

# Intersections Between Foster Care and IDEA Services—How to Bridge the Gap Between Systems on Behalf of Students with Disabilities

By Tara Moffett

Children in foster care are sometimes called our forgotten children.<sup>1</sup> They lack stability in their homes, in their education, and, without careful planning, they may leave the child welfare system without the skills necessary to become independent members of society. Tragically, the very system designed to protect children in foster care often creates the obstacles to successful outcomes. Children end up in the foster care system for a variety of reasons, from prenatal exposure to alcohol or drugs, parental abuse, neglect, abandonment, exposure to domestic violence, and family crisis and health issues. According to the Child Welfare Information Gateway Foster Care statistics, in September 2010, there were an estimated 408,425 children in foster care in the United States.<sup>2</sup> Regardless of the reasons they enter, they are disproportionately identified as children with disabilities as compared to the general population. They are often bereft of a consistent and well-informed adult to advocate for them, and they frequently move from one school to another due to the instability of the foster care system itself.



In an effort to curb the long term effects of foster care on children growing up in the system,<sup>3</sup> Congress passed the Fostering Connections to Success and Increasing Adoptions Act of 2008 (“Fostering Connections Act”), which underscores the importance of permanency planning and stability, including family connections and education planning, for children in care.<sup>4</sup>

Children under age 4 make up 31% of the foster care population nationally, yet while in care, many infants and toddlers fail to receive critical medical and educational interventions that they need to combat high rates of developmental, emotional, and behavioral problems.<sup>5</sup> Building on this unfortunate legacy, more than half the children in care (260,558) are between the ages of 5 and 17, which would make them “school aged” in most states across the nation.<sup>6</sup> It is undisputed that positive school experiences can enhance a child’s overall health and well-being, prepare them for successful transitions to adulthood, and increase the likelihood of being self-sufficient, employed, and economically stable.<sup>7</sup>

## I. The Problem—Challenges Facing Children in Foster Care

School success is directly related to and can lead to employment, housing, improved health, and life expectancy.<sup>8</sup> Historically, children in foster care lack educational stability, which undermines their academic performance and contributes to school failure.<sup>9</sup> The National Conference of State Legislatures reported in 2003 that school-aged foster children had “high rates of grade retention; lower scores on standardized tests; and higher absenteeism, tardiness, truancy and dropout rates” as compared to the general school population.<sup>10</sup> Students in foster care have lower rates of graduation (around 50%) compared to the 70% graduation rate for students in the general population.<sup>11</sup> Of the foster care children who do graduate from high school, either with a GED or a diploma, only 20% pursue higher education.<sup>12</sup> Considering that 75% of school-aged children in foster care are performing below grade level expectations, the fact that as many as fifty percent of children in care leave school without a diploma is unfortunately not surprising.

The highly transitory nature of foster care is a contributing factor to poor educational outcomes for children in care.<sup>13</sup> In a 2005 national study, the average consecutive stay in the foster care system was just over twenty-nine months.<sup>14</sup> While in care, children have been frequently relocated by the child welfare agencies, often with little to no regard given to their educational stability. On average, a child in foster care moves to a new foster placement one to two times per year.<sup>15</sup> With each relocation, in addition to the potential loss of academic credit, children in foster care are uprooted from their schools, their friends, their teachers, and their community. For every educational placement change, it can take anywhere from 4-6 months for the student to recover his or her stride academically.<sup>16</sup>

Stability in a child’s life fosters academic success. For children in foster care, who lack essential stability in their homes, their communities, and in their schools, the legacy of the foster care experience may extend beyond their time in care. According to the National Association of School Psychologists, aside from the academic adjustment, it can take children anywhere from six to eighteen months to regain a sense of security and control following a change in setting.<sup>17</sup> School change interferes and interrupts social development and experience as the child has fewer opportunities to develop strong and lasting peer relationships.<sup>18</sup> Children facing relocation lose ties not

only with their family and community, but they lose their friends, their teachers and their school.<sup>19</sup> It is not surprising that children in foster care tend to perform lower than their peers academically. One study quantified the impact, establishing that youth in foster care who were relocated four or more times by sixth grade lost one year of educational progress.<sup>20</sup> Without strong advocacy and support for a consistent and appropriate education, children in the child welfare system face a bleak future.

#### **A. 2008—The Fostering Connections to Success and Increasing Adoptions Act Is Passed**

In 2008, Congress passed the Fostering Connections Act to address the multiple obstacles foster children face. Among its important provisions to foster stability, as a major goal it placed a focus on the importance of educational stability.<sup>21</sup> For the first time, federal law required child welfare agencies to consider the proximity of out-of-home care to a child's school whenever remaining in the original school was determined to be in the child's best interest.<sup>22</sup>

The child welfare agency's case plan must provide for the educational stability of the child while in foster care, including:

(i) assurances that each placement of the child in foster care takes into account the appropriateness of the current educational setting and 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 education 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.<sup>23</sup>

The law became effective immediately on October 7, 2008.

