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In Spite of the Odds: Achieving Educational Stability for Maryland's African American Foster Youth

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I. INTRODUCTION

Access to appropriate public education in the United States has been an ongoing societal issue since its inception. The inherent racial inequalities in public education have been brought to light repeatedly over the years and are highlighted in *Brown v. Board of Education*.² The policy shift in viewing education as a civil right, and thus an issue of social justice, is a recent one in the history of public education in the United States.³ While education is not an established fundamental right under the Constitution, there are legal theories that support its designation as one.⁴ Furthermore, viewing education as a civil right would require that all children be provided an opportunity to access education and be given the tools to succeed within the education system, including foster children, who are arguably the most vulnerable population of youth. Within this extremely vulnerable population, African American foster youth remain the most at-risk for experiencing poor educational outcomes.⁵ The purpose of this article is to provide an overview of the recent federal laws that establish guidelines for the educational stability of foster youth: the Fostering Connections Act of 2008 (“Fostering Connections Act” or “FCA”) and the Every Student Succeeds Act (“ESSA”). Additionally, this article analyzes Maryland’s implementation of the educational stability requirements of the Fostering Connections Act and ESSA and its potential effect on improving outcomes for Maryland’s African American foster youth.

Racial inequality for African Americans is a persistent and pervasive problem in America that permeates many areas of society, including education. African American foster youth are not only members of a racial group that faces systemic discrimination and prejudice; they are also part of a class of extremely marginalized children. This article undertakes an analysis of the application of the federal laws addressing educational stability through the lens of critical race theory (“CRT”), providing a crucial discussion of the importance of improving educational outcomes for African American foster youth in general, with a special focus on Maryland. Generally, CRT encompasses an academic critique of the relationship of race, racism, and the power structure.⁶ More specifically, the CRT analysis considers racism as an ordinary occurrence in the lives of minorities and central to minorities’ experiences in society, making it difficult to eradicate.⁷ Further, CRT

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² See *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493, 495 (1954).

³ John B. King Jr., *Education Remains the Civil Rights Issue of Our Time*, THE EDUC. TRUST (May 17, 2017), <https://edtrust.org/the-equity-line/education-remains-civil-rights-issue-time/>.

⁴ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 34-35 (1973) (establishing that a right to public education is not a fundamental right); See also *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (holding that the Due Process Clause of the Fourteenth Amendment provides a property right for students in their education requiring notice and a hearing if deprived of this right).

⁵ David L. Sandles Jr. & Kenneth R. Magdaleno, *Factors Impeding the Social and Academic Progress of African American Males in Foster Care*, 3 CLEARVOZ J. 1, 1 (2016).

⁶ RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2nd ed. 2001).

⁷ *Id.* at 7.

establishes the concept of “differential racialization,” which describes how the dominant white majority racializes various minority groups differently based upon popular stereotypes or to satisfy the needs of the dominant majority at the time.⁸ Another basic concept of CRT is that minority identity is neither singular nor homogenous, and that everyone, including minorities, has intersecting identities.⁹ Also, CRT provides a voice to minorities, allowing individual experiences of discrimination and racism to be included in the discussions to address systemic racism.¹⁰

In examining the experiences of foster youth, race and involvement with the child welfare system are classifications that often intersect when analyzing educational achievement. CRT challenges the notion that the education system employs ideologies of color-blindness and race neutrality.¹¹ Enforcing laws intended to achieve equality in education by treating everyone the same, will likely only address blatant discrimination. However, this strategy does little to address the biases that African American foster youth face in the education system based upon race and their status in the child welfare system. These “one size fits all” enforcement strategies do not substantially address the life circumstances that African American foster youth have experienced as a result of being victims of the abuse or neglect that initiated their involvement in the child welfare system.

II. HOW A CHILD BECOMES A FOSTER YOUTH

Before addressing improvements in academic achievement of foster youth, one must first understand how a child enters the foster care system. The most common way a child may become involved in the child welfare system is following a report of alleged neglect or abuse that initiates an investigation by the local child protective services agency.¹² Generally, a child can be temporarily removed from his or her parents or legal guardians due to these allegations. Subsequent court hearings are held to determine if continued separation of the child from the family is necessary to continue to protect the safety and welfare of the child.¹³ Upon removal, a child is placed in the custody of the state with the authority to place the child with relatives, in a foster home, in a group home, or in a residential treatment center.¹⁴ The local child welfare agency, acting on behalf of the state in conjunction with the individual caregivers, is required to provide for the daily care of this youth until the local court deems that there is no likelihood of further abuse or neglect occurring if the child were returned to the care of his or her parents or legal guardians.¹⁵

The definition of neglect is very broad, but typically includes parents’ blatant disregard for a child’s health or safety, like failing to “provide appropriate supervision, food, housing, education,

⁸ *Id.* at 8.

⁹ *Id.* at 9.

¹⁰ *Id.*

¹¹ DELGADO & STEFANCIC, *supra* note 6, at 6-10; *see also* Kenyon L. Whitman, *Students on the Margins-Margins: A Critical Examination of Research on African American Foster Youth in Higher Education*, 4 URB. EDUC. RES. & POL’Y ANN. 47, 47-54 (2016).

