

Foster Children and the IDEA: The Fox No Longer Guarding the Henhouse?

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INTRODUCTION

The Individuals with Disabilities Education Act (IDEA) creates a complex bundle of rights for the parents of children with disabilities in an effort to provide each eligible child with a free appropriate public education (FAPE). Children in the dependency system, commonly referred to as foster children, also require a free appropriate public education when they have disabilities that affect their learning, but they have no one to advocate for them or assist them in securing an appropriate educational program. They need a surrogate to take the place of the parents who are unable to fill that role. The IDEA has always provided a mechanism for the child's school system to appoint an educational surrogate parent, but the 2004 reauthorization of the Act goes further in protecting the rights of children with disabilities by allowing dependency court judges the power to appoint them as well. This change could lead to much more effective protection of disabled foster children and their educational rights.

One case from Florida known to the author shows the potential benefit of allowing dependency court judges to appoint educational surrogates. Nancy has been in the dependency system for five years. At the age of seventeen, she cannot read or write competently in either her native language of Spanish or English, which has been her primary language for much of her school age

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years. The school system held a number of meetings about Nancy, and on at least one occasion, evaluations were requested by her individualized education program (IEP) team, but none were completed. Nancy was clearly in danger of aging out of the foster care system without any of the basic necessary academic skills needed for independent living. Even more frustrating was the fact that she was gravely aware of her academic weaknesses and desperately wanted services to help her learn.

The judge overseeing her dependency case recognized that something was going terribly wrong in her education and had heard of the provision under the IDEA allowing him to appoint a surrogate parent to represent her in educational matters. He appointed a surrogate parent who quickly requested another meeting to begin the evaluation process. Her surrogate parent signed the appropriate forms, and when the school system attempted to stall the process, her surrogate parent held the school responsible for actually starting the evaluation process rather than let Nancy continue in the frustrating cycle that she had been subject to for so long.

Despite her changes in home placement in the past year, her educational placement and program have remained consistent and positive. There is obviously no guarantee that Nancy will avoid homelessness upon aging out of the group home, but with improved academic support and skills, she will at least have a much better chance.

While children in the dependency system require consistency, stability, and support, they often find themselves in a constantly changing world, with little or no consistent support. For their own safety, they are removed from the only world they have known, for better or worse, and placed into a new world, foster care, hopefully for the better. Unfortunately, however, that world is not always hospitable and is rarely stable.

In the course of locating a safe haven for these children, everything else, including education, gets pushed aside. This is partly due to the immediate need to ensure the child's safety and partly due to the inexperience most case workers have with the bureaucracy of the school system. Many case workers trust that the school system will take care of the child's education as they tend to the home placement. This reliance is misplaced because the initial home placement, and every home placement change thereafter, greatly and directly impacts the education of the children they are trying to help. The impact is even greater on those children who require special education services. With each school change, the receiving school will often not have records for the child. Therefore, it will not know of the child's educational needs. For children with disabilities, this means weeks, sometimes months

without services. For children who require special services but whose needs are not yet identified, the cycle of repeated attempts to remediate their learning before they are properly evaluated substantially delays their educational progress. It has a particularly crippling effect for children who change schools so often that they cannot complete the process that determines whether the child is eligible to receive special education services. This is precious time when those children in need could be closing the learning gap rather than watching it widen.

United States Senator Patty Murray of Washington noted that “[w]ithout a parent to advocate for them, foster children can languish for years with unrecognized disabilities or insufficient services to help them succeed in school.”¹ The common missing link is someone tracking and advocating for the child’s educational needs as the child ventures through the dependency process. Historically, the Individuals with Disabilities Education Act (IDEA) has provided that missing link by requiring school systems to appoint a surrogate parent. Granting the school system sole responsibility for appointing an individual whose responsibility it is to monitor the school system’s compliance to the IDEA is like allowing the fox to guard the henhouse. The surrogate parent, appointed and trained by the school system, often rubber stamps the school’s decisions, placing no checks on the appropriateness of the program given the child’s individual needs. Regarding the provision that allows dependency judges the authorization to appoint a surrogate parent under the 2004 reauthorization of the IDEA, Senator Murray noted, “Our Amendment makes small but very important changes to the IDEA to ensure that disabled students who are homeless or who live in foster homes . . . get the help they need.”²

This Article will first discuss the background of and the need for special education services. Second, it will discuss the unique needs of foster children and how those needs impact their education. Third, it will discuss how those needs impact the children who require special education services including whether children in the foster care system are improperly included in special education. Fourth, the Article will discuss the 2004 changes to the IDEA that affect children in foster care including the definition of “parent” as well as changes to the appointment of surrogate parents process. Finally, the Article will explore how this new provision can be put into practice to help the foster child population.

1. 150 CONG. REC. S5250, S5353 (daily ed. May 12, 2004) (testimony of Sen. Patty Murray).

2. *Id.*

I. BACKGROUND

A. Education is Important for All of Society

The importance of education on the well-being of our society as a whole is undeniable. Beyond those actually receiving education, all of society benefits from a more educated population. “[E]ducation has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.”³ Furthermore, “education prepares individuals to be self-reliant and self-sufficient participants in society.”⁴ What the Supreme Court said so eloquently in 1954 continues to ring true today:

Today, education is perhaps the most important function of state and local governments It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.⁵

As our world becomes more dependent on technology and less dependent on manual labor, the power of education is increasingly imperative.

Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality in the Equal Protection Clause.⁶

Those children who do not receive an adequate or appropriate education are ill-prepared for independent living and are less

3. *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

4. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

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

6. *Plyler*, 457 U.S. at 222.

productive members of society. Why, then, are society's most vulnerable children left to fend for themselves without the proper tools? Children in foster care have the cards stacked against them even before they are removed from their parents' custody and declared wards of the state. Likewise, children with disabilities affecting their education are hindered, even if they have stable parental care. Therefore, children with a disability who are also wards of the state are particularly vulnerable to poor educational outcomes, particularly if they are in the foster system long enough to age out without ever receiving an appropriate education. Because this population is handicapped, the state exercises *parens patriae*⁷ and has the obligation to ameliorate and improve the quality of life for these children.

It is neither the choice of the child to become a ward of the state, nor to have a disability. In fact, our law recognizes that it is the responsibility of the state to educate all children with disabilities—including those within the dependency system.

B. Legislative Background on Purpose and Importance of IDEA

Throughout the early twentieth century, students who did not progress at an appropriate rate were considered "mentally deficient." These students were separated from their peers to remove them from the classroom, because they were a distraction to their classmates and took too much of the teachers' time, not because they needed special instruction.⁸ Students with "mild" disabilities who did not pose problems were left in the classroom but given no support or intervention; they often floundered and dropped out of school at the first opportunity.⁹

Although it would take another twenty years or so for an effective statute in the area of special education to be passed, *Brown v. Board of Education* in 1954 marked the beginning of a trend towards greater equality in educational opportunities.¹⁰ In the following decades, this trend eventually produced real advances for the education of students with disabilities.¹¹

7. *Parens patriae* explains the school's responsibility and authority over children while they are under the care of the school system during the school day.

8. Michael A. Rebell & Robert L. Hughes, *Special Education Inclusion and the Courts: A Proposal for a New Remedial Approach*, 25 J.L. & EDUC. 523, 529 (1996).

9. Sara Tarver, *How Special Education Has Changed*, in CHANGING PERSPECTIVES IN SPECIAL EDUCATION 11 (Rebecca Kneedler & Sara Tarver eds., 1977).

10. *Brown*, 347 U.S. 483.

11. See *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).

Nowhere in the Constitution is there a guaranteed right to education, nor are children a suspect class.¹² However, “[s]uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”¹³ It follows that the state must endeavor to educate children with disabilities just as it does those without disabilities. In 1963, Congress finally began addressing this concern by providing funds to train teachers for the handicapped, but the passive nature of this law cannot be understated.¹⁴ Congress did not make the training mandatory, nor did it require any state to accept the responsibility of educating students with disabilities. In 1965, the Elementary and Secondary Education Act (ESEA) provided federal funding for improving the education of the disadvantaged generally,¹⁵ and it was amended the following year to provide targeted funding for children with disabilities.¹⁶

Despite this federal legislation, states continued to exclude students with disabilities from public school programs. Two state class action suits shaped the meaningful legislation for the disabled that eventually emerged. In the first of two cases, Pennsylvania excluded students with mental retardation from public school and excluded them from attendance requirements. The Pennsylvania Association for Retarded Citizens (PARC) brought an action against the state in federal district court, which resulted in a decision requiring Pennsylvania “to provide . . . to every retarded person between the ages of six and twenty-one . . . access to a free public program of education and training appropriate to his learning capacities.”¹⁷ The decision also included specific notice and hearing rights afforded to parents and guardians of children with mental retardation.

Later that same year, the District of Columbia District Court heard a similar case involving seven children that were denied education by the District of Columbia Public Schools.¹⁸ As in *PARC*, the students in *Mills* were not afforded an education, nor were they afforded due process procedural rights to appeal

12. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

13. *Brown*, 347 U.S. at 493.

14. *See generally* Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963, Pub. L. No. 88-164, 77 Stat. 282.

15. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27.

16. Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89-750, 80 Stat. 1191.

17. *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 302 (D. Pa. 1972).

18. *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).

decisions of the board of education in expulsions, reassignments, or other denials of education to their children. The seven named plaintiffs in this case had a variety of disabilities ranging from mental retardation to behavioral, emotional, and physical disabilities. One student “was excluded because he wandered around the classroom.”¹⁹ The students were all poor and without financial means to obtain private placements, although some had promises of placements at appropriate private programs if funding became available.

The District of Columbia blamed the inadequacies of the system on insufficient funds and personnel. But whether or not it was occasioned by insufficient funding or administrative inefficiency, it certainly could not be permitted to bear more heavily on the student with a disability than on the child without a disability.²⁰ The *Mills* court, like the court in *PARC*, set out a detailed structure for procedural safeguards which included notice and hearing requirements. The *Mills* and *PARC* decisions became the framework for future legislation.