For students with disabilities, the need for educational stability presents an added dimension that requires close scrutiny and consideration.<sup>24</sup> To analyze the educational stability question properly on behalf of a child with a disability who is in foster care, child welfare agencies need to understand the complex infrastructure of the Individuals with Disabilities Education Act (IDEA) and how it is implemented on a district-by-district level (there will be variations between school districts, even if they are served by the same county's social services agency).<sup>25</sup> For foster

care children with disabilities, the appropriateness of the educational program in the current school (or in another school) and whether the school can serve the student's education interests and needs (including special education) is an important consideration for the best interest analysis by the child welfare agency.<sup>26</sup>

#### **B. New York's Response to the Fostering Connections Act from 2008-2012**

New York State has approximately 26,000 children in foster care.<sup>27</sup> Approximately seventy percent of the children in care in New York are school-aged<sup>28</sup> and more than half (approximately 62%) are located in New York City.<sup>29</sup> Children placed in foster care experience frequent relocation in a variety of settings, shuttling between family members, foster care families, group homes, and residential placements.<sup>30</sup> With every change, children in foster care not only face changes in their caregivers, but risk losing all ties to teachers, friends, and their communities. As a result, looking at the cohort of children in the foster care system as a subgroup, they are far more likely to become high school dropouts as well.<sup>31</sup>

Following enactment of the Fostering Connections Act, Senator Velmanette Montgomery introduced a bill in the New York State Senate to amend the social services law, education law, and the Family Court Act, to incorporate the major provisions of the Fostering Connections Act into State law.<sup>32</sup> The bill, introduced in September 2009, was referred to the Children and Families Committee on January 6, 2010, but was never reported out.<sup>33</sup> Despite recognition that New York had to comply with the Fostering Connections Act in order to continue receiving federal funding, the first conforming change in New York appeared in the social services regulations, amended by emergency action, on March 20, 2011, four years after the federal law mandates.<sup>34</sup>

As part of the permanency planning, New York regulations now require the county agency to make a "best interest" determination regarding the school of attendance.<sup>35</sup> Specifically, the regulations provide as follows:

When it is in the best interests of the foster child to continue to be enrolled in the same school in which the child was enrolled when placed into foster care, the agency with case management, case planning or casework responsibility for the foster child must coordinate with applicable local school authorities to ensure that the child remains in such school. When it is not in the best interests of the foster child to continue to be enrolled in the same school in which the child was enrolled when placed into foster care, the agency...must coordinate with...local school authorities where the foster child is placed in order that the foster child is

provided with immediate and appropriate enrollment in a new school; and the agency with...responsibility for the foster child must coordinate...to ensure that all of the applicable school records of the child are provided to the new school.<sup>36</sup>

Additionally the regulations were amended to reflect that children in the foster care system must attend school full-time unless they have a medical condition.<sup>37</sup>

### C. The Response of the New York State Education Department

In New York, a child's right to free public education is grounded in a determination of his or her residence. For children in foster care, while their residence continued to be the district where they first came into care (N.Y. Education Law §3202(4)) and consequently that district remained fiscally responsible for their education, in the district where they were placed, it became the policy of the New York State Education Department (NYSED) that once placed in foster care, the district where the child was relocated became responsible for the child's education. Consequently, whether a child was relocated five or fifty miles from his or her home school district, once moved outside the district's boundaries, the school district where the child was relocated became responsible for the child's education.

In 2012, without any change in law or regulation, NYSED issued a memorandum (#01-2012) that recognizes, for the first time, the rights of children in the foster care system to remain in their home school districts when determined to be in their interest to do so.<sup>38</sup> According to the memo, local district residency requirements no longer serve as a barrier to maintaining a child in foster care in his or her school district of residence and is entitled to remain,

in the same school in which the child was enrolled when placed into care, or the school most recently attended, [and that] the school district in which such school is located should maintain enrollment for the duration of the child's placement in foster care or until a subsequent best interest determination is made.<sup>39</sup>

This represents a complete reversal of over 15 years of education law and guidance from the department.

## II. The Implications of the Fostering Connections Act

The Fostering Connections Act<sup>40</sup> was an important step towards providing educational stability for children in foster care.<sup>41</sup> The challenge in full implementation of the law in New York requires coordination and cooperation between our courts, child welfare agencies, and school districts. As a result of the Fostering Connections

Act, in addition to planning for the student's eventual transition out of care, the law requires child welfare agencies to develop and plan for ensuring the educational stability of the child while in foster care, taking into consideration the appropriateness of the child's current educational setting as well as the proximity of the child's foster placement to the school where the child was enrolled at the time of placement into care.<sup>42</sup> State and local education agencies have a vested interest in the educational outcomes of foster care children, yet the challenges faced by these children (including the role of biological parents, juvenile courts, attorneys, foster parents, or agencies, etc.) may be foreign terrain for these stakeholders. There is no federal law that requires education agencies to help implement and achieve Fostering Connection Act outcomes, yet educational stability for children in foster care cannot be achieved without the cooperation of schools and the state education agency.