¹² *See* Child Abuse Prevention and Treatment Act (CAPTA), § 42 U.S.C. 5116 (2016) (amended by Pub. L. 114-22 and 114-198).

¹³ § 42 U.S.C. 5116.

¹⁴ *Id.*

¹⁵ *Id.*

or medical treatment.”¹⁶ Neglect can also include failure to protect a child from dangerous environments, such as exposure to illegal drugs or sexual predators.¹⁷ Abuse generally includes parents' physical acts that could cause serious harm to or death of the child, as well as sexual abuse.¹⁸ Children exposed to neglect and/or abuse often display symptoms of the trauma they experienced, like delayed cognitive or physical development and/or emotional and behavioral problems.¹⁹ Further compounding the issues, these children may also regularly experience a second layer of trauma as a result of the separation from their parents and families.²⁰

III. COMMON BARRIERS TO EDUCATIONAL SUCCESS FOR FOSTER CHILDREN

Foster youth as a whole face many barriers to educational success. First and foremost, foster youth are at a disadvantage due to their exposure to abuse and/or neglect, which can impact their development, emotional stability, and behavior.²¹ These children often suffer from extensive trauma that has been proven to affect cognitive development and, depending on the severity, can be a determinant of future negative behavior.²²

In 2017, there were approximately 437,000 youth in foster care in the United States.²³ Foster youth are twice as likely to be absent from school as children not in foster care.²⁴ Foster children often experience a change in school placements when they first enter care and could experience subsequent school changes when the child's foster placement changes.²⁵ Studies have shown that multiple changes in school placements negatively impacts foster children's academic performance.²⁶ These children are placed in a new home environment and consequently a new school environment and are expected to be able to keep up academically through this adjustment.

Reports show that, on average, 17- and 18-year-old foster children are operating at a seventh grade education level and are less likely to graduate from high school.²⁷ Studies have also shown that poor academic performance of foster youth has a direct correlation to their outcomes as adults in society after exiting the foster care system.²⁸ An unfortunate reality is that former foster youth are far more susceptible to homelessness, incarceration, unemployment, long term mental health issues, and even substance abuse.²⁹ Additionally, foster children deal with resulting trauma

¹⁶ Heather L. Fox, *Reality and Resiliency: The Educational Needs and Strengths of Former Foster Youth*, OFF. OF COMMUNITY RES. & LEADERSHIP 2 (Nov. 2016), <https://eric.ed.gov/?id=ED574531>.

¹⁷ Fox, *supra* note 16.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*; See also *About the CDC-Kaiser ACE Study: Major Findings*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/violenceprevention/acestudy/about.html> (last updated June 14, 2016) [hereinafter *ACE Study*].

²² *ACE Study*, *supra* note 21.

²³ THE AFCARS REP., THE CHILDREN'S BUREAU 24, 1 (2017).

²⁴ National Working Group on Foster Care and Education, *Fostering Success in Education: National Factsheet on the Educational Outcomes of Children in Foster Care*, LEGAL CTR. FOR FOSTER CARE & EDUC. 1, 2 (Apr. 2018), <http://www.fostercareandeducation.org/OurWork/NationalWorkingGroup.aspx> [hereinafter *Fostering Success in Education*].

²⁵ *Id.* at 5.

²⁶ *Id.*

²⁷ *Id.*; U.S. DEP'T OF EDUC. & U.S. DEP'T OF HEALTH & HUM. SERV., NON-REGULATORY GUIDANCE: ENSURING EDUCATIONAL STABILITY FOR CHILDREN IN FOSTER CARE 3 (June 23, 2016) [hereinafter *GUIDANCE*].

²⁸ *Fostering Success in Education*, *supra* note 24, at 7.

²⁹ Fox, *supra* note 16, at 3.

from abuse and/or neglect along with the trauma from removal from their parents, which often impacts their emotional and behavioral presentation in school, affecting their performance.³⁰ Hopefully, improving educational stability will address the disparity in foster youth's educational performance leading to improvement in their overall life circumstances as adults.

Historically, African American youth have been overrepresented in the child welfare system in the United States. African American foster children make up roughly 24.3% of foster youth in the U.S. while African Americans only constitute 13.8% of the total child population.³¹ In contrast, white children make up about 51.9% of the total child population but account for approximately 43.4% of the children in foster care.³² While the percentage of African American foster youth is undeniably lower than the percentage of white youth in foster care, this still amounts to a disproportionate representation in the child welfare system when analyzing the overall child population.³³ However, it should be noted that recent research differs from the historical understanding of this overrepresentation being a result of racial bias in the child welfare system. Rather, it suggests that this disproportionate representation is due to higher rates of child maltreatment in the black community, which itself signifies a need to further research and understand the catalyst for this difference based upon race.³⁴

Furthermore, African American youth face a number of inequalities during their involvement with the child welfare system. They suffer higher rates of poor academic performance and high school dropouts, higher grade retention, and even higher rates of suspension when compared to white foster youth.³⁵ African American youth also tend to experience longer stays in the child welfare system, which often leads to several changes in foster care placements.³⁶ The increased likelihood of placement changes ultimately results in a higher number of school transfers, which has been found to negatively impact academic achievement.³⁷ Therefore, African American foster youth are arguably one of the most vulnerable subgroups of an already marginalized youth population.