In 1975, Congress passed the Education for All Handicapped Children Act (EAHCA), signed into law as P.L. 94-142. Structured primarily on the *PARC* and *Mills* decisions, the EAHCA mandates that states ensure their intermediate and local education agencies provide a free appropriate public education to children with disabilities.²¹ This federal spending statute requires states to educate these children as much as possible with their non-disabled peers but not to the detriment of the educational progress.²² It also requires appropriate evaluation procedures and mandates that an individualized education program (IEP) be designed for each child, to be reviewed at least annually.²³ In addition, the parents were to be afforded due process safeguards including notice requirements.²⁴

Since the passage of the EAHCA, reauthorized in 1990 as the Individuals with Disabilities Education Act (IDEA), there have been numerous cases clarifying the rights of parents and students and the responsibilities of the school districts.²⁵ These cases reflect

19. *Id.* at 869.

20. *Id.* at 876.

21. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat 773.

22. *Id.*

23. *Id.*

24. *Id.*

25. *See generally* Sch. Comm. v. Dep’t of Educ., 471 U.S. 359 (1985); Smith v. Robinson, 468 U.S. 992 (1984); Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984); Bd. of Educ. v. Rowley, 458 U.S. 176 (1982); Hall v. Vance County Bd. of Educ., 774 F.2d 629 (4th Cir. 1985).

the desire of parents to obtain appropriate services for their children with disabilities.

Children with disabilities who do not have parents to represent their interests are at an even greater risk.

II. THE IMPORTANCE OF A FREE AND APPROPRIATE PUBLIC EDUCATION FOR ALL STUDENTS WHO QUALIFY UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

It is an undisputed fact that education improves anyone's chances of success. For children with disabilities, however, the effect is doubled, because without an appropriate education, these children become a burden on society instead of a self-sufficient contributor. An example from the personal knowledge of the author illustrates this danger. Norman was a talented artist and played basketball fairly well. In middle school he had difficulty getting by, and by ninth grade began doing drugs and skipping class. He was caught "tagging"²⁶ his high school during school hours under the influence of marijuana. He was placed in a rehabilitation program where the director noticed that Norman seemed to be much smarter than his academic skills showed and requested evaluations for Norman. The evaluations revealed that he had an IQ of 140, but also that he was dyslexic and had Attention Deficit Hyper-Activity Disorder (ADHD).

Norman's parents placed him in a school for students with learning disabilities, and he made tremendous progress both academically and emotionally. He returned to his artwork, he played more basketball, and became a leader within the school and community guiding fellow students away from drugs and into the Narcotics Anonymous program that he was still attending. The public school district was ordered to pay for his tuition for one school year but refused to provide funding for his final school year. While awaiting the court's decision, Norman attended the public high school in his area with some support. He struggled badly, and when the court's decision was for him to remain in the public school, he gave up and attempted to obtain a GED through the night program. He failed, and the last time he was seen in the winter of 1999, he was homeless in Washington, D.C. Norman had become a burden on instead of a benefit to society, because his learning disabilities were not addressed.

Society depends on the education of its citizens. For those students in and out of the dependency system, who are eligible for and require special education services, an appropriate education to

26. "Tagging" is the practice of spray painting signature graffiti.

ameliorate the affects of their disability is critical. Norman was just one heartbreaking example of what can happen to a child with a disability who does not receive the appropriate education he or she requires. Particularly frustrating in Norman's case was the fact that when he was given a second chance, he took full use of the opportunity for his and his community's sake. While it is impossible to know where he is today, unless he received another chance, he had become more of a burden on society rather than the community leader that he had shown he could have been.

At the minimum, students who do not receive a free appropriate public education (FAPE) never close the academic or life skills gap and contribute less to society than they otherwise could have. More often, the prognosis for children whose special education needs go unmet is more drastic. Not only are they less productive than they might be, they are often a burden on society either through the more extensive care they require because they are less independent, or through the expense of handling them within the criminal justice system, which they tend to cycle through at larger rates than the non-disabled.

A. Downward Spiral Towards the Juvenile Justice System

Failing to educate children with disabilities produces heavier costs for society because those children end up in the juvenile justice system at a higher than usual rate. Crime statistics show a link between the level of academic achievement, school attendance, graduation rates, and youth involvement in the criminal justice system.²⁷ Even though all children ages three through twenty-one are guaranteed a FAPE through the Individuals with Disabilities Education Act (IDEA), many, such as Norman, do not receive adequate special education services, which results in unemployment or imprisonment both as juveniles and as adults. "The delinquency system disproportionately attracts children with education-related disabilities both because those children are more likely to engage in delinquent conduct than their non-disabled peers and because the adults responsible for educational and delinquency systems are more likely to label and treat children with education-related disabilities as delinquent."²⁸

27. Clyde A. Winters, *Learning Disabilities, Crime, Delinquency, and Special Education Placement*, 32 *ADOLESCENCE* 451 (1997).

28. Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 *WHITTIER J. CHILD & FAM. ADVOC.* 3, 4 (2003), available at http://www.law.udc.edu/resource/resmgr/facultydocs/tulman_disability_delinquenc.pdf.

Frustration due to academic limitations and lack of academic success can lead learning disabled students to seek other avenues for success and acceptance including criminal activity. More students with learning disabilities are found among the adjudicated youth population than in the average school-age population.²⁹ While 12% of the public school population was in special education, anywhere from 20% to over 40% of individuals in correctional institutions were or should have been in special education.³⁰

Students with learning disabilities may be at risk for future incarceration if their disability is not remediated or at least lessened in severity so that they can become self-sufficient and participate fully in all economic and social opportunities that are available to their non-disabled peers.³¹

B. Productive Members of Society

The importance of education in preventing the downward spiral syndrome is only half the story. This Section will discuss how children with disabilities are productive members of society when afforded the appropriate services. Congress, in its reauthorization of the IDEA over the years, has increasingly recognized the potential of students with disabilities. Looking at the legislative history, the Supreme Court's interpretation of the Act in 1982 was that Congress's intent was to provide a "basic floor of opportunity" to students with disabilities.³² The Court further defined this "basic floor of opportunity" as "access to specialized instruction and related services which are individually designed to provide

29. *Id.*

30. John F. Mesinger, *Educateur Training as a Resource for Special/ Correctional Educators*, 38 J. CORRECTIONAL EDUC. 154. See also Tulman, *supra* note 28, at 4 n.2 (citing PATRICIA PURITZ & MARY ANN SCALI, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, BEYOND THE WALLS: IMPROVING CONDITIONS OF CONFINEMENT FOR YOUTH IN CUSTODY 16-17 (1998) (citing, *inter alia*, a meta-analysis conducted by Pamela Casey and Ingo Keilitz demonstrating that 35.6% of juvenile offenders have learning disabilities, 12.6% have mental retardation, and adding that the percentage of juvenile offenders with emotional disturbances is not adequately documented)). See also Peter Leone et al., *Understanding the Overrepresentation of Youths with Disabilities in Juvenile Detention*, 3 D.C. L. REV. 389 n.2 (1995) (citing Casey and Keilitz, among others, regarding the prevalence of disabilities among incarcerated youth); R.J. GEMIGNANI, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, UPDATE ON RESEARCH, JUVENILE CORRECTIONAL EDUCATION: A TIME FOR CHANGE, OJJDP UPDATE ON RESEARCH 2 (1994).

31. Winters, *supra* note 27, at 460.

32. Scott F. Johnson, *Reexamining Rowley: A New Focus in Special Education Law*, 2003 B.Y.U. EDUC. & L.J. 561, 563 (2003).

educational benefit to the [child with disabilities].”³³ Again, turning to legislative history, the Court concluded that Congress intended for children with disabilities “to achieve a reasonable degree of self-sufficiency.”³⁴

It bears repeating that this legislation comes on the heels of decades of near total exclusion from any educational opportunity. So, in its inception in 1975, the Act was seen as a bold new opportunity for students who, up to this point, had had no opportunity. The passion seems clear in the language of the Senate report, which sums up exactly the long range implications of denying these children an appropriate education. The Senate Report states:

The long range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society.³⁵

More specifically, the sponsors of the Act stated that “providing appropriate educational services now means that many of these individuals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments from public funds.”³⁶

As the protection for students with disabilities has evolved over the last thirty years, Congress has, to varying degrees, addressed the need for increased parental participation in the process of educating their children. Children who do not have parents to speak up for them have an even more difficult journey. Therefore, the IDEA seeks to protect these children.

III. PROBLEMS FOSTER CHILDREN FACE IN EDUCATION

This Section will discuss the problems faced by foster children within the educational system in general. Next, it will examine

33. Bd. of Educ. v. Rowley, 458 U.S. 176, 201 (1982).

34. *Id.* at 201 n.23.

35. S. REP. No. 94-168, at 9 (1975).

36. 121 CONG. REC. 19492 (1975) (remarks of Sen. Williams). *See also id.* at 25541 (remarks of Rep. Harkin); *id.* at 37024 (remarks of Rep. Brademas); *id.* at 37027 (remarks of Rep. Gude); *id.* at 37410 (remarks of Sen. Randolph); *id.* at 37416 (remarks of Sen. Williams).

specific issues for children within the foster system and also within the special education system. Finally, it will explore the different decision makers in the foster child's life, including the definition of a parent under the IDEA and the implications of the role of the foster parent generally, as well as under the IDEA.

A. Effect of the Status of Foster Child within the Educational System

It is no secret that children in the foster system underperform academically, not only in comparison to the general population, but also within their own economically distressed population. In fact, the dependency system itself perpetuates the cycle of poor academic performance. This is in no small part due to the significant number of school changes that invariably come with home placement changes. This next Subsection will explore each of these in detail.

