COVID-19 and Preventing Harm to Vulnerable Children

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I. INTRODUCTION

> "The #COVID19 pandemic is a health crisis which is quickly becoming a child rights crisis."[1]

Although COVID-19 mercifully seems to affect children less severely than adults,[2] children are far from immune from the impacts of the virus. Public health orders closing schools and businesses, cancelling events, and keeping children at home have been disruptive and distressing to many children and families. But for children who rely on government entities for protection, care, custody, and services, the effects of the public health orders can be devastating. COVID-19 and the response to it has serious implications for the safety, well-being, and development of these vulnerable children—those within the child welfare, juvenile justice, and special education systems. All three groups consist of children to whom the state has legal obligations.[3] Additionally, all three groups consist disproportionately of children of color,[4] a reality being brought to the forefront in the context of this pandemic and beyond.

As these child-serving systems adapt to the new realities defined by public health limitations, there exists an opportunity to address both immediate challenges as well as enduring concerns within these complex structures. This Article explores the current state of child rights within the child welfare, juvenile justice, and special education systems, highlighting concerns that pre-date COVID-19 as well as recent legal implications of the pandemic. Each section examines the particular repercussions of the pandemic and the response to it on children and proposes potential remedies. It also offers

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1. Henrietta H. Fore (@unicefchief), TWITTER (May 11, 2020, 5:07 PM), https://twitter.com/unicefchief/status/1259998581043400704 [https://perma.cc/2BE4-YVQ3].

2. *COVID-19: Why Are Children Less Affected?*, CEDARS SINAI NEWSROOM (Apr. 21, 2020), https://www.cedars-sinai.org/newsroom/covid19-why-are-children-less-affected/ [https://perma.cc/GF3L-MEJY].

3. *See* CHILD WELFARE INFO. GATEWAY, HOW THE CHILD WELFARE SYSTEM WORKS 1 (Feb. 2013), https://www.childwelfare.gov/pubPDFs/cpswork.pdf [https://perma.cc/XT8N-ZVHS]; Michael Umpierre, *Rights and Responsibilities of Youth, Families, and Staff*, NAT'L INST. CORRECTIONS, https://info.nicic.gov/dtg/print/11 [https://perma.cc/9R4C-RC97]; Peg Rosen, *Special Education: Federal Law vs. State Law, Understood*, https://www.understood.org/en/school-learning/your-childs-rights/basics-about-childs-rights/special-education-federal-law-vs-state-law [https://perma.cc/4WSR-F2SB].

4. ROWENA FONG, RUTH G. MCROY & ALAN DETTLAFF, ENCYCLOPEDIA OF SOC. WORK, DISPROPORTIONALITY AND DISPARITIES 1–2, 4–5 (2014), https://oxfordre.com/socialwork/view/10.1093/acrefore/9780199975839.001.0001/acrefore-9780199975839-e-899?print=pdf [https://perma.cc/KNC7-8X73].

perspective on how meeting today's critical challenges can result in long-term systemic improvements.

II. COVID-19 AND JUVENILE JUSTICE

A. Juvenile Justice History and Enduring Concerns

The original intent of the juvenile justice system was to address juvenile behavior apart from the criminal justice system, guided by an understanding that children are different from adults and the belief that troubled children would benefit from state involvement and oversight.[5] Despite the benevolent framing of the system's origins, the juvenile court and juvenile justice agencies have long struggled to humanely and effectively intervene in the lives of the children in their charge.[6] It is admittedly no easy task. The juvenile justice system must act in the best interest of society as well as in the best interest of youth; it must hold youth accountable as well as meet the youth's various needs. Balancing these responsibilities is always a challenge—a particularly difficult one during a pandemic.

Before the establishment of a formal juvenile justice system, children who were abused, neglected, abandoned, delinquent, and often just simply impoverished, were frequently sent to reformatories, which aimed to "save" children from their difficult circumstances.[7] In reality, these facilities were frequently abusive environments employing cruel methods of punishment and restraint.[8] Children were consigned to reformatories without any measure of due process—no opportunity to oppose their confinement, no procedure to identify less restrictive alternatives, no recourse for overly punitive and harmful treatment.[9] The development of a juvenile court did little to rein in such practices, with the doctrine of *parens patriae* granting courts discretion to order children involuntarily into reformatories for indeterminate periods of time without the constitutional protections provided within the criminal court.[10]

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5. Charisa Smith, *Nothing About Us Without Us! The Failure of the Modern Juvenile Justice System and a Call for Community-Based Justice*, 4 J. APPLIED RES. ON CHILD. 1, 1 (2013), https://digitalcommons.library.tmc.edu/cgi/viewcontent.cgi?article=1111&context=childrenatrisk [https://perma.cc/7PQB-HD8E].

6. *Id.*

7. *See* Daniel Macallair, *The San Francisco Industrial School and the Origins of Juvenile Justice in California: A Glance at the Great Reformation*, 7 U.C. DAVIS J. JUV. L. & POL'Y 1, 1 (2003).

8. *See id*. at 6.

9. *See* John R. Sutton, *The Juvenile Court and Social Welfare: Dynamics of Progressive Reform*, 19 L. & SOC'Y REV. 107, 115–16 (1985); *see also* Macallair, *supra* note 7, at 7.

10. *See* Macallair, *supra* note 7, at 7–8.

The informality of the juvenile court was challenged in the mid-twentieth century, culminating in the U.S. Supreme Court decision of *In re Gault*, which clearly articulated that children were entitled to due process in juvenile proceedings, including the right to counsel.[11] This arguably changed the character of the juvenile court, aligning it more with the adult criminal court in appearance and function.[12] A later increase in crime—juvenile crime in particular—further blurred the line between the adult and juvenile systems as highly reactive federal and state policies abandoned rehabilitative principles in favor of retributive ones.[13] Juveniles were detained, prosecuted, and incarcerated at high rates and young people were increasingly transferred to the criminal justice system.[14]

Beginning in the mid-1990s, juvenile crime rates began to decrease in stark contrast with predictions of a continuing and increasing juvenile crime wave.[15] At the same time, researchers and policymakers identified less punitive and more effective responses to delinquent behavior that aligned better with the original rehabilitative intent of the juvenile system.[16] Research findings promoted a deeper understanding of adolescent development and juvenile offending.[17] As a result, juvenile justice policy again changed course, re-emphasizing that children are different from adults.[18] This "developmental approach" to juvenile justice was bolstered by U.S. Supreme Court decisions citing brain science in the context of juvenile sentencing.[19] Ultimately, research and policy promoted the principle that many children could effectively be served outside of the juvenile justice system.[20] As a result,

11. *In re* Gault, 387 U.S. 1, 41 (1967).
12. Barry C. Feld, *Criminalizing the American Juvenile Court*, *in* 17 CRIME AND JUSTICE: A REVIEW OF RESEARCH 197, 197–98 (Michael Tonry ed., 1993).
13. *Id.* at 233.
14. *See generally id.*
15. *See* Mark Soler, Dana Shoenberg & Marc Schindler, *Juvenile Justice: Lessons for a New Era*, 16 GEO. J. POVERTY L. & POL'Y 483, 486–87 (2009). In the mid-1990s, several researchers from respected institutions predicted that significant increases in the juvenile population as a whole would inevitably lead to an increase in the number of violent juveniles, described as "super-predators." *Id.* at 486.
16. *See id.* at 489–92.
17. *See* Kathryn Monahan, Laurence Steinberg & Alex R. Piquero, *Juvenile Justice Policy and Practice: A Developmental Perspective*, *in* 44 CRIME AND JUSTICE: A REVIEW OF RESEARCH 577, 578 (Michael Tonry ed., 2015).
18. *See* Soler, Shoenberg & Schindler, *supra* note 15, at 495–97.
19. *See* Miller v. Alabama, 567 U.S. 460, 471–72 (2012); Graham v. Florida, 560 U.S. 48, 68–69 (2010); Roper v. Simmons, 543 U.S. 551, 569–70 (2005).
20. *See* Soler, Shoenberg & Schindler, *supra* note 15, at 489–91.

the number of youth processed by juvenile courts and placed in facilities as of 2018 is at its lowest point since 1997.[21]

Despite this evolution, children's rights in the juvenile justice system related to detention, incarceration, and due process continue to be a frequent subject of litigation and policy advocacy.[22] A primary concern is that, despite a massive reduction in recent years in the number of youth detained and incarcerated, juveniles continue to be held in secure facilities more often than it is warranted, even when they do not pose a danger to society.[23] This practice disproportionately impacts youth of color, with Black youth being five times more likely than White youth to be incarcerated.[24]

Children have a fundamental liberty interest in being free from restraint and confinement, just as adults do. This liberty interest can be limited, however, by state interests. For example, in 1984, the U.S. Supreme Court ruled in *Schall v. Martin* that pre-adjudication detention of a juvenile was constitutional, recognizing that the state has a legitimate interest in the protection of the child as well as protection of the community from potential harms resulting from the child's criminal acts.[25] However, recent research suggests that detention of youth may not necessarily make communities safer.[26] Studies have shown increased rates of recidivism for detained youth in comparison with youth diverted from the system.[27] Nevertheless,

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21. *See Juveniles in Corrections*, OFF. JUV. JUST. & DELINQ. PREVENTION: STAT. BRIEFING BOOK, https://www.ojjdp.gov/ojstatbb/corrections/qa08201.asp?qaDate=2018 [https://perma.cc/AUA8-TWS2].

22. *See* Wendy Sawyer, *Youth Confinement: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Dec. 19, 2019), https://www.prisonpolicy.org/reports/youth2019.html [https://perma.cc/3T9N-3C74].

23. *See id*. More than 200,000 youth are admitted to detention facilities each year across the nation. *Kids Deserve Better: Why Juvenile Detention Reform Matters*, ANNIE E. CASEY FOUND. (Dec. 5, 2018), https://www.aecf.org/blog/kids-deserve-better-why-juvenile-detention-reform-matters/ [https://perma.cc/5SZ7-TGBV]. The most recent point-in-time data shows more than 37,000 youth being held in residential placement on October 24, 2018. *See Juveniles in Corrections*, *supra* note 21.

24. Laura Ridolfi, *Racial and Ethnic Disparities*, BURNS INST. (Oct. 23, 2017), https://www.burnsinstitute.org/tag/racial-and-ethnic-disparities/ [https://perma.cc/GXL8].

25. Schall v. Martin, 467 U.S. 253, 264–66, 281 (1984).

26. *See* BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 4–5 (2006), http://www.justicepolicy.org/uploads/justicepolicy/documents/dangers_of_detention.pdf [https://perma.cc/86QV-FTSV].

27. *Id.* at 4–6; *see also* Elizabeth Cauffman & Laurence Steinberg, *Commentary: Release Nonviolent Juvenile Offenders from Custody to Protect Them from Covid-19*, L.A. TIMES (Apr. 8, 2020, 1:41 PM), https://www.latimes.com/socal/daily-pilot/opinion/story/2020-04-08/commentary-release-nonviolent-juvenile-offenders-from-custody-to-protect-them-from-covid-19 [https://perma.cc/39KS-NQQQ] (citing ongoing research study of 1,200 male, first-time juvenile offenders).

youth continue to be detained when charged with only low-level offenses and without being assessed a risk to public safety.[28]

A second area of concern focuses on the conditions of confinement for detained and incarcerated youth. It is well established that youth have a right to be safe while in the custody of the state.[29] However, harmful conditions within juvenile justice facilities have been documented for decades, and reports of unsafe environments continue to emerge.[30] Although juvenile facilities are intended to be rehabilitative rather than punitive, practices aimed at punishing youth are common.[31] Staff reportedly use force more often in juvenile facilities than in adult prisons.[32] Solitary confinement has been widely used as punishment despite having been recognized as a harmful practice for youth,[33] and despite recent federal law and policy and some state law prohibiting or restricting its use.[34] Incarceration in and of itself is a traumatic experience for children, and

28. Joaquin Palomino & Jill Tucker, *Vanishing Violence: Minor Crimes, Major Time*, S.F. CHRON. A1 (Nov. 21, 2019, 4:00 AM), https://projects.sfchronicle.com/2019/vanishing-violence-major-time/ [https://perma.cc/BV77-9UCH]. Note that this often occurs when children are confined as a result of a technical violation of probation, meaning that although the child's original offense was not criminal, e.g., truancy, violation of curfew, the subsequent violation of a court order makes them eligible for detention. Federal law allows for this loophole around the prohibition of detention of non-offending youth. *See* 34 U.S.C. § 11133(a)(11)(A)(i)(II) (2020); 28 C.F.R. § 31.303(f)(3)(i) (2020).

29. DeShaney v. Winnebago Cty. Dep't Soc. Servs., 489 U.S. 189, 198–99 (1989) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)).

30. *See, e.g.*, MAUREEN WASHBURN & RENEE MENART, CTR. ON JUVENILE & CRIMINAL JUSTICE, UNMET PROMISES: CONTINUED VIOLENCE & NEGLECT IN CALIFORNIA'S DIVISION OF JUVENILE JUSTICE 7, 15–16, 18–20, 26, 28–31, 36–38, 40, 43, 46, 53, 55, 59 (2019), https://files.eric. ed.gov/fulltext/ED597307.pdf [https://perma.cc/UTD2-NFYB].

31. *Id.* at 7–8, 22, 26, 38.

32. *See* MAUREEN WASHBURN & RENEE MENART, CTR. ON JUVENILE & CRIMINAL JUSTICE, A BLUEPRINT FOR REFORM: MOVING BEYOND CALIFORNIA'S FAILED YOUTH CORRECTIONAL SYSTEM 6 (2020), http://www.cjcj.org/uploads/cjcj/documents/blueprint_ for_ reform.pdf [https://perma.cc/ D4UQ-A825].

33. *See* WASHBURN & MENART, *supra* note 30, at 34. As far back as 1890, the U.S. Supreme Court recognized that prisoners who were isolated often suffered mental health issues, becoming "violently insane" or committing suicide. *In re* Medley, 134 U.S. 160, 168 (1890). A solid body of research confirms the harms of such treatment and concludes that the negative effect of isolation on youth is even more pronounced. *See, e.g.*, WASHBURN & MENART, *supra*, at 33–34.

34. JESSICA FEIERMAN, KAREN U. LINDELL & NATANE EADDY, JUVENILE LAW CTR., UNLOCKING YOUTH: LEGAL STRATEGIES TO END SOLITARY CONFINEMENT IN JUVENILE FACILITIES 3–4 (2017), https://jlc.org/sites/default/files/attachments/2018-03/JLC_Solitary_ReportFINAL.pdf [https://perma.cc/4QTJ-UHBQ].

harsh conditions within these facilities only exacerbate the negative effects.[35] It is well established that as many as 70% of youth within the juvenile justice system suffer from mental health disorders.[36] For many, their mental health conditions worsen as a result of being confined.[37]

A third area of concern is access to and quality of justice within juvenile courts. For example, although youth are entitled to representation by counsel in juvenile proceedings, due to a lack of funding as well as encouragement from judges to waive this right, a significant number of children appear in delinquency proceedings without the benefit of counsel.[38] Furthermore, not all youth receive representation in the post-dispositional phase of the proceedings, in which release from confinement is often the key issue.[39] Juveniles do not have a constitutional right to a speedy trial, and state statutes or court rules for timely processing vary among jurisdictions and are rarely mandatory or enforced.[40] Delay in adjudication can prevent timely provision of needed services and a reduced sense of fairness and accountability among youth when interventions are slow to be offered and consequences are not promptly imposed.[41]

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35. SUE BURRELL, NAT'L CHILD TRAUMATIC STRESS NETWORK, TRAUMA AND THE ENVIRONMENT OF CARE IN JUVENILE INSTITUTIONS 2 (2013), https://www.njjn.org/uploads/digital-library/NCTSN_trauma-and-environment-of-juvenile-care-institutions_Sue-Burrell_September-2013.pdf [https://perma.cc/SK55-28N7].

36. Lisa Callahan et al., *A National Survey of U.S. Juvenile Mental Health Courts*, 63 PSYCHIATRIC SERVICES 130, 130 (2012), https://ps.psychiatryonline.org/doi/pdf/10.1176/appi.ps.201100113 [https://perma.cc/LE6X-ACM4]; *see also* JENNIE L. SHUFELT & JOSEPH J. COCOZZA, NAT'L CTR. FOR MENTAL HEALTH & JUVENILE JUSTICE, YOUTH WITH MENTAL HEALTH DISORDERS IN THE JUVENILE JUSTICE SYSTEM: RESULTS FROM A MULTI-STATE PREVALENCE STUDY 5 (2006), https://www.unicef.org/tdad/usmentalhealthprevalence06(3).pdf [https://perma.cc/ED5L-9ASK].

37. HOLMAN & ZIEDENBERG, *supra* note 26, at 8.

38. Barry C. Feld, *Punishing Kids in Juvenile and Criminal Courts*, *in* 47 CRIME & JUSTICE: A REVIEW OF RESEARCH 417, 442–43 (Michael Tonry ed., 2018).

39. NAT'L JUV. DEF. CTR., ACCESS DENIED: A NATIONAL SNAPSHOT OF STATES' FAILURE TO PROTECT CHILDREN'S RIGHT TO COUNSEL 32–34 (May 2017), https://njdc.info/wp-content/uploads/2017/05/Snapshot-Final_single-4.pdf [https://perma.cc/YL7X-KPK6]

40. JEFFREY A. BUTTS, GRETCHEN RUTH CUSICK & BENJAMIN ADAMS, DELAYS IN YOUTH JUSTICE 3, 36, 42–44 (2009), https://www.ncjrs.gov/pdffiles1/nij/grants/228493.pdf [https://perma.cc/A65P-AEYZ]. Although almost all states have developed case processing standards for delinquency case processing through statute or court rules and procedures, these standards are often not adhered to in practice. *Id.* at 42, 51–52.