Specifically, Maryland had approximately 3,777 children in foster care in 2016.³⁸ Approximately 2,095 children in foster care in Maryland were African American compared to only roughly 1,083 white foster youth.³⁹ Thus, in Maryland, African American children make up more than half of the population of children in foster care. Further, in 2016 there was about 568,312 white children in Maryland, which is about 42% of the total child population.⁴⁰ In contrast, the total number of African American children is roughly 416,534, amounting to 31% of the child population.⁴¹ This is a disproportionate representation of African American youth when compared to white youth in foster care, even when these numbers are compared to the child population

³⁰ *Fostering Success in Education*, *supra* note 24, at 6-7.

³¹ Children's Bureau, *Racial Disproportionality and Disparity in Child Welfare*, CHILD WELFARE INFORMATION GATEWAY 1, 3 (Nov. 2016), https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf.

³² *Id.*

³³ *Id.*

³⁴ Sandles & Magdeleno, *supra* note 5, at 3.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ The Annie E. Casey Foundation, *Children in Foster Care by Race and Hispanic Origin*, KIDS COUNT DATA CTR. (2016), <https://datacenter.kidscount.org/>.

³⁹ *Id.*

⁴⁰ The Annie E. Casey Foundation, *Child Population by Race*, KIDS COUNT DATA CTR. (2017), <https://datacenter.kidscount.org/>.

⁴¹ *Id.*

demographics in Maryland. When conducting research for this article, it was difficult to find clear statistical information connecting academic achievement and African American youth in foster care in Maryland. This creates an obvious limitation on the ability to identify particular areas to target when initiating new policies and practices to improve the academic achievement of black foster youth. An in-depth look at Maryland's implementation of the federal requirements for education for foster youth will provide a general view of the state of education of foster youth in Maryland. This analysis will also allow for development of strategies to improve academic performance for foster youth, especially African American youth.

IV. OVERVIEW OF FEDERAL LAW: FOSTERING CONNECTIONS ACT OF 2008 AND EVERY STUDENT SUCCEEDS ACT

There are two recent federal laws that directly address issues of education of foster youth: the Fostering Connections to Success and Increasing Adoptions Act of 2008 and the Every Student Succeeds Act.⁴² The Fostering Connections Act covers a wide range of changes to the federal law affecting foster youth, namely increasing support for kinship or relative placement, improving outcomes for foster youth (including educational outcomes), tribal foster care and adoption access, and providing incentives for adoption.⁴³ Specifically, the FCA requires that states enact policies to achieve educational stability for foster youth.⁴⁴ Pursuant to Section 204 of the FCA, states are required to include in their policies a plan for ensuring educational stability while the child is in foster care, including:

(i) assurances that the placement of the child in foster care takes into account the appropriateness of the current educational setting and the proximity to the school in which the child is enrolled at the time of placement; and (ii)(I) an assurance that the State agency has coordinated with appropriate local educational agencies...to ensure that the child remains in the school in which the child is enrolled at the time of placement; or (II) If remaining in such school is not in the best interests of the child, assurances by the State agency and the local educational agencies to provide immediate and appropriate enrollment in a new school, with all of the educational records of the child provided to the school.⁴⁵

Additionally, the FCA requires "reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement."⁴⁶ Essentially, the FCA requires that state and local child welfare agencies coordinate with state and local education agencies to ensure that children in foster care can remain in the school they are enrolled in at the time of placement if it is determined that it is in that child's best interest. If it is in the child's best interest to remain in the

⁴² See generally Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949 [hereinafter Fostering Connections Act]; see also Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015).

⁴³ See generally Fostering Connections Act, *supra* note 42 (amending §§ B and E of Title IV of the Social Security Act, 74 Pub. L. No. 271, 49 Stat. 610 (1935)).

⁴⁴ See generally Fostering Connections Act, *supra* note 42, § 204(a)(1) (amending § 475(G) of the Social Security Act (1935)).

⁴⁵ *Id.*

⁴⁶ Fostering Connections Act, *supra* note 42, § 204(a)(2).

school he or she is currently enrolled in, then the state and local child welfare agencies are also required to coordinate with state and local education agencies to provide transportation to that school.⁴⁷ The goal of the FCA is to achieve stability and continuity for foster youth who have experienced trauma, are newly placed out of their home environment, and regularly experience several placement changes that can include enrollment in several schools.⁴⁸ This very vulnerable population of children often suffers academically, experiencing higher grade retention and dropout rates due to these circumstances.⁴⁹ The FCA attempts to improve these dire educational outcomes for our most marginalized youth.