1. Children in Foster Care Underperform Academically

Foster children not only underperform in comparison to the general population, but also compared to other children in their own economically distressed communities.³⁷ This means that improving education for all economically disadvantaged children will not necessarily help the plight of children in foster care. Compared to the general population, foster children are more likely to have poorer attendance rates, less likely to perform at grade level, more likely to have behavior and discipline problems, more likely to be identified as requiring special education, less likely to attend college, more likely to repeat grades, and twice as likely to drop out of school altogether.³⁸

Why is this? A combination of factors results in the downward spiral from which it is difficult for these children to break out. To begin with, most children in foster care come into the system because of ongoing neglect or abuse by their biological parents,

37. MARNI FINKELSTEIN, MARK WAMSLEY & DOREEN MIRANDA, VERA INST. OF JUST., WHAT KEEPS CHILDREN IN FOSTER CARE FROM SUCCEEDING IN SCHOOL? VIEWS OF EARLY ADOLESCENTS AND THE ADULTS IN THEIR LIVES 1 (2002), http://www.vera.org/publication_pdf/169_280.pdf. See also VERA INST. OF JUST., WORKING WITH FOSTER CHILDREN IN SCHOOL: A SUMMARY REPORT ON THE SAFE AND SMART DEMONSTRATION PROJECT (2002) (unpublished) (based on data from NEW YORK CITY BOARD OF EDUCATION ANNUAL SCHOOL REPORTS (1999–2001)).

38. FINKELSTEIN ET AL., *supra* note 37, at 2 (citing AMER. SCH. BD. J. STUDY (2001)).

who often had limited education themselves.³⁹ As part of the neglect, these parents have failed to register children in school, and even if registered, the parents often did not encourage or guide them in school. They may have discouraged attendance altogether.⁴⁰ Many of the older children in the family find themselves responsible for the care of younger, non-school-aged siblings and are not able to attend school on a regular basis. These parents also tend to neglect their children's health; so these children tend to have more health issues that keep them from school as well.⁴¹ Any one of these factors, but most often a combination of them, results in an inadequate education.

These children continue to slip further behind because the system into which they are placed with the initial intention of bettering their lives can further contribute to their educational demise. The immediate concern for these children when they are taken from their homes is their safety. Education first concerns case workers and other people involved with their cases when the children are failing or not attending school. It does not concern them earlier when preemptive measures could be taken such as providing them motivation or guidance in scheduling challenging classes, joining extra-curricular activities, or striving for higher than mediocre grades.⁴² This lack of attention to education, while seemingly necessary at the very early stages of securing the children's physical safety, is short sighted. The narrow focus on the child's physical safety loses sight of the one thing that can enable these children to escape the cycle: education.

2. The Dependency System Perpetuates the Cycle of Poor Academic Performance

The system perpetuates the abuse cycle each time a case worker is faced with a situation where a child is in an unsafe home placement. New home placement decisions, according to the McKinney-Vento Act,⁴³ are supposed to be made with the child's

39. RICHARD P. BARTH & CHARLES FERGUSON, INST. FOR EVIDENCE-BASED SOCIAL WORK PRACTICE, SWEDISH NAT'L BD. OF HEALTH & WELFARE, EDUCATIONAL RISKS & INTERVENTIONS FOR CHILDREN IN FOSTER CARE 32 (2004), <http://www.socialstyrelsen.se/NR/rdonlyres/B5498197-1554-47E0-9A0C-17EE9469F3C2/2905/20041109.pdf>.

40. FINKELSTEIN ET AL., *supra* note 37, at 16.

41. *Id.*

42. *Id.* at 4. See also Judith M. Gerber & Sheryl Dicker, *Children Adrift: Addressing the Educational Needs of New York's Foster Children*, 69 ALB. L. REV. 1, 3-4 (2005).

43. 42 U.S.C. § 11432(g)(1)(J) (Supp. V 2005).

education in mind; however, this is rarely done. For instance, in one example related to the author, a child was placed in a home at one end of town with a school and routine in place. Three weeks before he was to be returned home to his mother, he needed a temporary new home placement. Although there were options that would have enabled him to remain in the same school, he was placed in a temporary home that was more convenient for the case worker. He changed homes, schools, and daily routines, only to change them again in three weeks.⁴⁴ Every one of these changes affects the child, and to needlessly impose change when consistency could be maintained is unduly burdensome for the child, who is the focus of this process.

One underlying obstacle is the lack of coordination between the systems responsible for the care of children in foster care, the educational system, and the child welfare system.⁴⁵ Beyond communicating poorly with one another, each also lacks an understanding of how the other system works. Thus, each system often assumes the other is responsible for the individual needs of a child. Case workers are often overburdened with heavy caseloads, and even when they take time to investigate educational issues, they become overwhelmed by the bureaucracy of the educational system. Likewise, educators rarely are aware that a child is even in foster care or are confused about guardianship and who to call with academic or behavioral concerns.

Even while in a placement for a period of time, children within the foster system miss more school because of the demands placed on them simply by being in the system. Court dates, counseling sessions, and medical appointments are all set without consideration of the children's education.⁴⁶

At no point in this process is there a single person to whom the child can go for guidance. There is no one person who has the longitudinal knowledge of the child's educational background and who knows the child well enough to challenge her and assist her in setting appropriate goals. Studies of older children in foster care have shown that they have high educational aspirations and resent the lack of encouragement.⁴⁷ Clearly, a little encouragement and guidance, rather than mere maintenance, could go a long way in the educational arena.⁴⁸ Instead, school staff members, including

44. Interview with Laura Cauley, Foster Parent and Trained Surrogate Parent, in Atlantic Beach, Fla. (Sept. 2007) [hereinafter Cauley Interview].

45. FINKELSTEIN ET AL., *supra* note 37, at 45.

46. *Id.* at 44.

47. *Id.* at 3.

48. *Id.* at 4.

teachers and guidance counselors, do not expect children in foster care to excel. Also, foster parents typically have little formal education, and therefore, they do not expect any more than the minimum.⁴⁹ Thus, while children in foster care require guidance and support from adults who are sensitive to their unique needs and circumstances, because they do not have one person responsible for such educational needs, they get little to no guidance at all.⁵⁰

3. *Effect of Multiple School Changes on Children in Foster Care*

Another element that contributes to the lack of guidance and low expectations is the constant instability of these children's placements. Despite federal law that requires continuity in educational placement as a factor when placing children into homes,⁵¹ children within the system consistently change schools at an alarming rate,⁵² largely because when children change home placements, they often change educational placement as well. For every educational placement change, it can take anywhere from four to six months to recover academically.⁵³ A 1991 report from the National Association of School Psychologists said that it can take children anywhere from six to eighteen months to regain a sense of equilibrium, security, and control.⁵⁴ Case workers' first priority is safety, and with the additional burden of high case loads, the pressure to find beds pushes educational concerns to the back burner. The additional burden of navigating the bureaucracy of multiple school systems further complicates the situation.

The effect of school changes is multi-faceted. A study done by Dr. David Wood in 1993 showed that children who had changed schools at least six times between grades 1–12 were 35% more

49. *Id.* at 47.

50. Gerber & Dicker, *supra* note 42, at 4.

51. 42 U.S.C. § 675(1)(C)(iv) (2000). *See also* McKinney-Vento Homeless Education Assistance Improvements Act of 2001, 42 U.S.C. § 11432(g)(3)(A) (Supp. V 2005) (guaranteeing homeless children the chance to stay at one school even when they move from one temporary residence to another).

52. Interview with Marty Clark, Licensed Clinical Social Worker, in Jacksonville, Fla. (Sept. 7, 2007). *See also* Kathleen Kelly, *The Education Crisis for Children in the California Juvenile Court System*, 27 HASTINGS CONST. L. Q. 757 (1999).

53. ELIZABETH CALVIN ET AL., MAKE A DIFFERENCE IN A CHILD'S LIFE: A MANUAL FOR HELPING CHILDREN AND YOUTH GET WHAT THEY NEED IN SCHOOL (2001), <http://www.teamchild.org/manual.html> (fill in online form to download).

54. Linda Jacobson, *Moving Targets*, 20 EDUC. WEEK 29 (2001).

likely to fail a grade.⁵⁵ The report also indicated that frequent moving, alone, was an important predictor of academic success.⁵⁶ The effect on the child herself is traumatic enough without the added complication of rarely having their records follow them in a timely fashion.

Socially, the children must readjust to a new situation. New teachers, new peers, new curriculum, and a new set of rules and structure are stressful for all students when they enter a familiar school in the beginning of the school year. The solidarity of starting with a whole familiar group, however, allows the child to blend in with everyone else in the new environment. It is difficult in a new school even at the beginning of the year, but at that time it is likely they are not the only new students. With transfers mid-semester, however, they first have to contend with the stigma as the "new kid." Then, they must try to fit in. This is that much more difficult as they also try to adjust to a new home situation, one that they may or may not be willing to share the details of with their new classmates. Additionally, extra-curricular activities provide a non-threatening social outlet where the students share a common interest and/or talent. But, with mid-year transfers, there are fewer opportunities for extra-curricular involvement. The end result is that after too many transfers students give up the effort to keep up academically and socially.⁵⁷

Administratively, records get delayed or lost in transfers, which results in incomplete records of what the student has done and makes programming appropriately virtually impossible. Students unnecessarily repeat classes and even grades. Without school records, students with disabilities do not get the services required by their IEP.⁵⁸

B. Specific Problems Children in Foster Care Face Within Special Education

This next Subsection will discuss the frequency with which children with disabilities suffer abuse and neglect, as well as whether a lack of advocacy can lead to misdiagnosis or underdiagnosis of special needs within this population.