### A. Obstacles to Full Implementation of the Fostering Connections Act

The focus on education issues in child welfare accountability is a relatively new direction for child welfare agencies, which requires an agency mind-shift to place a greater emphasis on educational progress for children in care. School districts are often unfamiliar with the ins and outs of foster care and child welfare services and policy; therefore there is a steep learning curve on the opposite end to be able to recognize and appreciate the competing interests which must be balanced by social service programs. Limited fiscal resources between child welfare and educational agencies present another potential barrier when fiscal responsibility is not expressly assigned within the statute for education-stability related supports, such as transportation. Both child welfare staff and staff in the education system need to undergo a crash course in understanding how the other's system and policies work, so they can identify potential issues to children in both systems and develop practical approaches to meeting these challenges. Foster care parent recruitment in the local communities is a critical component of the ability of agencies to support and maintain children as close to their home and community as possible. And finally, the absence of a dispute resolution mechanism and definitions for key principles under this policy ("best interest" and "reasonable transportation," just to name a few) leaves unanswered which agency or decision-maker has the final say when there is an interagency difference of opinion in providing for children in care.

Children who are "awaiting foster care placement" are entitled to the protections of the McKinney-Vento Act,<sup>43</sup> including the right to continue in their present school placement, if it is in their best interest.<sup>44</sup> The term "awaiting foster care placement" is not defined in the federal law. New York does not have a formal definition of this term; however, it is generally given to mean a child who has been removed from his or her parents' home and

has not yet been placed in a foster home.<sup>45</sup> If the student has not yet been placed in a foster home, then his or her right to educational stability, including transportation to and from their temporary housing back to their school district of origin, is protected under McKinney-Vento.

The Fostering Connections Act creates a McKinney-Vento-like system of rights for students in foster care who do not meet the definition of “awaiting foster care placement” by allowing for students to remain in their original or “home” school district, or if appropriate, for their transfer and immediate enrollment into another school district.<sup>46</sup> The key difference between the two acts is the agency designated to assist the student in the school selection process. Under McKinney-Vento, the Local Educational Agency (LEA) is responsible for assisting homeless children in making the school selection and arranging for either continued attendance or immediate enrollment elsewhere. Under the Fostering Connections Act, it is the child welfare agency which takes on this role and is responsible for considering the best interest of the child’s educational interest when making a living placement decision.<sup>47</sup> There are many possible factors which can be considered, some of which include the child’s and parents’ preferences, the expected length of time in care, the age, grade and maturity level of the child, social adjustment, educational needs of the child, and the appropriateness of the current school program to meet those unique needs.<sup>48</sup> If the child welfare agency determines that continuing in the present school is not in the child’s best interest, then the agency must work with the LEA to ensure that the student is immediately and appropriately enrolled in the new school, without delay.<sup>49</sup>

### **B. Transportation—Who Is Responsible?**

Critically absent in the Fostering Connections Act is a clear mandate designating the responsibility for transporting children in foster care to enable them to continue in their prior school district regardless of their location. Foster care maintenance payments (FCMP) are costs associated with maintaining a child in a foster care placement.<sup>50</sup> These maintenance payments *may* be used to cover items such as food, clothing, shelter, personal incidentals and “reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement.”<sup>51</sup> The Fostering Connections Act allows child welfare agencies to use those funds to pay for “reasonable travel for the child to remain in the school where the child is enrolled at the time of placement” into care.<sup>52</sup> However, it does not provide a mandate to do so.

What constitutes “reasonable travel” to maintain educational stability is left undefined in the Fostering Connections Act. Therefore, it is up to each child welfare agency to determine what would be appropriate cost parameters, distance, and length of travel.<sup>53</sup> In June 2012, New York State’s Office of Children and Family Services and the State Education Department formed a task force to “explore” transportation responsibilities. However, there

remains no determination of how transportation will be funded.<sup>54</sup> While LEAs and local departments of social services (LDSS) are encouraged to collaborate to ensure students in foster care are provided with transportation,<sup>55</sup> the mechanism and dispute resolution system when there is no agreement has not been defined, leaving this vulnerable population without assurances that they can get from their living situation to their home school.

### **III. Individuals with Disabilities Education Act**

Add to the complex factors that contribute to the poor outcomes for children in foster care the fact that a disproportionately large percentage of children in care are also children with disabilities entitled to special education.<sup>56</sup> As recognized in the legislative history of the Individuals with Disabilities Education Act, for children with disabilities, special education is essential to enable them to meet academic standards.

In order to provide students with disabilities access to education, the federal law includes a complex set of procedural safeguards that provide for individual evaluations, annual reviews, and development of an individualized education program (IEP). Depending on the nature and severity of a child’s disability, the student may be placed in a highly specialized educational program which is designed to meet that student’s individual and unique special education needs. When considering the impact that educational disruption has on any child, the impact can be especially profound when the disruption requires a change in placement for a child with a disability.

