

## ARTICLES

### CHILDREN ADRIFT: ADDRESSING THE EDUCATIONAL NEEDS OF NEW YORK'S FOSTER CHILDREN

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#### I. INTRODUCTION

For every child, quality education can clear the path to opportunity and success in life. Yet every day children in foster care face profound disruption to their education and significant obstacles to school success. As a result, these vulnerable children—who enter foster care<sup>1</sup> already at risk for poor educational outcomes<sup>2</sup>—do not receive the education they need and deserve.<sup>3</sup>

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<sup>1</sup> In this Article, the term “foster care” is used to include children in state custody who are placed voluntarily or involuntarily into a variety of out-of-home foster care settings, including foster family homes, agency boarding homes, group homes, child care institutions, or certain health care facilities. See N.Y. COMP. CODES R. & REGS. tit. 18, § 441.2(k) (2001); N.Y. SOC. SERV. LAW § 383-c(1) (McKinney 2003).

<sup>2</sup> See P. David Kurtz et al., *Maltreatment and the School-Aged Child: School Performance Consequences*, 17 CHILD ABUSE & NEGLECT: INT'L J. 581, 588 (1993) (“School problems, both academic and behavioral, have emerged as the single most dramatic and consistent risk factor for school-aged abused and neglected children.”); see also CHERYL SMITHGALL ET AL., CHAPIN HALL CTR. FOR CHILDREN AT THE UNIV. OF CHI., EDUCATIONAL EXPERIENCES OF CHILDREN IN OUT-OF-HOME CARE 72 (2004), available at [http://www.chapinhall.org/article\\_abstract.aspx?ar=1372&L2=64&L3=116](http://www.chapinhall.org/article_abstract.aspx?ar=1372&L2=64&L3=116) (finding, in a study of children in Chicago Public Schools, “that slightly under two-thirds of [students] enter care either old for their grade or scoring in the bottom quartile in reading”).

<sup>3</sup> See CTR. WITHOUT WALLS, THE EDUCATIONAL NEEDS OF CHILDREN IN FOSTER CARE: THE NEED FOR SYSTEM REFORM (1998), <http://www.advocatesforchildren.org/pubs/foster.doc> (reporting findings, based on a survey of children in New York City, documenting system-wide deficiencies in addressing education of children in foster care); ADVOCATES FOR CHILDREN OF N.Y., INC., EDUCATIONAL NEGLECT: THE DELIVERY OF EDUCATIONAL SERVICES TO CHILDREN IN NEW YORK CITY'S FOSTER CARE SYSTEM 4-7 (2000), <http://www.advocatesforchildren.org/pubs/FCrep7-11.doc> [hereinafter EDUCATIONAL NEGLECT] (discussing the experiences of foster care children in New York City's school system). See generally ELISABETH YU ET AL., IMPROVING EDUCATIONAL OUTCOMES FOR YOUTH

In many communities, it is common child welfare practice to place children in foster care with little or no regard for their school history and needs. With each foster care move, children are pulled out of one school, often abruptly, and set down in another. Too often, these children are not timely enrolled in school and experience gaps in attendance and instruction. As children move, their educational records fail to follow them or arrive far too late; in the process, they lose critical services and both general and special education entitlements.

Children in foster care tend to under-perform in school—they often lag in achievement, repeat grades, fail classes, and attend school irregularly.<sup>4</sup> Stigmatized by their foster care status, they may display distressing behaviors, acting out more frequently or withdrawing from others.<sup>5</sup> Children in foster care manifest a broad

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IN CARE (2002) (discussing the educational experiences of children in foster care); Sandra J. Altshuler, *A Reveille for School Social Workers: Children in Foster Care Need Our Help!*, 19 SOC. WORK EDUC. 121, 121–22 (1997) [hereinafter *Reveille for School Social Workers*]; Robert H. Ayasse, *Addressing the Needs of Foster Children: The Foster Youth Services Program*, 17 SOC. WORK EDUC. 207, 208 (1995); Lynne Steyer Noble, *The Face of Foster Care*, EDUC. LEADERSHIP, Apr. 1997, at 26, 26–27; SUE BURRELL, YOUTH LAW CTR., GETTING OUT OF THE RED ZONE: YOUTH FROM THE JUVENILE JUSTICE AND CHILD WELFARE SYSTEMS SPEAK OUT ABOUT THE OBSTACLES TO COMPLETING THEIR EDUCATION, AND WHAT COULD HELP 2–3 (2003), available at <http://www.ylc.org/GettingOutOfth%20RedZone-October2003.pdf>; STEVE CHRISTIAN, NAT'L CONFERENCE OF STATE LEGISLATURES, CHILDREN'S POLICY INITIATIVE, EDUCATING CHILDREN IN FOSTER CARE 1–2 (2003), available at <http://www.ncsl.org/programs/cyflcpieducate.pdf>; MARK E. COURTNEY ET AL., CHAPIN HALL CTR. FOR CHILDREN, THE EDUCATIONAL STATUS OF FOSTER CHILDREN 2–3 (2004), available at [http://www.chapinhall.org/article\\_abstract.aspx?ar=1377](http://www.chapinhall.org/article_abstract.aspx?ar=1377) [hereinafter EDUCATIONAL STATUS OF FOSTER CHILDREN]; SMITHGALL ET AL., *supra* note 2, at 74–75 (recognizing and discussing issues that Chicago's foster children face by examining academic performance, communication patterns, school mobility, and special education classifications); CLAIRE VAN WINGERDEN ET AL., CASEY FAMILY PROGRAMS, EDUCATION ISSUE BRIEF: IMPROVING SPECIAL EDUCATION FOR CHILDREN WITH DISABILITIES IN FOSTER CARE (2002), available at [http://www.fosterclub.org/training/upload/fosterclub\\_219.pdf](http://www.fosterclub.org/training/upload/fosterclub_219.pdf) (exploring the special education needs of foster care children).

<sup>4</sup> See MASON BURLEY & MINA HALPERN, WASH. STATE INST. FOR PUB. POLICY, EDUCATIONAL ATTAINMENT OF FOSTER YOUTH: ACHIEVEMENT AND GRADUATION OUTCOMES FOR CHILDREN IN STATE CARE 1 (2001), available at <http://www.wsipp.wa.gov/rptfiles/FCEDReport.pdf> (discussing the educational status of foster care children in Washington State and noting that children in foster care scored an average of fifteen to twenty percent lower than other students on achievement tests); MARK E. COURTNEY ET AL., CHAPIN HALL CTR. FOR CHILDREN AT THE UNIV. OF CHIC., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: CONDITIONS OF YOUTH PREPARING TO LEAVE STATE CARE 39, 45 (2004), available at [http://www.chapinhall.org/article\\_abstract.aspx?ar=1355](http://www.chapinhall.org/article_abstract.aspx?ar=1355) (finding that despite high educational aspirations of children in care, a sample of foster youth read, on average, at only a seventh grade level); SMITHGALL ET AL., *supra* note 2, at 14–15, 23 (finding that almost fifty percent of third to eighth grade students in care scored in the bottom quartile in reading evaluations, while twenty percent scored at or above national norms, and that students in care are about 1.8 times more likely to be old for their grade level).

