

Closing the Justice Gap for Youth in the Foster Care to Prison Pipeline

by Kim Dvorchak*

“It almost feels like a jail. Too much structure and not enough freedom. It is not a normal life.”—Fathallah & Sullivan

Last year more than 630,000 children were served by the U.S. foster care system, including over 216,000 who entered care after being removed due to allegations they were abused or neglected (AFCRS). From the moment a young person is removed from their home, everything is at stake—where they live, go to school, and whether they see their brothers, sisters, family, and friends. Although the child welfare system was created to help children, it often does the reverse, fueling a damaging trajectory of disruption, inadequate services, and even further maltreatment (Sankaran et al., 2019). Despite this, youth who find themselves in child welfare court proceedings have fewer due process rights, including the absence of a nationally recognized right to counsel (Harfeld, 2019), than their counterparts in the juvenile legal system.¹

Recent studies indicate one-third of youth in the child welfare system will later be subject to the juvenile legal system (Herz et al., 2019). They are also more likely to be subject to the adult criminal legal system, either following a juvenile case or beginning after the age of adult jurisdiction (Yi, 2018). Studies of youth in the juvenile legal system show much higher percentages of child welfare histories. In some jurisdictions and settings, nearly half to over three-quarters of youth in placement or detention in the juvenile legal system have child welfare histories (Herz et al., 2019). In at least 13 states, it is at this moment of systems’ failures,

when youth “cross over” from the child welfare to the juvenile legal system, that a young person first obtains a lawyer.²

Just as the child welfare system drives cases into the juvenile legal system, the child welfare system drives racial disproportionality in the juvenile legal system (Cutuli et al., 2016). The greatest disproportionality rates for children in the child welfare system are experienced by Black youth, who are represented at 1.67 times their percentage of the youth population, and Native American youth, who are represented at 2.55 times their percentage of the youth population (NCJJ, 2019). Once in foster care, Black youth are twice as likely to be arrested as White youth in foster care (Vidal et al., 2017). This is due, in part, to adultification bias among child welfare professionals, which increases the likelihood of crossover due to a perception that Black youth are more threatening and less deserving of care (Conron & Wilson, 2019).

Research shows this “foster care to prison pipeline” is due, in part, to the experience of maltreatment leading to child welfare involvement, but it is also due to the youth’s experience of the child welfare system, which leads to arrest (Goodkind et al., 2013). In the face of this data, well-recognized patterns, and renewed commitments to race equity, there must be greater urgency to prevent crossover from the child welfare to the juvenile legal system. Several initiatives currently seek to address the needs of crossover/dual-status youth through juvenile justice reforms and in collaborative child welfare-juvenile justice system efforts.³ However, crossover has often been seen as a juvenile justice

issue (JJGPS, 2019), with most of the work focusing on improving systems *after* youth cross over from child welfare to juvenile justice (Herz et al., 2019). Now is the time to apply the lessons learned in this work with a focus on delinquency prevention in the child welfare system and prior to any child welfare involvement (Miller & Pilnik, 2021).

The choices made by child welfare agencies and courts will shape a youth’s child welfare experience and impact the likelihood of a justice response. These decision-makers exercise immense control over every aspect of a young person’s life, based upon what is deemed to be in the youth’s “best interests.”⁴ Youth entering a paternalistic child welfare system without access to counsel may find themselves all too readily subject to adultification bias, prosecution, and ultimately, incarceration. This pipeline cannot be disrupted without counsel trained to represent and assert the rights of youth in foster care. This requires client-centered zealous legal advocacy to ensure authentic youth engagement, demand supportive and appropriate services, and prevent the circumstances known to increase the risk of juvenile legal system involvement for adolescents.

This article discusses some of the conditions shown to increase the risk of a juvenile legal response for youth in foster care and the need for direct legal representation of youth to build an infrastructure of holistic advocacy to address complex cases and systems.

Foster Care to Prison Pipeline

Not all youth in the child welfare system are referred to or become involved in the juvenile or criminal legal systems. By better understanding the characteristics of youth with child welfare histories who are overrepresented in the justice system, we may better prevent the conditions more

¹ However, some state courts and lower federal courts have recognized such a right. See *Roe v. Conn.*, 417 F. Supp. 769 (M.D. Ala. 1976); *In re Jamie TT*, 191 A.D.2d 132, 599 N.Y.S.2d 892 (1993); *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005).

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² See 50-state map at <https://counselforkids.org/right-to-counsel-map/>

³ The two major initiatives focused on crossover are the Systems Integration Initiative at the Robert F. Kennedy Children’s Action Corps Dual Status Youth Reform and the Crossover Youth Practice Model at Georgetown’s Center for Juvenile Justice Reform. The Crossover Youth Practice Model (CYPM) focuses in part on practice changes aimed at preventing youth from crossing over from child welfare to juvenile justice. Other crossover initiatives include the Multi-Court Collaboration called “Project ONE” of the National Council of Juvenile and Family Court Judges.