In every case, the parent, a critical member of the decision making team, plays a central role in the development and review of a child’s IEP. For children placed in foster care homes, the parent is often left on the sidelines, sometimes forgotten altogether.<sup>57</sup> While federal law defines “parents” to include foster parents,<sup>58</sup> where such definition is consistent with state law, in New York, the child’s parent remains the decision maker unless the child is deemed a ward of the state, which under New York law includes only those children whose parental rights have been terminated.<sup>59</sup>

In every case, the laws affecting the rights of children with disabilities are complicated and, for parents, effective advocacy often presents a major challenge. For children with disabilities in the foster care system, the challenges their parents face are daunting and sometimes insurmountable. In every case, however, when a child’s permanency plan provides for the child’s reunification with the parent, a major focus for the parent to prepare for the child’s return needs to be on the development of effective advocacy skills on behalf of their child in school.

Studies show that between 30-40% of the children in foster care are entitled to special education and related services,<sup>60</sup> a rate significantly higher than the 12% average in the general student population.<sup>61</sup> For children in foster

care, the evaluation and placement process is often complicated by the difficulties in distinguishing between the effects of disability and the impact of child abuse, neglect, and instability.<sup>62</sup>

Access to a consistent advocate or caretaker who knows the child and is familiar with educational rights for children with disabilities is frequently absent in the case of children in the foster care system. Since parents play a pivotal role in securing services for children with disabilities, the absence of someone to champion the educational needs of the child in foster care is a stumbling block which can preclude or delay access to special education services.

Under the IDEA, the parents play a critical role in their child's education from referral, planning, programming, and determining when their child will enter and exit the educational system.<sup>63</sup> At the outset, parental consent is needed to authorize an initial evaluation for a student suspected of having a disability, before any educational decision is made.<sup>64</sup> After an eligibility determination is reached, the parent must provide consent, once again, to permit the initial provision of special education services.<sup>65</sup> What is often surprising is that the IDEA does not provide a means to override a parent's refusal to consent for services, even where the district and the child welfare agency agree the child's need for special education services is paramount. Yet, if a parent refuses or fails to give consent for the child to receive special education services, the decision is final.<sup>66</sup>

Moreover, if, at any time after the initial provision of special education services, the parents revoke consent in writing for continued services, the District must stop all services to the student and provide written notice to the parents advising them of the impact of their decision.<sup>67</sup> In the event that a parent disagrees with the IEP team regarding a program, recommendation, or service, the parent has certain due process rights to challenge the school district's decision, including the right to request an impartial hearing or mediation.<sup>68</sup> The child will remain in "pendency" while the dispute is resolved, which can mean without services if the dispute relates to the initial classification or service recommendation.

New York's definition of "parent" includes birth or adoptive parent, a legally appointed guardian or relatives acting in the place of a birth or adoptive parent, or a surrogate parent.<sup>69</sup> Children in foster care who are wards of the state in New York<sup>70</sup> are limited in their ability to access the special education system until a surrogate parent is appointed.<sup>71</sup> New York's educational regulations provide only three exceptions to an initial evaluation for children who are in the care and custody of the state and are not residing with their parents. The LEA may proceed with the evaluation,

- (1) [when] the school district cannot discover the whereabouts of the parent

despite reasonable efforts to do so; or (2) [when] the rights of the parents...have been terminated in accordance with State law; or (3) [where] the rights of the parent to make educational decisions have been subrogated by a judge in accordance with State law and the person the judge appoints to represent the student gives consent.<sup>72</sup>

New York state law does not provide authority for judges to limit parents' right to exercise their educational decision-making for their children in foster care, despite recognition in the state regulations that it may be necessary in some cases to limit or restrict a parent's decision-making authority while a child is placed in care.<sup>73</sup>

If a parent refuses to grant consent to evaluate his or her child, LEAs may, but are not required, to initiate due process to override lack of consent.<sup>74</sup> However, now that the regulations are permissive (instead of mandatory as they were prior to the 2004 reauthorization of IDEA), this option is rarely used. Even if the district did secure consent to conduct an initial evaluation, there is no law which allows the LEA to implement special education services recommended by the committee absent parental consent.

As identified above, if the child does not reside with his or her parent (while in the foster care system) and despite reasonable efforts, the parent cannot be found, the regulations provide for the appointment of a surrogate parent, who will be empowered to make all special education decisions on the child's behalf, including whether to accept special education services.<sup>75</sup> Following the required notification, the CSE/CPSE will determine, within a reasonable time following the student's referral to the committee for an evaluation, whether to appoint a qualified "surrogate" parent for the child who will make all other special education decisions, including whether special education services will begin. The role of a surrogate parent is to make decisions regarding the child within the education system related to special education and to ensure that the rights of the student are protected. A surrogate parent is afforded the same rights and responsibilities as accorded to the parent and represents the child in all matters related to: screening, evaluation, access to early intervention and preschool services as well as school-aged special education supports and services, placement decisions, transition planning, and graduation.<sup>76</sup> The person selected and appointed by the board of education must have no interests which would conflict with his or her allegiance to the child, should be knowledgeable about the programs and the student's need to adequately represent the child and cannot be "officers, employees or agents of the local school district or State Education Department or any other agency involved in the education or care of the student."<sup>77</sup> The caseworker assigned to the foster care child's case by the welfare agency cannot serve as a surrogate parent, given the potential conflict between the