<sup>5</sup> See John Eckenrode et al., *School Performance and Disciplinary Problems Among Abused*

array of medical, developmental, behavioral, and other disabilities that compromise their ability to learn or function in school.<sup>6</sup> Many receive special education services in disproportionately restrictive settings, while others are not identified to receive services at all.<sup>7</sup> They frequently lack the support of parents or other adults to help them meet the challenges of school or to obtain the services they need.<sup>8</sup> Set adrift in a “sea of adversity,” children in foster care are

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*and Neglected Children*, 29 DEVELOPMENTAL PSYCHOL. 53, 58–59 (1993); Rae R. Newton et al., *Children and Youth in Foster Care: Disentangling the Relationship Between Problem Behaviors and Number of Placements*, 24 CHILD ABUSE & NEGLECT INT'L J. 1363, 1371–72 (2000) (contending that children who experience high mobility in foster care are more likely to display challenging behaviors).

<sup>6</sup> Children in foster care are more likely than their typical peers to exhibit significant medical needs. Children subjected to neglect and abuse display profound and long lasting impairments in all areas of development, including their neurological and language development. See, e.g., Comm. on Early Childhood, Adoption and Dependent Care, Am. Acad. of Pediatrics, *Developmental Issues for Young Children in Foster Care*, 106 PEDIATRICS 1145, 1145, 1147 (2000) [hereinafter *Developmental Issues for Young Children*]. In one study, for example, researchers found that approximately eighty-two percent of all foster children studied had at least one chronic medical illness and approximately twenty-nine percent had three or more chronic medical conditions. Neal Halfon et al., *Health Status of Children in Foster Care: The Experience of the Center for the Vulnerable Child*, 149 ARCHIVES PEDIATRIC ADOLESCENT MED. 386, 389 (1995); see also Steven D. Blatt et al., *A Comprehensive, Multidisciplinary Approach to Providing Health Care for Children in Out-of-Home Care*, 76 CHILD WELFARE 331, 345 (1997) (“Children entering out-of-home care often are suffering from the effects of poor medical care, including lack of preventive pediatric care and adequate treatment of disease.”); Steven D. Blatt & Mark Simms, *Foster Care: Special Children, Special Needs*, 14 CONTEMP. PEDIATRICS 109, 113, 117 (1997) (delineating common medical problems of children in foster care); Robin Chernoff et al., *Assessing the Health Status of Children Entering Foster Care*, 93 PEDIATRICS 594, 597–98 (1994) (finding that a significant percentage of children entering foster care need referrals for medical services); Katen Shelly 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 & BEHAV. DISORDERS 30 (1996) (stating that “children placed in foster or kinship care have serious academic and behavioral problems” and reporting results of a study that used variables such as “academic referrals” and “referral out” to identify the different challenges faced by foster children and children in special education).

<sup>7</sup> Robert M. Goerge et al., *Special Education Experiences of Foster Children: An Empirical Study*, 71 CHILD WELFARE 419, 429–30 (1992) (finding “that special-education foster children are nearly five times as likely as other foster children to be in group care settings, primarily residential treatment centers and group homes,” and that “there are fewer learning-disabled and physically handicapped students in the foster care population than expected and that foster children are possibly being underidentified for emotional disturbance”); see also Cynthia Godsoe, *Caught Between Two Systems: How Exceptional Children in Out-of-Home Care Are Denied Equality in Education*, 19 YALE L. & POL'Y REV. 81, 83 (2000) (asserting that many foster children are either “erroneously placed in special education programs or,” conversely, “have special education needs which go unrecognized and untreated”).

<sup>8</sup> See Wendy Whiting Blome, *What Happens to Foster Kids: Educational Experiences of a Random Sample of Foster Care Youth and a Matched Group of Non-Foster Care Youth*, 14 CHILD & ADOLESCENT SOC. WORK J. 41, 48, 50 (1997) (revealing that “[a]s seniors in high school 65 percent of the foster youth said a parent or guardian had never attended a teacher conference,” and remarking that “data showed that the adults in the lives of foster youth were less likely to monitor homework or attend school conferences and functions”); MARNI

distracted from school by other life challenges and require sensitive support tailored to their needs in school.<sup>9</sup>

By the time they reach high school, many children in foster care are ready to give up on education. They drop out of high school at almost twice the rate of their classmates.<sup>10</sup> Some go on to earn general equivalency diplomas, but do so in fewer numbers than the general population.<sup>11</sup> Without a high school diploma, or at least its equivalent, foster care youth lack not only a vital passport to financial security and employment,<sup>12</sup> but a primary source of personal and social stature as well.<sup>13</sup> For many youth who are exiting foster care and entering into a world of “independent living,” prospects for the future are bleak. Once out of care, these youth experience high rates of poverty, homelessness, addiction, and entry into the adult criminal court system.<sup>14</sup> Those who drop out of school

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FINKELSTEIN ET AL., VERA INST. OF JUSTICE, WHAT KEEPS CHILDREN IN FOSTER CARE FROM SUCCEEDING IN SCHOOL?: VIEWS OF EARLY ADOLESCENTS AND THE ADULTS IN THEIR LIVES (2002), available at [http://www.vera.org/publication\\_pdf/169\\_280.pdf](http://www.vera.org/publication_pdf/169_280.pdf) (concluding, after studying children at a Bronx, NY middle school, that “[t]he adults in these foster children’s lives often lacked a full picture of their educational needs” and that “[n]o one acknowledged primary responsibility for the educational progress of these children”). See generally EDUCATIONAL NEGLECT, *supra* note 3, at 4 (reporting survey findings including information about foster parents’ knowledge of and participation in educational programs).

<sup>9</sup> *Reveille for School Social Workers*, *supra* note 3, at 122–23.

<sup>10</sup> See BURLEY & HALPERN, *supra* note 4, at 1; Blome, *supra* note 8, at 45–47; SMITHGALL ET AL., *supra* note 2, at 2.

<sup>11</sup> Blome, *supra* note 8, at 47; see Thomas M. Smith, *Who Values the GED?: An Examination of the Paradox Underlying the Demand for the General Educational Development Credential*, 105 TCHRS. C. REC. 375, 380–81 (2003).

<sup>12</sup> See YU ET AL., *supra* note 3, at 19–20. Census data and research studies in the United States demonstrate that high school graduates have higher employment rates and earnings than those who do not graduate. College graduates have even higher earnings. See ERIC C. NEWBURGER & ANDREA CURRY, U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES 6 (1999), available at <http://www.census.gov/prod/2000pubs/p20-528.pdf>.

<sup>13</sup> See Smith, *supra* note 11, at 393–94.

