foster youth belies larger issues plaguing the child welfare system. Older youth in care are perceived differently than their younger counterparts and held to higher standards to remain in foster care or extended foster care even though poor outcomes persist. When those same youth in care become pregnant or become parents, there is an implicit presumption that their age and their status in foster care renders them unfit to parent their infant. While services and supports to parenting teens in foster care can certainly be beneficial, the child welfare agency’s often coercive or punitive practices are at odds with ensuring the best interests of the dependent parent and respecting the basic custodial rights for the dependent parent and their child to be together.

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82. Shpiegel et al., *supra* note 8, at 6.

83. See, e.g., Lucas A. Gerber et al., *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 CHILD. & YOUTH SERVS. REV. 42, 52 (2019) (finding shorter stays in foster care and faster reunifications in cases where parents were represented by interdisciplinary law offices compared to solo practitioners in New York study); Vivek S. Sankaran, *A Hidden Crisis: The Need to Strengthen Representation of Parents in Child Protective Proceedings*, 89 MICH. BAR J. 36, 38 (2010) (pointing to data from studies in New York and Washington as a basis for proposed reforms in Michigan).