55. *Id.*

56. *Id.*

57. FINKELSTEIN ET AL., *supra* note 37, at 3.

58. *Id.*

1. There is a Correlation Between Disabilities and Children Suffering Abuse and Neglect

Studies suggest a correlation between disabilities and abused or neglected children.⁵⁹ Children with disabilities are more likely to suffer from maltreatment, emotional neglect, and sexual abuse.⁶⁰ Likewise, children in foster care are two to three times more likely to have a disability than their age-mates not in foster care.⁶¹ Studies show that 60% of children in foster care have measurable behavior or mental health problems, and about 35% to 45% of children in foster care have developmental problems.⁶² Is this an indication of improper over-identification of special education needs? Or is it an indication of how complicated these children's lives are? These children have multi-faceted issues that wreak havoc on their emotional and intellectual well-being merely within the status of being a foster child.

Children in the foster care system are prone to misdiagnosis and both over-inclusion and under-inclusion in special education because of a myriad of factors. These children tend to manifest disabilities at a higher rate compared to the general population.⁶³ Children enter dependency as either abused or neglected children, and as stated earlier, carry the consequential mental and physical health risks associated with it.⁶⁴ Some may have had low birth weights, lead poisoning, or malnutrition as a result of having lived in poverty. "Others may have faced health risks associated with parental neglect, including physical or sexual abuse, or maternal substance abuse."⁶⁵ These health issues can either manifest themselves as a disability or at least can look like a disability. It is,

59. See generally Andrew J. Baer et al., *Early Invention and Special Education Advocacy: Challenges in Representing Children, Parents, and the Department of Education*, 195 PLI/CRIM 97 (2003).

60. *Id.* at 110 (citing P. JAUDES & L. SHAPIRO, CHILD ABUSE AND DEVELOPMENTAL DISABILITIES IN YOUNG CHILDREN AND FOSTER CARE 221 (Judith A. Silver et al. eds., 1999) (citing, *inter alia*, NAT'L CTR. ON CHILD ABUSE & NEGLECT REPORT (1994))).

61. *Id.* (citing CAL. JUVENILE COURT SPECIAL EDUC. MANUAL 38 (Youth Law Ctr. 1994)).

62. *Id.* at 111 (citing P. JAUDES & L. SHAPIRO, CHILD ABUSE AND DEVELOPMENTAL DISABILITIES IN YOUNG CHILDREN AND FOSTER CARE 221 (Judith A. Silver et al. eds., 1999) (citing, *inter alia*, NAT'L CTR. ON CHILD ABUSE & NEGLECT REPORT (1994))).

63. Gerber & Dicker, *supra* note 42, at 29. (citing Keaton S. Smucket & James M. Kauffman, *School Related Problems of Special Education Foster-Care Students with Emotional or Behavioral Disorders: A Comparison to Other Groups*, 4 J. EMOTIONAL & BEHAVIORAL DISORDERS 30 (1996)).

64. *Id.*

65. *Id.*

therefore, not surprising that they are represented more in special education than their peers who have not had the same health background.⁶⁶ In addition, the behaviors arising from situations that lead to placement in foster care mimic those of a student with emotional disturbance.⁶⁷ For example, a child in the foster care system may exhibit emotional characteristics that are situational such as “fight” responses like tantrums, aggression, and oppositional and defiant behavior, or “flight” responses like withdrawal, detachment, apathy, daydreaming, or “freeze” responses. Finally, they may exhibit dysfunction in motor behavior and state regulation, such as hyperactivity, impulsivity, distractibility, mood swings, agitation, or sleep problems. All of these behaviors are also behaviors associated with common behavioral and emotional disorders when they occur over long periods of time, such as in attachment disorder, anxiety disorder, depression, adjustment disorder, attention deficit-hyperactivity disorder, or oppositional-defiant disorder.⁶⁸ If a child has been in a school for only a short period of time, after a significant emotional trigger, it is difficult to tease out whether the behavior is situational or an ongoing disorder requiring intervention.

2. A Lack of Advocacy Leads to Misdiagnosis and Underdiagnosis

While foster children with disabilities are the children in most need of guidance and advocacy, they lack the voice of someone to advocate for their educational needs, compounding an already degenerative situation.⁶⁹ Through lack of advocacy and misdiagnosis, they are either overlooked or inappropriately placed.⁷⁰

One advocate noticed that one thing that is sorely needed for these children is advocacy.⁷¹ There needs to be someone who works with the foster parents so that everybody can address the fact that the child is not getting the appropriate education.⁷² As

66. *Id.*

67. *Id.* at 41.

68. Laura Bailet, Live Presentation: Conditions that May Affect a Dependent Child’s Ability to Learn—Educating Dependent Children with Special Needs: How Surrogate Parents, Family Service Caseworkers, Guardians ad Litem, and Foster Parents Can Work Together to Help Dependent Children Achieve School Success (Apr. 5, 2007).

69. *Id.*

70. Gerber & Dicker, *supra* note 42, at 29 (citing Cynthia Goose, *Caught Between Two Systems: How Exceptional Children in Out-of-Home Care Are Denied Equality in Education*, 19 YALE L. & POL’Y REV. 81 (2000)).

71. *Id.*

72. *Id.*

stated above, the educational needs of the children are given short shrift behind family reunification and permanency planning by the child welfare professionals. The welfare professional, or case worker, believes it is the school system's job to look after the educational progress of these children.⁷³

Case workers rarely have an understanding of the special education system and do not know when the school system is not providing an appropriate program for the child. The foster parent, or group home coordinator, likewise, does not know the students' rights to services and often accepts whatever program is offered by the school system, which, if done in a timely manner, is done by a team of educators that has known the child for only a short period of time.⁷⁴

Further hindering any progress, schools frequently suspend children over the cumulative ten day limit in direct violation of the IDEA, but case workers and foster parents are often not aware of this protection⁷⁵ resulting in more missed school for children who need to miss it less than anyone else.⁷⁶ This happens to all populations of children with disabilities, but it affects children in foster care more because of the inconsistency in the supervision of the children and the lack of tracking of attendance from one school to another. If the foster parent is the focus of the advocacy, then that focus and "institutional knowledge" changes and starts over with each new home placement.

Probably the most pragmatic reason that children are misdiagnosed or under-diagnosed is that the children and their records get lost in the shuffle. As discussed earlier with all children in the dependency system, quite literally these children are shuffled

73. Ana España & Tracy Fried, *The Expanding Role of the Juvenile Court in Determining Educational Outcomes for Foster Children*, 5 J. CTR. FOR FAMILIES, CHILDREN & CTS. 83, 84 (2004), available at <http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/JVol5-Espana.pdf> (citing THOMAS PARRISH ET AL., AM. INSTS. FOR RESEARCH EDUC. OF FOSTER GROUP HOME—CHILDREN, WHOSE RESPONSIBILITY IS IT? (2001), http://www.csef-air.org/publications/related/LCI_final.pdf).

74. *Id.* at 85.

75. 20 U.S.C. § 1415(k)(1)(B) (Supp. V 2005) ("School personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 days (to the extent such alternatives are applied to children without disabilities).").

76. Interview with Foster Parents, in Jacksonville, Fla. (Feb. 20, 2006). See also CENTER WITHOUT WALLS, THE EDUCATIONAL NEEDS OF CHILDREN IN FOSTER CARE: THE NEED FOR SYSTEM REFORM—FINAL REPORT TO THE CHILD WELFARE FUND (1998), <http://www.advocatesforchildren.org/pubs/2005/fostercarereform.pdf>.

from home placement to home placement and therefore are shuffled to different schools. In addition to the complications covered above, these multiple moves impact children with disabilities exponentially more. They interfere with the evaluation and identification process, as well as the delivery of services and monitoring of progress. The regulations for the IDEA as reauthorized in 2004 require the school to complete an evaluation process within sixty days of obtaining a parent's consent.⁷⁷ The first hurdle to overcome is identifying that there is a problem and then obtaining a parent's consent to evaluate. Even if a problem is identified in a timely manner and the foster parent (that qualifies as a parent in these circumstances, as discussed below⁷⁸) signs a consent form to begin the evaluation process, it is unlikely that the child's stay at the school will be long enough to complete the process.⁷⁹ This is made more complicated by the policy of most school systems to attempt to remediate any deficits through general education interventions before beginning the evaluation process.⁸⁰ It is possible and is often the case that the child will repeat this intervention process over and over at each new school without ever getting an appropriate evaluation that will assist the IEP team in assessing what the actual needs of the child are.

The missing link in these children's lives is a parent. A critical role of parenting is guiding children in their education. Children in more intact families have an adult to act as an advocate through the educational process, usually a parent. Despite the myriad of adults involved in the foster child's care, no one person is responsible for his or her education. There is no one to navigate the school system, follow up on missing records, counsel the children on course selection in each new transfer to maintain consistent goals, and, as discussed further below, no one to monitor the special education process. Too many children in foster care are placed in inappropriate programs, lack sufficient evaluations, and lack sufficient services merely because there is no one to inform the new school of what the child needs. By the time the school realizes there is something needed, precious time has been lost.

C. Decision Makers in the Foster Child's Life

Numerous people are required to make the decisions and act on behalf of children in foster care, where the parent alone would

77. 34 C.F.R. § 300.301(c)(1)(i) (2007).

78. See *infra* Part III.E.2 and accompanying text.

79. CENTER WITHOUT WALLS, *supra* note 76.

80. *Id.*

usually do so. Foster parents or group home coordinators, guardians ad litem (GALs) and case workers all play roles in the child's affairs. Although the exact roles, responsibilities, and authority differ from state to state, some general principals apply.