⁴ Child welfare courts must weigh whether their decisions that affect children are in the “best interests” of the child. See Child Welfare Information Gateway, “Determining the Best Interests of the Child,” 2020.

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commonly associated with a juvenile legal referral or response.

First, youth are more likely to become involved in the juvenile legal system if they have had their first contact with child welfare services later in childhood or adolescence (Cutuli et al., 2016). While the general risk of juvenile legal involvement increases with age, this risk is compounded for youth in foster care, who are under increased surveillance (Goodkind et al., 2013; Wiig et al., 2003). Second, the number of foster care placements is a factor. Youth who experience multiple foster care settings are more likely to become justice involved (*id.*). Third, the type of foster care placement matters. There is increased risk for juvenile legal involvement for youth placed in a group home or congregate care as compared to kinship or family-like foster care settings (Cutuli et al., 2016). Just as racial disproportionality increases in the deeper end of the juvenile legal system (JJGPS, 2019), it similarly increases in the deeper end of the child protection system (Cutuli et al., 2016).

Mental health and substance abuse challenges are common for youth who become justice involved. Youth in foster care who experience a justice response are more than twice as likely to have mental health needs than youth in the juvenile legal system with no child welfare history (Young et al., 2014; Lee, 2015). Receipt of mental health or substance abuse services while in the child welfare system is positively correlated with juvenile justice involvement, which indicates that these services are not adequately meeting young people's needs (Goodkind et al., 2013; Herz et al., 2019). Professionals in the child welfare system may also have unrealistic expectations about the possible rehabilitation of young people with mental health challenges in the juvenile justice system, which faces its own deficiencies in serving youth with serious mental health needs.

Similarly, educational needs and disparities are relevant factors to address to prevent crossover. Multiple studies have indicated youth in foster care with special education needs, chronic truancy, and who experience school discipline are at risk for justice involvement, which can directly occur on school grounds (Young et al., 2014; Robertson & Walker, 2018).

While the safety of children is paramount, it is equally important for the

child welfare system to understand how its interventions can negatively affect many of the youth and families it encounters. Experts have warned that "it is critical to be sensitive to the potential negative effects of increased attention and surveillance," which can create an expectation of delinquency that becomes a self-fulfilling prophecy (Wiig et al., 2003). Other scholars starkly state: "[I]t is likely that [child welfare] system involvement may be exacerbating the relationship between maltreatment and delinquency for some dual-system youth" (Herz et al., 2019).

More attention needs to be paid to the child welfare system to address systemic factors and conditions leading to crossover. As discussed herein, one way we can help change these statistics is by providing youth high-quality children's lawyers who will zealously advocate in child welfare courts for the services and outcomes children and families need.

Justice Gap in Child Welfare Systems

Courts play an integral role in the child welfare system, where the decisions made are serious and consequential: Is the youth in danger of immediate harm? Should the child be removed from the home? Has the social service agency made reasonable efforts to prevent the need for removal? How will the parent and child and siblings be reunified? Is there a relative who will care for or adopt the child? What services does the youth and family need? Does the youth have the supports needed to transition out of foster care?

The legal interests at stake are significant. Children and youth face the trauma of abuse, neglect, family separation, school changes, and, as described above, the risk of juvenile and criminal legal system involvement. Parents face the possibility of permanently losing custody of, and contact with, their child. High-quality legal representation is essential to ensure fairness and due process—for youth to voice their concerns, assert their rights, provide information, and actively participate in reaching solutions that protect children and strengthen families.

For nearly 55 years, it has been established law that youth in delinquency proceedings have a constitutional right to legal representation (*In re Gault*, 387 U.S. 1 (1967)). However, there is no recognized federal constitutional right to counsel for youth in foster care proceedings. Federal law, the Child Abuse

Prevention and Treatment Act, currently lets states choose whether children will be appointed a volunteer advocate or a licensed attorney (Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101 et seq.). This gap has led to significant variance and a lack of protections at the state level. According to *A Child's Right to Counsel: A National Report Card on Legal Representation for Abused & Neglected Children* (First Star, 2019), 13 states still do not guarantee all children in foster care access to counsel.

Lack of counsel denies children an attorney uniquely qualified to file motions and appeals, call and cross-examine witnesses, give voice to their client's counseled wishes, advocate for trauma-informed treatment, promote family and sibling reunification, insist upon school stability, prevent multiple placement changes, fight against the overuse of congregate care, and more. Given the stakes involved for children and families, all youth in foster care must be represented by counsel in child welfare proceedings.