41. *Id.* at 4, 8. The limited research on this topic indicates that youth are less likely to reoffend when their delinquency matters are resolved efficiently. *Id.* at 8. The suggestion that swift consequences are important to preventing reoffending is supported by an understanding of adolescent development, which explains that youth are less able to understand the long-term consequences of their actions and tend to make impulsive decisions. *Id.* at 10 (citing Thomas Grisso et. al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 356–57 (2003); Thomas Grisso, *Society's Retributive Response to Juvenile Violence: A Developmental*

B. The Impact of COVID-19

1. Detention and Incarceration

The decision whether to detain a youth pre-adjudication generally turns on whether the youth poses a risk to himself or others.[42] While the state has a legitimate interest in protecting society from the effects of a child's criminal behavior, during the COVID-19 epidemic the state also has an interest in avoiding increasing the child's risk of exposure to coronavirus, as well as limiting the risk of those working within detention facilities. The child must also return to his home and community if not adjudicated delinquent and released, bringing with him whatever he may have been exposed to while detained. The youth's interest in freedom from institutional restraint is arguably greater when such restraint impedes his ability to comply with public health orders designed to protect him and the community at large. A similar calculation applies to youth committed to a secure facility as part of their disposition in a juvenile case, particularly for nonviolent offenses.

As noted above, the conditions within secure facilities raise several concerns about the health, safety, and well-being of youth, even in the best of times. A pandemic exacerbates these concerns. Incarcerated youth are disproportionately more likely to have existing health issues that may make them especially vulnerable to more severe effects of the virus.[43] Secure facilities are notorious for transmitting disease because social distancing is nearly impossible to maintain.[44] The highly communicable nature of COVID-19 necessitates isolating those who may be infected and those at higher risk of complications. Although many states have recently limited or prohibited the use of solitary confinement, the practice has reemerged

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Perspective, 20 LAW & HUM. BEHAV. 229, 232, 234 (1996); Lawrence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decisionmaking*, 20 LAW & HUM. BEHAV. 249, 262–63, 266 (1996)). In addition, when faced with a protracted court process, youth may be more likely to do whatever it takes to end the drawn-out proceedings even if the outcome may have negative consequences for their future. *Id.* at 10.

42. *See* Schall v. Martin, 467 U.S. 253, 266 (1984).

43. Catherine A. Gallagher, *Health Care for the Juvenile Justice Population*, 16 GEO. J. ON POVERTY L. & POL'Y 611, 613 (2009).

44. *Responses to the COVID-19 Pandemic*, PRISON POL'Y INITIATIVE (Aug. 6, 2020), https://www.prisonpolicy.org/virus/virusresponse.html [https://perma.cc/85HG-JWGQ].

in light of COVID-19, prompting lawsuits in at least five states.[45] Youth are reportedly being held in isolation for as long as twenty-three hours a day in some facilities, sometimes due not to their own health status, but as a result of employees calling in sick, leaving insufficient staff to provide adequate supervision.[46]

In addition to the increased use of solitary confinement in the name of public health, families are routinely being denied in-person visitation with their children.[47] By early April, all states had ended in-person visitation in their state facilities temporarily.[48] However, maintaining contact with family while incarcerated is an important part of a child's rehabilitation. In addition, the inability to see or visit with family members undoubtedly contributes to the distress and anxiety of living through a global pandemic while imprisoned.

Some juvenile facilities have suspended or reduced educational and therapeutic services as well.[49] Some classrooms have adapted to virtual learning or changed class schedules to maintain social distancing, but others have essentially shut down.[50] Some state facilities report that community-based providers of therapeutic programming are continuing to provide services remotely and through telehealth platforms that comply with the Health Insurance Portability and Accountability Act (HIPAA).[51] However, in many facilities children remain isolated and afraid.[52] In the words of one youth:

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45. Eli Hager, *Solitary, Brawls, No Teachers: Coronavirus Makes Juvenile Jails Look Like Adult Prisons*, MARSHALL PROJECT (May 12, 2020, 6:00 AM), https://www.themarshallproject.org/2020/05/12/solitary-brawls-no-teachers-coronavirus-makes-juvenile-jails-look-like-adult-prisons [https://perma.cc/M8Q4-HPTT].

46. Erica L. Green, *'Pacing and Praying': Jailed Youths Seek Release as Virus Spreads*, N.Y. TIMES (Apr. 14, 2020), https://www.nytimes.com/2020/04/14/us/politics/coronavirus-juvenile-detention.html [https://perma.cc/A29U-2Z7U]. Such concerns have continued throughout the pandemic, as evidenced by a November 2020 report from the Office of the Child Advocate for the State of Connecticut finding an "alarming degree" of cell confinement at the state's Manson Youth Institution through August of 2020. OFF. OF THE CHILD ADVOCATE, STATE OF CONN., OCA REPORT: CONDITIONS OF CONFINEMENT FOR INCARCERATED YOUTH AGE 15 TO 21 AT MANSON YOUTH INSTITUTION AND YORK CORRECTIONAL INSTITUTION 6 (2020), https://portal.ct.gov/-/media/OCA/OCA-Recent-Publications/ DOCReportFinalSummary.pdf [https://perma.cc/JA8Z-5PS5].

47. *See Responses to the COVID-19 Pandemic*, *supra* note 44.

48. COUNCIL OF JUVENILE JUSTICE ADM'RS, COVID-19 PRACTICE, POLICY & EMERGENCY PROTOCOLS IN STATE JUVENILE FACILITIES 4 (2020), http://cjja.net/wp-content/uploads/2020/06/COVID-19-Issue-Brief-.pdf [https://perma.cc/NS9N-Y7Z3].

49. *See id.* at 1; *see also* Hager, *supra* note 45.

50. *See* Hager, *supra* note 45.

51. *See* COUNCIL OF JUVENILE JUSTICE ADM'RS, *supra* note 48, at 5.

52. The CDC acknowledged that children and teens are among those particularly distressed by the spread of COVID-19. *See Coronavirus Disease 2019 (COVID-19)*, CENTERS FOR DISEASE CONTROL & PREVENTION (July 1, 2020), https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/managing-stress-anxiety.html [https://perma.cc/N6CX-M29S].

"To occupy the roughly 24 hours I am alone in my room, I have been given one book, a deck of cards, a puzzle and word search. None of these items keep me calm. I am very scared right now."[53] If rehabilitation is not possible within facilities where children must necessarily remain in isolation and are unable to participate in treatment and educational activities, there is little justification for locking them up, especially the approximately 70% of youth who are in secure confinement for nonviolent offenses.[54]

In light of the potential harms to youth, and the questionable necessity and value of their confinement, advocates mobilized quickly in response to COVID-19, calling on governors and local agency leaders to act to protect detained and incarcerated youth.[55] Attorneys in several states argued for a blanket release of juvenile offenders who are at greater risk of becoming sick due to underlying health conditions and those who do not pose a danger to the public.[56] Such measures were quickly taken for prisoners in adult facilities, but the same had not occurred for juveniles.[57] These petitions were denied,[58] but the higher courts encouraged local courts to find alternatives to detention and incarceration.[59]

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53. Green, *supra* note 46.

54. Josh Rovner, *COVID-19 in Juvenile Facilities*, SENTENCING PROJECT (Aug. 14, 2020), https://www.sentencingproject.org/publications/covid-19-in-juvenile-facilities/ [https://perma.cc/PUK6-N4JH].

55. *See Youth Justice Advocates in 35+ States Demand Governors and System Leaders Release Incarcerated Youth Amid COVID-19 Pandemic*, NO KIDS IN PRISON (Mar. 19, 2020), https://www.nokidsinprison.org/youth-justice-advocates-in-22-states-demand-governors-and-system-leaders-release-incarcerated-youth-amid-covid-19-pandemic?fbclid=IwAR3VETva_BpZv3l5e_ViJTfLqWQLQf9uNfx5PSVj6iYrB7G0HSbMWxi3QVc [https://perma.cc/36RB-UP4E]. *See generally* ALL. FOR CHILD PROT. IN HUMANITARIAN ACTION, TECHNICAL NOTE: COVID-19 AND CHILDREN DEPRIVED OF THEIR LIBERTY 2–9 (2020), https://alliancecpha.org/en/system/tdf/library/attachments/covid-19_and_children_deprived_of_their_liberty_v1_lowres_0.pdf?file=1&type=node&id=37576 [https://perma.cc/Z535-8FQJ].

56. *See* Green, *supra* note 46.

57. *Id.*

58. *See, e.g.*, Peter Hall, *Pa. Supreme Court Denies Request to Release Children in Juvenile Facilities During Coronavirus Pandemic*, MORNING CALL (Apr. 7, 2020, 8:49 PM), https://www.mcall.com/coronavirus/mc-nws-coronavirus-pennsylvania-supreme-court-juvenile-detention-20200407-gvqc3vznubhlvmpz26gpyfhyam-story.html [https://perma.cc/93Y9-UH63].

59. *See, e.g.*, Ann E. Marimow, *Maryland's Chief Judge Orders Release of Young Offenders to Reduce Covid-19 Risk*, WASH. POST (Apr. 14, 2020, 4:28 PM), https://www.washingtonpost.com/local/legal-issues/marylands-chief-judge-orders-release-of-young-offenders-to-reduce-covid-19-risk/2020/04/14/a16a0cce-7e54-11ea-9040-68981f488eed_story.html [https://perma.cc/B25U-4W62]. Similarly, the state of Nebraska responded to

On March 30, 2020, the National Governors Association issued a memorandum to Governors across the nation noting that incarcerated youth "may be limited in their ability to participate in proactive measures to keep themselves safe, such as social distancing and frequently washing hands."[60] The memo recommended that youth facilities be downsized by releasing youth in detention for low-level offenses, status offenses, or technical violations of probation; releasing youth with preexisting conditions who are at lower risk for reoffending; having courts prioritize cases where children are in pre-adjudication detention so they do not remain there as a result of continuances; and considering early release for youth who are close to their release date.[61] The memorandum also recommended limiting or prohibiting new admissions to facilities, in part by issuing citations instead of taking youth into custody.[62]

As of May 8, 2020, two Governors had issued executive orders encouraging the release of incarcerated youth in order to reduce the risk of transmission.[63] In seven states judges or state juvenile justice agencies took similar action.[64] According to the Council of Juvenile Justice Administrators, by April, most

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advocates' calls for mass release of youth by explaining that local courts have the authority to devise their own response and that attorneys have the ability to file motions for release when circumstances warrant. Letter from Corey R. Steel, Nebraska State Court Adm'r, to Juliet Summers, Voices for Children of Neb. (Mar. 23, 2020), https://www.documentcloud.org/documents/6819607-Youth-First-Initiative-Nebraska-response.html [https://perma.cc/AS7P-NKJX].

60. Memorandum from Bill McBride, Exec. Dir., Nat'l Governors Ass'n, to Governors' Offs. 1 (Mar. 30, 2020), https://www.nga.org/wp-content/uploads/2020/04/Memorandum_COVID-19-Responses-in-the-Juvenile-Justice-System.pdf [https://perma.cc/RQ6R-DVH4].

61. *Id.*

62. *Id.*

63. *See* Colo. Exec. Order No. D 2020 34 (Apr. 11, 2020), https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20034%20CDHS.pdf [https://perma.cc/UWF5-T6MF]; Mich. Exec. Order No. 2020-29 (Apr. 26, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-523422—,00.html [https://perma.cc/GMD6-MT5C]. In Colorado, Governor Polis issued an Executive Order directing the state's Department of Human Services to assess youth not sentenced as a serious offender for eligibility for release and to develop strict criteria for detention during this time. Colo. Exec. Order No. D 2020 34. In Michigan, Governor Whitmer issued an executive order that "strongly encouraged" juvenile detention centers to eliminate detention or residential placement of youth unless posing a substantial and immediate safety risk. Mich. Exec. Order No. 2020-29.

64. *See* NO KIDS IN PRISON, STATES MUST DO MORE TO PROTECT YOUTH BEHIND BARS DURING COVID-19 PANDEMIC 5–8 (2020), https://backend.nokidsinprison.org/wp-content/uploads/2020/05/NKIP-COVID19-Policy-Paper-2P.pdf [https://perma.cc/86YU-5D3L]. For example, in Alabama, the Department of Youth Services is considering making all but serious offenders eligible for release; Utah courts are working to vacate juvenile warrants. *See* COUNCIL OF JUVENILE JUSTICE ADM'RS, *supra* note 48, at 3–4.

state juvenile facilities had stopped admitting juveniles temporarily.[65] The Council also reports that although not every state juvenile justice agency is permitted by law to release youth, those that do have the authority have made efforts to release youth who are nonviolent or approaching release.[66]

Most efforts to reduce the number of children in secure facilities have occurred on the local level.[67] For example, in Clayton County, Georgia, Hon. Steven Teske, chief judge of the juvenile court, stepped up already existing measures aimed at reducing the number of detained and incarcerated youth.[68] The court modified admissions criteria to prohibit detention of nonviolent youth, created a team to assess youth currently detained in light of the new criteria, and held remote hearings.[69] These efforts ultimately reduced the number of youth in county custody by 95%.[70]

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65. COUNCIL OF JUVENILE JUSTICE ADM'RS, *supra* note 48, at 2.
66. *Id.* at 3.
67. *See* NO KIDS IN PRISON, *supra* note 64, at 11.
68. Robin Kemp, *Clayton County Juvenile Court Amends COVID-19 Order, Adding Videoconferences, Nonviolent Release Where Possible*, CLAYTON NEWS-DAILY (Apr. 7, 2020), https://www.news-daily.com/news/clayton-county-juvenile-court-amends-covid-19-order-adding-videoconferences-nonviolent-release-where-possible/article_9c6964a4-78e1-11ea-8594-3fbbafbb2716.html [https://perma.cc/88NY-SD5R].
69. *Id.*
70. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, COVID-19 JUVENILE JUSTICE RESPONSES 7 (2020), https://www.ncsl.org/Portals/1/Documents/cj/Juvenile_Justice_Virtual_Meeting_Presentation.pdf [https://perma.cc/DFX2-KPJK]. Similarly, Cook County, Illinois quickly began holding juvenile release hearings to reduce the number of youths in custody. Annie Sweeney & Megan Crepeau, *Hearings Start on Releasing Some Youths from Cook County Juvenile Detention Over COVID-19 Fears*, CHI. TRIBUNE (Mar. 24, 2020, 6:15 PM), https://bit.ly/2yiPC16 [https://perma.cc/AE2L-5Z5Y]. In Los Angeles County, California, the number of youths within its juvenile halls and juvenile camps dropped by more than 30% during the first two months of the pandemic. *See* Jeremy Loudenback & Chuck Carroll, *Advocates Ask California Supreme Court to Release L.A. Youth from Juvenile Jails as COVID Threat Surges*, IMPRINT (Apr. 14, 2020, 10:16 PM), https://chronicleofsocialchange.org/justice/juvenile-justice-2/advocates-ask-california-supreme-court-to-release-l-a-youth-from-juvenile-jails/42451 [https://perma.cc/GB9H-8EYE]. Nevertheless, with continued concerns for those incarcerated, and following weeks of protests by advocates and families of detained youth, attorneys filed an emergency request to the California Supreme Court seeking release of all Los Angeles County youth who have preexisting conditions, those exhibiting symptoms of COVID-19, those within six months of release, and those who pose little threat to public safety. *Id.* The petition also sought a moratorium on new admissions to juvenile halls with an exception for those who pose a serious risk to the public. *Id.* The case was redirected to the Court of Appeals and eventually landed before a L.A. Superior Court Judge who concluded that the youth within the facilities were being sufficiently protected by safety measures such as staggered meals and activities as well as providing masks and hand sanitizing stations. Jeremy Loudenback, *Judge Shoots Down Bid to Free Youth from Juvenile Detention During Pandemic*, IMPRINT (May 12, 2020, 10:33 PM), https://imprintnews.org/

Where it is not in the best interest of the child or the community to release or divert a child from detention, local juvenile justice officials and judges have been called upon to take steps to reduce risk of exposure and protect the emotional well-being of youth.[71] Several states implemented measures to protect youth, including testing and developing policies for quarantining and isolating youth.[72] Some states waived restrictions on solitary confinement, raising concerns about its use beyond medical necessity and the particular impacts such isolation may have during a time of crisis.[73] The American Academy of Pediatrics counseled that if a child must be isolated, she should have access to her things, educational and reading materials, and other means to continue developmentally appropriate activity.[74] Facilities must ensure that children are able to remain in contact with their families by extending visitation times, providing technology necessary to facilitate communication, and waiving or covering costs associated with the provision of devices that enable contact.[75]

Many argue that far too little has been done to mitigate the risk of COVID-19 among detained and incarcerated youth.[76] Facilities remain dangerous environments, putting children at high risk of contracting the virus.[77] As of November 13, 2020, 2,333 incarcerated youth have tested positive for COVID-19 in juvenile facilities.[78]

2. Due Process and Access to Justice

Public health orders present challenges to ensuring youth access to their attorneys and the court for hearings relevant to their liberty interests. However, it is critical that emergency measures do not result in an extension of time spent in confinement. Children must have timely access to the court and

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justice/juvenile-justice-2/judge-shoots-down-bid-to-free-youth-from-juvenile-detention-during-pandemic/43284 [https://perma.cc/83D3-NW33]. Advocates continue to point out that 44% of youth held in juvenile halls in the county are there on the basis of nonviolent offenses. *Id.*

71. *See Responding to the Needs of Youth Involved with the Justice System During the COVID-19 Pandemic*, AM. ACAD. OF PEDIATRICS (Aug. 25, 2020), https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/responding-to-the-needs-of-youth-involved-with-the-justice-system—during-the-covid-19-pandemic [perma.cc/97QJ-GBU7].