agency's goals and the needs of the child. In New York, a foster parent (who is only tangentially referenced in the state regulatory definition of "parent") may act as the parent<sup>78</sup> if he or she is appointed to serve as a surrogate parent by the school district's board of education.<sup>79</sup> New York also recognizes the authority of a "person in parental relationship" appointed by a parent to act in his or her place on behalf of the child.<sup>80</sup> Following title 15-A of the General Obligations Law, parents may temporarily assign their parental rights to another individual in the event that they have died, are ill, imprisoned, institutionalized, or have abandoned or deserted their child, if they are living outside the state or their whereabouts are unknown.<sup>81</sup> A parent may appoint a foster care parent to serve as his or her child's "person in parental relation" which would eliminate the need for the foster parent's appointment as the surrogate parent. It is essential that the child welfare agency and caseworker understand and explain to the parent and the foster parent these issues and limitations, so there are no misconceptions when it comes to who makes the educational decisions for the child. Nothing in the law or regulations precludes a parent from inviting a foster parent to attend and participate as a person with knowledge or special expertise about the student.

If the CSE/CPSE determines that the child qualifies for special education support and services, the committee will develop an individualized education program (IEP) which will serve as the vehicle for the student's educational program. The IEP reflects the individual needs of the student, as determined by the committee made up of educators, evaluators, related service providers, parents, and the district representative.<sup>82</sup> Although not a mandated IEP team member under state or federal law, a child welfare caseworker can participate if invited by the parent or the school district as a person who has knowledge and special expertise regarding the child.<sup>83</sup> Often the child's welfare agency caseworker has a wealth of information regarding the student's health and welfare and can offer insight into permanency planning, which is a relevant factor that may impact services or placement recommendations under the IDEA. In the event the caseworker is unable to attend a CSE/CPSE meeting, collaboration with the school district, the parent, and foster care providers is essential to allow the child welfare agency to remain informed about school needs and issues, which could conversely factor into decisions about school stability under the Fostering Connections Act.<sup>84</sup>

#### IV. Lessons Learned and Next Steps

Over the past eight years, the growing recognition that our children in foster care have paid the price for gaps in the system has resulted in key legislation that could turn the tide towards achieving better outcomes for this vulnerable population. Permanency planning, as envisioned by the Fostering Connections Act, provides a critical opportunity for interagency collaboration to

benefit all children in the foster care system. Educational stability can help ground children in foster care while issues beyond his or her control are being handled through proper channels. Moreover, when the plan is for a child to return to his or her parents' care, the child welfare agency can focus its efforts on preparing the parents to effectively resume their role as the primary advocate for their child's well-being. School districts can help reinforce the significant role that parents play, even while their child may be in the care of the child welfare system.

New York's Office of Children and Family Services and the State Education Department must reach consensus on what are the critical factors in reviewing whether remaining in the present school or relocation to another is in the "best interest" of the child in foster care. To ensure that a child's transition is as smooth as possible, OCFS and NYSED must also come to agreement on best practices and how to use the existing infrastructure within each organization to serve the interests and to meet the needs of the children in foster care. Another key step is to establish a mutually agreeable interagency dispute mechanism, so that systems are not in contest with one another when the child's interests should receive their collective focus. And the state needs to set aside funding in the budget for transportation for children in the welfare system, which will increase the likelihood that children are able to maintain the constancy of their education notwithstanding the circumstances which resulted in their placement into care.

The building blocks to serve as the foundation for better outcomes are in place. Now it is up to the state's agencies to develop the appropriate structure to deliver on the promise of a better future for our children in care.

#### Endnotes

1. Fostering Connections to Success and Increasing Adoptions Act of 2008, 154 CONG. REC. H8304-01 H8313 (daily ed. Sept. 17, 2008) (statement of Rep. McDermott).
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3. See generally LEGAL CTR. FOR FOSTER CARE & EDUC., FOSTER CARE AND EDUCATION Q AND A: THE LINK BETWEEN EDUCATION AND PERMANENCY (2009), <[http://fosteringmediaconnections.org/wp-content/uploads/2010/08/ABA\\_edpermanencylink.pdf](http://fosteringmediaconnections.org/wp-content/uploads/2010/08/ABA_edpermanencylink.pdf)>. Educational instability has been linked to higher rates of homelessness, unemployment, and incarceration. *Id.* at 1.
4. Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949 (codified as amended in scattered sections of 42 U.S.C.).
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6. *Id.* at 1.
7. Sara Munson & Madelyn Freundlich, *Educating Children in Foster Care: State Legislation 2004-2007*, NAT'L CONFERENCE OF STATE LEGISLATURES 1(2008), <[http://www.ncsl.org/print/cyf/foster\\_care\\_education.pdf](http://www.ncsl.org/print/cyf/foster_care_education.pdf)>.

