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LAW SUMMARY

Promoting “Normalcy” for Foster Children: The Preventing Sex Trafficking and Strengthening Families Act

PAUL JACOBSON*

I. INTRODUCTION

Establishing “normalcy” means that [foster youth] get to do what their friends do, that they have a chance to pursue their interests and build dreams for their future and, most importantly, that they have a family who cares about them, just like their friends.

And young people know that it is not normal:

- To be denied opportunities to play sports, participate in extracurricular activities, or go on a school field trip,
- To live in congregate (or group home) care, with restrictions on everything from brushing your teeth to visiting your sister or brother,
- To have judges, caseworkers, attorneys, and others making major decisions about your life without talking with you or really knowing who you are,
- To languish in foster care year after year, moving from placement to placement, school to school, or
- To suddenly be on your own at age 18, 19, or 20 and expected to live independently.¹

As the quote above describes, foster youth lead lives that are in many ways abnormal. A recently enacted law, the Preventing Sex Trafficking and Strengthening Families Act (“Act”), contains provisions designed to combat this.² This federal law requires states to establish a “reasonable and prudent parent” standard in order to give foster parents greater latitude to allow their

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1. Gary Strangler, *National Foster Care Awareness Month*, HUFFINGTON POST (May 23, 2014, 4:52 PM), http://www.huffingtonpost.com/gary-stangler/national-foster-care-awar_b_5381252.html.

2. Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, 128 Stat. 1919 (2014).

foster children to participate in activities such as school extracurricular activities, field trips, sleepovers, and sporting events.³ These sorts of activities are important for childhood and adolescent growth and have long been difficult and oftentimes impossible for foster youth to gain access to.⁴

This Article begins by analyzing the legal backdrop from which the Act emerged. It then discusses the promulgation and provisions of the Act. Lastly, this Note comments on the Act, specifically addressing its necessity, its likely effectiveness, and whether it adequately addresses the pressing concerns of foster youth in the United States.

II. LEGAL BACKGROUND

This background Part first addresses the general framework of the foster care system in the United States.⁵ Then, this Part discusses and stresses the importance of “normalcy” in the foster care context, and it demonstrates that “normalcy” is not being adequately achieved by the foster care system.⁶ Lastly, this Part notes the parental tort liability concept of the “reasonable and prudent parent,” which may easily be mistaken with the reasonable and prudent parent standards discussed in Part III of this Article.⁷

A. Foster Care in General and Foster Parent Requirements

The Code of Federal Regulations defines foster care as “24-hour substitute care for children” outside their own homes.⁸ In other words, the foster care system in the United States consists of minors who have been removed from their biological parents or their legal guardians were placed by the state in state-certified institutions, group homes, or private residences.⁹ Foster children are removed from their birth parents or legal guardians when it is determined that parents or guardians cannot or will not adequately care for their children. Foster parents are compensated for some of the expenses of caring for foster children through monthly stipends.¹⁰ Foster care is generally

3. *Id.* at 1924.

4. *National Foster Care Month: Letting Foster Kids Be Kids*, JUV. L. CTR. (May 14, 2014), <http://www.jlc.org/blog/national-foster-care-month-letting-foster-kids-be-kids>.

5. *See infra* Part II.A.

6. *See infra* Part II.B.

7. *See infra* Part II.C.

8. 45 C.F.R. § 1355.20 (2015).

9. *Deciding to Pursue Fostering*, ADOPT US KIDS, <http://www.adoptuskids.org/for-families/how-to-foster/deciding-to-pursue-fostering> (last visited Jan. 10, 2016). If a child is placed in a private residence, the state-certified caregiver is generally known as a “foster parent.” *Id.*

10. Vincent S. Nadile, Note, *Promoting the Integrity of Foster Family Relationships: Needed Statutory Protections for Foster Parents*, 62 NOTRE DAME L. REV. 221, 221 (1987).

intended to be a temporary solution for children, with emphasis placed on eventually returning the children to their birth families or finding them some other permanent home.¹¹ Despite this, many foster children spend at least two years in the foster system.¹²

Today, the foster care system in the United States is organized primarily under state law.¹³ However, states must also comply with federal guidelines and statutes in order to continue receiving federal funds under Title IV-E of the Social Security Act.¹⁴ Title IV-E funds reimburse states for expenses incurred for each state’s foster population, and these funds constitute the bulk of each state’s funding for foster care. In general, states have some latitude in satisfying the federal requirements imposed on them.¹⁵ State statutes provide for the placement of abandoned, abused, or neglected children in the homes of adults approved by the state’s social service agency.¹⁶ Some children are involuntarily taken from their biological parents by the state, but most foster children today are placed in the system voluntarily by a biological parent.¹⁷

There are both state and federal statutory requirements that must be met in order to become a foster parent.¹⁸ Potential foster parents must undergo an application process and training classes.¹⁹ The number of mandatory training hours varies from state to state, with most states requiring somewhere between ten and forty hours.²⁰ In the case of successful applicants, it generally

11. VA. DEP’T SOC. SERVS., CHILD AND FAMILY SERVICES MANUAL, FOSTER CARE OVERVIEW 3 (July 2015), http://www.dss.virginia.gov/files/division/dfs/fc/intro_page/guidance_manuals/fc/07_2015/Section_01_Foster_Care_Overview.pdf.

12. Nadile, *supra* note 10, at 222 (speaking of time spent in the foster system generally, and not just with one family).

13. Laura A. Harper, Note, *The State’s Duty to Children in Foster Care—Bearing the Burden of Protecting Children*, 51 DRAKE L. REV. 793, 796 (2003); KASIA O’NEILL MURRAY & SARAH GESIRIECH, A BRIEF LEGISLATIVE HISTORY OF THE CHILD WELFARE SYSTEM, http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/foster_care_reform/legislativehistory2004pdf.pdf (last visited Jan. 10, 2016).

14. Megan M. O’Laughlin, Note, *A Theory of Relativity: Kinship Foster Care May be the Key to Stopping the Pendulum of Terminations vs. Reunification*, 51 VAND. L. REV. 1427, 1430 (1998); VA. DEP’T SOC. SERVS., *supra* note 11, at 2.