While the FCA takes great strides toward achieving educational stability for foster youth, it has often been interpreted as one-sided, requiring child welfare agencies to do the heavy lifting in collaborating with the state and local education agencies to comply with the Act.⁵⁰ Some critiques of the FCA include, the difficulty resolving differences of opinion between the child welfare agency and the state or local education agency concerning which school placement is in the best interest of the child.⁵¹ Also, issues arise when deciding which factors should be considered priority when determining the best interest of the child in regards to the school placement.⁵² Further, determining which agency is responsible for arranging and paying for transportation to a school that is outside of the child's neighborhood zoned school to maintain stability is often a dispute under the FCA.⁵³ As a result, the recently enacted ESSA attempts to fill in these gaps and provide further direction to the states on how to ensure educational stability for foster youth.⁵⁴

On December 10, 2015, Congress passed the Every Student Succeeds Act, which effectively reauthorizes the Elementary and Secondary Education Act of 1965 ("ESEA"),⁵⁵ and amends the ESEA to include provisions relating specifically to foster youth and educational success in Title I.⁵⁶ This change is extremely significant, as it is the first amendment to the ESEA since the No Child Left Behind Act of 2002.⁵⁷ First, ESSA amends to the ESEA create a requirement for state education agencies to collaborate with state child welfare agencies to ensure educational stability as already set forth in the Fostering Connections Act.⁵⁸ This provision clarifies that the responsibility rests with both state education agencies and state child welfare agencies to develop and implement plans to allow foster children to remain in their current school

⁴⁷ *Id.*

⁴⁸ GUIDANCE, *supra* note 27, at 3-4.

⁴⁹ *Id.*

⁵⁰ *Id.* at 5; *see generally* LEGAL CTR. FOR FOSTER CARE & EDUC., STATE AND FEDERAL IMPLEMENTATION OF THE EDUCATION PROVISIONS OF THE FOSTERING CONNECTIONS ACT: PROGRESS AND CHALLENGES (2010) [hereinafter PROGRESS AND CHALLENGES]; *see also* John B. King, Sec'y, U.S. Dep't of Educ. and Sylvia M. Burwell, Sec'y, U.S. Dep't of Health & Hum. Serv., Dear Colleague Letter to Chief State School Officers and Child Welfare Directors (June 23, 2016) [hereinafter Dear Colleague Letter].

⁵¹ *See generally* PROGRESS AND CHALLENGES *supra* note 50; Dear Colleague Letter, *supra* note 50.

⁵² PROGRESS AND CHALLENGES *supra* note 50.

⁵³ *Id.*

⁵⁴ PROGRESS AND CHALLENGES, *supra* note 50.

⁵⁵ *See generally* Elementary and Secondary Education Act, Pub. L. No. 89-10, 79 Stat. 27 (1965).

⁵⁶ Every Student Succeeds Act, Pub. L. No. 114-95, § 9105(b), 129 Stat. 1802 (2015). ESSA took effect December 10, 2016 and includes a timeline for implementation based upon whether or not the state statutes were covered based upon the respective states' definition of homeless youth.

⁵⁷ *See* Laws & Guidance, Elementary and Secondary Education, Every Student Succeeds Act (ESSA), U.S. DEP'T OF EDUC., <https://www.ed.gov/essa>.

⁵⁸ Every Student Succeeds Act, *supra* note 56, §1005.

placements unless it is determined that it is not in their best interests.⁵⁹ Furthermore, ESSA, in support of the FCA, establishes that, if it is not in the child's best interest to remain in his or her current school, the foster child shall be enrolled immediately in an appropriate school even if the records necessary for enrollment are not readily available.⁶⁰ Additionally, ESSA requires the enrolling school to immediately contact the previous school placement to obtain school records.⁶¹ ESSA also provides that the state education agency must identify a Point of Contact ("POC") for state child welfare agencies, who is responsible for overseeing the implementation of the educational stability portions of the statute.⁶²

The ESSA amendments to the ESEA further expands the requirements of the FCA by including requirements that the local education agencies work closely with state or local child welfare agencies. Under Section 1006 of ESSA, both local education agencies and state or local child welfare agencies must designate a POC to oversee education issues for foster youth.⁶³ Also, ESSA requires that within one year of the enactment of this law, local education agencies, in collaboration with state or local child welfare agencies, must "develop and implement clear written procedures governing how transportation to maintain children in foster care in their school of origin when in their best interest will be provided, arranged, and funded for the duration of their time in foster care."⁶⁴ Pursuant to ESSA, the arranged transportation to maintain a foster youth in their school of origin must be cost-effective.⁶⁵ Any additional costs incurred must be covered either directly by the local education agency, or the local education agencies must reimburse child welfare agencies for costs covered, or both the local education agency and child welfare agency share the costs.⁶⁶ To comply with these requirements it is crucial that the local education agency works jointly with the relevant child welfare agency to ensure implementation of these provisions supporting educational stability.