Generally, foster parents are responsible for and have authority to make day to day decisions.⁸¹ A more detailed explanation of the foster parents' role is discussed below, but in short, the contractual agreement between the foster parent and the state entrusts the foster parents with the "legal custody," or the day to day supervision of the child, while the agency retains the responsibility of the "care and custody" of the child.⁸² Under the current IDEA, IDEA 2004, a foster parent may act as the parent in special education matters for children found eligible or children who may be eligible for services.⁸³

Typically, GALs represent the "best interest of the child."⁸⁴ They do not represent the child; rather, a GAL collects information including the child's preference when appropriate, and reports to the court as an independent party in dependency proceedings.⁸⁵ Due to this independence, courts tend to give great deference to their findings.⁸⁶ Their role is that of an investigator and reporter to the court.⁸⁷ An attorney ad litem, on the other hand, does represent the child's preference.⁸⁸

As an agent for the child welfare agency, the case worker's primary role is to the "care and custody" of the child.⁸⁹ While they are the front line person involved with the children, in some cases, such as in Florida, the caseworker is unable to make decisions without a full team discussion. While the protection of such a thorough system is laudable, it often takes much longer to get things done, time these children do not have.⁹⁰

81. *Smith v. Org. of Foster Families*, 431 U.S. 816, 826-27 (1977).

82. *Id.*

83. 20 U.S.C. § 1401(23) (Supp. V 2005).

84. LINDA ELROD, *CHILD CUSTODY PRACTICE AND PROCEDURE* § 12:7 (1993) (citing *Schwartzkopf v. Schwartzkopf*, 9 S.W.3d 17, 22 (Mo. Ct. App. 1999) and *Jacobsen v. Thomas*, 100 P.3d 106, 109 (Mont. 2004)).

85. *Id.*

86. Cauley Interview, *supra* note 44.

87. ELROD, *supra* note 84, § 12:7.

88. *Proposed Standards of Practice for Lawyers Who Represent a Child in Abuse and Neglect Cases*, 29 FAM. L.Q. 375 (1995).

89. *Smith v. Org. of Foster Families*, 431 U.S. 816, 826 (1977).

90. Cauley Interview, *supra* note 44; Interview with Ericka Curran, Surrogate Parent, in Jacksonville, Fla. (May 15, 2008, updated Nov. 11, 2008); Interview with Cynthia Irvin, Surrogate Parent, in Jacksonville, Fla. (May 15, 2008).

In short, the foster parents or group home personnel make day to day decisions. The caseworker or the agency with whom the caseworker is attached make “care and custody” decisions. The GAL observes and reports to the court, having no direct decision making ability, but having a powerful voice in the eyes of the court which could, therefore, affect any decision the court ultimately makes on both day to day and “care and custody” matters.

To whom does the school turn to answer questions? It seems that the answer depends on the question. For day to day issues that arise such as tardiness, absenteeism, and general hygiene, the foster parent is the most logical point of contact because the foster parent is responsible for making sure that the child is fed, bathed, and gets to school on a daily basis.

For more complicated questions involving students who are disabled or who are suspected of having a disability, the Individuals with Disabilities Education Act gives some guidance on the role of the parent and who should act as a parent when one cannot be found or is unwilling to act.

D. Role of the Parent Under the IDEA

The purpose of the Act is to provide all children with disabilities the right to a free and appropriate public education (FAPE),⁹¹ yet the IDEA is drafted to protect the rights of the *parents* of children with disabilities.⁹² The FAPE is tailored to the unique needs of each eligible child by means of an Individualized Education Program (IEP).⁹³ The IEP is drafted by a comprehensive team that must include the parent and may include the child when appropriate.⁹⁴

Moreover, the procedural safeguards found in section 1415 of the IDEA are highly specific and elaborate. When compared to the more general substantive requirements in the Act, the importance of these procedures cannot be gainsaid.⁹⁵ The purpose of these detailed and precise safeguards is “to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by [the state education agency, state agency, or local education agency].”⁹⁶ The types of procedures, notification requirements, and

91. *Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181 (1982).

92. *Id.* at 182 (describing the extensive procedural safeguards that parents afforded by the statute, imposed upon the states).

93. *Id.* at 181.

94. 20 U.S.C. § 1414(d)(1)(B) (Supp. V 2005).

95. *Rowley*, 458 U.S. at 205.

96. § 1415(a).

due process rights identified in section 1415 all pertain to the rights of the parents of children with disabilities. Presumably, this is because the rights of both are so interconnected. Congress recognized a gap when the parents of a child could not be found causing the child's right to a FAPE to lack an advocate.⁹⁷ Congress attempted to remedy this by requiring the Local Education Agency (LEA) to appoint a surrogate parent to advocate for the child's FAPE.

E. Role of Foster Parent

1. Generally

Who are we talking about when we say "children in foster care?" The Supreme Court defines "foster care" as: "child welfare service which provides substitute family care for a planned period for a child when his own family cannot care for him for a temporary period, and when adoption is neither desirable nor possible."⁹⁸ "Foster care" more generally applies to any type of care that provides a substitution for the care of the natural parents, including group homes, institutions, and foster family homes.⁹⁹

The relationship of the foster parent to foster child is complicated both legally and emotionally. Technically, foster families have a contractual agreement with the state to care for the children for which they are compensated.¹⁰⁰ As previously stated, the agency is entrusted with the "care and custody" of the child, while the "legal custody" (day to day supervision) is entrusted to the foster parents. Foster parents' relationships with the children are meant to be temporary.¹⁰¹ Not all the legal custody is in the foster parents because the state still supervises the foster parents, and the natural parents do not surrender their legal guardianship over the children.¹⁰² The contractual arrangement eliminates any right to family privacy otherwise recognized under the Federal

97. § 1415(b) (as effective in 1997).

98. *Smith v. Org. of Foster Families*, 431 U.S. 816, 823 (1977) (citing CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR FOSTER FAMILY CARE SERVICE 5 (1959)).

99. *Id.* Cf. Robert Mnookin, *Foster Care—In Whose Best Interests?*, 43 HARV. EDUC. REV. 599, 600 (1973).

100. *Smith*, 431 U.S. at 823.

101. *People v. Nassau County Dep't of Social Servs.*, 386 N.E.2d 235, 240 (N.Y. 1978).

102. *Smith*, 431 U.S. at 827. See also Donna A. Napolitano, *New York State Constitutional Decisions: In the Matter of Kevin M.*, 18 TOURO L. REV. 173, 182 (2002).

Constitution. Arguably, a foster parent cannot stand in a *loco parentis* relationship because the state's interest of ensuring education is less than that of the natural parent's.¹⁰³ Therefore, the interests of the foster parents, as the agent of the state, are also less than that of the natural parent.

The exact advantage of foster homes over institutions or group homes is simultaneously its disadvantage. The purpose of a true foster home is to emulate a homelike environment. Yet, because it is meant to only be temporary,¹⁰⁴ foster parents are discouraged from becoming too attached.¹⁰⁵ It is no wonder foster parents are confused about their role in education. Likewise, in the group home situation, it is even less clear which adult holds the right or the responsibility to make educational decisions. All this leaves the child in foster care alone with no guidance and with no educational accountability.

2. Under the IDEA

The Individuals with Disabilities Education Act recognizes the situation where a child may not have an identifiable parent to represent his or her interests in educational matters. The recent reauthorization of the regulations further clarifies the definition of a parent and the authority of a foster parent and provides a more

103. See *Wisconsin v. Yoder*, 406 U.S. 205, 232–33 (1972) (citing *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925)).

104. See FLA. DEP'T OF CHILDREN & FAMILIES, DCF QUICK FACTS: CRITICAL FEW PERFORMANCE MEASURES 4–5 (2008). For example, one of the Department of Children and Families (hereinafter DCF) performance measures includes an objective of “permanence” that outlines the goals of the department to first, reunify the children with their natural families within twelve months of the last removal, or in the alternative, if the children are unable to be returned to their home, to place them into a permanent adoptive family within two years. *Id.* Additionally, the department cites as another goal, that children have no more than two placements within twelve months of removal from their family. *Id.* at 4. Other statistics from Florida, in fact, indicate that the average length of stay in foster care is thirty-three months. FLA. FOSTER ADOPTIVE PARENT ASS'N INC., STATISTICS FROM THE U.S. AND FLORIDA (2001), <http://www.charityadvantage.com/fsfapa/stats1.asp>. Taken in their totality, these statistics and goals reaffirm that the main goal is permanency of children, but the reality is that they are out of a permanent home often for more than a year, sometimes up to at least thirty-three months, and in addition, they move frequently while in foster care. Foster care is not intended as the final resting stop for these children; it is merely a temporary placement, with no concrete timeline for either the foster parent or child to rely on.

105. *Smith*, 431 U.S. at 836.

thorough explanation of the appointment of surrogate parents, discussed in more detail below.¹⁰⁶

As previously discussed, foster parents' relationships to their foster children are complicated. It is precisely because of these complications that the language in IDEA 2004, in one respect, ends up taking a step backwards in providing advocacy for children in the dependency system who also require special education services. Prior to IDEA 2004, foster parents had qualified status as a parent under the IDEA, and three criteria must have been met: (1) state law must not prohibit it; (2) the natural parents' authority to make educational decisions must have been extinguished; and (3) *the foster parent is willing, has an ongoing long-term parental relationship, and has no interest that would conflict with the interests of the child.*¹⁰⁷ While this standard appears restrictive at first glance, it reflects the understanding of the *Smith* Court when it declared a difference between the foster family that forms a long standing and consistent relationship with the child and the foster family that is a short-term, temporary living arrangement with far less emotional attachment and investment. The danger in allowing the shorter term foster parents to make educational decisions is that they do not have enough knowledge of educational needs or the educational background of the child. When the child is moved again, the situation would repeat itself. In a longer term situation, the parent has the background information and the child is less likely to be moved, maintaining the bond and the background knowledge that is critical in educational advocacy.

106. See *infra* note 109 and accompanying text.

107. 34 C.F.R. § 300.20 (1999, repealed 2006) (emphasis added). The exact language of former section 300.20 reads:

(a) *General*. As used in this part, the term parent means—

A natural or adoptive parent of a child;

A guardian but not the State if the child is a ward of the State;

A person acting in place of a parent (such as a grandparent or stepparent with whom the child lives, or a person who is legally responsible for the child's welfare); or

A surrogate parent who has been appointed in accordance with [section] 300.515.