8. Amy Reichbach & Marlies Spanjaard, *Guarding the Schoolhouse Gate: Protecting the Educational Rights of Children in Foster Care*, 21 TEMP. POL. & CIV. RTS. L. REV. 101, 102 (2011).
9. Steve Christian, *Educating Children in Foster Care*, NAT'L CONFERENCE OF STATE LEGISLATURES: CHILDREN'S POLICY INITIATIVE 1 (2003), <<http://www.ncsl.org/Portals/1/documents/cyf/cpieducate.pdf>>.
10. *Id.*
11. Amy Reichbach & Marlies Spanjaard, *Guarding the Schoolhouse Gate: Protecting the Educational Rights of Children in Foster Care*, 21 TEMP. POL. & CIV. RTS. L. REV. 101, 102 (2011).
12. NAT'L WORKING GRP. ON FOSTER CARE AND EDUC., EDUCATION IS THE LIFELINE FOR YOUTH IN FOSTER CARE 1, 5 (2011), <<http://www.casey.org/Resources/Publications/pdf/EducationalOutcomesFactSheet.pdf>>.
13. NAT'L COUNS. ON DISABILITY, YOUTH WITH DISABILITIES IN THE FOSTER CARE SYSTEM: BARRIERS TO SUCCESS AND PROPOSED POLICY SOLUTIONS 25 (2008). In a 2005 national study, the average consecutive stay in foster care was just over 29 months.
14. *Id.*
15. *The Implementation of the Fostering Connections to Success and Increasing Adoptions Act: Hearing Before the Subcomm. on Income Sec. and Family Support of the Comm. on Ways and Means*, 111th Cong. 30 (2009) (statement of Kathleen McNaught, Assistant Dir. for the Center on Children and the Law).
16. Rebekah G. Hope, *Foster Children and the IDEA: The Fox Guarding the HenHouse*, 14 (2008), <[http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=rebekah\\_hope](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=rebekah_hope)>.
17. *Id.* (citing 1991 National Association of School Psychologists report referenced in Linda Jacobson, *Moving Targets*, EDUCATION WEEK, Apr. 4, 2001).
18. Sara Munson & Madelyn Freundlich, *Educating Children in Foster Care: State Legislation 2004-2007*, NAT'L CONFERENCE OF STATE LEGISLATURES 4(2008), <[http://www.ncsl.org/print/cyf/foster\\_care\\_education.pdf](http://www.ncsl.org/print/cyf/foster_care_education.pdf)>.
19. Judith M. Gerber & Sheryl Dicker, *Children Adrift: Addressing the Educational Needs of New York's Foster Children*, 69 ALB. L. REV. 1, 9 (2005).
20. Sara Munson & Madelyn Freundlich, *Educating Children in Foster Care: State Legislation 2004-2007*, NAT'L CONFERENCE OF STATE LEGISLATURES 4(2008), <[http://www.ncsl.org/print/cyf/foster\\_care\\_education.pdf](http://www.ncsl.org/print/cyf/foster_care_education.pdf)>.
21. 42 U.S.C. §671(a)(16); *see also* Amy Reichbach & Marlies Spanjaard, *Guarding the Schoolhouse Gate: Protecting the Educational Rights of Children in Foster Care*, 21 TEMP. POL. & CIV. RTS. L. REV. 101, 102 (2011).
22. Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949 (codified as amended in scattered sections of 42 U.S.C.).
23. 42 U.S.C. §§675(1)(G)(i)-(ii).
24. 42 U.S.C. §675(1)(G)(i); *see also* LEGAL CTR. FOR FOSTER CARE AND EDUC., FOSTER CARE & EDUCATION ISSUE BRIEF: HOW THE IDEA AND THE FOSTERING CONNECTIONS ACT CAN WORK TOGETHER TO ENSURE SCHOOL STABILITY AND SEAMLESS TRANSITIONS FOR CHILDREN WITH DISABILITIES IN THE CHILD WELFARE SYSTEM 5-6 (2012), <[http://www.americanbar.org/content/dam/aba/publications/center\\_on\\_children\\_and\\_the\\_law/education/issue\\_brief\\_IDEA2012\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/education/issue_brief_IDEA2012_authcheckdam.pdf)> [hereinafter FOSTER CARE & EDUCATION ISSUE BRIEF].
25. 42 U.S.C. §675(1)(G)(i); *see also* FOSTER CARE & EDUCATION ISSUE BRIEF at 5-6.
26. It is important to note that the determination of which special education or related services the student requires and where the student will be placed to receive those services is a decision made by the CSE/CPSE and not the child welfare agency.