72. *See* NO KIDS IN PRISON, *supra* note 64, at 8.

73. *See, e.g.*, Colo. Exec. Order No. D 2020 34 (Apr. 11, 2020), https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20034%20CDHS.pdf [https://perma.cc/UWF5-T6MF].

74. *Responding to the Needs of Youth Involved with the Justice System During the COVID-19 Pandemic*, *supra* note 71.

75. *See* ALL. FOR CHILD PROT. IN HUMANITARIAN ACTION, *supra* note 55, at 9.

76. *See* Rovner, *supra* note 54.

77. *See id.*

78. *Id.*

to legal assistance in order to challenge the deprivation of liberty effectively, and to have a decision rendered promptly.

Remote or virtual hearings, although allowed in some states, in typical times are generally not favored.[79] However, these are not typical times. Of greater concern is the threat to a youth's liberty should hearings be delayed or cancelled.[80] As noted above, delay in delinquency court proceedings is common.[81] Failing to provide an opportunity to be heard in a timely manner during this pandemic can have serious consequences for the health and well-being of children. To that end, courts have utilized video conferencing and juvenile defenders have advocated for courts to expedite hearings, as well as provide opportunities to resolve matters without hearings when agreeable to the parties.[82]

As noted above, despite the child's recognized right to counsel, many children proceed in delinquency court without representation.[83] Without the assistance of counsel in these circumstances, children may be denied

79. The National Juvenile Defender Center has explicitly stated that they do not support remote hearings. NAT'L JUVENILE DEF. CTR., GUIDANCE TO JUVENILE COURTS ON CONDUCTING REMOTE HEARINGS DURING THE COVID-19 PANDEMIC 1 (2020), https://njdc.info/wp-content/uploads/Guidance-to-Juvenile-Courts-on-Conducting-Remote-Hearings-During-the-COVID-19-Pandemic.pdf [https://perma.cc/GA4N-Z7P3].

80. *See, e.g.*, Clarissa Sosin, *Most Louisiana Parishes Adapt Quickly to Hearings Over Zoom Due to COVID-19*, JUV. JUST. INFO. EXCH. (June 1, 2020), https://jjie.org/2020/06/01/most-louisiana-parishes-adapt-quickly-to-hearings-over-zoom-due-to-covid-19 [https://perma.cc/3Q6Q-BMFK]. In general, juvenile courts have adapted to online proceedings during the course of the pandemic. *See, e.g.*, *id.* However, Orleans Parish in Louisiana inexplicably closed court and held no hearings, virtually or otherwise. *Id.* Juvenile defenders could submit motions, but the court provided no opportunity to advocate for release. *Id.* Judges did release youth at their discretion, but the suspension of all hearings was a clear violation of the rights of detained youth. *Id.* After thirty-six days, the Fourth Circuit Court of Appeals ordered the court to provide remote hearings. *Id.*

81. *See* BUTTS, CUSICK & ADAMS, *supra* note 40, at 3, 36, 42–44.

82. *See, e.g.*, Letter from Ji Seon Song, President, Pac. Juvenile Def. Ctr., to Hon. Tani Cantil-Sakauye, C.J., Cal. Supreme Court 1–4 (Apr. 4, 2020), https://www.pjdc.org/wp-content/ uploads/Request-to-Chief-Justice-for-Delinquency-Court-Guidance-4.4.20.pdf [https://perma.cc/FA6X-JD4V]. In California, the Judicial Council adopted a number of emergency rules, including a prohibition on the continuance of detention hearings and permitting any proceedings to be held remotely. CAL. R. CT., App. I (Emergency Rule 7). Similarly, the Colorado Supreme Court ordered that detention hearings for juveniles in delinquency cases were not to be suspended. Order Regarding COVID-19 and Operation of the Colorado State Courts (Colo. Sup. Ct., Mar. 16, 2020), https://www.courts.state.co.us/userfiles/file/Media?Opinion_Docs_COVID-19%20Order%2016Mar2020(1).pdf [httsp://perma.cc/PZR8-3TZ8].

83. *See* Feld, *supra* note 38, at 442–43.

the opportunity to challenge their confinement or have their concerns heard by a neutral arbiter. For example, the State of Nebraska responded to advocates' demand for mass release by allowing attorneys representing youth to file motions for release on a case-by-case basis.[84] But how can this occur when large numbers of children waive their right to counsel and others are no longer represented post-disposition? Access to counsel is of the utmost importance during this pandemic.

Even in the best of times, appointing counsel far enough in advance of a detention hearing is challenging, and likely impactful on the detention determination.[85] As Justice Marshall noted in his dissent in *Schall v. Martin*, in juvenile cases the lawyer generally has no opportunity to investigate the child's background and very little time to prepare argument prior to a detention hearing.[86] In the early days of the pandemic response, juvenile defenders in California asked the California Supreme Court to order probation departments to notify the public defender or other defense counsel when youth are brought into juvenile hall in order to allow ample time for investigation in advance of the detention hearing.[87]

The challenge of communicating prior to court hearings to ensure adequate preparation is exacerbated when all communications require technology. Thus, detention facilities must provide the necessary devices and connectivity to facilitate such communication between youth and their attorneys free of charge. To ensure remote hearings do not violate the youth's rights, it is recommended that there be a confidential means of communication provided for the attorney and client before, after, and during hearings, and that the court allow breaks during proceedings to facilitate confidential attorney-client communication. The youth must have a private space within which to conduct confidential communication and virtually attend the hearing.[88]

C. Potential Long-term Impacts of the COVID-19 Response

Researchers, advocates, and attorneys are urging more action in response to the virus as well as leveraging this circumstance to promote changes that can last beyond the pandemic.[89] Based on their extensive research regarding adolescent development and the harms of detention and incarceration, Professors Elizabeth Cauffman and Laurence Steinberg strongly advised that all but the most dangerous juveniles should be removed from secure

84. *See* Letter from Corey R. Steel, *supra* note 59.
85. *See* Schall v. Martin, 467 U.S. 253, 284–85 (1984) (Marshall, J., dissenting).
86. *Id.*
87. Letter from Ji Seon Song, *supra* note 82, at 4.
88. *See* NAT'L JUVENILE DEF. CTR., *supra* note 79, at 2.
89. *See* Hager, *supra* note 45.

detention facilities in light of COVID-19.[90] Their argument extends beyond the circumstances of COVID-19, however. They argue that "[u]nder the best of circumstances, the widespread detention of nonviolent juvenile offenders is bad public policy that in the long run makes our communities more, not less, dangerous."[91] As discussed *supra*, there are indications that confinement can increase, rather than decrease recidivism.[92] Furthermore, there is existing evidence that reducing the population within youth prisons does not correlate with increased danger to communities.[93] The crisis of COVID-19 may serve as a catalyst for action on the basis of such findings.

Even prior to the COVID-19 pandemic, many states had reduced the number of youth in juvenile facilities through new legislation and new, more stringent, screening criteria.[94] For example, in California, only the most serious offenders are sent to state facilities, and among the youth who remain local, the vast majority are supervised in the community.[95] In response to the pandemic, Governor Gavin Newsom of California issued an executive order suspending all commitments to state juvenile justice facilities, leaving juvenile courts and county probation departments to manage the serious offenders usually supervised by the state.[96] Several weeks later, as a part of the revised state budget, the Governor proposed the closure of all remaining state juvenile facilities.[97] The previous Governor had attempted

90. Cauffman & Steinberg, *supra* note 27.
91. *Id.*
92. *See* HOLMAN & ZIEDENBERG, *supra* note 26, at 4.
93. *See, e.g.*, JASON SZANYI & MARK SOLER, CTR. FOR CHILDREN'S LAW & POLICY, IMPLEMENTATION OF NEW YORK'S CLOSE TO HOME INITIATIVE: A NEW MODEL FOR YOUTH JUSTICE 8 (2018), http://www.cclp.org/wp-content/uploads/2018/02/Close-to-Home-Implementation- Report-Final.pdf [perma.cc/VM46-6EVU].
94. *See* ANNIE E. CASEY FOUND., JUVENILE DETENTION ALTERNATIVES INITIATIVE: INSIGHTS FROM THE ANNUAL RESULTS REPORTS 3–5 (2017), https://www.aecf.org/resources/jdai-at-25/ [https://perma.cc/F59S-CSW4].
95. *See* CHIEF PROB. OFFICERS OF CAL., 2018 CALIFORNIA PROBATION SUMMARY 4 (2018), https://www.cpoc.org/sites/main/files/file-attachments/california_probation_executive_summary.pdf?1555517616 [https://perma.cc/M5S7-YT9T].
96. Cal. Exec. Order No. N-36-20 (Mar. 24, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/03/3.24.20-EO-N-36-20.pdf [https://perma.cc/H258-XFTA]; *see also Governor Newsom Issues Executive Order on State Prisons and Juvenile Facilities in Response to the COVID-19 Outbreak*, OFF. GOVERNOR GAVIN NEWSOM (Mar. 24, 2020), https://www.gov.ca.gov/2020/03/24/governor-newsom-issues-executive-order-on-state-prisons-and-juvenile-facilities-in-response-to-the-covid-19-outbreak/ [perma.cc/F27Y-RTLE].
97. *See* Jeremy Loudenback, *In Surprise Move, Newsom Calls for an End to California's Youth Prison System*, IMPRINT (May 14, 2020, 11:58 PM), https://imprintnews.org/

the same,[98] but the "new normal" brought about by COVID-19 presented a more favorable environment for this consequential action, ultimately approved by the legislature and signed into law on September 30, 2020.[99]

In order to ensure fairness and justice in juvenile proceedings, long-standing issues related to access to justice must be addressed, with this pandemic emphasizing the importance of effective representation and timely processing. Early appointment of counsel, the ability for defenders to meet with clients and gather information prior to a detention hearing, and the provision of post-disposition representation to challenge incarceration all can support the goal of keeping youth out of harmful secure facilities unless absolutely necessary. Avoiding delay and even expediting some hearings can help to move youth out of expensive and deleterious detention environments more quickly. What is necessary in a pandemic may reveal what is possible in its wake.

The challenges arising in the unprecedented age of COVID-19 are really nothing new. The inappropriate confinement of children in dangerous facilities, with inadequate supports and barriers to obtaining justice, particularly for youth of color, has been a rallying cry for juvenile justice reform advocates for decades, if not generations.[100] What may be new, however, is the greater awareness of these deficiencies and an appreciation of the urgency with which action must be taken. As noted by the chief attorney of the Juvenile Division of the Maryland Office of the Public Defender, "[t]here was only a thin veneer of rehabilitation all along, and COVID has made that abundantly clear."[101] With this clarity, a new vision for juvenile justice may soon come into focus.

III. COVID-19 AND SPECIAL EDUCATION

A. The Purpose and Legal Obligations of Schools for Children with Disabilities

All children deserve a successful educational experience, but how it is accomplished is typically the prerogative of the individual states.[102] The

justice/juvenile-justice-2/in-surprise-move-newsom-calls-for-an-end-to-californias-youth-prison-system/43366 [https://perma.cc/3WA9-HNQS].

98. *See California Considers Final Closure of Its State Youth Corrections System*, ANNIE E. CASEY FOUND. (Mar. 16, 2012), https://www.aecf.org/blog/california-considers-final-closure-of-its-state-youth-corrections-system/ [https://perma.cc/WF52-4TV6].

99. *See* S.B. 823, 2019–2020 Leg., Reg. Sess. (Cal. 2020).

100. *See* ANNIE E. CASEY FOUND., *supra* note 94, at 1–2, 6.

101. Hager, *supra* note 45.

102. *Laws & Guidance*, U.S. DEP'T EDUC., https://www2.ed.gov/policy/landing.jhtml?src=pn [https://perma.cc/JZ6N-NXWB].

same is not true for children with learning challenges.[103] The Individuals with Disabilities Education Act (IDEA),[104] a federal law, guides the provision of education in all of the states and the District of Columbia for children who have a disability and whose disabilities adversely affect their education, and who therefore demonstrate a need for specialized instruction and related services.[105] The COVID-19 pandemic presents obstacles never envisioned by the drafters of IDEA, yet the law is flexible enough to ensure that every child can still receive a meaningful education.

"In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[106] Over sixty years ago, the U.S. Supreme Court was not overtly referencing children with disabilities when it held in *Brown v. Board of Education* that racially segregated schools deprive children of equal educational opportunities and experiences.[107] But it may as well have. Fortunately, IDEA guarantees a free appropriate public education (FAPE) in the least restrictive environment (LRE).[108] Those two principles remain both the foundation as well as the

103. *See About IDEA*, U.S. DEP'T EDUC., https://sites.ed.gov/idea/about-idea/ [https://perma.cc/QGU3-2CY9].

104. 20 U.S.C. §§ 1400–1482 (2018). Its most recent major revision, signed into law on December 3, 2004 and effective July 1, 2005, renamed the 1990 statute as the Individuals with Disabilities Education Improvement Act. *See id.*; Mitchell L. Yell, James G. Shriner & Antonis Katsiyannis, *Individuals with Disabilities Education Improvement Act of 2004 and IDEA Regulations of 2006: Implications for Educators, Administrators, and Teacher Trainers*, FOCUS ON EXCEPTIONAL CHILDREN, Sept. 2006, at 1, 1, 2. But that title never caught on, and even courts commonly continue to cite this statute as the Individuals with Disabilities Education Act or IDEA. *See* CONG. RESEARCH SERV., RL33444, THE INDIVIDUALS WITH DISABILITIES ACT (IDEA): SUPREME COURT DECISIONS 5, 10, 12 (2010), https://www.everycrsreport.com/reports/RL33444.html [https://perma.cc/MU8H-4JUW].

105. *See* KYRIE E. DRAGOO, CONG. RESEARCH SERV., R44624, THE INDIVIDUALS WITH DISABILITIES ACT (IDEA) FUNDING: A PRIMER 1 (2019), https://fas.org/sgp/crs/misc/R44624.pdf [https://perma.cc/UZJ6-6DQR]. Although advocates and parents often refer to IDEA as a civil rights statute, states have a choice whether to accept federal funds to cover the cost of some of the provisions of IDEA or to refuse those funds without liability under the statute. *See id.* Currently, all fifty states and the District of Columbia accept these federal funds. *Id.* at 1 n.4. Additionally, many states have enacted their own laws that mirror IDEA, so the protections may exist on one or more levels. *See Education of Students with Disabilities: Federal and State Laws: 50 State Survey of Special Education Laws & Regulations*, FRANKLIN COUNTY L. LIBR. (July 29, 2020, 1:33 PM), https://fclawlib.libguides.com/specialeducation [https://perma.cc/PYS7-V9S6].

106. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

107. *Id.*

108. 20 U.S.C. § 1411(e)(3)(F)(i) (2018).

struggle of IDEA.[109] The Purposes section of the statute is more specific; it requires states "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living."[110]

The Individualized Education Program (IEP) is the "centerpiece" of the IDEA.[111] It is a vehicle that is meant to ensure that children with disabilities have their needs identified and met, so they are prepared to participate in adult life to the maximum extent possible.[112] The IEP is not a static document. At its best, it becomes a road map for the school to use. The child's needs drive the IEP, and the goals, services, accommodations, and placement should flow from that.[113] IDEA requires school districts to identify those needs, unique to each child, first by conducting a "full and individual initial evaluation," and then reevaluating as needed—often annually or sooner if the student is not making progress—but no less than every three years.[114] Evaluations must be performed by trained and knowledgeable personnel,

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109. *See* Jaycee Kemp, *5 Pros and Cons of IDEA: What Every Parent (and Educator!) Should Know*, RUNNING THROUGH WATER (Apr. 12, 2016), https://runningthroughwater.com/2016/04/12/day-9-i-is-for-ieps-idea-inclusion/ [https://perma.cc/V4RX-EB4T].

110. 20 U.S.C. § 1400(d)(1)(A) (2018).

111. *See* Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 994 (2017) (quoting Honig v. Doe, 484 U.S. 305, 311 (1988)); Fry v. Napoleon Cmty. Sch., 137 S. Ct. 743, 753 (2017) (quoting *Honig*, 484 U.S. at 311). *See generally Honig*, 484 U.S. 305.

112. *See* 20 U.S.C § 1414(d) (2018).