(b) *Foster Parent*. Unless State law prohibits a foster parent from acting as a parent, a State may allow a foster parent to act as a parent under Part B of the Act if—

(1) The natural parents' authority to make educational decisions on the child's behalf has been extinguished under State Law; and

(2) The foster parent—

(i) Has an ongoing, long-term parental relationship with the child;

(ii) Is willing to make the educational decisions required of parents under the Act; and

(iii) Has no interest that would conflict with the interests of the child.

The current regulations supporting the IDEA 2004 define parent as:

- (1) A biological or adoptive parent of a child;
- (2) A foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent;¹⁰⁸
- (3) A guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State);
- (4) An individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or
- (5) A surrogate parent who has been appointed in accordance with §300.519 or section 639(a)(5) of the Act.¹⁰⁹

The current regulations do not place limits on foster parents' ability to act as parents for educational matters as the previous regulations did. They no longer require an ongoing, long-term parental relationship with the child and also do not require the foster parent to be willing to make educational decisions.¹¹⁰

Freeing limitations on foster parents' authority to act as parents may indeed optimize the chance that all children will have a parent-like figure performing the job of a parent in the special education process.¹¹¹ But, by changing the definition to be more inclusive for foster parents, it becomes over-inclusive including unwilling, unable, and inconsistent foster parents as advocates that cannot follow through with their responsibilities to a child who is in dire need of a responsible advocate at meetings. Not all foster parents are able or willing to navigate the complex bureaucracy of special education policy.¹¹²

In an effort to "optimize the chances that all children will have a parent like figure . . . in the special education process," the regulations for IDEA 2004 casts the net too far by loosening the

108. It is important to note that this subgroup of adults that qualifies as parents is the only subgroup (other than the natural parent) that does not have advance notice that the child for whom they are advocating has special needs.

109. 34 C.F.R. § 300.30(2) (2007).

110. Holding foster parents responsible for the educational matters of their foster children is outside the scope of this Article.

111. Gerber & Dicker, *supra* note 42.

112. See FINKELSTEIN ET AL., *supra* note 37.

qualifications of a foster parent acting as a parent even without a showing of a long standing relationship or willingness to act. The former regulatory language addressed those particular concerns on the face of the definition of “parents.”¹¹³ But the current regulations’ looser treatment of foster parents needs to be read in context with the provisions in IDEA 2004 on the appointment of surrogate parents.¹¹⁴ If a court used the old regulations and found that the foster parent had a long standing relationship, was willing, and had no conflicting interests with the foster child, then there would not be a need to appoint a surrogate. But in many cases, the foster parent has a tenuous relationship with the child, one that can end at a moment’s notice. Once the child is moved from the placement, that relationship is over, and a new one starts. If the foster parent was the surrogate parent as well, the child will have no consistent advocate between the changes. The goals of the statute are best served if an independent educational surrogate is appointed where the child does not have an ongoing, long-term relationship with a committed foster parent.

Some scholars proffer that the proposed regulations for 2004 Amendments set out a hierarchy that would automatically supplant a surrogate parent’s appointment if a child was in a foster home.¹¹⁵ There is no such language in the actual regulations that would suggest such a hierarchy, and to impose such a hierarchy would defeat one of the main purposes of appointing someone as a surrogate parent in special education cases—consistency in the child’s educational matters regardless of chaos in his or her home life. If, as some suggest, a hierarchy were imposed, the illogical result would be multiple parents rotating in after every change in the child’s home placement situation. For instance, when a child enters dependency, and the court finds the parents unable or unwilling to make educational decisions, a surrogate parent is appointed. If the child is then placed into foster care, under the new regulations and a hierarchical scheme, the new foster parent would automatically trump the court appointed surrogate parent. Then, upon removal from the foster home, the child changes homes, schools, and educational parent. One purpose of appointing a surrogate parent separate from the other decision makers in a foster child’s life is that no matter what happens throughout the rest of the process, the educational piece can continue instead of starting over each and every time. The purpose of appointing a surrogate parent in the dependency process would be thwarted by

113. 34 C.F.R. § 300.20 (1999, repealed 2006).

114. 20 U.S.C. § 1415(b) (Supp. V 2005).

115. Gerber & Dicker, *supra* note 42.

reassigning the child to a series of people each time the child's home placement changed—an illogical result.

The surrogate parent should be an independent third party. The statute requires that the surrogate parent have no conflicts and not be an employee of the agency caring for the child.¹¹⁶ This means that the case worker and anyone else involved with the agency caring for the child will not qualify as a surrogate parent. A more thorough discussion of who qualifies as such a person is explored below.¹¹⁷

VI. SURROGATE PARENTS—WHAT ARE THEY?

A. What are They?

1. Surrogate Parents Under IDEA Prior to 2004

It is evident that children in the dependency system need someone to advocate for them. The IDEA is a statute that protects the rights of parents of children with disabilities.¹¹⁸ Traditionally, under the Act, in the situation where there is no parent, a surrogate parent represents the educational interests of that child.¹¹⁹ The reauthorization of the IDEA in 2004 expanded on the appointment of surrogate parents when Congress seemed to recognize that the local education agencies (LEA) that had been responsible for the appointment were in fact not following through resulting in many children in foster care not receiving a FAPE.

From its inception until the current change in the IDEA, the Act and its supporting regulations required the LEA or the state agency or state education agency (SEA) to provide surrogate parent to any children who did not have a parent to advocate for them.¹²⁰ The regulations explained that employees of these

116. § 1415(b)(2)(A). For similar reasons, appointments made by the school systems are inherently problematic.

117. See *infra* note 131 and accompanying text.

118. Bd. of Educ. v. Rowley, 458 U.S. 176, 182 (1982).

119. § 1415(b)(2) (as effective between June 4, 1997 to Apr. 28, 1999).

120. While effective between 1997 and 1999, section 1415(a) read, in pertinent part:

(a) Establishment of procedures

Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provisions of free appropriate public education by sub agencies.

Types of procedures

agencies could not perform the duty and that those qualified individuals would represent the child in all matters relating to identification, evaluation, and educational placement.¹²¹

In an interesting foreshadowing of the new regulations, the comments to the 1999 regulations specify the difference between any foster parent qualifying as a surrogate parent and a foster parent that qualifies as a *parent*.¹²² The distinction is significant in that the definition of a parent under the old regulations is more strict so that allowing those foster parents to automatically qualify as surrogates satisfies the concerns stated earlier in having any foster parent (under the current regulations) automatically qualify. In other words, those foster parents that would have qualified as a *parent* under the old, more restrictive definition of *parent* would bring to the table a consistent institutional understanding of the child's disability as well as a long standing relationship with the child, which is more likely to result in consistency in advocacy through a series of years. Those foster parents that did not qualify under the old definition did not do so for the exact reasons that would not make them adequate surrogate parents. Because they are unlikely to remain the foster parents for any significant length of time, they are also unlikely to remain consistent advocates for the child's educational needs and are in the same tenuous position that the school personnel are in when they first receive the child.

2. *Surrogate Parents Under IDEA 2004*

Senator Murray, when advocating for *new* provisions under IDEA 2004, said that the amendments to the statute from the IDEA 1997 are directed to protect children in foster care and unaccompanied homeless youth.¹²³ Congress inserted three additional provisions to this subsection. The first authorized judges

The procedures required by this section shall include—

(2) procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child) to act as a surrogate for the parents . . .

121. 34 C.F.R. § 300.515 (1999, repealed 2006).

122. 34 C.F.R. § 300.20 cmt. (1999, repealed 2006).

123. H.R. 1350, 108th Cong. (2003) (statement of Sen. Patty Murray).

in dependency cases to appoint surrogate parents.¹²⁴ Next, Congress clarified that unaccompanied homeless youth shall be appointed a surrogate parent by the LEA.¹²⁵ Finally, Congress charged the state to ensure the appointment of surrogate parents within thirty days of determining a need for one.¹²⁶

The regulations delineate a bit more the distinctions between the appointment of a surrogate parent by an LEA versus the appointment of a surrogate parent in both the “wards of the state” and the “unaccompanied homeless youth” situations.¹²⁷ In both instances, the criteria for selecting a surrogate parent are less stringent than in the case where the LEA has appointed one.¹²⁸ In the case of an unaccompanied homeless youth, the emergency appointment of an agency employee as a surrogate is a temporary fix until an appropriate surrogate parent is found, but in the case of wards of state, the appointment by the dependency judge is permanent.¹²⁹

Not only did Congress provide more opportunities for appointments of surrogate parents in situations where a child is a ward of the state or homeless, but the Department of Education further relaxed the criteria for appointments made by dependency judges compared to appointments made by the public agencies.¹³⁰ According to the regulations, public agencies may select a surrogate parent in any way permitted under state law, but it must ensure that the person selected must not be an employee of the SEA, LEA, or any other agency that is involved in the education or care of the child.¹³¹ Additionally, the person must not have personal or professional interests that conflict with the interest of the child and must have the knowledge and skills to ensure adequate representation of the child.¹³² In contrast, the provision allowing dependency judges to appoint surrogate parents merely requires that the person selected is not an employee of the SEA, LEA, or any other agency that is involved in the education or care of the child.¹³³

124. 20 U.S.C. § 1415(b)(2)(A)(i) (Supp. V 2005).

125. § 1415(b)(2)(A)(ii).

126. § 1415(b)(2)(B).

127. 34 C.F.R. § 300.519(c) & (f) (2007).

128. § 300.519(d).

129. § 300.519(c) & (f).

130. Public agencies include state education agencies (SEAs), local education agencies (LEAs), and other state agencies. Typically, the parties carrying out these provisions are the LEAs, which are the school districts.

131. § 300.519(d)(1) & (2)(i).

132. § 300.519(d)(2)(ii)–(iii).