[S]tatus deprivation will be most serious among those having deviated most seriously from widely held societal norms. In American society, a high school diploma, and increasingly a college diploma, is associated with a minimum level of educational success. High school graduation is associated with the passage from youth to adulthood, from nonproductive child to productive adult. Dropping out of school, on the other hand, has over time become associated with deviance and delinquency. Since educational norms are strongly embedded in American society, they are tightly linked to the formation of individual’s self-concept. The dropout remains seriously disengaged from important life-course events and transitions.

*Id.* (citations omitted).

<sup>14</sup> See Mark E. Courtney et al., *Foster Youth Transitions to Adulthood: A Longitudinal View of Youth Leaving Care*, 80 CHILD WELFARE 685, 708–11 (2001) [hereinafter *Foster Youth Transitions*]. A recent study of Wisconsin youth discharged from out-of-home care revealed that twelve percent of teens interviewed had been homeless, eighteen percent had been incarcerated, and thirty-two percent had received public assistance since leaving foster care. Forty-four percent had difficulty obtaining medical care despite significant physical, mental,

are especially at risk, as they are less likely to lead productive and meaningful adult lives.

In the face of these discouraging statistics, there is a significant movement afoot to address the educational needs of children in foster care.<sup>15</sup> The Adoption and Safe Families Act (ASFA),<sup>16</sup> enacted by Congress in 1997, has served as an impetus for reform. Designed to promote the permanency, safety, and well-being of children in foster care, ASFA has focused increased attention on the quality of these children's lives and their prospects for long term success. The federal regulations implementing ASFA identify access to educational services as a key component of child well-being.<sup>17</sup>

In keeping with ASFA, New York State passed its landmark Governor's Permanency Bill in 2005, implementing significant reforms governing permanency for children in foster care, including

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and behavioral health needs assessed while in care. *Id.*

<sup>15</sup> National organizations that have sponsored initiatives and studies regarding education of children in foster care include the National Council of Juvenile and Family Court Judges, the Anne E. Casey Foundation, the American Bar Association Center on Children and the Law, the Child Welfare League of America, the Vera Institute for Justice, the National Court Appointed Special Advocate (CASA) Association, and the Chapin Hall Center for Children. For an excellent discussion of the law and strategies to address the educational needs of children in foster care, see generally KATHLEEN M. MCNAUGHT, ABA CTR. ON CHILDREN AND THE LAW, LEARNING CURVES: EDUCATION ADVOCACY FOR CHILDREN IN FOSTER CARE (Claire Sandt ed., 2004). See also YU ET AL., *supra* note 3, at vii; Godsoe, *supra* note 7, at 90-91 (profiling worrisome characteristics of children in out-of-home care); JANIS AVERY, EDUCATION AND CHILDREN IN FOSTER CARE: FUTURE SUCCESS OR FAILURE, <http://www.newhorizons.org/spneeds/inclusion/collaboration/avery.htm> (last visited Oct. 2, 2005) (describing issues and recommended strategies in Washington State); RICHARD P. BARTH & CHARLES FERGUSON, SWED. NAT'L BD. OF HEALTH & WELFARE, EDUCATIONAL RISKS AND INTERVENTIONS FOR CHILDREN IN FOSTER CARE 3 (2004), available at <http://www.socialstyrelsen.se/NR/rdonlyres/B5498197-1554-47E0-9A0C-17EE9469F3C2/2905/20041109.pdf> (assessing intervention programs in various states designed to improve the educational outcomes for children in foster care); CHILDREN'S LAW CTR. OF L.A., LOS ANGELES EDUCATION SUMMIT ON NEEDS & CHALLENGES FACING FOSTER YOUTH: "IDENTIFYING OBSTACLES & FORGING SOLUTIONS" 3-4 (2003), available at [http://www.abanet.org/child/rcj/education/laeducation\\_summit.pdf](http://www.abanet.org/child/rcj/education/laeducation_summit.pdf) (highlighting issues, challenges, and possible reforms in Los Angeles, California); Lynette Mullen, *Promoting Educational Opportunities for Children and Youth in Care*, THE CONNECTION, Summer 2004, available at <http://www.casnet.org/library/advocacy/promoting-edu-opp-%5Bconnection-04%5D.htm> (highlighting CASA initiatives); PATRICIA POWERS & JANET F. STOTLAND, THE EDUC. LAW CTR., LOST IN THE SHUFFLE REVISITED: THE EDUCATION LAW CENTER'S REPORT ON THE EDUCATION OF CHILDREN IN FOSTER CARE IN PENNSYLVANIA (2002), available at <http://www.elc-pa.org/Lost%20in%20the%20Shuffle%20Revisited%2012.02.pdf> (surveying the stakeholders and listing recommendations for reform in Pennsylvania); VERA INST. OF JUSTICE, FOSTER CHILDREN & EDUCATION: HOW YOU CAN CREATE A POSITIVE EDUCATIONAL EXPERIENCE FOR THE FOSTER CHILD (2004), available at [http://www.vera.org/publication\\_pdf/241\\_452.pdf](http://www.vera.org/publication_pdf/241_452.pdf).

<sup>16</sup> Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

<sup>17</sup> 45 C.F.R. § 1355.34(b)(1)(iii)(B) (2004).

the creation of a new Article 10-A of the Family Court Act relating to permanency hearings.<sup>18</sup> Calling on child welfare agencies to address child well-being in meaningful ways, the Governor's Permanency Bill seals the legal connection between education and permanency by making education a prime component of each child's permanency plan.<sup>19</sup> The new law requires the local Department of Social Services to address the educational and vocational needs of children in foster care, ensuring prompt enrollment in appropriate programs and referral for needed evaluations and services.<sup>20</sup> The law also brings schools into the realm of permanency planning, requiring them to cooperate in facilitating the educational components of children's permanency plans.<sup>21</sup>

In view of these legislative mandates, the time is ripe to examine the laws and practices affecting the education of children in foster care in New York State. This Article offers judges, attorneys, child welfare professionals, and educators a roadmap of New York and federal laws and regulations.<sup>22</sup> It presents an overview of the laws governing education of children in foster care, as well as a detailed description of the legal responsibilities of child welfare agencies regarding education. It reviews the laws governing continuity of school placement, school enrollment, and disclosure of education records. This Article also describes general education services that may be available to children in foster care and offers a basic introduction to the special education system, highlighting recent amendments to the Individuals with Disabilities Education Act that may affect children in foster care. It describes the requirements for communication among the courts, the child welfare system, and the education system regarding children with special education needs. This Article explores the complex issue of parental responsibilities and education decision-making in both the general and special education arenas. It also briefly examines the interplay between the child welfare and education laws regarding the transition of foster youth into the adult world. Throughout the Article, we highlight some of the promising initiatives implemented both within and beyond the borders of New York State.

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<sup>18</sup> S. 5805, 2005–2006 Leg., Reg. Sess. § 27 (N.Y. 2005).