15. Ericka S. Garcia, Comment, *Where Do Foster Children With Disabilities Fit? How the State Legislatures Must Create the State Programs for Specialized Services to Ensure the Proper Fit*, 30 U. LA VERNE L. REV. 131, 140 (2008).

16. Harper, *supra* note 13, at 796.

17. *Id.*

18. Thomson Reuters, *50 State Regulatory Surveys: Family Law: Foster Care, Standards for Foster Care Families*, 0080 REGSURVEYS 3 (June 2015).

19. *Deciding to Pursue Fostering*, *supra* note 9.

20. Nat’l Res. Ctr. for Family-Centered Practice & Permanency Planning, *Foster Parent Pre-Service Training*, HUNTER C. SCH. SOC. WORK, http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/policy-issues/Foster_Parent_Preservice_Training.pdf (last updated Jan. 3, 2008).

takes about a year between when the applicant first contacts the relevant agency and when a foster child is placed with them.²¹ Each state's Department of Child Protective Services or Department of Human Services usually oversees state eligibility requirements.²² These requirements vary somewhat from state to state, with some of the more universal qualifications being a minimum age (most states require applicants to be at least twenty-one, but five states permit eighteen-year-olds),²³ a minimum income level, a criminal background check, a household free from diseases, a letter from the applicant's employer, and interviews with a social worker.²⁴

B. Normalcy, Its Importance, and Whether Current Foster Youth Are Experiencing It

The abuse Manushka Gilet suffered from the age of 12 at the hands of her stepfather did not stop her from engaging in a wide range of school-sponsored activities as a teenager; it took the laws then governing the foster-care system to do that.²⁵

In the context of foster care, "normalcy" is a current buzzword,²⁶ with definitions of normalcy usually centering around participation in "normal" activities, such as visiting a friend's house, attending school field trips, having a part-time job, volunteering, participating in school clubs and teams, dating, going to the prom, attending faith-based activities, and learning to drive.²⁷ It is becoming increasingly clear that participation in these sorts of activities is of great importance to healthy childhood and adolescent development for all youth, not just those facing the additional challenges of the foster care system.²⁸

21. *Deciding to Pursue Fostering*, *supra* note 9.

22. See CHILD WELFARE INFO. GATEWAY, HOME STUDY REQUIREMENTS FOR PROSPECTIVE FOSTER PARENTS (Mar. 2014), <https://www.childwelfare.gov/pubPDFs/homestudyreqs.pdf>.

23. *Id.* at 1–2.

24. Harper, *supra* note 13, at 796; CHILD WELFARE INFO. GATEWAY, *supra* note 22, at 4.

25. Nancy Kinnally, *Florida Foster Youth Shine at the Capitol*, FLA. B. (Dec. 15, 2013), <http://www.floridabar.org/divcom/jn/jnnews01.nsf/8c9f13012b96736985256aa900624829/441dcef07bd1235085257c3c004beece!OpenDocument>.

26. Nat'l Foster Care Youth & Alumni Council, *Recommendations for Implementation of Public Law 113-183*, FOSTER CLUB 4 (Nov. 2014), https://www.fosterclub.com/sites/default/files/Public%20Law%20113_183%20Recommendations.pdf.

27. Jennifer Pokempner, *Promoting Normalcy for Adolescents in Foster Care* 1–2 (unpublished manuscript) (on file with author).

28. *Id.* at 1.

Adolescence and childhood are largely considered by scientists to be two of the most important developmental periods in the human lifespan.²⁹ “Normal” activities allow youth to become responsible and independent through the process of learning how to handle freedom³⁰ and by practicing decision-making skills.³¹ “Normal” activities let youth take risks and make mistakes, which can ultimately lead to growth.³² “Normal” activities allow adolescents to earn the trust of their parents or guardians.³³ They often improve a student’s school attendance, motivation, and overall academic achievement.³⁴ They can provide an outlet for processing negative emotions.³⁵ They often enable youth to discover and develop their skills, talents, and interests, which may remain unnoticed without some form of outlet.³⁶ They allow youth to connect with other youth³⁷ and with “caring adults like coaches, teachers, and parents of friends”³⁸ who can provide mentorship and serve as role models.³⁹ In sum, “normal” activities have been described as “the hallmark of childhood and adolescence.”⁴⁰

Some of these “normal” activities are especially valuable for foster youth. For example, the opportunity to meet and develop relationships with caring adults can be especially helpful for foster children because these adults can become important members of a foster youth’s support team, helping out in ways such as advocating for their permanency.⁴¹ Also, opportunities to

29. CHARLYN H. BROWNE, CTR. FOR STUDY SOC. POL’Y, ADVANCING HEALTHY ADOLESCENT DEVELOPMENT AND WELL-BEING 1 (Sept. 2014), http://www.cssp.org/reform/child-welfare/youth-thrive/2014/Youth-Thrive_Advancing-Healthy-Adolescent-Development-and-Well-Being.pdf.

30. *National Foster Care Month: Letting Foster Kids be Kids*, JUV. L. CTR. (May 14, 2014), <http://www.jlc.org/blog/national-foster-care-month-letting-foster-kids-be-kids>.

31. Pokempner, *supra* note 27, at 3.

32. *Id.*

33. Marjorie Cortez, *Teens in Foster Care Lobby Lawmakers for ‘Normalcy’ Law*, DESERT NEWS (Feb. 21, 2014, 3:05 PM), <http://www.deseretnews.com/article/865597057/Teens-in-foster-care-lobby-lawmakers-for-normalcy-law.html?pg=all>.

34. Stephanie Klitsch, *Beyond the Basics: How Extracurricular Activities Can Benefit Foster Youth*, NAT’L CTR. FOR YOUTH L. (2010), <http://youthlaw.org/publication/beyond-the-basics-how-extracurricular-activities-can-benefit-foster-youth/>.

35. Amy Wang, *Foster Youth Seek Legislative Support for Extracurriculars, Savings Accounts*, OREGONIAN (Feb. 3, 2015, 5:10 AM), http://www.oregonlive.com/kiddo/index.ssf/2015/02/foster_youth_are_subject_of_se.html.

36. *National Foster Care Month: Letting Foster Kids be Kids*, *supra* note 30; Pokempner, *supra* note 27, at 1.

37. Pokempner, *supra* note 27, at 1.

38. *National Foster Care Month: Letting Foster Kids be Kids*, *supra* note 30.