133. See § 300.519(c), entitled Wards of the State: “In the case of a child who is a ward of the State, the surrogate parent alternatively may be appointed

The comments to the regulations emphasize the intentional difference between the criteria. Many commentators expressed concern over the less stringent criteria for appointing surrogate parents to wards of the state when a judge overseeing a case appoints the surrogate parent. The Department of Education intentionally declined to impose the additional requirements to this group in order to interfere as little as possible with the appointment of individuals to act for the child.¹³⁴ The comments further explain that it is their expectation that the individuals appointed by the judges would not have personal or professional interests that conflict with the interests of the child, nor would they choose someone without knowledge and skills adequate enough to represent the interests of the child.¹³⁵ It bears notice that the Department prioritizes flexibility in appointing surrogate parents to this population over regulation, where in the case of LEA appointments, regulation is prioritized.

The third addition to the statutory language in this section is the requirement that SEAs “make reasonable efforts to ensure the assignment of a surrogate parent not more than thirty days after a public agency determines that a child needs a surrogate parent.”¹³⁶

B. Inherent Problems with Making the Local Education Agency (LEA) Solely Responsible for Appointment of a Surrogate Parent

An LEA surely has no interest in appointing a surrogate parent. While not appointing one violates the IDEA, if it did appoint one it

by the judge overseeing the child’s case, provided that the surrogate meets the requirements in paragraphs (d)(2)(i) and (e) of this section.”

See also § 300.519(d)(2)(i) & (e):

(2) Public agencies must ensure that a person selected as a surrogate person—

(i) Is not an employee of the SEA, LEA, or any other agency that is involved in the education or care of the child;

(e) Non-employee requirement; compensation. A person otherwise qualified to be a surrogate parent under paragraph (d) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.

134. Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities—Final Rule, 71 Fed. Reg. 46,711 (Aug. 14, 2006) (to be codified at 34 C.F.R. pt. 300), available at <http://idea.ed.gov/download/finalregulations.pdf>.

135. *Id.* (referencing the requirements of LEAs in appointing surrogate parents under § 300.519(d)(ii) & (iii)).

136. 20 U.S.C. § 1415(b)(2)(B) (Supp. V 2005).

would open the LEA up to more scrutiny of its compliance to the rest of the IDEA. The irony is that an LEA that is largely compliant with the requirements of the IDEA is more likely to appoint a surrogate parent in a timely manner. A compliant LEA has nothing to fear from a surrogate parent's oversight, and a compliant LEA is more likely to have systems in place to adequately identify the need and appoint a surrogate parent. By contrast, a habitually noncompliant LEA not only has an inherent disincentive to appoint a neutral surrogate, but would likely not have the systems in place to follow through with such an appointment.

These non-compliant LEAs nevertheless continue to appoint surrogate parents. Anecdotal evidence, however, suggests that surrogate parents, when appointed by the LEA from a list of people kept by the LEA are nothing more than a rubber stamp for the district.¹³⁷ Despite the fact the regulatory language requires that the public agencies must ensure that a surrogate parent does not have conflicting interests, it is little wonder why this phenomena occurs. The mere fact that the LEA appoints the person from its list is like the fox choosing the guard to the henhouse. The natural allegiance is to the party in control of the appointment and termination of the appointment, whether or not they are compensated. Although the regulations seem to provide protections from retaliation when surrogates do not agree with the district, the school systems can still find pretexts to dismiss them.

Comments to the regulations address the protections for surrogate parents who may disagree with the district during their representation of the child with a disability.¹³⁸ The surrogate parents, the Department of Education answers, are protected under section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act, which prohibit retaliation or coercion against any individual who exercises their rights under federal law for the purpose of assisting children with disabilities by protecting rights protected under those statutes.¹³⁹ This response minimizes the fact that the surrogate parents' specific role is to provide oversight of the district for the benefit of the child with a disability. The

137. Interview with Sarah Wallerstein, GAL Program, Education Attorney, Legal Aid Society of the OCBA, in Orange County, Fla. (Feb. 25, 2008). Most of the surrogate parents are parents themselves of children with a disability, and they are paid by the school system. In addition, prior to taking any action they check with the school system, defeating the checks and balances of independence. *Id.* See also CENTER WITHOUT WALLS, *supra* note 76, at 14–15.

138. 71 Fed. Reg. 46,711.

139. *Id.* See also 34 C.F.R. § 104.61 (2007) (referencing 34 C.F.R. § 100.7(e) and 28 C.F.R. § 35.134).

extensive procedural protections in the IDEA exist precisely because districts routinely deny children with disabilities a free appropriate public education and similarly disregard the retaliation or coercion provisions related thereto. If this were not the case, then surrogate parents and the IDEA as a whole would not be needed.

C. Appointment by a Dependency Court

The gate keeper of change in the new law is the dependency court judge. Typically, judges don't have a background in disabilities and special education. Additionally, most dependency judges are not well versed with the IDEA or the changes since the 2004 reauthorization. They very well may not know that they have been granted the authority to appoint surrogate parents to represent the educational interests of children whose parents are not available or unwilling to represent them.

Judges need to be made aware first of their authority to appoint surrogate parents. Second, they need to acquire at least a minimal understanding of the impact of disabilities on a child's education and an awareness of some red flags that may alert someone to the possibility a disability exists. Third, and following on the understanding of disabilities, is that judges need to know when to appoint a surrogate parent. If a child has a disability or is *suspected* of having a disability, a surrogate parent may be appointed. It is important to note that just because the LEA has not identified the child as a student requiring special education; it does not mean that that child is not in need of such services. It is in those instances where an independent surrogate parent can be of most use. Finally, in order to facilitate the appointment process for the court as a whole, an efficient mechanism that is consistent within the court is needed to make sure the appointments occur effectively. For instance, form orders can be available for the judges' appointments as well as packets of pertinent information for the surrogate parents.

Another challenge is locating qualified volunteers to be surrogate parents. As discussed earlier, the qualifications for a court appointed surrogate parent are less stringent than they are for those appointed by an LEA. At this time, it appears that it is up to each individual court to find and train appropriate volunteers to be surrogate parents. The success of the program will only be as strong as the people who do the service, so it behooves all people involved with the care of the child to properly choose and prepare the individuals who will be appointed. The time commitment is one of longevity more than anything else. An important purpose of

the surrogate parent is to provide consistency through changes in home and school. Finding an appropriate candidate and preparing them for the commitment can be a daunting task. A likely candidate is the guardian ad litem (GAL), who already has much of the information required for the task. The question is whether the GAL role would conflict with the surrogate parent role.

The role of the GAL and attorney ad litem vary from state to state. Some states permit dual representation,¹⁴⁰ while others discourage it, and still others statutorily forbid the same person to act as both guardian ad litem and legal counsel.¹⁴¹

In family law cases, the guardian ad litem represents the best interest of the child and invariably may have conflicts of interest with at least one parent and potentially the child's actual expressed interest, which is advocated through an attorney ad litem.¹⁴² In dependency cases, the GAL may also have conflicts with the other parties, parents, and children, but when a surrogate parent is appointed, by definition the parents are not a potentially conflicting party because they are unavailable. When, or if, the parents become available, the need for the surrogate parent would be extinguished.

Moreover, the legal status of the surrogate parent parallels that of the guardian ad litem in two significant ways. First, where the GAL represents the child's best interest in care and custody matters, the surrogate parent represents the child's best interest in educational matters. Both may take into consideration what the child's expressed interest is, but ultimately their position is whatever is in the best interest of the child. Second, neither is

140. See, e.g., TEX. FAM. CODE ANN. § 107.001(4) (Supp. 2008) (“Dual role” means the role of an attorney who is appointed under Section 107.0125 to act as both guardian ad litem and attorney ad litem for a child in a suit filed by a governmental entity.”). See generally *Auclair v. Auclair*, 730 A.2d 1260 (Md. Ct. Spec. App. 1999). Appointed attorney in custody cases may fill several roles, including reporting the child's preference, investigating the reasons for the child's preferences, and making independent determination of the child's best interest. *Id.* See also *Fox v. Wills*, 890 A.2d 726, 728–29 (2006) (discussing *Auclair* but not overturning the decision).

141. See, e.g., FLA. STAT. ANN. § 61.401 (West 2005).

142. *Newman v. Newman*, 663 A.2d 980, 987–88 (Conn. 1995) (“[W]e are concerned about creating conflict in the attorney's role by conflating the role of counsel for a child with the role of guardian ad litem or next friend. Typically, the child's attorney is an advocate for the child, while the guardian ad litem is the representative of the child's best interests. As an advocate, the attorney should honor the strongly articulated preference regarding taking an appeal of a child who is old enough to express a reasonable preference; as a guardian, the attorney might decide that, despite such a child's present wishes, the contrary course of action would be in the child's long term best interests, psychologically or financially.”). See also *Gil v. Gil*, 892 A.2d 318, 324 (Conn. App. Ct. 2006).

acting as legal counsel even if they are a licensed attorney. In Duval County, Florida, for example, the form order used by the dependency judges in appointing surrogate parents specifically states, "The surrogate parent, even if licensed as an attorney, is not the child's attorney in this case and is not responsible for legal representation of the child."¹⁴³

In such cases where the GAL has been appropriately trained, it makes sense to combine the roles of the GAL and surrogate parent into the same person. The GAL has authority to collect information necessary to make recommendations in all aspects of the child's life which is useful in the surrogate parent's role as well. At the very least, the surrogate parent and GAL will need to share information and work together to ensure that the best interest of the child is represented consistently between the educational and home placement matters.