<sup>19</sup> *Id.* sec. 27, § 1089(c).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> The laws governing the foster care system continue to change, as do the laws regarding the special education of children. Throughout the Article, we advise the reader to watch for revisions in the law.

## II. CHILD WELFARE TERMINOLOGY

Responsibility for child welfare in New York is shared among public and private agencies at the state and local level. The New York State Office of Children and Family Services (OCFS) oversees child welfare services on a statewide basis, while the “local social service district” administers foster care on the county level.<sup>23</sup> For ease, we refer to all local social service district agencies as the Department of Social Services (DSS), even though agency names vary across the state.<sup>24</sup>

In those dependency proceedings in which the Family Court places children into foster care, the court typically assigns children into either the “custody or care” of DSS or, when their parents no longer have parental rights, the guardianship of DSS.<sup>25</sup> DSS places these children in a broad variety of public and privately operated settings, ranging from the least restrictive foster care homes to more restrictive group home or residential placements. DSS may also contract with private agencies, which then assume responsibility for placing and servicing the children; these are variously referred to as “voluntary,” private, or, as we do in this Article, contract agencies.<sup>26</sup> Together, DSS and its contract agencies

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<sup>23</sup> For an overview of the functions of OCFS, see New York State Office of Children and Family Services, <http://www.ocfs.state.ny.us/main/about/mission> (last visited Sept. 30, 2005). New York City is served by a single social service district, known as the Administration for Children’s Services. See NYC Administration for Children’s Services, <http://www.ci.nyc.ny.us/html/acs/html/whatwedo/introduction.html> (last visited Sept. 30, 2005).

<sup>24</sup> DSS is monitored by OCFS. OCFS itself assumes custody or guardianship of children adjudicated as juvenile delinquents or persons in need of supervision who are placed in foster care, including residential placements. N.Y. SOC. SERV. LAW §§ 383(2), 398(3)(c), (6)(g) (McKinney 2003). DSS and OCFS, together, are the “public authorized agenc[ies]” responsible for children in foster care. See N.Y. COMP. CODES R. & REGS. tit. 18, § 441.2(c) (2001).

<sup>25</sup> In addition, children may be placed in the care and/or custody of relatives or non-related individuals, typically referred to as kinship or resource placements. See N.Y. FAM. CT. ACT §§ 1017(1)(b), 1055(a) (McKinney 1999). Kinship placements are not foster care placements unless the relative is certified as such by an authorized agency. See *id.* § 1017(1). New OCFS regulations define and describe a type of placement as a “Non-LDSS Custody–Relative/Resource Placement.” This is defined as the situation when

[a] child is placed in the home of a relative or non-related resource person with or without a court order and the local social services district is providing supervision and/or services to enable the child to return home or to enable the child to remain safely with the relative or resource person. The local social services district does not have custody of the placed child.

N.Y. COMP. CODES R. & REGS. tit. 18, § 428.2(g)(5) (adopted Aug. 3, 2005) (N.Y. State Legislative Bill Drafting Comm’n, Legislative Retrieval System).

<sup>26</sup> The contract agencies are also referred to as “voluntary authorized agenc[ies].” N.Y. COMP. CODES R. & REGS. tit. 18, § 441.2(b) (2001).

fall under the umbrella terms “child-care agenc[ies]” or child welfare agencies.<sup>27</sup>

Throughout the Article, we use the term “child welfare professionals” to include caseworkers, case managers, case planners, and others who work within the child welfare agencies.

### III. THE NEW YORK STATE GOVERNOR’S PERMANENCY BILL REQUIREMENTS REGARDING EDUCATION

Long before the advent of ASFA or the New York Governor’s Permanency Bill, New York’s social services regulations required child welfare agencies to play an active role in the education of children in foster care.<sup>28</sup> The 2005 Governor’s Permanency Bill, however, details the mandated statutory steps that the local social service districts must take regarding each child in foster care.<sup>29</sup>

To ensure that children placed in foster care move speedily toward their permanency goals,<sup>30</sup> the Governor’s Permanency Bill requires the Family Court to hold an initial permanency hearing within eight months of the child’s removal from home and at least every six months thereafter.<sup>31</sup> To keep the court (as well as the parents, foster parents, and attorneys, among others) apprised of the child’s health, well-being, and current status, DSS must submit a Permanency Hearing Report fourteen days in advance of each hearing. Through the report, DSS will not only update the court on the child’s educational progress, but must detail the steps taken “to enable prompt delivery of appropriate educational and vocational services to the child.”<sup>32</sup>

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<sup>27</sup> See *id.* § 441.2(e). “Child-care agency means any voluntary authorized agency, any public authorized agency,” or the Office of Children and Family Services (formerly the New York State Division for Youth). *Id.* DSS is a public authorized agency while contract agencies are voluntary authorized agencies. See *id.* § 441.2(b)–(d); N.Y. SOC. SERV. LAW § 371(10)(a).

<sup>28</sup> N.Y. COMP. CODES R. & REGS. tit. 18, § 441.13. The regulations, adopted in 1978, require child welfare agencies to “take such steps as may be necessary to make certain that all children in care receive education appropriate to their needs and in accordance with the requirements of the Education Law” and to “make certain that each child in its care receives appropriate educational and vocational guidance.” *Id.*

<sup>29</sup> S. 5905, 2005–2006 Leg., Reg. Sess. § 27 (N.Y. 2005).

<sup>30</sup> The Governor’s Permanency Bill establishes the following permanency goal options:

(i) return to the parent or parents; (ii) placement for adoption [after the] termination of parental rights; (iii) referral for legal guardianship; (iv) permanent placement with a fit and willing relative; or (v) placement in another planned permanent living arrangement that includes a significant connection to an adult who is willing to be a permanency resource for the child.

*Id.* sec. 27, § 1089(c)(1).

<sup>31</sup> *Id.* sec. 27, § 1089(a)(2).

<sup>32</sup> *Id.* sec. 27, § 1089(b), (c)(2)(iii).

Detailing the specific programs in which children, if eligible, should be enrolled, the Governor's Permanency Bill is designed to prevent all children—from infancy through adolescence—from getting lost in the education system. The Permanency Hearing Report must document steps taken to: refer young children who may have developmental delays or disabilities for early intervention and preschool evaluations and services; promptly enroll eligible children in pre-kindergarten programs, if available; refer school-aged children for special education evaluations or services, as appropriate; promptly enroll children who are diploma-bound in appropriate high school programs; and assist children age sixteen and over who do not intend to earn a diploma in becoming employed or enrolled in a vocational program.<sup>33</sup> The Permanency Report must also provide available information regarding evaluations and services provided or scheduled to be rendered, thus providing a way to measure whether a child's entitlement to timely evaluation and implementation of services has been honored.<sup>34</sup>

#### IV. FOSTER CARE PLACEMENT DECISIONS: MAINTAINING SCHOOL CONTINUITY AND TIES

Too frequently, when children move into foster care, they lose meaningful and consistent ties to their families, friends, neighborhoods, and schools.<sup>35</sup> Once in care, they become transient, moving multiple times from one foster care setting to another.