Moreover, only 37% of states that do provide lawyers to youth in foster care have adequate statutory due process protections for youth to earn an "A" grade. In delinquency court, youth are represented by an attorney who is ethically bound to advocate for the young person's expressed wishes in the case. In the child welfare system, many attorneys are required to represent what the lawyer thinks is in the youth's "best interests," even if this is contrary to the expressed wishes of the youth. In other states, attorneys are required to fill a hybrid role, simultaneously putting forth the youth's position but also advocating for what the attorney thinks is best. This risks not only the very real possibility of reaching the wrong outcome in the case, but also denies the youth a voice in the process, which is essential in understanding the causes of youth behavior as well as what is needed for healing (ACFCB, 2019). The ABA Model Act and NACC Recommendations on Representation of Children call for client-directed representation for all children and youth (ABA, 2011; NACC, 2021), and many advocates recommend a right to counsel, at a minimum, for adolescents in child welfare proceedings (Pokemper et al., 2012).

In 2017, the American Bar Association adopted the ABA Criminal Justice

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Standards Relating to Dual Jurisdiction Youth (ABA, 2017). The Standards were designed to guide juvenile courts and systems professionals in meeting the complicated needs of dual systems involved youth. The standards recommend judges ensure all youth have access to an attorney at all stages of a delinquency and dependency case (ABA, 2017, Standard 2.7(c) (i)), and refer to the responsibilities of prosecuting attorneys and the

responsibilities of defense counsel, but they do not address the responsibilities of children's counsel on the child welfare case. Perhaps unsurprisingly, lawyers representing youth in child welfare proceedings still receive limited to no training on the dangers of detention and juvenile justice involvement, resulting in insufficient advocacy on behalf of youth.

Closing the Justice Gap

Despite the many laws on the books that promote protections and opportunities

for young people in the child welfare system, the language and the spirit of these laws is unrealized without legal counsel for youth in foster care. Child welfare agencies are required by law to make reasonable efforts to prevent the removal of a child from his or her home and make it possible for children to be reunited with their families (*see Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-972)*). Moreover, the

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law requires children in foster care to be placed in the “least restrictive” most family-like setting available (42 U.S.C. § 675(5)), and that states consider giving preference to an adult relative or a nonrelated caregiver when determining placement for a child (42 U.S.C. § 761(a)(19)). Preventing the circumstances that lead to crossover—out-of-home placements, multiple placement changes, congregate care—bolsters the importance of enforcing these provisions at the outset of a child welfare case.

Factors Increasing Likelihood of Crossover. Young people with lived experience in child welfare and juvenile justice systems have identified a prevention framework to address the factors known to increase the likelihood of crossover (NFCYAPC, 2015). The key elements are as follows:

1. First, provide youth with trauma-informed interventions from the time they enter foster care and regularly thereafter.
2. Second, avoid punitive actions that focus solely on acting-out behaviors, and help youth understand the thoughts and emotions causing the behavior.
3. Third, employ youth empowerment strategies that give young people more control and voice over their living arrangement or educational setting.
4. Fourth, do not place youth in secure or level-system placements due to a lack of other foster care placement options.
5. Lastly, utilize diversion for status offenses; do not penalize youth in foster care or escalate law enforcement response because young people are not in a family setting.

Trained Counsel Improves Outcomes. Access to due process through the courts is typically a young person’s only recourse for accountability within the system. Lawyers, if appointed and properly trained, can use the law to employ the strategies outlined by people with lived expertise and more, such as:

- Advocating for intensive services and supports to keep youth with family and kin to avoid congregate care (NCSC, NACCC, 2020);
- Ensure youth who are placed out of home are in high-quality settings with individualized services appropriate for treatment needs, as required by

the Family First Prevention Services Act (ABA, 2020);

- Educate clients in foster care about their rights, including their **Miranda** rights, which should not be waived by child welfare professionals; and
- Engage in robust client counseling, ensure youth have full participation in their cases, actively challenge inequitable treatment, and provide holistic advocacy tailored to meet individual needs (NACC).

In addition, parental notification laws protecting a child’s **Miranda** rights also need to be applied to youth who are in the legal custody of the state in child welfare cases.

A growing body of research links the early appointment of trained counsel to improved outcomes for children (Zinn & Slowriver, 2008). Recent evaluations found children appointed specially trained counsel were 40% more likely to leave foster care within their first six months (Orlebeke et al., 2016) and 45% more likely to reunify with their family (WSCCR, 2021). These are the outcomes needed to reduce both child welfare involvement and prevent crossover to the juvenile legal system. Trained attorneys spent more time communicating with the child and other parties relevant to the case, spent more time preparing for the case, and engaged in more effective conflict resolution and legal advocacy. High-quality legal representation is essential to help children and youth navigate these complex processes, advance their legal rights, ensure their voices are heard, and reach better outcomes.

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