39. Alice Bussiere, *Permanence for Older Foster Youth*, 44 FAM. CT. REV. 231, 233, 235 (2006).

40. Pokempner, *supra* note 27, at 1.

41. *National Foster Care Month: Letting Foster Kids be Kids*, *supra* note 30.

connect with adults can help foster youth overcome the sense of distrust that sometimes results from the experiences of separation and loss faced by many foster youth.⁴²

Many foster children struggle with healthy identity development because they are teased about being in foster care.⁴³ This negative stereotyping does not only come from peers; some teachers “harbor misconceptions about [foster children’s] development and qualities as a group.”⁴⁴ Opportunities to develop relationships with peers can help overcome this negative stereotyping.⁴⁵

Additionally, all “normal” activities take on a degree of added importance for foster youth merely because they provide moments of normalcy in the midst of lives that are in many ways quite abnormal.⁴⁶ While participation in sports teams, drama clubs, and other relatively intensive programming is not ubiquitous, activities such as field trips are more universally attended. Considering that many foster children may already be sensitive to their living situations, the negative effects of exclusion from “normal” activities may be amplified for foster youth.⁴⁷

Access for foster youth to these sorts of activities has historically been very limited.⁴⁸ A large percentage of foster youth experience significant isolation from their peers once school concludes for the day because they are essentially left no option but to stay at home. In most states, foster youth hoping to participate in after-school activities normally face a variety of hurdles.⁴⁹ These impediments reflect bureaucratic red tape to a degree, but they mostly flow from the fact that child-welfare agencies are usually quite risk-averse.⁵⁰ Concerned heavily with the safety of foster children, child-welfare agencies have established practices that sacrifice access to normalcy.⁵¹ This concern for safety and liability has even led to restrictions on such mundane activities as using kitchen knives at home⁵² or getting haircuts.⁵³

42. JIM CASEY YOUTH OPPORTUNITIES INITIATIVE, SOCIAL CAPITAL: BUILDING QUALITY NETWORKS FOR YOUNG PEOPLE IN FOSTER CARE 1, <http://www.jimcaseyyouth.org/sites/default/files/documents/Issue%20Brief%20-%20Social%20Cap.pdf> (last visited Jan. 29, 2016).

43. Klitsch, *supra* note 34.

44. Cynthia Godsoe, *Caught Between Two Systems: How Exceptional Children in Out of Home Care Are Denied Equality in Education*, 19 YALE L. & POL’Y REV. 81, 113 (2000).

45. *Id.* at 153.

46. *See* Klitsch, *supra* note 34.

47. Kinnally, *supra* note 25.

48. Godsoe, *supra* note 44, at 99.

49. *See* Thomson Reuters, *supra* note 18.

50. Pokempner, *supra* note 27, at 5.

51. Megan E. Davis, *Law Loosens Strings on Kids in Foster Care*, FLA. B. (June 15, 2013), https://www.floridabar.org/_85256aa9005b9f25.nsf/0/71a67e66f5fcc76985257b8600475e8e!OpenDocument&Click=; Pokempner, *supra* note 27, at 5.

52. Bussiere, *supra* note 39, at 235.

Usually, participating in “normal” activities requires a foster child to navigate multiple levels of permission, requiring communication with one’s caseworker and, oftentimes, court hearings.⁵⁴ Having to get a court order to attend a school field trip is now “a common experience for foster youth across the country.”⁵⁵ This approval process is often cumbersome, lengthy, and embarrassing,⁵⁶ with many states even requiring that in order for a foster youth to spend the night at a friend’s house, that friend’s parents be fingerprinted and undergo criminal and child abuse clearances.⁵⁷

The actual caregivers of foster youth are typically given little authority to make daily decisions regarding participation in activities.⁵⁸ The authority they are given is often unclearly defined.⁵⁹ Perhaps most importantly, foster parents can face significant liability if they allow a foster child to participate in an activity, without first going through the normal channels of obtaining permission, and that foster child gets hurt.⁶⁰ Fear of the liability that would follow should a foster child become hurt during such an activity has long led to many foster children being allowed to attend school and not much else.⁶¹

All these impediments have ultimately resulted in dramatically lower participation in “normal” activities amongst foster youth than among non-foster youth.⁶² The hurdles to obtaining permission are significant, and they can result in foster youth receiving fewer offers to socialize.⁶³ Additionally, the hurdles to permission are exacerbated by the fact that many foster children experience “tremendous geographic instability,”⁶⁴ often changing homes and school districts multiple times per year.⁶⁵ This instability could make the challenge of obtaining permission to participate in an activity not worth the limited reward of participating for a short time before having to leave the area.

The long-existing trend of reduced participation in normal activities has obviously resulted in the denial of the many benefits discussed above. This denial is believed to contribute to issues such as foster youth running away

53. Cortez, *supra* note 33.

54. Pokempner, *supra* note 27, at 5; Journalism for Soc. Change Fellows, *Florida and California Work Towards Promoting Normalcy in the Foster Care System*, CHRON. SOC. CHANGE (July 23, 2013), <https://chronicleofsocialchange.org/news/florida-and-california-work-towards-promoting-normalcy-in-the-foster-care-system/3538>; Cortez, *supra* note 33.

55. Pokempner, *supra* note 27, at 5.

56. *Id.*

57. *Id.*; Davis, *supra* note 51.

58. Pokempner, *supra* note 27, at 6.

59. *See generally* Nadile, *supra* note 10.