At the same time these children struggle to adapt to a new home and new caretakers, they must also adapt to a new school<sup>36</sup>—typically with little or no advance notice to that school. Children are asked to adjust to new teachers, classmates, curricula, routines, and expectations. Not surprisingly, their learning suffers and their

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<sup>33</sup> *Id.* sec. 27, § 1089(c)(2)(iii)(A)–(D).

<sup>34</sup> *See id.* sec. 27, § 1089(c)(4)–(5).

<sup>35</sup> *See* EDUCATIONAL STATUS OF FOSTER CHILDREN, *supra* note 3, at 4 (stating that “placement instability” disrupts students’ “educational instruction and social relationships”).

<sup>36</sup> *See id.* (stating that over one third of adolescents interviewed in a midwest study reported five or more school changes; in a Chicago study, over sixty-six percent of students switched schools shortly after placement, which often leads to grade retention); *Foster Youth Transitions*, *supra* note 14, at 699, 705 (discussing a Wisconsin study where the youth surveyed had resided in a median number of three out-of-home settings and almost fifty percent had changed schools at least four times); Bonnie T. Zima et al., *Behavior Problems, Academic Skill Delays and School Failure Among School-Aged Children in Foster Care: Their Relationship to Placement Characteristics*, 9 J. CHILD & FAM. STUD. 87, 94–95 (2000) (discussing a Los Angeles study where twenty-eight percent of the children studied had lived in five or more different placements during their lifetime, and thirty-six percent of those children had attended two or more different schools).

emotional well-being is further compromised.<sup>37</sup>

Reflecting national trends, child welfare practices in New York often disrupt the education of the most vulnerable children. In a large scale study of over 16,000 children in foster boarding homes in New York City, researchers found that seventy percent of the children experienced one or more transfers to a new school for non-educational reasons in the year after their placement in foster care.<sup>38</sup> In a smaller study of a similar population, more than seventy-five percent of foster children surveyed reported being compelled to change schools when they entered care. Of these, sixty-five percent transferred in the middle of the school year.<sup>39</sup>

Although New York law does not guarantee school continuity to children in foster care, it does provide a valuable tool to promote school continuity. New York State regulations require DSS to factor school continuity into foster care placement decisions.<sup>40</sup> DSS must place children in a setting that is not only “the least restrictive and most homelike,”<sup>41</sup> but also, whenever possible, enables them to maintain ties to their school, as well as their neighborhood, peers, and family members.<sup>42</sup> Federal law also requires child welfare professionals to consider the proximity of a foster care setting to the child’s current school when determining a placement.<sup>43</sup>

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<sup>37</sup> Child welfare professionals and researchers have documented the negative effects of school transfers on children in foster care. See, e.g., Ayasse, *supra* note 3, at 208 (explaining a 1990 Oregon study which found that “children who had multiple foster placements during the school year were less likely to be above grade level or to be involved in extracurricular activities [or receive special education services] than children who had a sustained period of time in one school”); *Reveille for School Social Workers*, *supra* note 3, at 121 (discussing below average school performance of foster children, many of whom “change schools often, usually in mid-year”); Noble, *supra* note 3, at 26 (explaining that foster children are “behind academically” due in part to frequent transitions). For a full discussion of research literature and data on placement stability for children in foster care, see YU ET AL., *supra* note 3, at 9–14.

<sup>38</sup> DYLAN CONGER & ALISON REBECK, VERA INST. OF JUSTICE, HOW CHILDREN’S FOSTER CARE EXPERIENCES AFFECT THEIR EDUCATION 21–23 (2001), available at [http://www.vera.org/publication\\_pdf/147\\_183.pdf](http://www.vera.org/publication_pdf/147_183.pdf).

<sup>39</sup> ADVOCATES FOR CHILDREN OF N.Y., INC., THE EDUCATIONAL NEEDS OF CHILDREN IN FOSTER CARE: THE NEED FOR SYSTEM REFORM 5 (1998), available at <http://advocatesforchildren.org/pubs/reports.php3> [hereinafter EDUCATIONAL NEEDS OF CHILDREN].

<sup>40</sup> N.Y. COMP. CODES R. & REGS. tit. 18, § 430.11(c)(1)(i) (2001).

<sup>41</sup> See *id.* § 430.11(d)(1).

<sup>42</sup> See *id.* § 430.11(c)(1)(i). Within the uniform case record, the caseworker must document that the standard has been applied by showing “that the child has been placed in a setting which enables him or her to maintain ties to his or her previous school, neighborhood, peers and family members, or show the reasons why such placement was not practicable or in the best interests of the child.” *Id.* § 430.11(c)(2)(i).

<sup>43</sup> 42 U.S.C. § 675(1)(C)(iv) (2000) (stating that such assurances must be documented in the child’s case plan). New OCFS regulations also provide that the

Because school continuity is intimately tied to a child's well-being, it should be a factor in all foster care determinations, as well as a consideration in permanency planning. DSS and child welfare agencies need to adopt a routine protocol that incorporates school continuity into all foster care placement decisions. From the outset, DSS should gather information on the child's current school placement and assess the impact of a school transfer on the child.

To work effectively with the schools, child welfare professionals should be acquainted with local school district personnel, policies and practices, and communicate with school officials whenever a child may be moving to another foster care setting. For example, some districts have "open enrollment" or "school choice" policies that may permit a child to remain in the same school despite a change in residence. Other districts, like New York City, may have express policies that permit children in foster care to remain in a school despite a mid-year transfer.<sup>44</sup> Other school districts, upon request, may agree to accommodate a child's need for school stability under a formal or informal "hardship" policy. Some school administrators may even honor requests to permit a child in foster care—particularly one whose placement is short term—to continue attending schools across district borders.<sup>45</sup>

Outside New York State, some jurisdictions have made great strides in addressing educational stability for children in foster care. In response to class action litigation,<sup>46</sup> Illinois has enacted

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[f]amily assessment and service plans prepared at the time a child enters foster care or is moved from one foster care placement to another, as applicable, must also include . . . [among other things] documentation that continuity in the child's environment has been maintained in accordance with the [continuity] standards . . . or the reasons why this is not practicable or in the best interests of the child.

N.Y. COMP. CODES R. & REGS. tit. 18, § 428.6(a)(2) (adopted Aug. 3, 2005) (N.Y. State Legislative Bill Drafting Comm'n, Legislative Retrieval System).

<sup>44</sup> See N.Y.C. DEP'T OF EDUC., REGULATION OF THE CHANCELLOR A-101, paras. I.F–I.G, III.E (Apr. 14, 2005), *available at* <http://docs.nycenet.edu/docushare/dsweb/Get/Document-11/A-101.pdf> (permitting children to stay in their current school until the terminal year; however, social welfare students' agency workers are directed to discuss school placement with the school principal for mid-year transfers); *see also id.* para. I.G (allowing New York City children in grades one through twelve who change residence within the city to remain in their current school until they complete the terminal grade, though they are ineligible for "yellow bus transportation"). Together, child welfare agencies and school districts may be able to negotiate appropriate transportation arrangements.