113. *See id.* On September 28, 2020, the Office of Special Education Programs, within the USDOE's Office of Special Education and Rehabilitative Services, released guidance stating that the sixty-day initial evaluation deadline under Part B of IDEA can be extended if a parent repeatedly fails or refuses to produce the child for the assessment, or if the child enrolls in a new school in a new public agency after the relevant timeframe has begun. OFFICE OF SPECIAL EDUC. PROGRAMS, U.S. DEP'T OF EDUC., IDEA PART B: SERVICE PROVISION 5 (2020), https://sites.ed.gov/idea/files/qa-provision-of-services-idea-part-b-09-28-2020.pdf [https://perma.cc/ASX5-FL93]. States may specifically adopt a timeframe within which the initial evaluation must be conducted, including adopting the IDEA sixty-day timeframe, and have the flexibility to establish additional exceptions through State regulation or policy. *Id.* For triennial reevaluations, districts should use all appropriate assessment tools available to determine if a reevaluation can be done remotely, provided that reevaluation is based on personal observation, i.e., through videoconferencing if necessary. *Id.*

114. 20 U.S.C. § 1414(a). School closures have resulted in a "pause" on evaluations, and it is likely that evaluations will not resume until schools reopen. *See* Andrew M.I. Lee, *Special Education and the Coronavirus: Legal FAQs About IEPs*, UNDERSTOOD, https://www.understood.org/en/school-learning/special-education-coronavirus-faqs [https://perma.cc/99DE-6G6C]. In fact, on June 12, 2020, the U.S. District Court for the Eastern District of Arkansas ruled that a school district cannot be compelled to assess a student over the summer, unless the student's guardian can show a concrete threat that the student will suffer irreparable harm without an assessment. Jacksonville N. Pulaski Sch. Dist. v. DM, No. 4:20-CV-00256-BRW, 2020 WL 3129039, at *1 (E.D. Ark. Jun. 12, 2020). However, the court noted that although it refused to issue an injunction, school districts should consider evaluating students prior to schools reopening, if it is safe to do so. *Id.*

who assess the student in all areas of suspected disability.[115] Parents must consent to the evaluation.[116] It should identify not only the disability, or disabilities, but how that disability adversely affects a child's ability to make appropriate progress.[117] Then the IEP team works collaboratively to develop an annual IEP.[118]

Parent participation is an integral part of each step of the IEP development.[119] "IDEA, through its text and structure, creates in parents an independent stake not only in the procedures and costs implicated by this process but also in the substantive decisions to be made. . . . IDEA does not differentiate . . . between the rights accorded to children and the rights accorded to parents."[120] The parent right to "participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child" is a very broad one.[121] Parent participation is so important that it is legally protected throughout the entire process—from the initial identification of needs to the decision on the least restrictive placement that will enable the school district to meet those needs.[122] Parents may challenge any element in the process or in the school district's offer of FAPE.[123]

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115. 20 U.S.C. § 1414(b)(3) (2018); *see also id.* § 1414(a). On July 6, 2020, the Office of Special Education Programs, within the USDOE's Office of Special Education and Rehabilitative Services, released guidance stating that state lead agencies and early intervention service providers can delay an evaluation, assessment, screening, or individualized family services program meeting beyond the forty-five day IDEA deadline on a case-by-case basis when necessary due to limitations arising from the COVID-19. OFFICE OF SPECIAL EDUC. PROGRAMS, U.S. DEP'T OF EDUC., INITIAL EVALUATION AND ASSESSMENT TIMELINE 2 (2020), https://sites.ed.gov/idea/files/QA-Evaluation-Timeline-Part-C.pdf [https://perma.cc/4BZN-2BVZ]; *see also* OFFICE OF SPECIAL EDUC. PROGRAMS, U.S. DEP'T OF EDUC., IDEA PART B PROCEDURAL SAFEGUARDS 4 & n.2 (2020), https://sites.ed.gov/idea/files/qa-procedural-safeguards-idea-part-b-06-30-2020.pdf [https://perma.cc/C4Z9-NY37] [hereinafter IDEA PART B PROCEDURAL SAFEGUARDS].

116. 20 U.S.C. § 1414(a)(1)(D)(i)(I) (2018).

117. *Id.* § 1414(d). On June 30, 2020, the Office of Special Education Programs, within the USDOE's Office of Special Education and Rehabilitative Services, released guidance to states that electronic and digital signatures can be used for parental consent to initial evaluations and reevaluations. *See* IDEA PART B PROCEDURAL SAFEGUARDS, *supra* note 115, at 1–3.

118. 20 U.S.C. § 1414(d).

119. *See id.*

120. Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 531 (2007).

121. 20 U.S.C. § 1415(b)(1) (2018).

122. *Id.* § 1415(b)(6).

123. *Id.*

But what happens when a national pandemic such as COVID-19 occurs? It adds an additional legal layer of complexity for state departments of education and local education agencies, commonly known as school districts, as well as for parents. At a minimum, it adds to the struggle of children with disabilities to learn and grow as other children. Remote education complicates the very structure of IDEA. It is not the least restrictive environment—yet it is the only environment when a stay-at-home order is in place and school doors have closed. That assumes instruction is the primary service offered on the IEP. What about related services, such as speech therapy, occupational therapy, and counseling? Offering those services is not insurmountable. School districts can draw from the experiences of some states, such as Louisiana in the aftermath of Hurricane Katrina, to continue to provide a free, appropriate, public education to all students.[124]

B. COVID-19, Remote Learning, and Implications for the Provision of Special Education

"Currently there are approximately 7 million students with disabilities eligible for special education under the [IDEA] . . . and over 700,000 students with 504 plans as provided by Section 504 of the Rehabilitation Act of 1973 . . . whose learning has been interrupted and, in some cases, has stopped altogether."[125] From the outset of the COVID-19 shutdown of public schools, "a serious misunderstanding . . . circulated within the educational community," according to the United States Department of Education Office for Civil Rights (OCR) and the Office of Special Education and Rehabilitative Services (OSERS).[126]

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124. *See* Katrina's Displaced School Children: Hearing Before the Subcomm. on Educ. & Early Childhood Development of the S. Comm. on Health, Educ., Labor & Pensions, 109th Cong. 31, 65 (2005) (stating that when displaced students arrived at schools without IEPs, as documents were washed away, districts individually evaluated and determined the appropriate instructional placement for each student to meet federal requirements and make certain that all students with disabilities were accommodated). *But see* Louis Foglia, *How Katrina Changed Special Education in New Orleans*, CNNMONEY (Aug. 28, 2015, 8:39 AM), https://money.cnn.com/2015/08/14/news/hurricane-katrina-special-education/ [https://perma.cc/9VKN-82N3] (stating that post-Katrina, the Louisiana legislature transformed 100 of the lowest performing schools to the charter system, resulting in unregulated schools that often turned children with disabilities away, and that as a result, many special education students had to relocate to other cities to find programs).

125. *Protecting the Rights of Students with Disabilities as States and Districts Reopen Schools*, COUNCIL PARENT ATTORNEYS & ADVOCATES (May 26, 2020), https://www.copaa.org/page/ReOpening [https://perma.cc/AYA5-8RFY].

126. Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities, U.S. DEP'T EDUC. (Mar. 21, 2020), https://sites.ed.gov/idea/idea-files/supplemental-fact-sheet-addressing-risk-covid-19-

> As school districts nationwide take necessary steps to protect the health and safety of their students, many are moving to virtual or online education (distance instruction). Some educators, however, have been reluctant to provide any distance instruction because they believe that federal disability law presents insurmountable barriers to remote education.[127]

That is not the case, said the agencies. "Rather, school systems must make local decisions that take into consideration the health, safety, and well-being of *all* their students and staff."[128]

In fact, a survey of more than 1,500 families by ParentsTogether Action, a national parent-led organization with over two million members, found that "remote learning is jeopardizing the education of our most vulnerable students."[129] The organization called for Congress to designate at least $175 billion more for K–12 schools to support those students at risk.[130] The survey also found that just 20% of children with an IEP were receiving the services included in their IEP, and 39% were not receiving any support at all, according to parents responding to the survey.[131]

Certainly, school districts and parents entered distance education and remote learning with almost no history to guide them.[132] A short lag of services—for students with and without disabilities—was inevitable. But problems arose when the parents of many children with IEPs realized that their child's IEP services had ceased, in most cases, despite the fact that distance education was now the norm for the rest of the school year rather than a temporary exception.[133] National education advocacy groups, such

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preschool-elementary-secondary-schools-serving-children-disabilities-march-21-2020/ [https://perma.cc/55H9-HA4Q].

127. *Id*.

128. *Id.* (emphasis added).

129. *ParentsTogether Survey Reveals Remote Learning Is Failing Our Most Vulnerable Students*, PARENTSTOGETHER ACTION, https://parents-together.org/parentstogether-survey-reveals-remote-learning-is-failing-our-most-vulnerable-students/ [https://perma.cc/784M-39RV]. Note that the survey results were not limited to students with learning challenges, but included students from low income families as well. *Id.*

130. *Id.*

131. *Id.*

132. As *The Wall Street Journal* characterizes it, "America took an involuntary crash course in remote learning." Tawnell D. Hobbs & Lee Hawkins, *The Results Are in for Remote Learning: It Didn't Work*, WALL ST. J. (June 5, 2020, 12:42 PM), https://www.wsj.com/articles/schools-coronavirus-remote-learning-lockdown-tech-11591375078 [https://perma.cc/U5H4-RMKS].

133. *See* Jennifer Gavin, *Are Special Education Services Required in the Time of COVID-19?*, AM. B. ASS'N (Mar. 31, 2020), https://www.americanbar.org/groups/litigation/

as the Council of Parent Attorneys and Advocates (COPAA), took the lead in ensuring that children with disabilities were not forgotten.[134] As early as two weeks into distance education in many states, COPAA released a statement on protecting important IDEA rights for students covered under that Act,[135] as well as Section 504 of the Rehabilitation Act of 1973.[136]

COPAA offered three principles to ensure the rights and opportunities of students with disabilities are thoughtfully included when planning to reopen.[137] That assumed that schools would reopen quickly, which has not been the case. Thus, the principles gained new importance as schools continued distance learning. They are

> 1) Plan with equity and individualization in mind. . . . [;]
> 2) Collaborate and communicate with families. . . [; and]
> 3) Review, and if necessary, revise IEPs and 504 plans to be responsive to the child's needs.[138]

Those three principles flow directly from IDEA requirements.[139] First, each IEP must be based on the individual student's needs, and how those needs can be met equitably.[140] That requirement dates back even before IDEA in its present form.[141] The U.S. Supreme Court, in the first special education case ever reviewed by that Court, recognized that "'all handicapped children [have] the right to a free appropriate public education[,]' . . . [which] policy must be . . . tailored to the *unique needs* of the handicapped child by means of an 'individualized educational program' (IEP)."[142] The Supreme Court reaffirmed and expanded upon that foundational principle in 2017

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committees/childrens-rights/articles/2020/are-special-education-services-required-in-the-time-of-covid19/ [https://perma.cc/2MGY-VT4C].

134. *See Protecting the Rights of Students with Disabilities as States and Districts Reopen Schools*, *supra* note 125.

135. *See id.*

136. *See* Rehabilitation Act of 1973, 29 U.S.C. § 794 (2018). Although COPAA and other organizations recognize that some students with disabilities are accommodated through what are commonly called 504 Plans, those plans typically include accommodations rather than services, and thus were far less impacted by distance education. *See What Is a 504 Team?*, UNDERSTOOD, https://www.understood.org/en/school-learning/special-services/504-plan/what-is-a-504-plan [https://perma.cc/Q9UY-5SN6].

137. *Protecting the Rights of Students with Disabilities as States and Districts Reopen Schools*, *supra* note 125.

138. *Id.*

139. *See* 20 U.S.C. § 1414 (2018).

140. *See Protecting the Rights of Students with Disabilities as States and Districts Reopen Schools*, *supra* note 125.

141. *See* Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 182 (1982).

142. *Id.* at 180–81 (first quoting 20 U.S.C. § 1412(1) (2018); then quoting 20 U.S.C. § 1401(9)(D) (2018)) (emphasis added).

in *Endrew F.*, when it held that a school district's substantive obligation under IDEA requires it to offer "an educational program reasonably calculated to enable a child to make progress appropriate *in light of the child's circumstances*."[143] Therefore, individualization is critical to meeting IDEA requirements.

Next, schools must collaborate with parents throughout the child's time receiving special education.[144] The importance of parents in the IEP process cannot be exaggerated. Parents hold the child's educational rights until the age of majority.[145] These rights are especially important in the context of IDEA and development of the IEP. "IDEA, through its text and structure, creates in parents an independent stake not only in the procedures and costs implicated by this process but *also in the substantive decisions to be made*."[146] Although the courts recognize the value of parent input, there may be obstacles that parents sometimes must overcome when asserting these rights with the school. School culture, with its beliefs, perceptions, and attitudes, has been called an "invisible wall."[147] Considering the effect of the pandemic on day-to-day life, it is not surprising that schools may be particularly challenged by—and fearful of—implementing the IEP outside of its typical provision on the school site. Nevertheless, a move to distance learning does not negate the duty to provide the services on the IEP, to the extent possible.

Lastly, the IEP is not a static document.[148] The law allows for revisions and changes so long as the school and the parents come to an agreement through an IEP meeting.[149] During statewide or nationwide remote learning, those adjustments are critical. The guarantee of FAPE looks very different

143. Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 1001 (2017) (emphasis added).

144. *Protecting the Rights of Students with Disabilities as States and Districts Reopen Schools*, *supra* note 125.

145. *See* 20 U.S.C. § 1415(m) (2018). Exceptions to parents as rights holders until the age of majority occur only in cases where a court has removed those rights—generally because of abuse or neglect—or if a young person reaches age eighteen and parents continue as conservators due to extreme disability. *See id.*; *see also* Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 TUL. L. REV. 55, 68 (2016).

146. Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 531 (2007) (emphasis added).

147. PETER W.D. WRIGHT & PAMELA DARR WRIGHT, FROM EMOTIONS TO ADVOCACY 31 (2d ed. 2006).

148. *Protecting the Rights of Students with Disabilities as States and Districts Reopen Schools*, *supra* note 125.

149. *See generally* 20 U.S.C. § 1415. The law provides for dispute resolution through a number of mechanisms, including the due process hearing. *See id.* § 1415(f).

when school classrooms are shut down and all schools can offer is distance education.[150] However, that does not mean that FAPE can be ignored—even during a pandemic, IDEA remains in full force and effect. Rather, school districts need to meet the needs of their students to the maximum extent possible under the circumstances.[151] The parent right to request an IEP meeting to discuss concerns remains, as does the school district's duty to hold such a meeting within thirty days.[152] Although those meetings typically occur in person at the child's school, nothing in the law prevents a remote, electronic meeting.[153] In fact, the 2004 Reauthorization of IDEA specifically added a provision allowing for this. "When conducting IEP team meetings and placement meetings pursuant to this section . . . the parent of a child with a disability and a local educational agency may agree to use alternative means of meeting participation, such as video conferences and conference calls."[154]

C. Federal Response to COVID-19 in the Education Setting

Advisory information from the U.S. Department of Education (USDOE) is not legally binding, but does represent an interpretation by the primary federal agency that oversees the applicable law.[155] In addressing COVID-19 challenges, the USDOE Office of Civil Rights reiterated that decision-making authority "to take necessary actions to protect the health, safety, and welfare of students and school staff" resides in school districts.[156] A fact sheet released on March 16, 2020, confirmed the Department's view that

150. Kristin Wright, *Special Education Distance Learning Webinar Notes*, CAL. DEP'T EDUC. (Apr. 2, 2020), https://www.cde.ca.gov/ls/he/hn/sspiupdatespecialdisted.asp [https://perma.cc/WXK9-5KHJ].

151. *See Parents Together Survey Reveals Remote Learning is Failing our Most Vulnerable Students*, *supra* note 129. According to the national survey, children with IEPs are "[t]wice as likely to say that distance learning is going poorly" as students without IEPs—40% to 19%. *Id.*

152. *See* 20 U.S.C. §§ 1415(b)(1), 1415(f)(1)(B)(ii) (2018).

153. *See generally* 20 U.S.C. §§ 1400–1482 (2018).

154. *Id.* § 1414(f) (footnote omitted).

155. *See U.S. Department of Education's Guidance Homepage*, U.S. DEP'T EDUC., https://www2.ed.gov/policy/gen/guid/types-of-guidance-documents.html [https://perma.cc/C32S-9KPZ] (last modified Aug. 13, 2020).

156. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., FACT SHEET: ADDRESSING THE RISK OF COVID-19 IN SCHOOLS WHILE PROTECTING THE CIVIL RIGHTS OF STUDENTS 1 (2020), https://www2.ed.gov/about/offices/list/ocr/docs/ocr-coronavirus-fact-sheet.pdf [https://perma.cc/F9Q2-XBTX].

> [i]f a student who has an individualized education program (IEP) through the Individuals with Disabilities Education Act . . . is required or advised to stay home by public health authorities or school officials for an extended period of time because of COVID-19, provision should be made to maintain education services.[157]

The USDOE directive also suggests that the IEP team should consider whether "the identified services can be provided through alternate or additional methods."[158] It points out that technology might be utilized to enrich the education offered remotely during an extended school closure.[159]

The Coronavirus Aid, Relief, and Economic Security (CARES) Act set aside approximately $13.2 billion to provide emergency relief funds to state departments of education.[160] Congress intended those funds to provide aid to local school districts struggling to meet the needs of all students in elementary and secondary public schools who were suddenly thrust into remote learning and distance education with virtually no notice due to COVID-19.[161] On April 3, 2020, the USDOE sent a letter to all chief state school officers in the country to "discuss flexibility in K–12 education funding, in particular the Elementary and Secondary Education Act

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157. *Id.* at 2.

158. *Id.*

159. *Id*. Note that since IDEA protects the rights of students with disabilities to have the same right to education, even through remote means, that a student without disability has, it suggests that school districts could avoid their IDEA obligations if they did not provide any distance education during COVID-19 to regular education students. *See Protecting the Rights of Students with Disabilities as States and Districts Reopen Schools*, *supra* note 125.

160. *See* Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020); *see also* Secretary DeVos Makes Available Over $13 Billion in Emergency Coronavirus Relief to Support Continued Education for K-12 Students, U.S. Dep't Educ. (Apr. 23, 2020), https://www.ed.gov/news/press-release/ [https://perma.cc/52BA-AZSV].