60. Pokempner, *supra* note 27, at 6.

61. Journalism for Soc. Change Fellows, *supra* note 54.

62. *Id.*

63. Pokempner, *supra* note 27, at 7.

64. Godsoe, *supra* note 44, at 109.

65. Klitsch, *supra* note 34; Godsoe, *supra* note 44, at 109.

before age eighteen or reaching age eighteen without the skills necessary for independence.⁶⁶ This has placed foster youth at an abnormally high risk of becoming homeless.⁶⁷

It is clear that foster youth consider access to “normal” activities to be an important issue. Foster youth often report that personal rights, such as the right to participate in activities, the right to send and receive mail, and the right to use the telephone, are of high priority to them.⁶⁸ Furthermore, there have been efforts by foster youth across the country to petition their lawmakers for change on this subject.⁶⁹

Restraints on normalcy also have a negative impact on foster parents themselves and on relationships between foster children and their foster parents.⁷⁰ Restraints on normalcy serve to deny foster parents the rights that biological parents have over their children.⁷¹ They create an unnatural parenting environment and prevent foster parents from fully supporting their foster children.⁷² They create tension by incentivizing foster parents to deny requests from their foster children.⁷³

III. RECENT DEVELOPMENTS

As discussed immediately below, the promulgation of “reasonable and prudent parent standards,” both at the state and federal level, has been one of the most substantive improvements in normalcy for foster youth. It is important to note that these standards are different from the use of “reasonable and prudent parent” in the context of parental tort liability.⁷⁴ In the 1970s, the idea of the “reasonable and prudent parent” was promulgated by California as an alternative to the idea of parental immunity, which basically held parents (foster and otherwise) immune from suits by their children.⁷⁵ The California courts rejected parental immunity and held that “the proper test for parental liability is whether the parent failed to maintain the degree of care that an ordinary and careful parent would use under the same or similar circumstances.”⁷⁶

66. Pokempner, *supra* note 27, at 7.

67. Bussiere, *supra* note 39, at 232.

68. Symposium, *Session 3: Children’s Rights in the Context of Welfare, Dependency, and the Juvenile Court*, 8 U.C. DAVIS J. JUV. L. & POL’Y 267, 293–94 (2004).

69. Cortez, *supra* note 33.

70. Journalism for Soc. Change Fellows, *supra* note 54.

71. *Id.*

72. *Id.*

73. *Id.*

74. *See, e.g.*, FL. STAT. ANN. § 39.4091 (West 2016).

75. Joseph J. Basgier, III, *Children’s Rights: A Renewed Call For the End of Parental Immunity in Alabama and Arguments for the Further Expansion of a Child’s Right to Sue*, 26 LAW & PSYCHOL. REV. 123, 123, 128–29 (2002).

76. *Id.*

This Part will first discuss the rise of state “reasonable and prudent parent” standards.⁷⁷ Next, this Part will address the promulgation of foster care Bill of Rights and other forms of non-binding legislation.⁷⁸ Lastly, this Part will discuss the federal Preventing Sex Trafficking and Strengthening Families Act.⁷⁹

A. State “Reasonable and Prudent Parent” Standards and Related Legislation

In the last decade, a small number of states have addressed the difficulty of obtaining access to “normal” activities for foster children by enacting statutory “reasonable and prudent parent” standards.⁸⁰ These standards are often known as “normalcy laws.”⁸¹ Such laws have been passed in California, Florida, Ohio, Utah, and Washington.⁸² These statutes differ somewhat from state to state, but they generally authorize foster parents to grant their foster children permission to participate in activities without first obtaining the permission of caseworkers and courts as long as giving that permission is something a “reasonable and prudent parent” would do.⁸³ Most of the statutes also eliminate liability incurable by foster parents should their foster children be hurt in an activity, as long as permission for that activity was granted in accordance with the reasonable and prudent parent standard.

California, the state with the largest foster care population in the United States,⁸⁴ has codified its reasonable and prudent parent standard at Sections 362.04 and 362.05 of its Welfare & Institution Code.⁸⁵ It states that foster children “shall be entitled to participate in age-appropriate extracurricular, enrichment, and social activities.”⁸⁶ It also includes a provision, absent in the standards passed by Florida, Utah, and Washington, that bans state or local regulations from preventing or impeding the participation of foster children in

77. *See infra* Part III.A.

78. *See infra* Part III.B.

79. *See infra* Part III.C.

80. CAL. WELF. & INST. CODE §§ 362.04–.05 (West 2016); FL. STAT. ANN. § 39.4091; OHIO REV. CODE ANN. § 5103.162(C) (West 2016); UTAH CODE ANN. § 62A-4a-211 (West 2016); WASH. REV. CODE ANN. § 74.13.710 (West 2016).

81. Cortez, *supra* note 33.

82. *Preventing Sex Trafficking and Strengthening Families Act of 2014*, NAT’L CONF. ST. LEGISLATURES (Oct. 22, 2015), <http://www.ncsl.org/research/human-services/preventing-sex-trafficking-and-strengthening-families-act-of-2014.aspx>; Pokempner, *supra* note 27, at 10.

83. *See, e.g.*, FL. STAT. ANN. § 39.4091; OHIO REV. CODE ANN. § 5103.162; WASH. REV. CODE ANN. § 74.13.710.

84. Jeannine Balfour, *Celebrating National Foster Care Month*, CONRAD N. HILTON FOUND. (May 24, 2013, 11:58 AM), <http://www.hiltonfoundation.org/horizons/entry/national-foster-care-month>.

85. CAL. WELF. & INST. CODE §§ 362.04–.05.

86. *Id.* § 362.05.

these activities.⁸⁷ Foster parents are required to use a “reasonable and prudent parent standard” in determining whether to permit a foster child to participate in extracurricular, enrichment, and social activities.⁸⁸ The “reasonable and prudent parent standard” is defined as the standard “characterized by careful and sensible parental decisions that maintain the child’s health, safety, and best interest.”⁸⁹ Foster parents are also required to take “reasonable steps to determine the appropriateness of the activity in consideration of the child’s age, maturity, and developmental level.”⁹⁰

Florida’s “reasonable and prudent parent” law, dubbed the “Let Kids be Kids” law, was signed into law on April 11, 2013.⁹¹ Let Kids be Kids states that foster children are entitled to participate in “age-appropriate extracurricular, enrichment, and social activities”⁹² and requires caregivers to use a reasonable and prudent parent standard in determining whether to give a child permission to participate in a certain activity.⁹³ The law clearly states that if a caregiver grants a child permission to participate in a certain activity, in accordance with the reasonable and prudent parent standard, that caregiver shall not be liable should the child hurt herself during that activity.⁹⁴ The factors that shall be considered when applying the reasonable and prudent parent standard include: the child’s age, maturity, and developmental level; the potential risk factors and the appropriateness of the activity; the importance of encouraging the child’s emotional and developmental growth; and the importance of providing the child with the most family-like living experience possible.⁹⁵

Ohio’s reasonable and prudent parent standard, signed into law on June 17, 2014,⁹⁶ is codified as Ohio Revised Code Section 5103.162(C). It requires foster parents to use the reasonable and prudent parent standard when deciding whether to grant permission to participate in “extracurricular, enrichment, and social activities.”⁹⁷ It defines the “reasonable and prudent parent” standard as “the standard characterized by careful and sensible parental decisions that maintain the child’s health, safety, and best interests while at the same time encouraging the child’s emotional and developmental

87. *Id.*

88. *Id.*

89. *Id.* § 362.04.