<sup>45</sup> See N.Y. EDUC. LAW § 3202(2) (McKinney 2001).

<sup>46</sup> See *B.H. v. McDonald*, 49 F.3d 294, 295 (7th Cir. 1995) (explaining how a consent decree entered at an earlier stage in the proceedings addressed numerous problems with the Illinois Department of Children and Family Services); *see also* Rob Karwath, *Child-Welfare Reforms OK'd*, CHI. TRIB., Aug. 30, 1991, at C1 (describing how the consent decree was designed to hire more caseworkers in order to reduce caseloads, "to establish an elaborate screening

legislative and administrative reforms that allow children to remain in their current schools when they are initially placed in foster care; shortly thereafter, in consultation with their supervisors and school personnel, caseworkers then determine whether a school transfer serves the child's "best interest."<sup>47</sup> In Broward County, Florida, the public schools and social services department operate under a "memorandum of understanding" that enhances school stability, detailing procedures for school selection, enrollment, and transportation of children in foster care.<sup>48</sup> Additionally, in California, new legislation permits children in foster care to remain in their school of origin for the remainder of the school year, so long as it is in the child's best interests.<sup>49</sup>

Laws governing education for homeless children offer a valuable model for addressing the needs of transient children, including those in foster care. The McKinney-Vento Homeless Education Assistance Improvements Act of 2001 (McKinney-Vento) guarantees homeless children the option of remaining in one stable school setting as they move from one temporary residence to another.<sup>50</sup> Although McKinney-Vento does not apply to children in foster care per se, it does apply to children who are "awaiting foster care placement."<sup>51</sup> The American Bar Association has adopted a policy to encourage the U.S. Department of Education to interpret "awaiting foster care placement" broadly so as to "include children and youth placed by public agencies in interim, emergency, or short-term placements," thus ensuring these children and youth "uninterrupted educational access."<sup>52</sup>

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system so children's medical, psychological and educational needs are met," to provide a five percent pay increase to foster parents, to bid out services to private social-service agencies, and to "keep better records of children").

<sup>47</sup> ILL. DEP'T OF CHILDREN & FAMILY SERVS., POLICY TRANSMITTAL 2001.08, § 314.30(b) (Mar. 21, 2001); *see also* 105 ILL. COMP. STAT. ANN. 5/10-20.12b (West, Westlaw through P.A. 94-202 of 2005 Reg. Sess). Transportation can be a difficult issue even in Illinois, but there, the state child welfare agency (the Department of Children and Family Services) is ultimately responsible for arranging transportation.

<sup>48</sup> *See* MCNAUGHT, *supra* note 15, at 114-15.

<sup>49</sup> *See* YOUTH LAW CTR., CHILDREN'S LAW CTR. OF L.A., ENSURING EDUCATIONAL RIGHTS AND STABILITY FOR FOSTER YOUTH—AB 490 SUMMARY (2003), *available at* <http://abanet.org/child/rcj/education/ab490summary.pdf>.

<sup>50</sup> McKinney-Vento Homeless Education Assistance Improvements Act of 2001, 42 U.S.C. § 11432(g)(3)(A) (Supp. II 2002). The Act awards grants to state educational agencies to work toward providing homeless children equal access to a free appropriate public education. The law also addresses barriers to enrollment, attendance, and success in school. *See id.* §§ 11431(2), 11432(a).

<sup>51</sup> *Id.* § 11434a(2)(B).

<sup>52</sup> AM. BAR ASS'N, CTR. ON CHILDREN AND THE LAW, EDUCATION ACCESS FOR HOMELESS AND FOSTER YOUTH (2004), *available at* [www.abanet.org/child/abapolicies#89](http://www.abanet.org/child/abapolicies#89).

Under McKinney-Vento, school districts determine what school the child should attend based on the best interests of the child.<sup>53</sup> In determining the child's best interests, however, the school district must, to the extent possible, keep the child in his or her original school unless this is against the wishes of the child's parent or guardian.<sup>54</sup> Under New York law, the parent (or, if no parent is available, the child) or the director of the residential program in which the child lives decides which school the child should attend.<sup>55</sup> Homeless children, for the duration of their homelessness, are entitled to remain in the school district in which they were enrolled at the time they became homeless. They may remain in the same school building within the district until the end of the school year, and through the next year as well, if it is the child's last year in the building.<sup>56</sup> School districts must cooperatively provide and finance the child's transportation to school.<sup>57</sup>

#### V. CHILD WELFARE AGENCIES AND THEIR LEGAL DUTIES TO ADDRESS EDUCATION OF CHILDREN IN FOSTER CARE

New York's OCFS regulations have long required DSS and its contract agencies to address the education of children in foster care.<sup>58</sup> New regulations adopted by OCFS, implementing the 2005 Governor's Permanency Bill, as well as federal child welfare laws, charge child welfare agencies with a series of specific responsibilities in connection with school matters.<sup>59</sup> Such duties

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<sup>53</sup> 42 U.S.C. § 11432(g)(3)(A).

<sup>54</sup> *Id.* § 11432(g)(3)(B)(i).

<sup>55</sup> N.Y. EDUC. LAW § 3209(1)(b), (2)(a) (McKinney 2001); N.Y. COMP. CODES R. & REGS. tit. 8, § 100.2(x)(1)(ii), (2)(i) (2003).

<sup>56</sup> N.Y. EDUC. LAW § 3209(2)(b)(1); N.Y. COMP. CODES R. & REGS. tit. 8, § 100.2(x)(2)(ii).

<sup>57</sup> N.Y. EDUC. LAW § 3209(4); N.Y. COMP. CODES R. & REGS. tit. 8, § 100.2(x)(6).

<sup>58</sup> N.Y. COMP. CODES R. & REGS. tit. 18, § 441.13 (2001). Section 441.13 assigns child care agencies the overarching responsibility to make certain each child in care receives an appropriate education. *Id.*; *see also id.* §§ 448.3(g)(11), 447.2(d)(7) (requiring agency boarding homes and agency group homes to make provisions to meet the educational needs of children in their care). To date, New York courts have barely touched on the scope of section 441.13 and the education-related duties of DSS and other child care agencies. *See In re Kevin M.*, 724 N.Y.S.2d 816, 823–24 (Fam. Ct. 2001) (holding that DSS, as the legal custodian of the foster child, had improperly delegated decisions concerning the child's rights to receive an adequate education to the foster parent, who, among other things, had withdrawn the child from public school); *see also Torres v. Little Flower Children's Servs.*, 474 N.E.2d 223, 225–27 (N.Y. 1984) (barring claims by a former foster child against New York City's DSS and its contract agency on the ground that it was, in effect, a claim for educational malpractice, an action not cognizable in New York's courts on public policy grounds, and declining to "define the responsibility of a legal custodian with respect to a child's education").