161. *See Elementary and Secondary School Emergency Relief Fund*, U.S. DEP'T OF EDUC.: OFF. ELEMENTARY & SECONDARY EDUC. (June 25, 2020), https://oese.ed.gov/offices/education-stabilization-fund/elementary-secondary-school-emergency-relief-fund/ [https://perma.cc/SQV2-3U87]; *see also* Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act, H.R. 6800, 116th Cong. (2020) (allocating over $100 billion for preschool through higher education, but not allocating specific funds to be spent on special education). Note also that prominent education organizations are urging Congress to ease "maintenance of effort" requirements under IDEA, which requires school districts to maintain consistent funding levels for special education from year to year. Bianca Quilantan, *Debate Over How to Reopen Colleges Heads to the Senate*, POLITICO (May 28, 2020, 10:00 AM), https://www.politico.com/newsletters/morning-education/2020/05/28/debate-over-how-to-reopen-colleges-heads-to-the-senate-787938 [https://perma.cc/374G-RQ44].

of 1965 (ESEA), as the CARES Act authorizes the Secretary to provide additional flexibility through waivers of specific requirements."[162] The Act required U.S. Secretary of Education Betsy DeVos to examine certain federal education laws to recommend any additional waiver authority that might be needed to "provide limited flexibility to state and local education agencies during this unprecedented time."[163]

This and similar communications resulted in special education advocacy groups joining efforts to communicate to Congress and Secretary DeVos their strongest possible objection to any substantive waivers of IDEA requirements.[164] Because IDEA is a federal statute, only Congress may waive its requirements.[165] But state directors of special education and special education administrators had been urging the Secretary to pause IDEA provisions, especially those relating to timelines.[166] The pause would be lengthy under their view—lasting during the entire school closure and forty-five days beyond.[167] This would be no small matter, because IDEA timelines form the basis for evaluations to begin—including the initial evaluation to qualify for special education—as well as for IEP meetings to occur, records to be viewed, and procedural safeguards to be utilized.[168] The Consortium for Citizens with Disabilities (CCD) Education Task Force submitted a letter to Congress, co-signed by hundreds of child and education

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162. Letter from Frank T. Brogan, Assistant Sec'y for Elementary & Secondary Educ., U.S. Dep't of Educ. Office of Elementary and Secondary Educ., to Chief State School Officers 1 (Apr. 3, 2020), https://oese.ed.gov/files/2020/04/invite-covid-fiscal-waiver-19-20.pdf [https://perma.cc/4YZG-SKJ3].

163. Secretary DeVos Reiterates Learning Must Continue for All Students, Declines to Seek Congressional Waivers to FAPE, LRE Requirements of IDEA, U.S. Dep't of Educ. (Apr. 27, 2020), https://www.ed.gov/news/press-releases/secretary-devos-reiterates-learning-must-continue-all-students-declines-seek-congressional-waivers-fape-lre-requirements-idea [https://perma.cc/PE4V-LGR4].

164. Letter from Consortium for Citizens with Disabilities et al. to Mitch McConnell, Majority Leader, U.S. Senate 1 (May 7, 2020), http://www.c-c-d.org/fichiers/CCD-Ed-TF-letter-to-Congress-on-IDEA-waivers—COVID-05-07-20.pdf [https://perma.cc/5S3V-SHMG].

165. *See* Laura Meckler, *Betsy DeVos Tells Congress to Keep Intact Law on Educating Students with Disabilities*, WASH. POST (Apr. 27, 2020, 3:29 PM), https://www.washingtonpost.com/local/education/betsy-devos-tells-congress-to-keep-intact-law-on-educating-students-with-disabilities/2020/04/27/8c7bc94c-88cc-11ea-ac8a-fe9b8088e101_story.html [https://perma.cc/QP5F-L2CK].

166. Quilantan, *supra* note 161. Organizations that signed on to the letter included the Council of Administrators of Special Education, the National Association of State Directors of Special Education, the National Association of School Psychologists, and the National School Boards Association. *Id.*

167. Letter from Phyllis Wolfram, Executive Director, CASE; John Eisenberg, Executive Director, NASDSE; Erin Maguire, President, CASE; & Steven Milliken, President, NASDSE, to Hon. Lamar Alexander, Chairman, Comm. on Health, Educ., Lab. & Pensions, et al. (Apr. 13, 2020), https://blogs.edweek.org/edweek/speced/2020/04/special_education_groups_want_idea_waivers.html [https://perma.cc/F77H-TZAC].

168. *See* 20 U.S.C. §§ 1414–15, 1437 (2018).

advocacy organizations, stating that they "are unwavering in [their] pursuit of educational equity and stand unified in the strong conviction that NO ADDITIONAL waivers are necessary."[169] CCD emphasized that the flexibility of IDEA provides sufficient mechanisms for students with disabilities to have the "civil rights protections" they need and deserve.[170] IDEA already includes provisions to amend portions of the IEP, utilizing electronic or other means.[171] More significantly, when a dispute arises, parents may access their due process rights to achieve resolution.[172]

COPAA, joined by numerous advocacy groups, argued strongly for no pause and no IDEA waivers.[173] Advocates believed that such waivers would weaken IDEA to the point that it could cause irreparable harm and could not possibly be in the best interests of these children.[174] Rather, advocates urged that all parties should concentrate their efforts on how best to provide special education services remotely, "ensuring continuity of education and services."[175] The final outcome saw only very few limited waivers authorized by Congress, none of which was considered to be problematic by child advocates.[176]

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169. Letter from Consortium for Citizens with Disabilities et al., *supra* note 164, at 1 (emphasis omitted). The CCD is the "largest coalition of national organizations working together to advocate for federal public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society." CONSORTIUM FOR CITIZENS WITH DISABILITIES, http://www.c-c-d.org [https://perma.cc/TD3A-QZGQ].

170. Letter from Consortium for Citizens with Disabilities et al., *supra* note 164, at 2.

171. 20 U.S.C. §§ 1414(d)(3)(D), 1414(d)(3)(F), 1415(n).

172. Letter from Consortium for Citizens with Disabilities et al., *supra* note 164, at 3. On June 22, 2020, the Office of Special Education Programs, within the USDOE's Office of Special Education and Rehabilitative Services, released guidance that affirms IDEA's inherent flexibility when parents and school districts agree. *See* OFFICE OF SPECIAL EDUC. PROGRAMS, U.S. DEP'T OF EDUC., IDEA PART B DISPUTE RESOLUTION PROCEDURES 1–2 (2020), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-dispute-resolution-procedures-part-b.pdf [https://perma.cc/K7P3-YSAQ]. The guidance states that "[t]here is nothing in IDEA that would prevent the parent and [school district] from mutually agreeing to extend the 15-day timeline for the [school district] to convene a resolution meeting and the 30-day resolution period timeline when a parent files a due process complaint." *Id.* at 3.

173. Denise Marshall, *Our Kids Count!! Tell Congress: NO IDEA WAIVERS*, COUNCIL PARENT ATTORNEYS & ADVOCATES (Apr. 1, 2020), https://www.copaa.org/news/498851/Our-Kids-Count-Tell-Congress-NO-IDEA-WAIVERS.htm [https://perma.cc/6JUM-44BZ].

174. *Id*.

175. *Id.*

176. *See* Elissa Nadworny, *Secretary DeVos Forgoes Waiving Disability Law amid School Closures*, NPR (Apr. 28, 2020, 11:48 AM), https://www.npr.org/sections/coronavirus-

D. Post COVID-19: Protecting Student Rights

The collaboration between parents of children with disabilities and schools that IDEA drafters originally sought has been illusory, even in the best of times. The procedural safeguards in IDEA are the mechanisms for protecting the rights of children with disabilities in the education setting.[177] The requirements are extensive.[178] The Reauthorization of IDEA in 2004 elaborated on the Act's historical emphasis on complaints by adding statutory language that ensures parents are able to "examine all records[,] . . . participate in meetings . . . and . . . obtain" an Independent Educational Evaluation (IEE), as well as requiring specific types of notice, consideration of mediation, and the opportunity for a due process hearing.[179] The sudden shift to remote learning impacted these safeguards, particularly the ability to examine the child's records and obtain evaluations.[180]

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live-updates/2020/04/28/847305749/secretary-devos-forgoes-waiving-disability-law-amid-school-closures [https://perma.cc/KLZ2-6NLQ].

177. 20 U.S.C. § 1415 (2018).

178. *Id. See generally* Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982) (analyzing the procedural safeguards for special education services under an earlier version of the statute).

179. 20 U.S.C. § 1415(b)(1). School districts are required to provide parents with Prior Written Notice (PWN) within a "reasonable time" under IDEA. 34 C.F.R. § 303.421 (2020). "Reasonable time" is not defined, but the Office of Special Education Programs, within the USDOE's Office of Special Education and Rehabilitative Services, released guidance on June 30, 2020 that states that it would be appropriate for school districts to consider factors such as the closure of public and school buildings and facilities, social distancing, and other health-related orders during COVID-19. OFFICE OF SPECIAL EDUC. PROGRAMS, U.S. DEPT. OF EDUC. IDEA PART C PROCEDURAL SAFEGUARDS 3 (2020), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-procedural-safeguards-idea-part-c-06-30-2020.pdf [https://perma.cc/3GFT-U2WN]. However, school districts should make every effort to ensure that PWN is provided as soon as possible prior to a proposed or refused action. *Id.* The guidance also states that PWN can be issued via email if upon receipt of parental consent. *Id.*

180. Procedural violations, such as lack of adherence to timelines, were severely restricted with the 2004 Reauthorization of IDEA. Margaret A. Dalton, *Forgotten Children: Rethinking the Individuals with Disabilities Education Act Behavior Provisions*, 27 AM. U. J. GENDER SOC. POL'Y & L. (SYMPOSIUM EDITION) 137, 172 (2019). Since that change, procedural violations must reach one of three categories to be successful. 20 U.S.C. § 1415(f)(3)(E)(ii)(I)–(III) (2018). These are (1) impeded the student's right to FAPE; (2) significantly impeded the parents' opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. *Id.* However, on June 30, 2020, the Office of Special Education Programs, within the USDOE's Office of Special Education and Rehabilitative Services, released guidance stating that if parents request to review a child's records, parents and school districts can agree to a mutually agreeable timeframe and method to access the records. *See* OFFICE OF SPECIAL EDUC. PROGRAMS, *supra* note 179, at 3. Records can be shared via reasonable methods such as email, a secure on-line portal, or postal mail until schools reopen. *Id.* at 4.

Although early on in the COVID-19 pandemic there was no attempt by most school districts to hold IEP meetings, many quickly adapted.[181] The data is not yet available, but it seems likely that IEP meetings were less than optimal. Participating in these important meetings electronically can be an obstacle for many parents and can be overwhelming for parents who do not have the appropriate technology readily at hand. Yet school districts such as Los Angeles Unified successfully held more than 1,000 virtual meetings by late May 2020, just over two months into distance learning.[182]

The USDOE emphasizes that if informal efforts between parents and a public agency cannot resolve disagreements, IDEA's three dispute resolution mechanisms—mediation, State complaint, and due process complaint procedures—are still available.[183] Fortunately, IDEA's procedural safeguards are sufficiently flexible to withstand COVID-related challenges. For example, for State complaints, states are allowed to extend the sixty-day limit for resolving complaints due to COVID-related complications, but only on a case-by-case basis.[184] IDEA lists two reasons to grant an extension: (1) if exceptional circumstances exist with respect to a particular complaint; or (2) if the parent and school district agree to extend the time to engage in mediation or other alternative means of dispute resolution.[185] "Exceptional circumstances" may include unavailability of staff due to COVID-19, or if the parties are ill or hospitalized.[186] For mediation procedures, as long as mediation is not used to deny or delay a parent's right to a hearing, there is no strict timeline requirement for mediation so parties are able to agree on a mutually beneficial time to meet, ensuring parent participation.[187] Moreover, the majority of dispute resolution meetings and hearings can occur through video or conference calls, if consistent with the legal practice in the state.[188] By implementing

181. *Compare* Kyle Stokes, *Four Big Questions About Teaching Kids with Special Needs in the Age of Coronavirus*, LAIST (Apr. 17, 2020, 6:00 AM), https://laist.com/2020/04/17/coronavirus_special_education_special_needs_students_disabilities_california_lausd.php [https://perma.cc/3K6Q-KCSV], *with* Carolyn Jones, *Virtual Special Education Meetings Popular in Some Districts, but a Major Hurdle in Others*, LAKE COUNTY REC.-BEE (May 28, 2020, 6:22 AM), https://www.record-bee.com/2020/05/28/education/ [https://perma.cc/3KP7-MBKS].

182. Jones, *supra* note 181.

183. OFFICE OF SPECIAL EDUC. PROGRAMS, *supra* note 172, at 1.

184. *Id.* at 2.

185. 34 C.F.R. § 300.152(b)(1)(i)–(ii) (2011).

186. *See* OFFICE OF SPECIAL EDUC. PROGRAMS, *supra* note 172, at 2.

187. 20 U.S.C. § 1415(e) (2018).

188. OFFICE OF SPECIAL EDUC. PROGRAMS, *supra* note 172, at 3.

these provisions, parties are able to preserve their due process rights and resolve disputes, despite school shutdowns.

It is no exaggeration to say that COVID-19 may have put special education back years. Newly won programs could not be delivered. Students who needed hands-on services could not receive them. Fortunately, IDEA provides multiple remedies, including reimbursement to parents, as well as compensatory education.[189] The latter remedy seems most appropriate in a post-COVID world, because it is unlikely that parents could access services elsewhere and thus qualify for reimbursement. Compensatory education encompasses a gamut of equitable remedies, including direct services or new services, and is used to make up for the loss in progress when services should have been offered, but were not.[190] The COVID-19 pandemic should not and cannot become an education epidemic of lost special education. As schools reopen and regular instruction begins, students with disabilities need to recoup what was lost.

IV. COVID-19 AND FOSTER CHILDREN

A. Children Subject to Alleged Parental Abuse and Neglect and State Interaction

The problems of child abuse and neglect are primarily addressed in American law through intervention after the fact by the state.[191] The state investigates, adjudicates, and sometimes removes children deemed to have been harmed or who are at imminent risk of harm.[192] Such removal involves its own trauma to children and their families and can sometimes cause more harm than good. However, substitute placement in the home of a relative or foster family is necessary at times as state law provides. Failure to remove children can result in continued or more serious abuse, including a disturbing level of child deaths.[193] Federal statistics document

189. *See generally* Terry Jean Seligmann & Perry A. Zirkel, *Compensatory Education for IDEA Violations: The Silly Putty of Remedies?*, 45 URB. LAW. 281, 292–96 (2013).

190. *Id.* at 282.

191. *See* CHILD WELFARE INFO. GATEWAY, *supra* note 3, at 2.

192. *Id.* at 9. Note that there has historically been little focus or political investment in primary prevention of child maltreatment. Julia Ingram, *Has Child Abuse Surged Under COVID-19? Despite Alarming Stories from ERs, There's No Answer*, NBC NEWS (July 26, 2020, 2:00 AM), https://www.nbcnews.com/health/kids-health/has-child-abuse-surged-under-covid-19-despite-alarming-stories-n1234713 [https://perma.cc/LCS8-QBUT]. For suggestions to address this pervasive nonfeasance in the conclusion, see *infra* Section IV.F.8.

193. In 2018, 1,770 child deaths from abuse or neglect were counted by the Children's Bureau of the Administration for Children and Families within DHHS. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2018, at 46 (29th ed. 2018), https://www.acf.hhs.gov/sites/default/files/cb/cm2018.pdf [https://perma.cc/ERU9-

a high correlation between these deaths and prior reports to child protective services (CPS), as well as between such deaths and untreated parental mental health and substance use disorders, suggesting a need for increased preventative supports and services.[194]

1. The Steps

All fifty states have somewhat disparate systems of child protection from parental abuse and neglect, subject to some federally required floors and financial subsidies.[195] Virtually every state proceeds in the following order:

MMCJ]. Additionally, the Children's Advocacy Institute (CAI) conducted a survey of child deaths in California over a five month period and found over three-fourths of victims were previously reported to child protective services agencies, and over half had a child welfare history CAI determined was substantially related to the reported fatality. Johner Riehl, *Child Fatalities and Near Fatalities—Do We Need the Details?*, CHILDREN'S ADVOCACY INST.: CAI BLOG (July 25, 2012), https://caichildlaw.wordpress.com/2012/07/25/child-fatalities-and-near-fatalities-do-we-need-the-details/ [https://perma.cc/8VKW-ZNZE].

194. *See Reporting Systems*, CHILD. BUREAU (June 19, 2019), https://www.acf.hhs.gov/cb/research-data-technology/reporting-systems [https://perma.cc/2HST-RBWH]; *see also Child Maltreatment*, CHILD. BUREAU (Jan. 15, 2020), https://www.acf.hhs.gov/cb/research-data-technology/statistics-research/child-maltreatment [https://perma.cc/RB9Z-QB78]. Major sources of data about child abuse incidence and correlations include: (a) the Adoption and Foster Care Analysis and Reporting System (AFCARS), (b) the National Child Abuse and Neglect Data System (NCANDS), and (c) the National Youth in Transition Database (NYTD). *Reporting Systems*, *supra*. Other sources of data include the publications of the Children's Bureau of the Administration on Children and Families, including annual Child Maltreatment Reports. *Child Maltreatment*, *supra*.

195. The single most significant source of federal funding is the over $8 billion a year in matching funds to states for provision of foster care *et al*. from Title IV-E of the Social Security Act and implemented by Code of Federal Regulations (CFR). *See* 45 C.F.R. §§ 1355– 1357 (2015); *see also* Further Consolidated Appropriates Act, Pub. L. No. 116-94, 133 Stat. 2574 (2020); EMILIE STOLTZFUS, CONG. RESEARCH SERV., IF10590, CHILD WELFARE: PURPOSES, FEDERAL PROGRAMS, AND FUNDING 1–2 (2020), https://crsreports.congress.gov/product/pdf/IF/IF10590 [https://perma.cc/FL7C-K5XL]. See *infra* Section IV.A.3 for a discussion of the other major federal funding mechanisms. Note also the National Report documenting the failure of the federal administration to enforce any of the minimum floors in the Child Welfare Act, the Child Abuse Prevention and Treatment Act or any other statute—notwithstanding common violations of many of them. *See* CHILDREN'S ADVOCACY INST., SHAME ON U.S.: FAILINGS BY ALL THREE BRANCHES OF OUR FEDERAL GOVERNMENT LEAVE ABUSED AND NEGLECTED CHILDREN VULNERABLE TO FURTHER HARM, at iii (2015), http://www.caichildlaw.org/Misc/Shame%20on%20U.S._FINAL.pdf [https://perma.cc/EVN2-F62M].