90. *Id.* § 362.05.

91. *Gov. Scott: Let Kids Be Kids*, FLA. GOV. (Apr. 11, 2013), <http://www.flgov.com/2013/04/11/gov-scott-let-kids-be-kids/>.

92. FLA. STAT. ANN. § 39.4091(3)(a) (2016).

93. *Id.* § 39.4091(3)(b).

94. *Id.* § 39.4091(3)(d).

95. *Id.* § 39.4091(3)(b).

96. *Governor Signs Lehner Initiative to Improve Ohio Foster Care System*, OHIO SENATE (June 17, 2014), <http://www.ohiosenate.gov/lehner/press/governor-signs-lehner-initiative-to-improve-ohio-foster-care-system>.

97. OHIO REV. CODE ANN. § 5103.162(c)(1) (West 2016).

growth.”⁹⁸ It eliminates liability for foster parents who act in accordance with the standard.⁹⁹

Utah’s reasonable and prudent parent standard is codified as Utah Code Section 62A-4a-210 and Utah Code Section 62A-4a-211.¹⁰⁰ It states that foster children are “entitled to participate in age-appropriate activities for the child’s emotional well-being and development of valuable life-coping skills.”¹⁰¹ Furthermore, foster parents shall be allowed “to make important decisions, similar to the decisions that a parent is entitled to make, regarding the child’s participation in activities.”¹⁰² The reasonable and prudent parent standard is defined as “the standard characterized by careful and sensible parental decisions to maintain a child’s health, safety, and best interest while at the same time encouraging the child’s emotional and developmental growth.”¹⁰³

Utah Administrative Code, rule 512-310, implements Utah’s reasonable and prudent parent statute and provides additional detail.¹⁰⁴ This rule eliminates liability for foster parents who act in accordance with the reasonable and prudent parent standard.¹⁰⁵ Furthermore, this rule creates an affirmative duty for foster parents to act in accordance with the reasonable and prudent parent standard when deciding whether to grant a child permission to participate in a certain activity.¹⁰⁶ The rule also requires foster parents to consider, among other factors, “the importance of providing the child with the most family-like living experience possible.”¹⁰⁷ Perhaps because of the prevalence of outdoor recreation in Utah, the rule even requires foster parents to “ensure that the child has the safety equipment and any necessary permissions and training necessary to safely engage in” activities such as boating, rock climbing, recreational vehicle use, sports, and camping.¹⁰⁸

Washington’s reasonable and prudent parent standard is codified as Revised Code of Washington Section 74.13.710, and it is defined as “careful and thoughtful parental decision making that is intended to maintain a child’s health, safety, and best interest while encouraging the child’s emotional and developmental growth.”¹⁰⁹ This statute provides foster parents the authority to grant permission, in accordance with the reasonable and prudent parent standard, to participate in “normal childhood activities,”¹¹⁰ which include, but

98. *Id.* § 5103.162(c)(4).

99. *Id.* § 5103.162(c)(2).

100. UTAH CODE ANN. §§ 62A-4a-210, 62A-4a-211 (West 2016).

101. *Id.* § 62A-4a-211(1).

102. *Id.* § 62A-4a-211(3).

103. *Id.* § 62A-4a-210(6).

104. UTAH ADMIN. CODE r. 512-310 (2016).

105. *Id.* r. 512-310-3(5).

106. *Id.* r. 512-310-4(1).

107. *Id.* r. 512-310-4(2)(e).

108. *Id.* r. 512-310-5(1).

109. WASH. REV. CODE ANN. § 74.13.710(3)(b) (West 2016).

110. *Id.* § 74.13.710(3).

are not limited to, “extracurricular, enrichment, and social activities.”¹¹¹ Foster parents shall not be liable for any injuries their foster children may suffer while participating in an activity, as long as permission for that activity satisfied the reasonable and prudent parent standard.¹¹²

Colorado does not have a “reasonable and prudent parent standard,” but it does require by statute that foster parents “make a reasonable effort” to allow youth to participate in “extracurricular, cultural, educational, work-related, and personal enrichment activities.”¹¹³

B. Foster Care Bill of Rights and Non-Binding Guidance

In addition to “reasonable and prudent parent” standards, state foster care “Bill of Rights” are also on the rise. As of December 17, 2014, fifteen states enacted Foster Children’s Bill of Rights in order to protect the rights of children in the child welfare system.¹¹⁴ Some of these Bill of Rights have been codified by statute.¹¹⁵ Bill of Rights often include provisions directed toward protecting normalcy.¹¹⁶ For example, California’s Bill of Rights for foster youth includes the right “to attend school and participate in extracurricular, cultural, and personal enrichment activities, consistent with the child’s age and developmental level.”¹¹⁷ Arizona’s Foster Care Bill of Rights includes the right to attend appropriate “community, school, and religious services and activities.”¹¹⁸

While they are a step forward, many state foster care Bill of Rights do not actually create any enforceable rights, and those that do create such rights often fail to include an enforcement mechanism.¹¹⁹ Additionally, it appears that many foster youth are not aware of these Bill of Rights.¹²⁰

Many states have made efforts to promote normalcy for foster youth by providing guidance to foster parents on achieving normalcy and by identifying normalcy as a policy objective.¹²¹ Arkansas and Colorado are two states

111. *Id.* § 74.13.710(3)(a).

112. *Id.* § 74.13.710(6).

113. COLO. REV. STAT. ANN. § 19-7-103 (West 2016).

114. *Foster Care Bill of Rights*, NAT’L CONF. ST. LEGISLATURES (Oct. 21, 2015), <http://www.ncsl.org/research/human-services/foster-care-bill-of-rights.aspx#Parents>; *Foster Child Bill of Rights*, MASS., <http://www.mass.gov/eohhs/gov/departments/dcf/foster-care/our-children-and-youth/foster-child-bill-of-rights.html> (last visited Jan. 10, 2016).