ESSA goes a step further to also amend Section 725 of the McKinney-Vento Homeless Assistance Act ("McKinney-Vento Act"). The McKinney-Vento Act, reauthorized by ESSA, provides for the education of homeless youth by allowing special services to be implemented to ensure educational stability for homeless children.⁶⁷ Under this Act, homeless is defined as "individuals who lack a fixed, regular, and adequate nighttime residence...and includes children and youths... who are awaiting a foster care placement."⁶⁸ ESSA removes the "awaiting foster care placement" language from the definition of homeless youth used in the McKinney-Vento Act.⁶⁹ Thus, ESSA's educational stability requirements govern youth who may be "awaiting a foster care placement" rather than the McKinney-Vento Act.⁷⁰

The increased level of cooperation between state and local education agencies and child welfare agencies required by ESSA necessitates developing procedures for information sharing and data collection. Improving educational stability for foster youth requires that child welfare

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Every Student Succeeds Act, *supra* note 56, § 1006.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See Stewart B. McKinney Homeless Assistance Act, 42 U.S.C. § 11431 (2016).

⁶⁸ *Id.* § 11302.

⁶⁹ ESSA, *supra* note 56, § 9105(a)(1).

⁷⁰ *Id.* § 9105(b).

agencies notify local education agencies of a foster youth's involvement with the child welfare system so that the local education agency can identify the particular needs of this very vulnerable youth.⁷¹ There exists a similar need for child welfare caseworkers to have access to school records to assist with advocating on behalf of foster youth for services or any other needed support or interventions to ensure academic success. However, ESSA does not provide formal guidelines for identifying which particular youth are in foster care. This leaves the responsibility to state and local education and child welfare agencies to design procedures to achieve this level of information sharing.⁷² This collaborative data sharing must also be in accordance with applicable privacy laws set forth in federal statutes like the Family Educational Rights and Privacy Act ("FERPA")⁷³ and the Individuals with Disabilities Education Act ("IDEA"),⁷⁴ as well as any local or state privacy laws.⁷⁵

Additionally, ESSA sets forth requirements for state education agencies to compile data and publicly report on academic achievement of all youth educated in the statewide system.⁷⁶ Further, ESSA requires that, in addition to other required disaggregated data, foster youth should be included as a subgroup when collecting and reporting on data concerning student achievement on academic assessments, performance on state selected academic indicators, and high school graduation rates.⁷⁷ Collecting data on foster youth's academic performance will allow child welfare agencies and state and local education agencies to measure the effectiveness of efforts to ensure educational stability. Analysis of this data can support ongoing improvements to these efforts and continuously advance educational outcomes for foster youth.

In Maryland, the legislature has created statutes and regulations that incorporate the provisions of the FCA and ESSA into state law. The entitlement of foster youth to educational stability created by the FCA is clearly set forth in the Maryland Code's Education Article and Code of Maryland Regulations ("COMAR").⁷⁸ In accordance with FCA and ESSA, §7-101(b)(2)(ii) provides authority to the local school systems to permit foster youth to remain in their current school, regardless of whether or not they are currently living in that school district, if it is in their best interest.⁷⁹ COMAR 13A.08.07.06 details the steps which the local child welfare agency and the local school system must take to achieve educational stability.⁸⁰ If the child welfare agency determines it is not in the best interest for the child to remain in the school of origin, the child welfare agency must provide notice to the school of origin and must immediately enroll the foster child in the appropriate school.⁸¹ The receiving school must enroll the foster child regardless of whether the child welfare agency is able to produce the requisite documentation for enrollment.⁸² As for transportation, if a foster child remains in the school of origin, then the neighborhood zoned school is required to provide transportation to the school of origin unless the

⁷¹ GUIDANCE, *supra* note 27, at 23.

⁷² *Id.* at 24.

⁷³ See generally Family Educational Rights and Privacy Act, 20 U.S.C. § 1232 (g) (1974).

⁷⁴ See Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1409 (2004).

⁷⁵ GUIDANCE, *supra* note 27, at 23.

⁷⁶ Every Student Succeeds Act, *supra* note 56, § 1005.

⁷⁷ *Id.*

⁷⁸ See MD. EDUC. CODE ANN. § 7-101(b)(2)(ii) (2017); see also MD. CODE REGS. 13A.08.07.06 (2017).

⁷⁹ MD. EDUC. CODE ANN. § 7-101(b)(2)(ii) (2017).

⁸⁰ See MD. CODE REGS. 13A.08.07.06 (2017).

⁸¹ *Id.*

⁸² *Id.*

child welfare agency decides to provide transportation.⁸³ Furthermore, this regulation provides that each local school system designate a Fostering Connections Liaison, similar to a POC, who must coordinate with child welfare agencies regarding best interest determinations for school placement, enrollment, transfer of records, and establishing transportation for foster children.⁸⁴ The above mentioned statute and regulation serve to comply with the FCA and even some of the expanded provisions of ESSA. Specifically, these local laws and regulations meet ESSA's requirements for establishing plans for immediate enrollment, addressing the issue of transportation and which agency is responsible for the cost, as well as requiring joint decision-making between the local education agency and the child welfare agency.