(a) Reports to state or county child protective services of possible neglect or maltreatment, primarily from "mandated reporters," trigger an inquiry.
(b) Investigations into those reports yield an initial "substantiated" or "unsubstantiated" status. Ideally, each such report is not judged in isolation but together with all other relevant reports. Unsubstantiated reports are not pursued but are ideally maintained in state registers for some period of time for cumulative review.[196] Substantiated reports may be followed up with removal and litigation, or without removal of the child but with supportive services for the family termed "family preservation services."[197]
(c) Where the child is removed from the parents, a detention hearing before a dependency court judge occurs—generally under a preponderance of the evidence test and with counsel for the state, the parents, and for the children in most states.[198] In addition, many states provide Court Appointed Special Advocates (CASAs) to advise the court on the needs of the child.[199]
(d) Many cases, almost half in most jurisdictions, result in reunification, or the return of children to parents, with specific conditions outlined in a case plan to assure child safety.[200] In other cases, children will continue in placement outside the parents' home, often with other family members, sometimes in "stranger" foster care, and sometimes in group facilities.[201]

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196. CHILD WELFARE INFO. GATEWAY, U.S. DEP'T HEALTH & HUMAN SERVS., REVIEW AND EXPUNCTION OF CENTRAL REGISTRIES AND REPORTING RECORDS 1–2 (2018), https://www.childwelfare.gov/pubPDFs/registry.pdf [https://perma.cc/2JYF-9FHW].

197. *Id.* at 3, 5.

198. *See* CHILDREN'S BUREAU, *supra* note 193, at 124 tbl.C-1; *see also* Vivek S. Sankaran, *When Child Protective Services Comes Knocking: What Family Law Attorneys Need to Know*, 31 FAM. ADVOC., Winter 2009, at 8, 10.

199. *See The CASA/GAL Model*, NAT'L CASA/GAL ASS'N FOR CHILD., https://nationalcasagal.org/our-work/the-casa-gal-model/ [https://perma.cc/MJN3-DCQZ].

200. *See, e.g.*, Jey Rajaraman, *Celebrating Reunification Starts with Understanding What Keeps Families Together*, CHILD. BUREAU EXPRESS (June 2020), https://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=217&sectionid=2&articleid=5590 [https://perma.cc/L44Y-UKTE].

201. *See* CHILD WELFARE INFO. GATEWAY, *supra* note 3, at 5–6.

(e) When a child is removed, the goal is almost always to reunify the family safely.[202] But if timely reunification is not possible and a child has been in foster care consecutively for fifteen out of twenty-two months, the state is in most circumstances required to file a "Termination of Parental Rights" (TPR) proceeding, here with a harsher "clear and convincing" burden of proof on the state that the parent is unfit.[203]

(f) Where termination has been ordered, a different permanency goal is determined. These goals might include adoption, guardianship or relative care, or, if they are older and these options are not available, the goal could be "another planned permanent living arrangement" or (APPLA), which could include independent living until they leave the system.[204] As discussed *infra*, this final grouping of foster children warrants special concern regarding the COVID-19 pandemic because they generally leave foster care or "age out" at eighteen, with some assistance possible to age twenty-one.[205]

Until a child in foster care thusly ages out, her legal parent is a superior court state judge who likely has a high caseload.[206] She will lose that only

202. *Id.* at 2–3, 6.

203. CHILD WELFARE INFO. GATEWAY, U.S. DEP'T HEALTH & HUMAN SERVS., GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 1 (2017), https://www.childwelfare.gov/pubPDFs/ groundtermin.pdf [https://perma.cc/R7AX-52RZ].

204. *See OPPLA/APPLA*, CHILD WELFARE INFO. GATEWAY, https://www.childwelfare.gov/topics/outofhome/foster-care/oppla-appla/ [https://perma.cc/TD9Q-9HRA].

205. *See Aging Out of Foster Care*, FINDLAW (Oct. 5, 2018), https://family.findlaw.com/foster-care/aging-out-of-foster-care.html#:~:text=Children%20usually%20%22age%20out%22%20of,of%20emancipation%20in%20most%20states.&text=Federal%20guidelines%20require%20states%20to,as%20early%20as%20age%2013 [https://perma.cc/FNH8-VGAU].

206. *See* E.T. v. Cantil-Sakauye, 682 F.3d 1121, 1122 (9th Cir. 2012). This case brought by the Children's Advocacy Institute challenged child attorney caseloads of as many as 395 per attorney in Sacramento County. Complaint at 17, E.T. v. George, 682 F. Supp. 2d 1151 (E.D. Cal. 2010) (ECF No. 2), 2009 WL 4610226. The Ninth Circuit invoked "abstention," refusing to "interfere" with a state court policy created by the California Supreme Court, the defendants who determine the relevant caseloads. *E.T.*, 682 F.3d at 1124. During this litigation, discovery revealed common caseloads for judges serving as the legal parents of foster children in urban counties to also be excessive. *See* Complaint, *supra*, at 20. Although the political embarrassment of this case did lead the state to reduce attorney caseloads in 2017–2020, the caseloads of courts remain scandalously high and are generally immune from political pressure to manage responsibly given the political

parent in a society where the median age of self-sufficiency is not eighteen or twenty-one, but twenty-six.[207] Most parents who are able continue to provide for their children and in particular provide room and board in their homes for an older child in need.[208] In contrast, foster children are literally "children of the state" and lack that assistance and familial security that most of us take for granted.[209]

2. The Numbers

The most recent national data concerning initial reporting of abuse to child protective services agencies per year totals 4.3 million reports covering 7.8 million children.[210] Of these reports, 56% were "screened in" for inquiry.[211] Further investigation yielded substantiation of 678,000 abuse or neglect victims, 391,661 of whom received "some services" and 146,706 who were removed from families and placed into foster care.[212] These cases involve 546,365 alleged "perpetrators," 77.5% of whom were a parent to the victim.[213] These numbers are intimidating when considering the accumulation of eighteen years of such children into state foster care. However, a large number of these foster children are either returned to parents—"reunified" —or leave foster care for kinship care or adoption.[214] Nevertheless, the number of children subject to this process is momentous, with hundreds of thousands subject to state supervision for much of their childhood.[215]

The movement into and out of foster care status is active and substantial. The base of foster care total population for all ages in 2018, pre-COVID-

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passivity of superior court judges and the lack of judicial status given to dependency court judges and proceedings. *See* Sara Tiano, *California Ponders Cap on Caseloads for Dependency Court Judges*, IMPRINT (Mar. 26, 2019, 7:00 AM), https://imprintnews.org/child-welfare-2/california-ponders-cap-on-caseloads-for-dependency-court-judges/34328 [https://perma.cc/5ZST-JDBV].

207. *Cf. Young Adult Coverage,* U.S. DEP'T OF HEALTH & HUM. SERVICES (Jan. 31, 2017), https://www.hhs.gov/healthcare/about-the-aca/young-adult-coverage/index.html [https://perma.cc/R4ND-2FZV]. At the age of twenty-six, young adults lose parental health insurance coverage and must obtain their own health insurance policy. *See id.*

208. *See* Megan Leonhardt, *39% of Younger Millennials Say the Covid-19 Recession Has Them Moving Back Home*, CNBC (Aug. 5, 2020, 12:58 PM), https://www.cnbc.com/2020/08/05/39-percent-of-younger-millennials-say-covid-19-has-them-moving-back-home.html [https://perma.cc/GNF4-2KFC].

209. *See* CHILDREN'S ADVOCACY INST., *supra* note 195, at ES-1, 11.

210. *See* CHILDREN'S BUREAU, *supra* note 193, at ix.

211. *Id.*

212. *Id.* at xiii, fig.S–2.

213. *Id.* at xi.

214. *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN. SERVS., CHILD WELFARE OUTCOMES 2016: REPORT TO CONGRESS, at i (2019), https://www.acf.hhs.gov/sites/default/files/cb/cwo2016.pdf [https://perma.cc/ZJ6C-FD7Q].

215. *See* CHILDREN'S BUREAU, *supra* note 193, at xiii, fig.S–2.

19, includes 687,000 children who experienced some time in foster care during that year.[216] Importantly, there is much movement in and out of foster care, so on a specific date the number in care is a smaller 437,000, using September 30, 2018.[217] That figure is a roughly accurate number of children in foster care on a given day.

During 2018, 263,000 children entered foster care and 250,000 exited—e.g., turned eighteen years of age or were reunited with parents or adopted.[218] In terms of the ebb and flow of that population over a typical year, between 30 and 50% of those initially removed leave foster care through reunification with their families, usually within the first year following removal based on statutory deadlines.[219] An average of 21% of the exits in a year are due to adoption by new parents.[220] In 2018, 125,000 had adoptions pending—reflecting the often-extended time taken for their finalization.[221]

3. Federal Funding

Federal funding for child abuse prevention and the care of foster children comes from a mix of sources. The largest is Social Security Act Title IV-E, and is joined by that Act's Title IV-B.[222] In addition, the Social Services Block Grant (SSBG), Chafee funds, and the Child Abuse Prevention and Treatment Act (CAPTA) provide limited funding.[223] To some extent, the basic safety net provisions of federal law—e.g., TANF, Medicaid, SNAP—act also as primary prevention by lessening the impact of many children in families afflicted with poverty.[224] Some of these sources consist of federal grants, while others provide matching funds for state expenses.[225] The most important deficiency comes from the largest account—Title IV-E—

216. *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN. SERVS., TRENDS IN FOSTER CARE AND ADOPTION: FY 2009–FY 2018, at 1 (2019), https://www.acf.hhs.gov/cb/resource/trends-in-foster-care-and-adoption [https://perma.cc/G79V-P9BA].
217. *See id.*
218. *See id.*
219. *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN. SERVS., THE AFCARS REPORT 3 (2019), https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport26.pdf [https://perma.cc/F9ZC-UYER].
220. CHILDREN'S BUREAU, *supra* note 216, at 2.
221. *Id.* at 1–2.
222. *See* STOLTZFUS, *supra* note 195, at 1–2.
223. *See id.*
224. *See Government Benefits*, USAGOV, https://www.usa.gov/benefits [https://perma.cc/W7ZM-46LW] (last updated Mar. 6, 2020).
225. *See* STOLTZFUS, *supra* note 195, at 1.

providing $8.7 billion in 2018 in matching funds for the care, housing, and feeding of children in state foster care.[226] However, note that one of the most irrational provisions in all of federal law disqualifies children from such federal matching dollars for their care if the families they were removed from have incomes above the poverty line, as it existed in 1996.[227] Called the "look back" provision, this measure now disqualifies about one half of foster children from federal matching assistance for their care.[228]

4. The Special Status of Foster Children

Much is written about the obligations a society has to its children.[229] But foster children are in a separate and sacrosanct category. They are taken from their parents, albeit hopefully for their own good. Now they have new parents. Who are they? To the person reading these words: YOU ARE. The legal parent of these children is literally the dependency court judge overseeing the above process.[230] This a public official appointed by those we elect, and paid for by taxpayers, as are all services ordered by that judge. This is who decides who will care for the child, where the child is going to live, the school to be attended, and all sorts of details a part of generic parental power—from permission to go to a summer camp to the purchase of a new jacket. That court or those appointed by the court, and who is in turn effectively supported and sanctioned by us in a democracy, is the parent of this child. They are not "our children" in a metaphorical sense only, they are legally the children of those we have assigned that task.

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226. *See HHS FY 2018 Budget in Brief*, U.S. DEP'T HEALTH & HUM. SERVICES, https://www.hhs.gov/about/budget/fy2018/budget-in-brief/acf/mandatory/index.html [https://perma.cc/4K46-H7TB] (last reviewed May 23, 2017).

227. *See* ANGIE SCHWARTZ & BRIAN BLALOCK, CHILD WELFARE FUNDING IN THE NEW FEDERAL LANDSCAPE 17 (2017), https://kids-alliance.org/wp-content/uploads/2017/09/Why-you-need-to-understand-child-welfare-funding-and-federal-safety-net-programs.pdf [https://perma.cc/5E7N-74ZS].

228. *See id.* at 15, 19, 51; *see also Foster Care*, CHILD. BUREAU, https://www.acf.hhs.gov/cb/focus-areas/foster-care [https://perma.cc/3LJ7-A6RR] (last reviewed Aug. 9, 2019). Note that recent legislation now allows family preservation services to be matched with federal money—but that inclusion shamefully does not apply to the hundreds of thousands of foster children in that care. Teresa Wiltz, *This New Federal Law Will Change Foster Care as We Know It*, PEW CHARITABLE TR. (May 2, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/05/02/this-new-federal-law-will-change-foster-care-as-we-know-it [https://perma.cc/NB9D-TGYH].

229. *See, e.g.*, *Foster Parent Code of Ethics*, NAT'L FOSTER PARENT ASS'N, https://nfpaonline.org/Ethics **[**https://perma.cc/878B-T7SF**].**

230. *See How Can a Judge's Decision in Juvenile Dependency Court Affect My Rights as a Parent?*, ROOT & REBOUND, https://roadmap.rootandrebound.org/family-children/juvenile-dependency-court/scenario-1-reconnecting-with-your-child-ren-in-dep/how-can-a-judges-decision-in-juvenile-dependency-c/#:~:text=Just%20like%20any%20court%27s%20decisions,reduce%20or%20take%20away%20some **[**https://perma.cc/3Z68-N3DJ].

Accordingly, we do not properly abandon them at age eighteen or twenty-one, and we affirmatively act to protect them when a contagious disease threatens them. This difference, that they have no parents except for those we have provided and assigned that task, gives them a special status and gives us a special obligation.

B. Child Abuse Detection and COVID-19

As noted *supra*, the first step in detecting child abuse or neglect is the receipt of reports by state and county child protective services agencies and initial investigation to substantiate possible danger.[231] Each state has a system of mandated child abuse reporting.[232] Specific categories of persons are listed, varying from state to state, who are charged with the obligation to report known or suspected danger to a child.[233] In 2018, mandated reporters constituted over 67% of reports to child protective services.[234] Such a specified reporter receives immunity from libel or other liability for what may be determined later to be unjustified or erroneous.[235] Indeed, in most states the *failure* to report a known danger by such an enumerated mandated reporter can constitute a criminal offense.[236]

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231. *See supra* Section IV.A.

232. *E.g.*, Child Abuse and Neglect Reporting Act (CANRA), CAL. PENAL CODE §§ 11164–11174.3 (West 2011).

233. *See, e.g.*, *id* § 11165.7.

234. CHILDREN'S BUREAU, *supra* note 193, at x.

235. *See, e.g.*, CAL. PENAL CODE § 11172.

236. *See, e.g.*, *id.* § 11166. California's list of persons so mandated is typical, and includes the following, almost half of whom are education related:

- a teacher,
- an instructional aide,
- a teacher's aide or teacher's assistant employed by a public or private school,
- a classified employee of a public school,
- an administrator or employee of a public or private youth center, youth recreation program, or youth organization,
- a Head Start program teacher,
- a public assistance worker,
- an employee of a child care institution,
- a social worker, probation officer, or parole officer,
- an employee of a school district police or security department,
- a police officer,
- a firefighter, except for volunteer firefighters,
- a physician and surgeon, psychiatrist, psychologist, dentist, resident, intern, chiropractor, and marriage and family therapist,

Many of these categories involve teachers or other school-related employees.[237] Importantly, education settings are most amenable to abuse and neglect detection—involving extensive contact over many hours and days and in settings where both physical injuries and interaction with others are likely to be visible.[238] Such contact by a social worker or firefighter or physician or member of the clergy is not as common as it is for those involved in education and child care.

The impact of school closures means the cutoff of the major source of reporting about child abuse and neglect, including serious abuse implicating serious injury or death.[239] New York City has reported a drop in reports of child abuse and neglect of over 50% and Michigan sources reported a 40% drop in hotline calls,[240] which is not an unusual reduction where major sources of reporting are now absent.[241] Such detection decline is especially concerning given that the COVID-19 pandemic exacerbates nearly all of the major risk factors associated with child abuse injury and death, including social isolation, financial insecurity added to major familial stress, a lack of suitable child care, parents with untreated mental health and substance abuse disorders, and domestic violence.[242] In addition, the elements that keep children safe in otherwise perilous times, known as protective factors, such as access to extended family caregivers, pediatric visits, before and after-school programs, and time with faith communities have been largely cut off.[243]

- a child visitation monitor, and
- a clergy member, including a priest, minister, rabbi, and religious practitioner.

Id. § 11165.7.

237. *Id.* § 11165.7.

238. *See* Cynthia Crosson-Tower, U.S. Dep't Health & Human Servs., The Role of Educators in Preventing and Responding to Child Abuse and Neglect 8, 13 (2003), https://www.childwelfare.gov/pubPDFs/educator.pdf [https://perma.cc/R8MW-9MYF].

239. *See* Nikita Stewart, *Child Abuse Cases Drop 51 Percent. The Authorities Are Very Worried*, N.Y. TIMES (June 9, 2020), https://www.nytimes.com/2020/06/09/nyregion/coronavirus-nyc-child-abuse.html?smid=em-share [https://perma.cc/JT5N-EZVW].