27. Cara Chambers & Erika Palmer, *Educational Stability for Children in Foster Care*, 26 TOURO L. REV. 1103, 1104 (2011).
28. N.Y. STATE OFFICE OF CHILDREN AND FAMILY SERVS., 2012 NEW YORK STATE CHILD AND FAMILY SERVICES PLAN FY 2010-2014 ANNUAL PROGRESS AND SERVICES REPORT 41 (2012), <<http://www.ocfs.state.ny.us/main/reports/>>. 2011 data analysis identifies the following statistics—Children under age 2 account for nearly one fifth of new entries (21.2%); children ages 2-5 (13.2%); ages 6-9 (9.6%) and ages 14-17 (40.4%). *Id.*
29. Cara Chambers & Erika Palmer, *Educational Stability for Children in Foster Care*, 26 TOURO L. REV. 1103, 1104 (2011).
30. NAT'L WORKING GRP. ON FOSTER CARE AND EDUC., EDUCATION IS THE LIFELINE FOR YOUTH IN FOSTER CARE 1, 3 (2011), <<http://www.casey.org/Resources/Publications/pdf/EducationalOutcomesFactSheet.pdf>>.
31. *Id.* at 2.
32. S. 6185, 232d N.Y. Leg. Sess.
33. *See* S. 6185 Actions report, *available at* [http://assembly.state.ny.us/leg/?default\\_fld=&bn=S06185&term=2009&Summary=Y&Actions=Y&Text=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=S06185&term=2009&Summary=Y&Actions=Y&Text=Y).
34. N.Y. STATE OFFICE OF CHILDREN AND FAMILY SERVS., ADMINISTRATIVE DIRECTIVE: NEW REQUIREMENT REGARDING EDUCATIONAL STABILITY OF FOSTER CHILDREN 3 (2012) [hereinafter Administrative Directive 3].
35. N.Y. Comp. R. & Regs. tit. 18, §430.11(c)(1)(1) (N.Y.C.R.R.).
36. *Id.*
37. *See* NAT'L ASS'N OF CHILD WELFARE ADM'RS, HOW STATES ARE IMPLEMENTING THE FOSTERING CONNECTIONS ACT 2, <<http://www.napcwa.org/Legislative/docs/NY.pdf>>.
38. Memorandum from Ken Slentz to District Superintendents, Superintendents of Public Schools & Charter School LEA Administrators on Education Stability Guidance: NYSED Field Memo #01-2012 (June 2012), *available at* <<http://www.p12.nysed.gov/accountability/homeless/docs/FMEDStabilityGuidance.pdf>> [hereinafter Memo on Education Stability Guidance].
39. *Id.* at 28-29.
40. Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub.L. No. 110-351, 122 Stat. 3949.
41. N.Y. STATE OFFICE OF CHILDREN AND FAMILY SERVS., ADMINISTRATIVE DIRECTIVE: NEW REQUIREMENT REGARDING EDUCATIONAL STABILITY OF FOSTER CHILDREN 3 (2012) [hereinafter Administrative Directive 3].
42. Cara Chambers & Erika Palmer, *Educational Stability for Children in Foster Care*, 26 TOURO L. REV. 1103, 1104 (2011).
43. The McKinney-Vento Homeless Assistance Act (the McKinney-Vento Act) guarantees a variety of rights and services to children who are homeless, designed to increase the school enrollment, attendance, and educational success of children who do not have a fixed, regular, and adequate nighttime residence. 42 U.S.C. §§11301-11432. Under the McKinney-Vento Act, states and local educational agencies (LEAs) must have systems in place to provide for the continuing educational stability of children who are homeless. Children who are homeless have the right to school selection, including the option of remaining in the school of origin (typically the school where the student last attended), or attending the local school district where they are temporarily housed. If the homeless student elects to enroll in the school district where he or she is temporarily housed, he or she is entitled to immediate enrollment, even without the required documentation typically required. 42 U.S.C. §11432(g)(3)(C)(i). In addition, the McKinney-Vento Act provides for transportation for the students to and from the school they designate, regardless of whether their living situation is located in another district. 42 U.S.C. §11432(g)(1)(j)(iii).
44. 42 U.S.C. §11434a(2)(A)-(2)(B)(i).
45. Cara Chambers & Erika Palmer, *Educational Stability for Children in Foster Care*, 26 TOURO L. REV. 1103, 1104 (2011).