Maryland's laws are also in line with another ESSA requirement regarding the best interest determination and what should be considered in making that determination. COMAR 07.02.11.12 (B) states that the local department of social services ("LDSS") who has custody of the child shall determine whether it is in the child's best interest to remain in the school the child attended prior to the most recent change in placement.⁸⁵ Further, this regulation requires that the local department of social services consults with the local education agency in considering what school placement is in the child's best interests and enumerates several factors to consider.⁸⁶ Also, according to this regulation, the local department of social services must ensure that a child placed in an out-of-home placement is enrolled in school within five school days of placement, which satisfies the "immediate enrollment" requirement of ESSA.⁸⁷

Additionally, in 2014, Maryland enacted a specific statute that defines educational stability and provides direction for inquiry by the courts presiding over child welfare matters.⁸⁸ The Courts and Judicial Proceedings article of the Maryland Code defines "educational stability" as "the continuous process of identifying and implementing the appropriate educational placement, training, resources, services, and experiences that will address the fundamental needs necessary to ensure the successful educational outcome of a child and contribute to the child's overall well-being."⁸⁹ This statute mandates that the court inquire as to educational stability at all stages of child welfare proceedings, including at a shelter care hearing, adjudication hearing, disposition hearing, and any change of placement review hearing.⁹⁰ The statute also provides several factors that courts may consider in determining educational stability, such as "the appropriateness of the child's current school placement, the school placement of the child's siblings, minimization of school changes, and the proximity of the school to the child's placement" ... etc.⁹¹

Moreover, Maryland has developed a detailed state plan in compliance with the requirements of ESSA.⁹² This state plan includes disaggregated data collection required by ESSA to report on foster children's academic progress, performance on assessments, and graduation

⁸³ *Id.* at (H)(1).

⁸⁴ *Id.* at (I)(3).

⁸⁵ MD. CODE REGS. 07.02.11.12 (2018) (Local Department of Social Services or "LDSS" is the title for Maryland local child welfare agencies and is used interchangeably with "local child welfare agencies").

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *See generally* MD. CODE ANN. § 3-816.4 (2018).

⁸⁹ *Id.*

⁹⁰ *Id.* § 3-816.4(b).

⁹¹ *Id.* § 3-816.4(c).

⁹² *See generally* *Maryland Every Student Succeeds Act (ESSA) Consolidated State Plan*, MD. ST. DEP'T of EDUC. (Jan. 2018), <http://marylandpublicschools.org/about/Documents/ESSA/ESSAMDSUBMISSIONConsolidatedStatePlan091718.pdf>.

rates.⁹³ Maryland intends to include foster care involvement as a subgroup along with other subgroups like race and gender.⁹⁴ However, Maryland states that this data will not be included in their accountability system, which is a tool used by the Maryland State Department of Education to collect, analyze, and report data on students to track achievement and provide targeted services.⁹⁵ The failure to include this data in the accountability system could mean the Maryland State Department of Education will not analyze data on foster children's academic progress in the same manner that other student's data is analyzed. Potentially this could lead to a lack of attention to necessary improvements and allocation of resources for education of foster youth.

Maryland's state laws and regulations comply in large part with the FCA and ESSA. However, several areas still require improvement to come into full compliance with these laws. First and foremost, the "awaiting foster care placement" language from the McKinney-Vento Act needs to be removed from Maryland's equivalent statute and regulations as well as from the statutes and regulations implementing the FCA.⁹⁶ ESSA is in effect as of December 2016, and its provisions cover youth awaiting foster care placement wishing to continue attending their school of origin, which needs to be reflected in Maryland law. Also, Maryland needs to clearly designate state education and state child welfare Points of Contact. If applicable, Maryland should also provide local education agency POCs that are separate from the POCs required under the McKinney-Vento Act for homeless youth. Currently, the Fostering Connections Liaison is not sufficient nor permitted to also serve as a POC under ESSA.⁹⁷ In addition, to fully comply with the requirements of ESSA, Maryland needs to establish a uniform policy to arrange and fund transportation to support foster youth who remain in their current school that may not be in the school district where their foster care placement is located.⁹⁸ Another way that Maryland could comply with ESSA is to establish a statewide procedure specifically for interagency collaboration to make determinations on educational stability and to efficiently meet the decided goal. For example, requiring a meeting be held when there is a question of school placement for a foster youth to include representatives from the relevant education agency, child welfare agency, and any other stakeholders involved with advocating for the foster youth, like the child's attorney and Court Appointed Special Advocate (CASA)⁹⁹ volunteer.¹⁰⁰ In December 2017 Maryland's Department of Human Services issued a policy directive updating the educational stability policies in accordance with ESSA; however, more needs to be done to ensure that these directives are actually consistently practiced in the various jurisdictions across the state.¹⁰¹

V. CRITICAL RACE THEORY ANALYSIS OF MARYLAND'S CURRENT AND FUTURE IMPLEMENTATION OF FCA AND ESSA

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*; *See also* *Accountability*, MD. ST. DEP'T OF EDUC., <http://marylandpublicschools.org/about/Documents/DAPI/ESEA/Read/ESSAAccountabilityStatePlansRegs.pdf>.