<sup>59</sup> *See* N.Y. COMP. CODES R. & REGS. tit. 18, § 441.13. *See generally* 42 U.S.C. §§ 11431–35

include the following:

Child welfare agencies must “maintain an active and direct liaison with any school in which a child in its care is enrolled,”<sup>60</sup> thus communicating directly with school personnel about the child’s individual status and progress. In addition, caseworkers are required to document their contacts with school personnel.<sup>61</sup>

Child welfare agencies must supply foster parents with education records and information on the child’s school history and educational experiences.<sup>62</sup> Because foster parents typically assume the daily parental responsibilities regarding school, they need to know about the children’s educational needs.<sup>63</sup> In practice, however, foster parents report that they are given little, if any, information.<sup>64</sup>

Child welfare agencies must gather, review, and update each foster child’s education records.<sup>65</sup> Pursuant to federal law, the child’s case plan must include “school record[s]” and information about the child’s “educational providers” and “grade level

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(Supp. II 2002).

<sup>60</sup> N.Y. COMP. CODES R. & REGS. tit. 18, § 441.13(b).

<sup>61</sup> Progress notes in uniform case records (UCRs) must include “descriptions of collateral contacts and other activities relating to the collecting of information needed to formulate an assessment.” N.Y. COMP. CODES R. & REGS. tit. 18, § 428.5(c)(2) (adopted Aug. 3, 2005) (N.Y. State Legislative Bill Drafting Comm’n, Legislative Retrieval System). UCRs must include “descriptions of contacts with educational/vocational personnel on behalf of a child.” *Id.* § 428.5(c)(6).

<sup>62</sup> The OCFS regulations require authorized agencies to provide the foster parent with information on a child’s “school and educational experiences” before the child is placed in care. N.Y. COMP. CODES R. & REGS. tit. 18, § 443.2(e)(3)(iv). This information must be provided within thirty days of an emergency placement. *Id.* § 443.2(e)(3). ASFA requires that education records, along with health records, be “reviewed and updated, and supplied to the foster parent or foster care provider with whom the child is placed, at the time of each placement of the child in foster care.” 42 U.S.C. § 675(5)(D) (2000).

<sup>63</sup> The OCFS Foster Parent Manual instructs foster parents that they are “expected to actively participate in their foster child’s education.” The manual states:

It is important that all interested parties be aware of the school achievement and special needs of your foster child. Therefore, when a child is placed in your home, the child’s caseworker will share with you information about the child’s academic standing. It is important that you involve yourself in the child’s school progress and activities; this shows the child that you are interested and that you care. The agency should also be kept informed of your child’s school progress at all times.

N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., NEW YORK STATE FOSTER PARENT MANUAL 35 (2003), available at <http://www.ocfs.state.ny.us/main/fostercare/resources.asp>.

<sup>64</sup> See CTR. WITHOUT WALLS, *supra* note 3.

<sup>65</sup> The OCFS regulations require DSS to maintain highly detailed and well-organized “uniform case record[s]” for all children placed in foster care or considered for such placement. N.Y. COMP. CODES R. & REGS. tit. 18, § 428.3(a)–(b) (adopted Aug. 3, 2005) (N.Y. State Legislative Bill Drafting Comm’n, Legislative Retrieval System). Though DSS is responsible for maintaining the UCRs, it may contract with agencies to perform this task. See *id.* § 423.4(e)(1)(ii), (f).

performance.”<sup>66</sup> Under OCFS regulations, the child’s case records should include “educational and/or vocational training reports or evaluations indicating the educational goals and needs of each foster child, including school reports and Committee on Special Education evaluations and/or recommendations.”<sup>67</sup>

Child welfare agencies must document the child’s history of school placements,<sup>68</sup> permitting DSS to track the child’s school history. This requirement also permits DSS to identify the child’s school district of origin, which may be responsible for funding the child’s education as the child moves into another school district.<sup>69</sup>

Child welfare agencies must include the child’s birth certificate and reports of medical examinations in the case record.<sup>70</sup> These documents are needed to enroll children in school.

Child welfare agencies must notify school districts whenever a child in foster care is newly enrolled in a school district, thus permitting those districts to apportion tuition costs for the child’s schooling.<sup>71</sup> Within ten days of the child’s admission to a new school district, the DSS Commissioner or the agency acting in the Commissioner’s stead must notify both the new district and the school district in which the child attended school at the time DSS assumed responsibility for the child’s foster care placement.<sup>72</sup> This confidential notice permits districts to determine their financial

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<sup>66</sup> 42 U.S.C. § 675(1)(C).

<sup>67</sup> N.Y. COMP. CODES R. & REGS. tit. 18, § 428.3(b)(2)(iii) (adopted Aug. 3, 2005) (N.Y. State Legislative Bill Drafting Comm’n, Legislative Retrieval System). The mandate to gather, maintain, and share a child’s education records intersects with the confidentiality requirements of the Federal Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232(g) (2000). See discussion *infra* Part VII. To obtain the records, DSS and contract agencies may be asked by schools to provide written parental consent or court orders authorizing the release of records. 20 U.S.C. § 1232g(b)(1)–(2) (2000 & Supp. I 2001).

<sup>68</sup> N.Y. COMP. CODES R. & REGS. tit. 18, § 441.7(a)(1) (adopted Aug. 3, 2005) (N.Y. State Legislative Bill Drafting Comm’n, Legislative Retrieval System). Authorized agencies are required to “maintain current case records for each child in its care, in accordance with the requirements of section 372 of the Social Services Law. The records must be conveniently indexed and retained in accordance with” OCFS regulations. *Id.* The records include a broad array of items, including “record of school placement.” *Id.*

<sup>69</sup> N.Y. EDUC. LAW § 3202(4)(a) (McKinney 2001).

<sup>70</sup> N.Y. COMP. CODES R. & REGS. tit. 18, § 428.3(b)(2) (adopted Aug. 3, 2005) (N.Y. State Legislative Bill Drafting Comm’n, Legislative Retrieval System).

<sup>71</sup> N.Y. EDUC. LAW § 3202(4)(a), (f)(i).