V. WHAT NEEDS TO BE DONE TO ENSURE THAT FOSTER CHILDREN RECEIVE THE EDUCATION THEY NEED?

Both systemic changes and individual representation are needed to make a lasting difference. Systemic reform is necessary to sustain any kind of improvement efforts made by individuals, but this cannot be the only answer. Communication between agencies, school systems, and the courts is an obvious but underutilized factor in improving cooperation and efficiency. For example, the school board of Duval County, Florida, along with the Florida Department of Children and Families in Duval County and the Family Support Services entered into an interagency agreement in August 2006.¹⁴⁴ The spirit of the agreement is cooperation and communication sharing in an effort to maintain the academic continuity of those children under the court's supervision. Included in the agreement is language to encourage consistency in children's educational placement when the home placement has changed,¹⁴⁵ but the language is exploratory in nature, and necessary concrete solutions to the problems are minimal.¹⁴⁶

143. Order Appointing Surrogate Parent (4th Jud. Cir., Duval County, Fla. 2007).

144. Interagency Agreement Between the Sch. Bd. of Duval County, the Fla. Dep't of Children & Families Dist. 4, First Coast Workforce Dev., Inc., and Family Support Servs., Inc. (Aug. 31, 2006).

145. *Id.*

146. *Id.* One concrete example of a breakdown in communication between the courts, agencies, and the surrogate parent arose when a child's home placement was changed. Theoretically, this is a prime time for a surrogate parent

Exchanging information to keep better track of where the children have been, are, and are going is a good start, but it does not necessarily solve the ultimate problem. It merely uncovers it. These children need more than an accurate record of their history; they need someone to advocate for them and help guide and encourage them so that that history of abuse, neglect, and failure in school does not impede their future.

A. "Safe and Smart" Project

Prior to the reauthorization of the IDEA in 2004 which allowed for judicial appointments of surrogate parents, in 1999, the Vera Institute for Justice and the Administration for Children's Services within the NYC Board of Education collaborated to create a project called "Safe and Smart." Child welfare workers who were trained as "school specialists"¹⁴⁷ were placed in schools to provide guidance and counseling to children who were in foster care. They were placed in five middle schools in the Bronx. They focused on improving school attendance and academic performance. In the process the case workers learned first hand about the obstacles foster children faced, such as changes in home placement, medical appointments, court appearances, as well as the effects of emotional and physical trauma from abuse and neglect that put them into foster care. Despite their background as case workers, they encountered difficulties in navigating the educational system and were surprised at the disinterest of foster parents. Eventually, and often after rocky starts, the school specialists built strong working relationships and were able to provide a point of contact within the educational arena for the many adults in the child's life.¹⁴⁸

to step in and provide consistency at a time of change. In this case, however, the agency in charge of effecting the change in home placement did not have a record that a surrogate parent had even been appointed. The child, who required a placement within a self-contained classroom, was re-enrolled into the school closest to the new foster home by the foster parent after several days. The school did not have a self-contained classroom, however, and yet another school change had to take place to correct the mistake. None of this would have occurred if the surrogate parent was notified in a timely manner.

147. Although they were not appointed surrogate parents, the role they assumed was very similar in nature to what an educational surrogate parent's role is.

148. VERA INST. OF JUST., FOSTER CHILDREN AND EDUCATION: HOW YOU CAN CREATE A POSITIVE EDUCATIONAL EXPERIENCE FOR THE FOSTER CHILD (2004), http://www.vera.org/publication_pdf/241_452.pdf.

The program was a success. The attendance of the children involved was 92%.¹⁴⁹ Academic gains were modest, but evident, and were stronger with tutoring. Additionally, foster parents increased participation in the parent-teacher conferences.¹⁵⁰

There were obstacles to overcome, such as the resistance of adults to identify children because they felt the children would resist participation because of the stigma attached. Since there was no data base that could provide real-time information, it was impossible to identify children without help. Once children were identified and approached, however, none of the resistance that was expected materialized; instead, there was relief. These children finally felt as if they were not alone and had support. Virtually every child invited into the program joined.

The program, while a success, could not be sustained due to funding constraints. But a few lessons were learned. First, children wanted support and despite reports of other adults wanted to be found, not hidden and left alone. Second, it was impossible to effectively find a concentration of foster children, which merely underscores a bigger systemic issue. If school specialists who are also trained case workers can not locate these children with this as a major goal, is it any wonder that on a daily basis these children get utterly lost in the system? This failure to find the children pushed the project towards a more welfare-based project rather than educational. Also, foster parents were ill-equipped to help with homework and talk to teachers about how the children were doing in school. The teachers were split between welcoming the support and reluctance to invest effort because the child would inevitably move away soon. In the end, many adults involved in the children's lives assumed that education of these children was someone else's job. The ultimate, underlying obstacles that could not be removed were the constant changes in home placement and scheduling of appointments, health and court, that routinely took them out of school.¹⁵¹

Other jurisdictions have attempted similar programs with varying success. For example, in Illinois, the Center for Child Welfare and Education formed a partnership between Northern Illinois University and the State's Department of Children and Family Services that trained foster parents to be educational advocates for the children in their care.¹⁵² Some foster care

149. *Id.* at 11.

150. *Id.* at 12.

151. *Id.* at 13.

152. *Id.* at 10.

agencies employ educational specialists, but their roles vary and with precarious funding, they are often cut from the program.¹⁵³

San Diego was the first jurisdiction to implement the Health and Education Passport, which is a record of the child's educational and medical history that travels with him from placement to placement and school to school. Washington State enacted a similar program in 1997, but both jurisdictions reported problems with the programs efficiency because of issues of confidentiality and lack of procedures for sharing information.¹⁵⁴

*B. Pilot Program in Duval County Florida*¹⁵⁵

More recently, in August 2006, Duval County, Florida, piloted a program for court appointed surrogate parents. There is a three hour training session provided twice a year covering various topics that rotate. Each session addresses both substantive material on disabilities and education as well the procedural and legal responsibilities and rights. Those willing to serve as surrogate parents fill out an application and after the training session are given a background check through Family Support Services.¹⁵⁶ The list of available, trained, and checked volunteers is forwarded to the dependency court through a court liaison, who provides the updated lists directly to the judges. The judges can appoint anyone on the list with a prepared order and a letter for the surrogate parent to provide to the schools and other professionals who may not understand the role of the surrogate parent.

As this program is in its infancy, there are obstacles to overcome, such as achieving seamless appointments and better understanding by the school system of the role of surrogate parents. Additionally, the interplay between the guardians ad litem (GALs) and surrogate parents will work more fluidly as more GALs become trained and can become surrogate parents for their own cases.

The advantages of this system far outweigh the obstacles and challenges. One indirect benefit of granting judges the authority to appoint surrogate parents is that it may encourage courts to play a

153. *Id.*

154. *Id.*

155. The author has personal experience in participating in planning and implementing a court appointed surrogate parent program in Duval County, Florida. The program began with its first training in August of 2006 and continues to train new surrogate parents and appoint them through the dependency court system.

156. In 1999, the Florida Department of Children and Families was privatized and the agency that took over from the DCF after the initial investigation is the Family Support Services.

more active role in monitoring the education of the children in foster care.¹⁵⁷ More directly, appointments made by the court are independent of the LEA and allow the surrogate parent to act strictly on the behalf of the child, not as a delegate of the school system.

CONCLUSION

Can we use the IDEA 2004 to better serve the students with disabilities in the foster care system? Yes. As alluded to above, both systemic change and individual advocacy is needed. Additionally, interagency coordination is critical for any program to succeed. On a very concrete level, if the Child Welfare Department does not know who a surrogate parent is, information that is important to the education of the child may never get to the surrogate parent. If the school system does not understand, the surrogate parent will be left out of the loop. However, if the agencies involved in the care of the child include the surrogate parent in notification of changes to the child's placement, the surrogate parent can be instrumental in facilitating the maintenance or the current educational placement or, if appropriate, the move to a new school without loss of services. The combination of the system change with interagency coordination will enable the individual representation of the most vulnerable children in foster care, those that require special education to make educational progress.

The IDEA ensures that children with disabilities receive a free appropriate public education, but only inasmuch as there is someone to advocate for the child's educational needs; someone with an interest independent from the party responsible for determining eligibility and independent from providing the services; someone other than the fox that guards the henhouse.

The changes in the reauthorization of the IDEA expand the options for children in foster care who also require special education services. First, the change in the definition of a "parent" explains more clearly who can represent a child as a parent in special education matters. For instance, although it may not be appropriate in all cases, a foster parent may act as a parent. The advantages and disadvantages of foster parents acting as parents in special education matters are various and complicated, but in some instances are logical and necessary.¹⁵⁸

157. Gerber & Dicker, *supra* note 42, at 63.

158. For instance, a child in Duval County, Florida, was assigned a surrogate parent who was not adequately addressing the child's needs because the surrogate parent was not attending meetings for the child. Upon further investigation, it was discovered that the child had been in the same foster home

Additionally, and more importantly, a judge in the dependency case may appoint a surrogate parent to a child who is a ward of the state instead of depending on the school system to identify the need and appointing one itself.

We cannot allow the fox to guard the henhouse and expect the hens to make progress. It seems clear that Congress identified a hole in the current system and attempted to fill the gap by providing as many options as possible for a child within the dependency system to be represented by someone who is independent and unbiased. In allowing judges to appoint surrogate parents with a lower bar of requirements and more clearly identifying foster parents as a parent under IDEA, the spirit of the changes clearly suggests that the priority is to attempt to reach more children who may be in need of special education services.

for a few years and that the foster parent had been involved with this child's education on a daily basis. It would seem that this foster parent would make a better match as a surrogate parent. On the other hand, there was a child in a similar foster care situation in Texas, and when the foster parent, acting as the parent under the applicable section of the IDEA, disagreed with the school system's proposed educational plan, the school personnel called the Child Welfare Office up to three times a day to log complaints against the foster mother. After two weeks of calls that were never legitimized by a visit, the child was removed and placed into a new foster home in a different district—changing homes, school, and community in one fell swoop. Interview with Dustin Rynders, Equal Justice Works Fellow/Attorney, Protection and Advocacy for Texans with Disabilities, East Texas Regional Office, in Houston, Tex. (Mar. 2008) (the special education attorney working on the case).