⁹⁶ *See* MD. EDUC. CODE ANN. § 7-101 (2017); *see also* MD. CODE REGS. 13A.08.07.06 (2017).

⁹⁷ MD. CODE REGS. 13A.08.07.06 (2017); *see also* Every Student Succeeds Act, *supra* note 56.

⁹⁸ MD. DEP'T OF HUM. RES., SSA-CW NO. 18-8, POLICY DIRECTIVE ON EDUCATIONAL STABILITY (Dec. 7, 2017).

⁹⁹ CASA volunteers are appointed by Judges to represent the best interest of children who are before the court due to allegations of child abuse or neglect. *See generally* CASA, http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5301295/k.5573/National_CASA_Association.htm (last visited Feb. 2018).

¹⁰⁰ *See generally* POLICY DIRECTIVE ON EDUCATIONAL STABILITY, *supra* note 98.

¹⁰¹ *Id.*

Maryland has struggled with a significant overrepresentation of African American youth in the foster care system, having a nearly two-to-one ratio of black children to white children.¹⁰² As discussed previously, all foster youth, regardless of race, are at greater risk for poor educational outcomes as a result of their unique circumstances as foster youth. Maryland has also struggled to address the educational achievement gap among African American youth and white youth in general.¹⁰³ Further, the intersection of the African American foster care experience and striving for educational success requires a comprehensive review of how implementation of recently enacted federal laws discussed above can improve future outcomes for this subset of vulnerable youth. Utilizing critical race theory in this analysis is very relevant, as the intersection of these issues involves both legal application and analysis, as well as analysis of the education and child welfare systems.

Many scholars have used CRT analysis to advocate for transformation across both the legal and education systems, as well as among other disciplines.¹⁰⁴ Although CRT first developed within the legal system, it has been applied in the education system to examine issues like school discipline and IQ, and achievement testing.¹⁰⁵ Furthermore, CRT has been used to dissect the overall problem of inequity in the education system, especially for African Americans.¹⁰⁶ Gloria Ladson-Billings and William F. Tate, IV are two scholars undertaking this analysis in education and assert that racism is deeply rooted in American society and is thus inevitably present in the education arena.¹⁰⁷ Civil rights laws enacted to redress inequity in education in practice rarely achieve that goal, and often result in unintended consequences that reinforce the power structure.¹⁰⁸ As a result of this, the importance of using individuals' stories of their experiences of inequality is even more essential to this discourse to demonstrate discrimination within the system.¹⁰⁹

Moreover, one of the first tenets of CRT proposes that racism is ordinary and commonplace in American society. It therefore permeates every system, making it difficult to eradicate.¹¹⁰ This common thread that gives rise to multi-disciplinary application from the legal system to the education system and others is also applicable to the child welfare system. Historically, African American children comprise an overwhelming number of youth in the child welfare system, and "[t]he overrepresentation of children of color within the foster system reflects in part the higher rates of poverty that impact populations of color, the criminalization of both men and women of color, and racialized stereotypes of parental unfitness."¹¹¹ Furthermore, a recent report notes that African American youth are two times as likely to have poor outcomes across the education and child welfare systems, as well as in other systems serving children and families.¹¹² Thus, in light

¹⁰² CHILDREN'S DEFENSE FUND, *THE STATE OF AMERICA'S CHILDREN* 1, 66 (2017).

¹⁰³ *Id.* at 57-62.

¹⁰⁴ DELGADO & STEFANCIC, *supra* note 6, at 2-3.

¹⁰⁵ *Id.*

¹⁰⁶ Gloria Ladson-Billings & William F. Tate, IV, *Toward a Critical Race Theory of Education*, 87 *TEACHER'S C. REC.* 1, 47, 55-58 (1995).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ DELGADO & STEFANCIC, *supra* note 6, at 7.

¹¹¹ Fox, *supra* note 16, at 2.

¹¹² American Institute for Research, *Improving Outcomes for African-American Males in the Child Welfare System: Meeting Summary* 1, 7 (2013) [hereinafter American Institute for Research].

of applying a CRT lens to this analysis, the nexus between the challenges faced by African American youth in the education system and the child welfare system becomes even clearer.

Plenty of research exists discussing the barriers African American foster youth face in education generally. However, in order to specifically identify the local needs of African American foster youth, more complete and accurate data needs to be collected throughout Maryland. It is also important to note that there is a lack of research addressing the issues of academic achievement among African American female youth not only in Maryland, but nationally as well. Much of the discourse relies heavily on studies focusing on African American male youth in foster care.¹¹³ Furthermore, Maryland's state plan recently approved by the U.S. Department of Education includes a requirement for disaggregated data collection for a subgroup of foster youth in Maryland. This data collection will be the first step in being able to target educational improvements for African American foster youth.¹¹⁴ For the most thorough data collection, the disaggregated subgroups should include race, gender, and socioeconomic status within the category of child welfare involvement.