115. *See, e.g.*, N.C. GEN. STAT. ANN. § 131D-10.1 (West 2016).

116. *National Foster Care Month: Letting Foster Kids be Kids*, *supra* note 30.

117. CAL. WELF. & INST. CODE § 16001.9 (West 2016).

118. ARIZ. REV. STAT. ANN. § 8-529 (2016).

119. Pokempner, *supra* note 27, at 11.

120. *Id.*

121. *Id.*

that have led this effort.¹²² Ultimately, however, mere encouragement and policy promulgation without any accompanying enforcement mechanism is not likely to bring about dramatic improvements for foster youth. This is illustrated by efforts made in Florida, prior to Florida’s reasonable and prudent parent standard, to promote normalcy via less binding means, such as issuing memos to caseworkers and foster parents. In the absence of an enforcement mechanism, the memos were largely ignored.¹²³

C. The Preventing Sex Trafficking and Strengthening Families Act

President Obama signed the federal Preventing Sex Trafficking and Strengthening Families Act into law as Public Law No. 113-183 on September 29, 2014.¹²⁴ It was sponsored by Republican Representative David Camp and introduced into the House of Representatives on June 26, 2014.¹²⁵ It was referred to the House Committee on Ways and Means and the House Budget Committee,¹²⁶ and it eventually passed with the unanimous support of the House and Senate.¹²⁷ In addition to addressing normalcy amongst foster youth, the Act also addresses sex trafficking and permanency of foster youth.¹²⁸

This Note limits its scope to the provisions of the Act addressing normalcy, which are found in Title I, Subtitle B, Section 111 of the Act.¹²⁹ This section is entitled “Supporting normalcy for children in foster care.”¹³⁰ This section aims to give foster parents and caregivers the ability to make more day-to-day decisions regarding the youth they care for.¹³¹ More specifically,

122. *Id.* Arkansas’s DCFS manual says, “Children in foster homes should be encouraged to participate in normal age-appropriate activities such as overnight visits with friends, extra-curricular activities, church activities, and short-term summer camps.” DIV. OF CHILDREN & FAMILY SERVS., ARK. DEP’T HUM. SERVICES, FOSTER PARENT HANDBOOK 18 (2013), <http://humanservices.arkansas.gov/dcf/DCFSpublications/PUB-030.pdf>.

123. Pokempner, *supra* note 27, at 12.

124. Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183 128 Stat. 1919 (2014); *Preventing Sex Trafficking and Strengthening Families Act of 2014*, *supra* note 82.

125. *Preventing Sex Trafficking and Strengthening Families Act*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/4980> (last visited Jan. 10, 2016).

126. *Id.*

127. Pokempner, *supra* note 27, at 8.

128. *Id.*

129. § 111.

130. *Id.*

131. *Preventing Sex Trafficking and Strengthening Families Act (P.L. 113-183), Implementation Timeline*, CHILDREN’S DEF. FUND 3 (Dec. 11, 2014), <http://www.cwda.org/sites/main/files/file-attachments/hr-4980-timeline.pdf>.

it is intended to give designated decision makers the freedom to make “parental decisions that support the health, safety, and best interest of the child.”¹³²

Section 111 requires states to take a number of steps. The core requirement of Section 111 is that the designated state authority do the following: “(1) develop a reasonable and prudent parent standard for the child’s participation in age or developmentally appropriate extracurricular, enrichment, cultural, and social activities; and (2) apply this standard to any foster family home or child care institution receiving funds under title IV part E.”¹³³ In sum, the requirement here is that all states do what the five states discussed above have already done.¹³⁴

The Act defines a reasonable and prudent parent standard as:

the standard characterized by careful and sensible parental decisions that maintain the health, safety, and best interests of a child while at the same time encouraging the emotional and developmental growth of the child, that a caregiver shall use when determining whether to allow a child in foster care under the responsibility of the State to participate in extracurricular, enrichment, cultural, and social activities.¹³⁵

States are also required to promote participation in “normal” activities by ensuring that “children who remain in foster care until 18 years of age have regular, ongoing opportunities to engage in age or developmentally-appropriate activities.”¹³⁶ States must

require, as a condition of any contract between an institution and the stage agency, the presence on-site of at least one official designated as caregiver for a particular child who is authorized and trained to apply the reasonable and prudent parent standard to decisions involving the child’s participation in age- or developmentally-appropriate activities.¹³⁷

States must also implement “liability protections that ensure protection when the reasonable and prudent standard is applied by foster parents.”¹³⁸

132. *Promoting Well-Being Through the Reasonable and Prudent Parent Standard: A Guide for States Implementing the Preventing Sex Trafficking and Strengthening Families Act (H.R. 4980)*, CTR. FOR STUDY SOC. POL’Y [hereinafter *Promoting Well-Being*], <http://www.cssp.org/policy/2014/A-GUIDE-FOR-STATES-IMPLEMENTING-THE-PREVENTING-SEX-TRAFFICKING-AND-STRENGTHENING-FAMILIES-ACT-HR-4980.pdf> (last visited Jan. 10, 2016).

133. *Preventing Sex Trafficking and Strengthening Families Act*, *supra* note 125.

134. Pokempner, *supra* note 27, at 10.

135. § 111(a)(10).

136. *Id.* § 111(c)(8).

137. *Preventing Sex Trafficking and Strengthening Families Act*, *supra* note 125.