240. *See id.*

241. Similar drops have occurred in states throughout the nation. *See, e.g.*, Ingram, *supra* note 192; Eleanor Tabone, *Calls to DCFS Drop amid COVID-19 Pandemic*, WQAD (June 8, 2020, 4:59 PM), https://www.wqad.com/article/news/health/coronavirus/calls-to-dcfs-drop-amid-covid-19-pandemic/526-4f86f262-7946-4486-9058-0014759d2b69 [https://perma.cc/Z58E-82AB] (finding that the number of hotline reports of child abuse and neglect dropped by 45% after the Illinois shutdown order).

242. *See* Stewart, *supra* note 239.

243. *See id.*

C. COVID-19 and Child Welfare Services

There has been a movement over the past thirty years to make federal foster care funding more flexible by not confining it to payments to foster families or group homes for child placement, which ignores the need for prevention and may actually incentivize removals.[244] That concern is supported by the substantial incidence of parent reunification in traditional dependency court proceedings and by greater understanding of the traumatic consequences of removals and the systemic deficiencies that too often confuse poverty with neglect.[245] Accordingly, increasing numbers of substantiated reports of child abuse and neglect lead not to removal, but to supportive services that can be safely provided with the child at home, commonly referred to as "family preservation services."[246]

Related to this change is a new policy severely limiting the use of "group home" placements for foster children, sometimes called "congregate care."[247] Most psychologists agree that children are best raised by individual persons playing a personal, parental role, not raised under the supervision of employees or persons lacking a strong and secure personal commitment.[248] The issue is complicated given the breadth of child maltreatment and needed protections, but COVID-19 dangers are likely increased for any person living in a group environment interacting with different caregivers over time. Accordingly, the recent changes confining federal matching

244. *See Federal Foster Care Financing: How and Why the Current Funding Structure Fails to Meet the Needs of the Child Welfare Field*, OFF. ASSISTANT SECRETARY FOR PLAN. & EVALUATION (Aug. 1, 2005), https://aspe.hhs.gov/report/federal-foster-care-financing-how-and-why-current-funding-structure-fails-meet-needs-child-welfare-field [https://perma.cc/PGG8-FLBN].

245. *See* Maren K. Dale, *Addressing the Underlying Issue of Poverty in Child Neglect Cases*, AM. B. ASS'N (Apr. 10, 2014), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2014/addressing-underlying-issue-poverty-child-neglect-cases/ [https://perma.cc/GQP8-D5P7].

246. *See id.*

247. *See The Child Welfare Placement Continuum: What's Best for Children?*, NAT'L CONF. ST. LEGISLATURES (Nov. 3, 2019), https://www.ncsl.org/research/human-services/the-child-welfare-placement-continuum-what-s-best-for-children.aspx [https://perma.cc/L3TJ-44A9].

248. *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., A NATIONAL LOOK AT THE USE OF CONGREGATE CARE IN CHILD WELFARE 1 (2015), https://www.acf.hhs.gov/sites/default/files/cb/cbcongregatecare_brief.pdf [https://perma.cc/T8Q2-ZMPJ].

funds for care in such group settings to no more than two weeks could have somewhat of a palliative benefit as to COVID-19 infections.[249]

In general, the state and local CPS investigations into mandated reports or other indices of child abuse are much affected by COVID-19. The pandemic understandably makes field work in the homes currently quarantined more difficult.[250] As discussed *infra*, there is a need for a combination of new technology, including virtual visits and more comprehensive testing to ensure the safety of front line child welfare workers, including social workers and others.[251] That means a proper high priority to the monitoring of infections among case workers who still need to conduct visits and field interviews, as well as those whom they need to contact. And in the alternative, those children, families, and attorneys they need to communicate with need to all have technology and connectivity to facilitate communications, including smartphones, laptops, and chromebooks which have declined markedly in cost. Although inferior to live in-home monitoring, virtual meeting platforms—e.g., Skype, Microsoft

249. *See* Wiltz, *supra* note 228. *See generally* Family First Prevention Services Act of 2017, H.R. 253, 115th Cong. (2017) (passed as part of the Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 64 (2018)). However, note that these provisions have not been implemented universally and that full compliance is uncertain. *See Family First Act: A False Narrative, a Lack of Review, a Bad Law*, CHILD WELFARE MONITOR (Oct. 1, 2019), https://childwelfaremonitor.org/2019/10/01/family-first-act-a-false-narrative-a-lack-of-review-a-bad-law/ [https://perma.cc/E5FJ-NLCJ]. The provision is also complicated by opposition to its blanket application with some providers arguing that "one size does not fit all" and some children require the specialized supervision of such congregate care. *See Family First Act*, *supra*.

250. Major federal programs in this category include: (1) Title I of the Child Abuse Prevention and Treatment Act (CAPTA), Grants to States for Child Abuse or Neglect Prevention and Treatment Programs, which provides funds to states to improve CPS systems. 42 U.S.C. § 5106a (2018). The grant is directed at improvement of investigations and use of multidisciplinary teams, as well as training CPS workers and mandated reporters, and improving services to infants with serious health risks. *Id.* (2) Title II of CAPTA, Community-Based Grants for the Prevention of Child Abuse and Neglect program (formerly the Community-Based Family Resource and Support program), which provides funding to a lead state agency to develop and enhance community-based, prevention-focused programs to strengthen and support families to prevent child abuse and neglect. 42 U.S.C. § 5116 (2018). This program is administratively known as the Community-Based Child Abuse Prevention (CBCAP) Program. *Id.* (3) Title IV–B of the Promoting Safe and Stable Families Amendments, which have the goal to keep families together by funding prevention services to prevent removal necessity and develop placements other than foster care, including assistance to family reunification if appropriate. Promoting Safe and Stable Families, 42 U.S.C. § 629 (2018). (4) Title XX of the Social Security Act, Social Services Block Grant (SSBG), under which states may use funds for such prevention services as child daycare, child protective services, information and referral, counseling, and foster care, as well as other services. Social Security Act, Pub. L. No. 93-647, 88 Stat. 2337 (1975) (codified as amended in scattered sections of 42 U.S.C. ch. 7).

251. *See* discussion *infra* Section IV.F.2, 4.

Team, Zoom—allow some visibility and personal interaction that is much more useful than the completion of some mailed-in form or a phone call. Some jurisdictions including New York City are experimenting with a hybrid model, sending caseworkers to visit families, but keeping all contact outdoors.[252]

D. The Difficulties in Dependency Court Effective Adjudication and Child Protection

At the outset of the pandemic, the vast majority of dependency courts quickly shuttered entirely or postponed all but the most urgent hearings.[253] Our legal system was not designed to operate virtually.[254] Dependency courts necessarily depend on social workers and counsel from all sides to provide current and comprehensive information for effective rulings.[255] But that information is severely limited where its sources are all confined to their respective homes. The need for direct information extends well beyond the social worker task of conducting investigations and making regular visits to ensure child safety. The courts themselves require further investments to develop their capacity for virtual proceedings, including the allowance of parties and counsel to see each other and to interact competently. And a critical aspect of the virtual platform is its need to provide confidential communications between children and their counsel, among others, before and even during proceedings. The National Association of Counsel for Children provides detailed guidance around the special issues involved in representing a client during this pandemic.[256]

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252. Stewart, *supra* note 239.

253. *See* NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, DEPENDENCY COURT AND STATE RESPONSES TO COVID-19, at 1 (2020), https://www.ncjfcj.org/wp-content/uploads/2020/03/NCJFCJ-Court-Responses-to-COVID19_3-24-2020.pdf [https://perma.cc/3TCD-ZCJM].

254. *See* Douglas Keith & Alicia Bannon, *Promise and Peril as Courts Go Virtual Amid Covid-19*, BRENNAN CTR. FOR JUST. (May 29, 2020), https://www.brennancenter.org/our-work/analysis-opinion/promise-and-peril-courts-go-virtual-amid-covid-19 [https://perma.cc/728W-6NQX].

255. *See* JUDICIAL COUNCIL OF CAL., DEPENDENCY QUICK GUIDE: A DOGBOOK FOR ATTORNEYS REPRESENTING CHILDREN AND PARENTS, at H-17 to H-18 (3d ed. 2017).

256. *See* NAT'L ASS'N OF COUNSEL FOR CHILDREN, ADVOCACY AND CHILD'S ATTORNEY-CLIENT RELATIONSHIPS DURING COVID-19: A TIP SHEET 1–5 (2020), https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/covid19/nacctipsheet_advocacyduringc.pdf [https://perma.cc/G6W7-754W].

The need extends to the initial decision regarding child placement. For example, some respected experts are emphasizing the value of finding relatives of the child as placement alternatives.[257] The advantages here are many and data suggests improved outcomes.[258] But unlike the existing cadre of licensed foster homes, kin placement may not involve the same advance training or screening of those in the household—e.g., for prior offenses—that is common in licensed foster care regulation.[259] While kin placement has important advantages, it also warrants the background checks and placement visits generally applicable to foster care providers, including contact with children in care. But, as noted *supra,* that contact need not always be live and can be made safer with use of masks and distancing.[260] Creative adaptation can allow an interview with all persons viewing the faces of each other, and with a virtual tour of the home and the child's planned bedroom and living area. It can include interviews of references. In fact, it is possible that a sophisticated system of this type can gather more information from more sources and contribute to a more informed decision than has been the case with some in-person visits involving extensive driving through traffic. It can mean information from many times the sources available on a personal visit basis. Ideally, the system should use these positive attributes in combination with the undeniable benefit of personal contact once this crisis has passed.

The research into placement candidates is but one area where the COVID-19 pandemic needs a technologically sophisticated response. Routine aspects of dependency courts, from the initial hearing to six-month reviews to TPR proceedings, all raise similar problems of access to information by judges, attorneys for all sides, caseworkers, guardians ad litem (GALs), CASAs, and of course the children themselves. The grouping of adults directly representing the child needs to have direct and candid contact—particularly the child's counsel conferring with his or her client as noted

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257. *See* Andrew Cohen & Cathy Krebs, *Advocating for Kinship Placement During the COVID-19 Pandemic*, AM. B. ASS'N (May 6, 2020), content/aba-cms-dotorg/en/groups/litigation/committees/childrens-rights/artiles/2020/advocating-for-kinship-placement-during-the-covid19-pandemic [https://perma.cc/QS7J-AVFC].

258. *See, e.g.*, Heidi Redlich Epstein, *Kinship Care Is Better for Children and Families*, ABA CHILD L. PRAC., July/Aug. 2017, at 77, 77–78; *see also* Marc A. Winokur, Amy Holtan & Keri E. Batchelder, *Systematic Review of Kinship Care Effects on Safety, Permanency, and Well-Being Outcomes*, 28 RES. ON SOC. WORK PRAC. 19, 27 (2018); ERIN SUGRUE, ALIA, EVIDENCE BASE FOR AVOIDING FAMILY SEPARATION IN CHILD WELFARE PRACTICE 12 (2019), http://www.thetcj.org/wp-content/uploads/2019/10/Alia-Research-Brief-2019.pdf [https://perma.cc/AVV4-6C3U].

259. *See* CHILD WELFARE INFO. GATEWAY, U.S. DEP'T HEALTH & HUMAN SERVS., PLACEMENT OF CHILDREN WITH RELATIVES 11, 23 (2018), https://www.childwelfare.gov/pubPDFs/placement.pdf [https://perma.cc/H883-P982].

260. *See* discussion *supra* Section IV.C.

supra.[261] The virtual court system must implement a mix of visibility and confidentiality features that may require some substantial refinements to the "chat room" and sequestered meetings sometimes possible.

E. Transition Age Foster Youth and State Abandonment

The fate of foster children aging out of foster care as young adults without families warrants our universal attention. We allow these vulnerable youth to fall off the proverbial cliff as they encounter adulthood. The abysmal outcomes youth experience when they leave foster care at age eighteen have received some attention. These outcomes include issues involving housing, employment, education, substance abuse, mental health, commercial sexual exploitation, gangs and illicit drug use and sales, and high rates of incarceration.[262] Our record in performing the parental role for these youth is shameful.

Congress allows states to extend some foster care benefits, including housing help, up to age twenty-one, and many states effectuate those provisions.[263] But the median age of self-sufficiency for children in America is not eighteen or twenty-one, but twenty-six.[264] And most parents provide substantial funds for their children during this period, typically more than $54,000.[265] These foster children do not receive that level of assistance. And they lack the unconditional love, guidance, example, and dedication provided by the vast majority of parents. There is no home with a bed and meals to retreat to when the world around them collapses. According to a March 2020 survey of transition age youth by Foster Club, in light of the

261. *See* discussion *supra* Section IV.D.

262. *See Older Youth Housing, Financial Literacy and Other Supports*, NAT'L CONF. ST. LEGISLATURES (Apr. 23, 2020), https://www.ncsl.org/research/human-services/supports-older-youth.aspx [https://perma.cc/S6X9-6FJZ].

263. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-19-411, FOSTER CARE: STATES WITH APPROVAL TO EXTEND CARE PROVIDE INDEPENDENT LIVING OPTIONS FOR YOUTH UP TO AGE 21, at 2–3, 9 (2019), https://www.gao.gov/assets/700/699219.pdf [https://perma.cc/9UBT-LY6Z].

264. Eileen Gallo & Jon Gallo, *How 18 Became 26: The Changing Concept of Adulthood* (2009), http://www.galloconsulting.com/how-18-became-26-the-changing-concept-of-adulthood [https://perma.cc/476J-MBMT].

265. *See* CHILDREN'S ADVOCACY INST., CULTIVATING SELF SUFFICIENCY FOR FORMER FOSTER YOUTH: THE TRANSITION LIFE COACH MODEL 2 (2019), http://www.caichildlaw.org/Misc/TLC.Pilot.Summary.2019.pdf. [https://perma.cc/6PLK-MSDP]. For CAI's Transition Life Coach Proposal and study by Professor Packard indicating substantial net savings, see *id.* at 3–5.

pandemic, 40% of respondents reported housing insecurity, 27% had been laid off, 40% had their hours at work severely cut, and 33% had less than a week's worth of cash at hand.[266]

F. Eight Solutions: From Harm Mitigation to Prevention

As the discussion above suggests, there is a mix of advisable measures in addressing the intersection of child protection and the COVID-19 pandemic. They include:

1. Additional Sources of Information about Child Abuse/Neglect Incidence

Where mandated reporters are lacking, CPS advisedly develops new strategies to identify children most at risk and ensure their safety.[267] Proactive virtual or in-person check-ins and offers of support should be provided to those children who have been removed and reunified with their families, or who were subjects of recent substantiated reports but not removed. As states trend towards reopening, we may be able to accommodate alternative settings where such children and families are available for interviews or casework visits such as parks and other settings. Finally, improvements must occur to share data among child medical providers, law enforcement, teachers, and child protective services. This public health crisis has highlighted the need for extension beyond CPS in securing child welfare.

2. Development of Modern Virtual Technology in Contacts and Court Proceedings

All persons integrally connected to the child welfare system, including judges, social workers, all counsel, GALs, CASAs, and post-infant children—should have a laptop or other device and adequate connectivity that can accommodate the virtual platforms discussed *supra*.[268] The cost of such devices is manageable and may involve some expense decline from the transportation costs and time required for personal visits in homes. Further, court reporter costs may be conserved by the simple option of recording at least the public and official parts of those proceedings. There are advantages

266. Press Release, Foster Club, Youth from Foster Care Thrown Into Crisis During Pandemic 1–3 (Mar. 27, 2020), https://www.fosterclub.com/sites/default/files/docs/blogs/PR%20FosterClub%20TAY%20Crisis.pdf [https://perma.cc/2YGQ-2GBU].

267. *See* Morgan Welch & Ron Haskins, *What COVID-19 Means for America's Child Welfare System*, BROOKINGS (Apr. 30, 2020), https://www.brookings.edu/research/what-covid-19-means-for-americas-child-welfare-system/ [https://perma.cc/PK9R-FVAD].

268. *See* discussion *supra* Section IV.C.

to in-person proceedings, but assuming participants are required to transmit live images rather than static photos or available electronic false images, many of the elements can be presented virtually. Important guidance and a push to do this thoughtfully was recently emphasized by the Administration for Children and Families (ACF) within the federal Department of Health and Human Services (DHHS).[269]

3. Higher Education Accommodation of Foster Youth Housing

Almost all colleges and other sources of higher education have closed operations as of March of 2020 and relegated most instruction to virtual formats.[270] Those alterations have been unavoidable given the difficulty of spacing for large classes and the density of living at these locations.[271] But it has also meant a closing of dormitories and other housing as youth over age eighteen return home or to other relatives. Most foster children lack these alternatives and, as indicated in the survey referenced *supra*,[272] many are relegated to couch surfing or homelessness. Accordingly, schools should provide continuation in university housing for such youth. And due to the much-reduced resident population, social distancing—with only one in five to ten rooms occupied—is feasible. The current Administration for Children and Families (ACF) within the DHHS has laudably encouraged such arrangements.[273]

A related higher education impact of COVID-19 is the resurgence of predatory for-profit school abuses. With a common emphasis already on remote computer instruction, these institutions have commonly increased

269. *See* Letter from Jerry Milner, Assoc. Comm'r, Children's Bureau, to Child Welfare Legal and Judicial Leaders 2–3 (Mar. 27, 2020), https://mcusercontent.com/3404efd2e55731e8483aea1aa/files/f129a1a5-5aba-4de4-9073-4d20f2fb2398/Covid_19.Child.Legal_and_Judicial_Letter_Signed_002_002.pdf [https://perma.cc/8JNB-V6N5].