Another major component of critical race theory is the assertion that African Americans have a unique voice in describing their experiences as part of a marginalized group navigating various systems in the United States.¹¹⁵ African American foster youth sharing their personal experiences could play an important role in contributing to the development of policies and programs to achieve educational stability and to improve academic achievement.

As an attorney in Maryland representing children in the child welfare system, I can recount numerous stories of African American youth who struggled in school due to some factor relating to their status as a foster child. There were clients who demonstrated difficulty conforming their behavior in school as a result of issues with anger and impulse control, often leading to fights or bullying with disciplinary consequences that impacted their education. Some clients were even subjected to bullying because of their status as foster children, causing them anxiety about attending certain classes, or about attending school at all. Other clients displayed an overall sense of hopelessness based upon their individual and unique experiences. This feeling of hopelessness oftentimes stemmed from a lack of support from their biological family and/or foster family in conjunction with several placement changes, which resulted in school transfers and interrupted any existing school support system.¹¹⁶

Additionally, African American foster youth regularly deal with incidences of bias in the form of various stereotypes based upon race. African American foster youth's behavior is often criminalized, and they tend to suffer harsher discipline for exhibiting behavior symptomatic of severe trauma.¹¹⁷ They are frequently disregarded in school and do not receive the assistance needed because they are both African American and a foster youth.¹¹⁸

In an article titled "Students on the Margins-Margins: A Critical Examination of Research on African American Foster Youth in Higher Education," Kenyon L. Whitman delivers a very

¹¹³ See generally Sandles & Magdaleno, *supra* note 5, at 3.

¹¹⁴ See generally Maryland Every Student Succeeds Act (ESSA) Consolidated State Plan, *supra* note 92; U.S. DEP'T OF EDUC., *Secretary DeVos Approves Maryland's ESSA State Plan* (Jan. 16, 2018), <https://www.ed.gov/news/press-releases/secretary-devos-approves-marylands-essa-state-plan>.

¹¹⁵ DELGADO & STEFANCIC, *supra* note 6.

¹¹⁶ Sandles & Magdaleno, *supra* note 5, at 4.

¹¹⁷ *Id.*; Whitman, *supra* note 11, at 47-54; American Institute for Research, *supra* note 97, at 1, 10-11, 14.

¹¹⁸ Sandles & Magdaleno, *supra* note 5, at 4; Whitman, *supra* note 11, at 47-54; American Institute for Research, *supra* note 97, at 1, 10-11, 14.

poignant account of his experience as a black male youth in foster care and in the education system, detailing many of these same sentiments.¹¹⁹ He reflects on his life in foster care, noting the “detrimental effects foster care had on [him],” like not feeling comfortable in foster homes because of his race, experiencing racial microaggressions from social workers and school teachers, and facing the stigma of being a foster youth.¹²⁰ While I can retell my clients’ experiences my efforts do not do their stories justice. The most impactful voice is the client’s own firsthand experience.

Critical Race Theory also emphasizes using analysis to develop solutions to transform the current inequities in the system. Accurate data collection and analysis of that data is necessary to identify the specific areas where African American foster youth are falling behind in education. Also, providing a platform for current and former African American foster youth to share their unique experiences in the education system and be a part of informing how to address improving educational outcomes is essential. This will allow these youths to “name their reality” and possibly provide some healing, while simultaneously forcing society as a whole to acknowledge the biases and work to dismantle them.¹²¹ However, focusing on the negative statistics and experiences should not be the only driving force in developing policies. In reviewing the data and collective experiences of African American foster youth in Maryland, a focus on their resilience should also be incorporated into the transformation strategies. This is needed to prevent further perpetuation of the stereotypes associated with African American foster youth and education while trying to improve educational outcomes. For example, this can be attained through, encouraging involvement in extra-curricular activities and establishing healthy peer relationships, having culturally responsible mentors and child welfare agency employees available that can identify with the experiences of the black foster youth, and identifying and supporting the foster youth’s strengths.¹²²

Therefore, utilizing the CRT framework is critical in analyzing the application of new federal laws, like ESSA and FCA, in connection with the current barriers African American foster youth face in education. This approach can lead to development of creative strategies to target improvement in educational outcomes for this population of marginalized youth. Furthermore, there is a clear intersection of the impact of race and poverty on educational success. A focus on developing policies to attain better educational outcomes for African American foster youth will likely extend to improving educational outcomes for foster youth as a whole along with other marginalized youth. This is especially true in Maryland where there is a particularly large amount of African American foster youth who will benefit from strategies that identify and acknowledge racial biases in the child welfare and education systems, and thus work to eradicate them through programs designed to ensure educational stability and encourage resiliency.

¹¹⁹ See Whitman, *supra* note 11, at 47-54 .

¹²⁰ *Id.*

¹²¹ See Ladson-Billings & Tate, *supra* note 101.

¹²² Sandles & Magdaleno, *supra* note 5, at 7-8; American Institute for Research, *supra* note 97, at 10-12.