138. Pokempner, *supra* note 27, at 10.

Lastly, Section 111 “makes it a purpose of the John H. Chafee Foster Care Independence Program to ensure that children who are likely to remain in foster care until age 18 have regular, ongoing opportunities to engage in age or developmentally-appropriate activities”¹³⁹ and (2) “authorizes increased appropriations for the program beginning in FY2020.”¹⁴⁰

Section 111(d)(1) requires that states implement the normalcy requirements of the Act by September 29, 2015, in order to remain in compliance with Title IV-E of the Social Security Act.¹⁴¹ However, Section 111(d)(2) allows some delay for any state whose Secretary of Health and Human Services has determined that state legislation (excluding legislation that merely appropriates funds) is necessary for that state to pass a state plan in adherence with this Act.¹⁴² In such cases, no state shall be deemed to be late unless they have not enacted an adequate state plan by “the 1st day of the 1st calendar quarter beginning after the 1st regular session of the State legislature that begins after the date of the enactment of this Act.”¹⁴³

Section 111(a)(3) provides that the Secretary of Health and Human Services shall assist the states in developing strategies for helping parents apply the reasonable and prudent parent standards.¹⁴⁴ This assistance is ultimately intended to help parents apply the standard in a way that protects child safety while “also allowing children to experience normal and beneficial activities.”¹⁴⁵

IV. DISCUSSION

This Part first discusses some of the uncertainties created by vague language and a lack of guidance in the Act.¹⁴⁶ Next, this Part argues that the Act leaves significant concerns for foster youth untouched.¹⁴⁷ Finally, this Part analyzes some of the likely immediate and long-term impacts of the Act.¹⁴⁸

A. *Sufficient Guidance?*

The Act provides some guidance regarding the standards that will soon apply to decisions made by foster parents, but this guidance leaves significant uncertainties. The concept of a “reasonable and prudent parent” is not self-

139. *Preventing Sex Trafficking and Strengthening Families Act*, *supra* note 125.

140. *Id.*

141. § 111(d); CHILDREN’S DEF. FUND, *supra* note 131.

142. § 111(d)(2).

143. *Id.*

144. *Id.* § 111(a)(3).

145. *Id.*

146. *See infra* Part IV.A.

147. *See infra* Part IV.B.

148. *See infra* Part IV.C.

defining.¹⁴⁹ With regard to the subject of giving children in one's care permission to participate in activities, a diverse range of opinions exists. There is no clear consensus in the United States regarding what activities a reasonable and prudent parent would let their children participate in. The Act does define the concept of a "reasonable and prudent parent standard," as laid out above, describing it as making "careful and sensible parental decisions that maintain the health, safety, and best interests of a child while at the same time encouraging the emotional and developmental growth of the child."¹⁵⁰ However, in some sense this definition merely creates more questions: What does it mean to make a decision carefully and sensibly? What are the best interests of a child? How should the interests of a child be prioritized? Should emotional and developmental growth be encouraged by allowing youth to participate in demanding, challenging activities, or do youth develop best when they are mostly protected from risk? The Act provides three examples of the sorts of activities the Act is indented to address: "sports, field trips, and overnight activities lasting 1 or more days."¹⁵¹ These examples provide relatively scarce guidance for examining activities that fall outside these three examples.

The Act does provide some further guidance by stating that the activities should be age- and developmentally-appropriate.¹⁵² Age- and developmentally-appropriate activities are defined as activities that are "generally accepted as suitable for children of the same chronological age or level of maturity or that are determined to be developmentally-appropriate for a child, based on the development of cognitive, emotional, physical, and behavioral capacities that are typical for an age or age group."¹⁵³ The Act further instructs that a determination of whether a certain activity is age- and developmentally-appropriate for a specific child should include consideration of that child's cognitive, emotional, physical, and behavioral development.¹⁵⁴ However, whether a certain activity is "generally accepted as suitable" is very likely to be open to debate.

As states implement their own reasonable and prudent parent standards, foster children would benefit from efforts to provide further guidance regarding the sorts of decisions the standard aims to require and encourage. The Act attempts to address this need by requiring that each state's Secretary of Health and Human Services assist the state as they work to implement the reasonable and prudent parent standard.¹⁵⁵ Further, it would be in the best

149. *Reasonable and Prudent Parent Standards*, CHILD. ADVOC. ALLIANCE (Sept. 2014), <http://caanv.org/wp-content/uploads/2014/08/Prudent-Parent-Laws-NV-Final.pdf>.

150. § 111(a)(1).

151. *Id.* § 111(a)(2)(C).

152. *Id.*

153. *Id.* § 111(a)(11)(A)(i).

154. *Id.* § 111(a)(11)(A)(ii).

155. *Id.* § 111(a)(3).

interests of foster children to set the standard quite high.¹⁵⁶ It has been suggested that the definition of a reasonable and prudent parent standard should be amended to include the adjective “nurturing.”¹⁵⁷ This would be a prudent element for states to include in their standards. Many foster youth have experienced significant trauma,¹⁵⁸ and in light of the frequent moves many foster youth make, it can be difficult to achieve consistent nurturing to address this trauma.¹⁵⁹ As Florida’s reasonable and prudent parent standard does,¹⁶⁰ other states should craft their standards to encourage the emotional development and well-being of foster youth.

The Act appropriately provides for some consideration of the wishes of a foster youth’s biological parents.¹⁶¹ Section 111(a)(3) states that in assisting the states as they assist foster parents, each state’s Secretary of Health and Human Services should provide guidance concerning appropriate consideration of the wishes of a child’s biological parents.¹⁶² This section states that the concerns of a youth’s biological parents “should *not necessarily* determine” whether the child can participate in a certain activity.¹⁶³

B. Far Enough?

The reasonable and prudent parent standards that states must adopt are required to be quite far reaching. Section 111(a)(10)(A) states that these standards must apply to decisions regarding whether to let a child participate in four broad classes of activities: extracurricular, enrichment, cultural, and social activities.¹⁶⁴ Together, under a reasonable definition of these four terms, they cover a very broad range of activities. However, the Act provides no definition of these types of activities. Thus, it is conceivable that these terms will be interpreted narrowly.

One manner in which foster youth suffer is that they often lack sufficient access to driver’s education and the parental driving training and practice that is needed to obtain a driver’s license.¹⁶⁵ It is unclear whether this will fall under the sorts of activities addressed by the Act. While a broad reading of “extracurricular” activities would seem to encompass an after-school driver’s education class, it is not clear that the standard will be read this expansively.

156. *Promoting Well-Being*, *supra* note 132.

157. *Id.*

158. *Id.*

159. *Id.*

160. FLA. STAT. ANN. § 39.4091(2)(c) (West 2016).

161. Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 111(a)(3), 128 Stat. 119, 1924 (2014).

162. *Id.*

163. *Id.* (emphasis added).

164. *Id.* § 111(a)(10)(A).