46. *Id.* at 1110.
47. See N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., INFORMATIONAL LETTER: EDUCATIONAL STABILITY OF FOSTER CHILDREN (June 13, 2012) [hereinafter Informational Letter]; see also Memo on Education Stability Guidance. The Office of Children and Family Services, the State Education Department, and the Office of Court Administration in New York are trying to reach consensus on a collaborative decision-making approach to determine how best to make decisions related to school selection.
48. Memo on Education Stability Guidance, at 3.
49. 42 U.S.C. §675(1)(G)(ii).
50. 42 U.S.C. §675(4)(A).
51. *Id.*
52. *Id.*
53. U.S. DEP'T OF HEALTH AND HUMAN SERVS.: ADMIN. FOR CHILDREN AND FAMILIES, GUIDANCE ON FOSTERING CONNECTIONS TO SUCCESS AND INCREASING ADOPTIONS ACT OF 200820 (July 9, 2010), <[http://www.scf.hhs.gov/programs/cb/laws\\_policies/policy/pi/2010/pi1011.htm](http://www.scf.hhs.gov/programs/cb/laws_policies/policy/pi/2010/pi1011.htm)>.
54. There are alternative funding sources, provided that children in foster care meet certain qualifications. Children who meet the definition of "homeless" under McKinney-Vento (including those awaiting foster care placements) have the unequivocal right to transportation funded through the education system. 42 U.S.C. §11432(g)(1)(j)(iii). In New York, funding for homeless transportation is set forth in education statute. N.Y. Education Law §3209(4)(d). Additionally, New York's social service law has provisions to fund transportation for purposes of school stability for homeless children. N.Y. Social Services LAW §350-j (SSL).
55. Informational Letter; see also Memo on Education Stability Guidance.
56. Margaret Ryznar & Chai Park, *The Proper Guardians of Foster Children's Educational Interests*, 45 LOY. U. CHI. L.J. 147, 148-49 (2010) (identifying that children in foster care receive special education at a rate of roughly five times that of the general school population).
57. To this day, there remains confusion among caseworkers, school officials and parents as to the continuing role of the child's parent, regardless of placement in foster care. What is clear is that the child welfare caseworker is not authorized to serve in the role of "parent," therefore this issue needs to be addressed early on to ensure that the appropriate individuals receive notice of meetings, have access to the child's educational records, and are in a position to represent the interests of the child.
58. Pursuant to the IDEA, a "parent" is defined as:  
 A natural, adoptive or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent); a guardian (but not the State if the child is a ward of the State); an individual acting in the place of a natural or adoptive parent (including grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or except as used in sections 1415(b)(2) and 1439(a)(5), an individual assigned under either of those sections to be a surrogate parent. 20 U.S.C. §1401(23).
59. 8 N.Y.C.R.R. §200.1(ii)(1).
60. NAT'L COUNCIL ON DISABILITY, *YOUTH AND DISABILITIES IN THE FOSTER CARE SYSTEM: BARRIERS TO SUCCESS AND PROPOSED POLICY SOLUTIONS* 9 (2008), <[www.ned.gov/publications/2008/02262008](http://www.ned.gov/publications/2008/02262008)>.
61. *Id.*; see also Steve Christian, *Educating Children in Foster Care*, NAT'L CONFERENCE OF STATE LEGISLATURES: CHILDREN'S POLICY INITIATIVE 1 (2003), <<http://www.ncsl.org/Portals/1/documents/cyf/cpieducate.pdf>>. Research suggests that the high rate of classification and disability among children in foster care is likely due to the early exposure of physical and emotional trauma such as parental abuse, neglect, abandonment, or lack of appropriate medical and prenatal care and then subsequent changes in home and school once children are placed into the foster care system.
62. Rebekah G. Hope, *Foster Children and the IDEA: The Fox Guarding the HenHouse*, 14 (2008), <[http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=rebekah\\_hope](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=rebekah_hope)>.
63. Margaret Ryznar & Chai Park, *The Proper Guardians of Foster Children's Educational Interests*, 45 LOY. U. CHI. L.J. 147, 159 (2010) (identifying that children in foster care receive special education at a rate of roughly five times that of the general school population).
64. 20 U.S.C. §1414(a)(1)(D)(k)(I).
65. 20 U.S.C. §1414(a)(1)(D)(i)(II).
66. 20 U.S.C. §1414(a)(1)(D)(ii)(III).
67. 34 C.F.R. §§300.9, 300.300(b)(4); 8 N.Y.C.R.R. §§200.5(b)(5)(i)-(iv).
68. 20 U.S.C. §§1415(b)(5), (6).
69. See 20 U.S.C. §1401 (defining parent to include an individual assigned to serve as a surrogate parent); 34 C.F.R. §300.519(a)-(b) (requiring LEAs or Districts to assign a surrogate parent to protect the rights of a child if no parent can be identified or found, if the child is a ward of the state or if the child is an unaccompanied youth); see also 34 C.F.R. §300.300(a)(2); 8 N.Y.C.R.R. §200.1(ii)(1).
70. 8 N.Y.C.R.R. §200.1(kkk)(1-3) (A "ward of the state" is a child under the age of twenty-one who has been placed or remanded, freed for adoption, who is in custody of the Commissioner of Social Services or the Office of Children and Family Services, or who is a destitute child.).
71. 8 N.Y.C.R.R. §200.5(n).
72. 8 N.Y.C.R.R. §§200.5(b)(6)(i)-(iii). New York's Education Regulation mirrors the provisions under IDEA. See 20 U.S.C. §§1414(a)(1)(D)(iii)(II)(aa)-(cc).
73. N.Y. Family Court Act §1101 *et seq* (FCA).
74. 34 C.F.R. §300.300(c)(1)(ii); 8 N.Y.C.R.R. §200.5(b)(3).
75. 8 N.Y.C.R.R. §200.5(n)(3).
76. 8 N.Y.C.R.R. §200.5(n)(3)(iv).
77. 8 N.Y.C.R.R. §§200.5(n)(2)(i)-(iii).
78. 8 N.Y.C.R.R. §200.1(ii)(2).
79. 8 N.Y.C.R.R. §200.5(n)(3)(v).
80. N.Y. Educ. Law §3212.
81. N.Y. General Obligations Law §§5-1552; 5-1115 (GOL).
82. 34 C.F.R. §300.321; 8 N.Y.C.R.R. §200.3(a).
83. 34 C.F.R. §300.321(a)(5); 8 N.Y.C.R.R. §200.3(a)(1)(ix).
84. See FOSTER CARE & EDUCATION ISSUE BRIEF.

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