270. *See* Andrew Smalley, *Higher Education Responses to Coronavirus*, NAT'L CONF. ST. LEGISLATURES (July 27, 2020), https://www.ncsl.org/research/education/higher-education-responses-to-coronavirus-covid-19.aspx [https://perma.cc/N2JJ-NQVQ].

271. *See Considerations for Institutions of Higher Education*, CENTERS FOR DISEASE CONTROL & PREVENTION (May 30, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/colleges-universities/considerations.html [https://perma.cc/QS9C-PHHG].

272. *See* Press Release, *supra* note 266, at 1–3.

273. *See* Letter from Jerry Milner, Assoc. Comm'r, Children's Bureau, to Child Welfare Leaders (Mar. 12, 2020), https://fosteractionohio.files.wordpress.com/2020/03/milner-letter.pdf [https://perma.cc/7FP7-7WV7].

enrollment during economic downturns and other crises,[274] and are apparently doing so now.[275] The evidence of their irreparable abuses, including inflated tuition costs and loans that cannot be repaid due to a lack of marketable skills, is overwhelming.[276] The current Department of Education policies of blocking tuition or loan recovery from defunct and fraudulent institutions exists in a financial setting where education loans are not even dischargeable in bankruptcy.[277] The costs of higher education and the debt most students must incur to obtain degrees is particularly devastating for former foster youth who lack family-based support and relief. Schools that do not provide employment opportunity and future salaries adequate to pay off these debts shortly after attendance warrant elimination from public subsidy. That elimination properly applies to public and non-profit schools, as well as those in the for-profit sector. But the last category has been the major source of extreme harm to youth, including intentional enrollment targeting of vulnerable youth with a foster care history.[278]

4. Population Priorities for COVID-19 Testing and Initial Vaccine Administration

The two most useful countermeasures to COVID-19 infection spread are the testing of possible sources of transmission and, when vaccines become available, the preventive inoculation.[279] Both of these palliatives are and will be hampered by short supply.[280] Assuming supplies increase, what should be the priority of administration? Obviously, first priority must be for the doctors, nurses, and others who care for those who are ill

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274. Sarah Butrymowicz & Meredith Kolodner, *For Profit Colleges, Long Troubled, See Surge Amid Pandemic*, N.Y. TIMES (June 17, 2020), https://www.nytimes.com/2020/06/17/business/coronavirus-for-profit-colleges.html [https://perma.cc/7HPL-TLY5].

275. *Id.*

276. *See* Children's Advocacy Inst., Failing U.: Do State Laws Protect Our Veterans and Other Students from For-Profit Postsecondary Predators? 3 (2018), http://www.caichildlaw.org/Misc/FailingU.pdf [https://perma.cc/WT8T-FYXP].

277. *See* Zach Friedman, *Can You Discharge Your Student Loans in Bankruptcy?*, FORBES (Jan. 9, 2019, 8:32 AM), https://www.forbes.com/sites/zackfriedman/2019/01/09/student-loans-bankruptcy-discharge/#6d4ebb016d56 [https://perma.cc/8J2Y-WMCU].

278. *See* CHILDREN'S ADVOCACY INST., *supra* note 276, at 1, 4. Note that the education loans available to former foster children give these predatory schools a strong incentive to target them for enrollment, with consistently dire consequences. *Id.* at 1, 3. Such "education loans" are not even dischargeable in bankruptcy, condemning a large number of such indebted students with personal credit ruination. *See* Friedman, *supra* note 277.

279. *See COVID-19 (Coronavirus) Vaccine: Get the Facts*, MAYO CLINIC (Sept. 10, 2020), https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-vaccine/art-20484859 [https://perma.cc/Q57X-KWBG].

280. *See* Elaine Chen, *Drugmakers Race to Build COVID-19 Vaccine Supply Chains*, WALL ST. J. (July 30, 2020, 8:41 AM), https://www.wsj.com/articles/drugmakers-race-to-build-covid-19-vaccine-supply-chains-11596101586 [https://perma.cc/E6ED-NQN5].

or already infected. Close behind that are the populations of highest risk, such as the elderly in nursing homes or those working in unavoidable close proximity to others, such as those in meatpacking plants. But before distribution to the public at large, our foster children, and those who care for and work with them, warrant next-in-order priority. These are children and youth with a special status as wards of the state and are often subjected to increased risk due to an existing or changing placement.

5. Support for Initial Efforts of the Children's Bureau

To its credit, the Children's Bureau within the Administration for Children and Families has softened bureaucratic barriers that impede help for foster children encountering COVID-19 difficulties.[281] First, even before the pandemic erupted, they made a clear policy change that for the first time counsel for children—and parents—will now qualify for federal matching funds.[282] These attorneys, particularly those for the child, may be in a position to interact personally with children and may allow another set of eyes to detect the current safety and other issues involving the custody of those children. In addition, the Bureau has promulgated other useful changes, including (a) simplifying the requirements to extend foster care for IV-E funding qualification, (b) explicit encouragement of the states to extend eligibility for Chafee services up to the age of twenty-three, (c) making clear that those over eighteen can reenter care, an option the pandemic can make urgent, and (d) provide for enhanced payment rates for children who have tested positive for the coronavirus.[283]

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281. *See, e.g.*, Letter from Jerry Milner, Assoc. Comm'r, Children's Bureau, to Child Welfare Leaders 1–2 (Apr. 15, 2020), https://www.acf.hhs.gov/sites/default/files/cb/stafford_act.pdf [https://perma.cc/STT7-BDM2].

282. *See* Robert C. Fellmeth & Noy Davis, *Legal Representation Is Essential for Abused Children – and Smart States*, THE HILL (June 11, 2019, 3:00 PM), https://thehill.com/opinion/judiciary/447862-legal-representation-is-essential-for-abused-children-and-smart-for-states [https://perma.cc/SYE6-NVMP]; John Kelly, *Trump Administration Rule Change Could Unleash Millions in Federal Funds to Defend Rights of Parents, Children in Child Protection Cases*, IMPRINT (Feb. 5, 2019, 4:00 AM), https://imprintnews.org/child-welfare-2/how-the-fight-for-family-legal-support-was-won/33631 [https://perma.cc/6F3G-3JKP].

283. *See* Letter from Elizabeth Darling, Comm'r, Admin. on Children, Youth & Families, to State, Tribal and Territorial Agencies Administering or Supervising the Administration of Title IV-E of the Social Security Act 2 (May 8, 2020), https://www.acf.hhs.gov/sites/default/files/cb/pi2010.pdf [https://perma.cc/B9XN-N3RS]; Letter from Jerry Milner, Assoc. Comm'r, Admin. on Children, Youth & Families, to State and Tribal Welfare Leaders 1–3 (Apr. 27, 2020), https://www.acf.hhs.gov/sites/default/files/cb/flexibility_letter.pdf [https://perma.cc/F6KF-QFY4]; *see also COVID-19 Resources*, CHILD. BUREAU (June 25,

6. *Support for Seven Specific, Existing Congressional Proposals*

In addition to the termination of the "look back" exclusion of about half of all foster children from federal matching fund assistance discussed above, a collective of hundreds of children's organizations have asked Congress for a series of relief measures to specifically address COVID-19 relevant to child welfare.[284] Each of them has some likely beneficial impact vis-à-vis the issues discussed *supra* and warrant support. They include specific funding for prevention programs,[285] specific funding for child protection vis-à-vis the COVID-19 threats,[286] and a marked infusion of $500 million into foster care programs assisting young people in the transition from foster care to adulthood.[287]

7. *Save the State's Own Children from Falling off the Cliff*

Current efforts and proposals address some of the problems posed by COVID-19, but they do not suffice. The underlying problem here is the disparity between youth with parents who provide not only room and board for their own children after the age of eighteen, but also pay for other needs—from tuition to a car to get to work. As noted above, most parents invest tens of thousands of dollars in their children between the ages of eighteen and twenty-six.[288] Because youth aging out of care are legally parented by us through public funds and are legally parented by state court judges, the assistance rendered should be comparable.

There is a promising way to do so. Rather than "top down" payments for only specified expenses, with applications and conditions attached, the Children's Advocacy Institute proposes the Transition Life Coach (TLC) model, which when launched would set aside funds in a specialized trust

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2020), https://www.acf.hhs.gov/cb/resource/covid-19-resources [https://perma.cc/H9KL-XT43].

284. Letter from Nat'l Children's Orgs. to Mitch McConnell, Majority Leader, U.S. Senate, et al. 1–2 (Apr. 10, 2020), https://childwelfarecovid.org/wp-content/uploads/2020/05/Federal-Advocacy-Letter-to-Congress-with-Comprehensive-Ask.pdf [https://perma.cc/LK32-J9QR].

285. *Id.* These include (1) increased funding for CAPTA Title II Community-Based Child Abuse Prevention (CB-CAP) by $1 billion; (2) increased funding to Title IV-B, Part 2, the MaryLee Allen Promoting Safe and Stable Families Program (PSSF) by $1 billion; and (3) assurance that the FMAP Rate Increase is provided to the new Title IV-E Prevention Program. *Id.*

286. *Id.* at 2. These measures include (1) increased funding for the Kinship Navigator Programs (by $20 Million); (2) increased funding for CAPTA Title I (by $500 million); and (3) increased funding for the Court Improvement Program (CIP) (by $30 million). *Id.*

287. *Id.*

288. *See* CHILDREN'S ADVOCACY INST., *supra* note 265, at 2.

account for each transition age youth.[289] It would operate under the auspices of the court judge who is familiar with the youth and appreciates the important ongoing role of the court in ensuring a successful transition to adulthood.[290] The court would operate as the trustor, and someone chosen by and trained to assist the youth, such as a relative, former foster parent, or CASA would serve as trustee.[291] The youth would play a central role in proposing a budget for assistance into self-sufficient adulthood, in collaboration with the trustee and subject to periodic court reviews of progress.[292] The funds could be used flexibly for a variety of needs such as an air conditioner in an apartment in Phoenix, transportation costs, or a microwave to provide food in a new apartment.[293] It replicates what a parent does.

This proposal has been endorsed by district attorneys, law enforcement, and successive presiding juvenile court judges in San Diego County, where a pilot has been proposed continuously for the past eleven years.[294] A study by economist Professor Packard projected its savings as substantially more than its costs, with major gains in increased taxes from employment and substantial reduction of jail, safety net, and other expenses emanating from the present system.[295] It has never been funded, even on a pilot basis, anywhere in the nation. It should be advanced as a pilot project in five locations nationally and evaluated for its effects and net cost.[296]

8. Six Primary Prevention Strategies

The two variables most capable of accomplishing the ideal result include (a) an effective vaccine to immunize all foster children from the pandemic, or (b) the prevention of child abuse and neglect precluding the need for extensive foster children care. The former is the focus of major current

289. *Id.* at 5.
290. *Id.* at 4.
291. *Id.* at 3.
292. *Id.* at 3–4.
293. *Id.* at 4.
294. *See Transition Age Foster Youth*, U. SAN DIEGO: CHILD.'S ADVOC. INST., https://www.sandiego.edu/cai/advocacy/advocacy-by-subject/foster-youth.php [https://perma.cc/9GC3-UUPV]. The initial TLC proposal was put forth in 2009 and has been followed up since then with reiterations and related advocacy. *See* Robert C. Fellmeth, *America's Child Welfare System: The Four Missing Priorities*, WHITTIER J. CHILD & FAM. ADVOC. 115, 130–33 (2009). For a detailed recitation, see *Transition Age Foster Youth*, *supra*.
295. *See generally* Thomas Packard et al., *A Cost-Benefit Analysis of Transitional Services for Emancipating Foster Youth*, 30 CHILD. & YOUTH SERVS. REV. 1267 (2008).
296. *See* CHILDREN'S ADVOCACY INST., *supra* note 265, at 5.

effort.[297] The latter, although with momentous advantages beyond the infection danger, is not even a part of current political discussions.[298] Much of it never has been. Although perhaps extending beyond the parameters of the instant topic, six areas of reform can, together or in some combination, reduce radically the number of abused children, making the protection of foster children from COVID-19 effectively moot:[299]

1. Recognizing the simple right of a child to be intended and provided for by his or her parents and promoting paternal engagement and family support.
2. Ensuring universal health care for all children, including needed mental health services and home visiting of infants by nurses—a practice with strong evidentiary support.
3. Incorporating education modules in our high schools covering basic parenting skills.
4. Dismantling the current culture of racial discrimination that impedes millions of children from achievement and is contrary to the very essence of America.
5. Rejecting the glorification of violence, gangs, and drugs in entertainment and games.
6. Combatting fiercely the scourge of alcohol and drug abuse, a serious epidemic beyond COVID-19—but more damaging to children. In 2016, drug or alcohol use was identified as a contributing factor in more than 35% of removals of children from their homes.[300]

A major impact from the pandemic has been historic unemployment, increased poverty, and substantial burdens on an already compromised safety net.[301] These six steps promise more economic savings and human

297. David E. Sanger, et al., *Profits and Pride at Stake, the Race for a Vaccine Intensifies*, N.Y. TIMES (May 2, 2020), https://www.nytimes.com/2020/05/02/us/politics/vaccines-coronavirus-research.html [https://perma.cc/75E7-CU67].

298. *See* Ingram, *supra* note 192.

299. For a discussion of some of these factors, see ROBERT C. FELLMETH & JESSICA K. HELDMAN, CHILD RIGHTS & REMEDIES 399–401 (2019).

300. *See Child Welfare and Alcohol & Drug Use Statistics*, NAT'L CTR. ON SUBSTANCE ABUSE & CHILD WELFARE, https://ncsacw.samhsa.gov/research/child-welfare-and-treatment-statistics.aspx [https://perma.cc/QGZ9-YVST].

301. *See* Samuel Stebbins, *Unemployment Rate Remains Historically High: These US Cities Are Among Those with Highest Jobless Rates*, USA TODAY (Aug. 8, 2020, 7:00 AM), https://www.usatoday.com/story/money/2020/08/08/cities-with-the-worst-unemployment-since-the-pandemic-started/42187029/ [https://perma.cc/Q58W-5X9N]; *see also* Caitlin Brown & Martin Ravallion, *Poverty, Inequality, and COVID-19 in the US*, VOX EU (Aug. 10, 2020), https://voxeu.org/article/poverty-inequality-and-covid-19-us [https://perma.cc/4J82-DVJP] ("[P]oorer people are less able to protect themselves, which leads them to different choices – they face a steeper trade-off between their health and their economic welfare in

success than do our current post-abuse palliatives. The current travail amplifies the case for their pursuit.

V. CONCLUSION

COVID-19 has changed our daily lives and it remains unclear when and to what extent we will return to life as it was before the pandemic. As society continues to navigate the complications arising as a result of the virus, we must focus our attention on the children whose primary needs are met within systems such as juvenile justice, education, and child protection. The critical importance of the functions they provide to vulnerable children is demonstrated in the collection of federal and state policy that establishes the responsibilities of these systems and the rights of the children within them. Obligations to these children are not aspirational; they are mandatory. And not only do they not cease during a pandemic, they arguably become more imperative.

The juvenile justice system is responsible for both the protection of the community as well as the protection and care of the child.[302] COVID-19 has added a new urgency to this challenging balancing act. The system's historical lack of success in promising consistently humane, fair, and effective treatment can have particularly severe consequences at this time. Today's efforts to protect justice-involved children and ensure the most informed decision-making on their behalf in light of COVID-19 have the potential to positively impact juvenile justice policy and practice into the future.

The system of special education is rooted in the federal mandate to provide a free appropriate public education for all children with disabilities.[303] This is a complex endeavor made even more challenging following public health orders requiring remote education. Yet the federal law provides flexibility that can support schools in adapting to the circumstances of COVID-19 as well as ensuring remedies to parents for progress lost. It is incumbent on educators to forge effective collaborations with parents and

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the context of the threats posed by COVID-19."); Karen Robinson-Jacobs, *Federal Deficit Balloons to $2.8 Trillion, with More Coronavirus Aid Still in Limbo*, FORBES (Aug. 12, 2020, 5:10 PM), https://www.forbes.com/sites/karenrobinsonjacobs/2020/08/12/federal-deficit-balloons-to-28-trillion-with-more-coronavirus-aid-still-in-limbo/#5406b5801555 [https://perma.cc/83RT-AY3R].

302. *See* Schall v. Martin, 467 U.S. 253, 264–66 (1984) (balancing the interests of the community against the interests of the child in a juvenile court proceeding).

303. *See* 20 U.S.C. § 1412(a)(1) (2018).

children—a historically challenging endeavor—in order to ensure that children's educational needs are met during this time and beyond.

The child protection system has the extraordinary responsibility of ensuring the safety of children vulnerable to abuse and neglect and in some cases literally serving as the child's parent.[304] With COVID-19 creating barriers to identifying and responding to abuse and neglect and exacerbating the disadvantages of children exiting foster care into young adulthood, it has never been more critical to examine child welfare agency and dependency court policy and practice. The urgent needs of children in this system and the devastating potential consequences of failure to respond adequately must drive an embrace of technological solutions, increased investment, and an emphasis on preventive measures that protect children now and in the future.

The success of the response to this virus will be measured by various metrics. Among them will be the ability to protect, humanely care for, and prioritize the development of vulnerable children. And if challenges posed during this global event can be met, there is added potential for overcoming long-standing problems with renewed energy and innovation. The words of Nelson Mandela have never been more apt: "The true character of a society is revealed in how it treats its children."[305]

304. *See* CHILD WELFARE INFO. GATEWAY, *supra* note 3, at 4–6.

305. Nelson Mandela, Address by President Nelson Mandela at Worcester Station (Sept. 27, 1997), http://www.mandela.gov.za/mandela_speeches/1997/970927_worcester.htm [https://perma.cc/B9TS-V9FH].