165. Pokempner, *supra* note 27, at 3.

Financial literacy is another area in which foster children often suffer.¹⁶⁶ Many foster youth are ineligible for savings accounts under widely followed banking rules.¹⁶⁷ Without access to a savings account, foster youth are less likely to develop healthy and wise financial habits, and they are also less likely to acquire wealth. Some states have begun addressing this by introducing bills to ensure foster children have access to savings accounts.¹⁶⁸ This is an area in which national legislation could quickly make a positive effect on the lives of the foster youth in the United States.

Even after the hurdles of obtaining permission are eliminated, many foster youth will still be prevented from participating in a variety of activities because of the associated fees.¹⁶⁹ Many school extracurricular activities require “pay-to-play” fees. A provision waiving school fees for participation in extracurricular activities would help eliminate this impediment.¹⁷⁰ One area in which associated costs are especially burdensome is in learning to drive. Many foster youth do not have enough money for “driver’s education, car insurance or even enough to cover the cost of a license.”¹⁷¹ An example of an attempt to address this is Florida’s “Keys to Independence” bill, passed in 2014,¹⁷² which was designed to promote safe driving, driver education, and insurance reimbursement for foster youth.¹⁷³

One significant question left untouched by the Act is whether employment is intended to fall under the reasonable and prudent parent standard. Obtaining and working part-time jobs can be a very constructive experience for most youth. The need for part-time employment may be amplified for many foster youth due to the fact that frequent moves and lesser family support may make acquiring savings difficult. Indeed, foster youth are at an increased risk of becoming dependent on social assistance.¹⁷⁴

C. Immediate and Long-Term Impacts

The immediate impact of the Act is especially difficult to predict in light of some of the questions left unanswered by the Act itself. It is not clear precisely how the state standards are to be applied. In sum, the Act merely requires that states develop a reasonable and prudent parent standard and then

166. Wang, *supra* note 35.

167. *Id.*

168. *Id.*

169. *Getting Involved*, BECKY’S KIDS, <http://www.beckyskids.org/Featured-Article/extracurricular-activities.html> (last visited Jan. 10, 2016).

170. Klitsch, *supra* note 34.

171. Glen Casel, Opinion, *Foster Children Finally Getting Their Keys to Independence*, SUN SENTINEL (Nov. 12, 2014, 12:39 PM), <http://www.sun-sentinel.com/opinion/commentary/sfl-foster-children-finally-getting-their-keys-to-independence-20141112-story.html>.

172. *Id.*

173. *Id.*

174. Godsoe, *supra* note 44, at 90–91.

apply that standard to foster homes.¹⁷⁵ This could mean that the standards are primarily meant to *empower* foster parents to act as a reasonable and prudent parent would and to eliminate liability for doing so. In other words, this approach would allow, but not require, foster parents to grant permission, as long as that permission is in accordance with the reasonable and prudent parent standard. A more aggressive approach would consist of the reasonable and prudent parent standards being treated as a behavioral floor, which foster parents could incur some punishment or liability for falling below. In other words, foster parents could be reprimanded for unreasonably denying their foster children access to extracurricular activities. If this second approach is taken, changes would likely occur quite quickly as caregivers would seek to avoid liability. However, this might be tempered by the fact that foster youth may be hesitant to air complaints about their caregivers. If the reasonable and prudent parent standards are instead applied solely to empower foster parents and to eliminate liability, it seems less likely that foster youth would see as rapid a change in their access to activities. This is evidenced by the relative ineffectiveness that non-binding suggestions have had in promoting normalcy.¹⁷⁶ The treatment of the state standards developed thus far suggests that as more states implement reasonable and prudent parent standards, they will be utilized primarily to empower foster parents and eliminate liability, rather than to actually require foster parents to grant permission.

The enactment by states of reasonable and prudent parent standards is likely to make foster parenting more attractive to many potential foster parents.¹⁷⁷ The burden of having to seek consent from a social worker or court official surely serves as a deterrent to some potential foster parents.¹⁷⁸ People with the skills and desire to help may currently be hesitant to take on the task of fostering children, knowing that their ability to let the children they care for participate in normal life activities will be very limited.¹⁷⁹

175. Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 111(a)(10)(A), 128 Stat. 1919, 1923 (2014).

176. See *supra* notes 122–24 and accompanying text.

177. *Reasonable and Prudent Parent Standard*, CAL. DEP’T SOC. SERVICES, <http://www.fosterfamilyhelp.ca.gov/PG3001.htm> (last visited Jan. 10, 2016); David Cray, *New Law Tells States to Seek ‘Normalcy’ for Foster Children*, WASH. POST (Apr. 7, 2015), http://www.washingtonpost.com/national/new-law-tells-states-to-see-normalcy-for-foster-children/2015/04/07/7a230e54-dd4b-11e4-b6d7-b9bc8acf16f7_story.html.

178. *Reasonable and Prudent Parent Standard*, *supra* note 177.

179. *The What and Why of the Reasonable and Prudent Parent Standard and Telephone Access for Foster Children*, CAL. DEP’T SOC. SERVICES 2 (Nov. 2006), <http://www.cld.ca.gov/res/pdf/PrudentParentTrainingTool.pdf>. One of the reasons for California’s reasonable and prudent parent standard is to “[r]emove barriers to recruitment and retention of high quality foster caregivers.” *Id.*

V. CONCLUSION

While the long-term impact of the Preventing Sex Trafficking and Strengthening Families Act remains unclear, the Act is a substantial step toward achieving greater normalcy for youth in foster care. It is clear that children and adolescents benefit greatly from participation in extracurricular, enrichment, cultural, and social activities. Considering the additional challenges facing youth in the foster care system, it is a travesty for them to also be unnecessarily denied access to such vital activities. It is also evident that a significant change was needed if foster youth were ever to achieve access to activities anywhere near the sort of access provided to most children growing up in traditional family settings. For far too long, many foster children have been effectively denied access to the sorts of experiences that make childhood and adolescence enriching and formative. By requiring states to adopt a reasonable and prudent parent standard, as five states freely chose to do prior to the passage of the Act, the Act will substantially increase the latitude of caregivers to make decisions regarding participation in activities by the youths they care for. It is not yet clear how quickly or substantially this will shift the involvement of foster youth in these sorts of activities. However, despite the uncertainties, a very solid national step forward has been made.