<sup>72</sup> *Id.* § 3202(4)(f)(i). The New York Education Law requires that notice be provided within ten days of placement, but the New York regulations require the DSS Commissioner to provide notice within ten days of admission to the school. N.Y. COMP. CODES R. & REGS. tit. 18, § 445.1(a) (2001). Currently, the DSS form used to notify the school districts is designated as Form 2999. See N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., SCHOOL DISTRICT NOTIFICATION OF FOSTER CHILD PLACED IN A FOSTER FAMILY, AGENCY BOARDING, OR GROUP HOME (2005), available at <http://www.ocfs.state.ny.us/main/forms/foster%5fcare/>.

responsibility for the child's tuition based upon a formula developed by the New York State Commissioner of Education.<sup>73</sup>

DSS must ensure that children are suitably clothed and may authorize additional clothing allowances for school and educational activities.<sup>74</sup>

DSS may authorize "special payments" for children in foster care in connection with school, camp, and extracurricular and outside enrichment activities, including public transportation to attend school.<sup>75</sup> Over and above established rates for board, care, and clothing, foster parents may request special payments for a variety of expenditures detailed in the social services regulations.<sup>76</sup>

The OCFS regulations encourage the interagency contact and collaboration that is so vital to successful education, as well as permanency planning. Those who study education of children in foster care frequently call for interagency communication and collaboration as a prime recommendation for system reform.<sup>77</sup> In New York, the existing social services regulations already provide the legal framework needed for interagency collaboration.

Jurisdictions in New York and elsewhere have adopted a variety of models to promote interagency communication, typically appointing liaisons to serve within schools, child welfare agencies, or the courts.<sup>78</sup> The Illinois Department of Children and Family

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<sup>73</sup> N.Y. EDUC. LAW § 3202(4)(d). The underlying policy goal is to spread the tuition burden among districts so that those who educate foster children are not disproportionately financing education of children whose families are not residents of the district. See *Longwood Cent. Sch. Dist. v. Springs Union Free Sch. Dist.*, 806 N.E.2d 970, 972 (2004). Despite the notice requirement, however, some school districts complain that they sometimes do not receive notice that a child is in foster care and that the forms, when submitted, are not always filled out properly. The notice should go to the school district to which the child is newly admitted and to the district the child attended when he or she first became of public charge because that district will typically be responsible for costs of the child's education and will reimburse tuition to the new district. N.Y. EDUC. LAW § 3202(4)(a).

<sup>74</sup> N.Y. COMP. CODES R. & REGS. tit. 18, § 427.16 (2001).

<sup>75</sup> *Id.* § 427.3(a), (c)(1)–(2).

<sup>76</sup> *Id.* § 427.3(e)(2) (delineating specific special payments that include "school expenses [and] extraordinary transportation and communication expenses").

<sup>77</sup> See EDUCATIONAL STATUS OF FOSTER CHILDREN, *supra* note 3, at 6 (identifying various collaborative intervention strategies to improve the educational success of children in foster care). Historically, communications between child welfare agencies and educators in school districts have been guarded, particularly in light of confidentiality requirements. See Sandra J. Altshuler, *From Barriers to Successful Collaboration: Public Schools and Child Welfare Working Together*, 48 SOC. WORK 52, 55–56, 58–60 (2003) [hereinafter *From Barriers to Successful Collaboration*] (identifying the need for collaboration between these entities and possible strategies to promote good communication and integrated planning for children).

<sup>78</sup> For example, in Erie County, New York, the Erie County Family Court and Department of Social Services, along with a spectrum of stakeholders, participate in the Erie County Permanency for Children Collaborative, which has been the vehicle for implementing a broad

Services (DCFS) employs Educational Advisors to provide ongoing support to DCFS staff and foster parents. It also provides funding for private agencies across the state to employ educational liaisons, whose mission includes building collaborations with the schools and developing an educational infrastructure within the state to service children in foster care.<sup>79</sup> California law requires all schools to appoint “a foster care education liaison . . . to oversee placement, transfer, and enrollment” of children in foster care.<sup>80</sup> In Broward County, Florida, schools employ staff to serve as liaisons to the child welfare agency and to the court. They also select school personnel to be “foster care designees,” who “serve as single contact points for that school” and help coordinate school administration and staff to address the needs of children in foster care.<sup>81</sup>

## VI. SCHOOL ENROLLMENT

In New York, all school-aged children, including those in foster care, must attend school daily, barring a legitimate excuse for absence.<sup>82</sup> Studies across the nation, including those in New York City, document that children in foster care experience frequent gaps in attendance because of delays in school enrollment.<sup>83</sup> In many instances, as children move from one foster home to another, they miss school while they await enrollment. Even children of kindergarten age miss school simply because no one took the time to properly enroll them.<sup>84</sup>

Though each school district in New York State fashions its own enrollment practices, it must do so within the parameters of state

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variety of interagency initiatives regarding permanency and services for children in the child welfare system. The School Transitions Workgroup, whose members represent the court, agencies and schools, focuses on issues concerning education of children in out-of-home care. Nat'l Child Welfare Resource Ctr. On Legal and Judicial Issues, National Summary: Implementation Projects, <http://www.abanet.org/scripts/cip/nationalcat.jsp?catid=21&subid=0> (last visited Oct. 22, 2005).

<sup>79</sup> ILL. DEP'T OF CHILDREN AND FAMILY SERVS., CHILD AND FAMILY SERVICES PLAN FY 2000–FY 2004, available at [http://www.state.il.us/DCFS/docs/childplan2000\\_ed.shtml](http://www.state.il.us/DCFS/docs/childplan2000_ed.shtml).

<sup>80</sup> MCNAUGHT, *supra* note 15, at 112.

<sup>81</sup> *Id.* at 114–15.

<sup>82</sup> See N.Y. EDUC. LAW § 3205 (McKinney Supp. 2005); N.Y. EDUC. LAW § 3210 (McKinney 2001).

<sup>83</sup> See, e.g., CTR. WITHOUT WALLS, *supra* note 3.

<sup>84</sup> See *id.* Absenteeism among children in foster care may be caused by additional factors as well, including health issues, truant behaviors, school resistance, or school phobia. See *id.* Child welfare professionals, judges, Court Appointed Special Advocates (CASAs), foster parents, and others should be on alert for issues that affect school attendance of children in foster care and promote strategies to enhance attendance.

law.<sup>85</sup> School attendance is generally compulsory for children ages six through sixteen.<sup>86</sup> Sixteen year olds must remain in school through the end of the school year in which they turn sixteen.<sup>87</sup> At their discretion, some school boards may adopt policies to require sixteen and seventeen year olds to attend school through the end of the year in which they turn seventeen.<sup>88</sup>

To enroll students, schools require adequate proof of a child's age, immunizations, a "health certificate," and residency in the district; most schools will also request copies of a child's past school records.<sup>89</sup> Under New York law, when enrollment in school poses difficulty, school districts should play an active role in assisting families or child welfare professionals in locating documents and ensuring that children meet standards for enrollment.

The legal requirements regarding the documents needed for enrollment include the following:

(1) *Proof of Age*. Schools require documentation of the child's age, typically substantiated by a birth certificate or similar record. Schools are empowered to obtain a child's birth certificate on their own.<sup>90</sup>

(2) *Immunizations*. Unless a student is granted a legal exemption for medical, religious, or other reasons, schools require

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<sup>85</sup> Many school districts maintain websites replete with information about their schools, staffs, policies, and programming. See, e.g., Albany City School District, <http://www.albanyschools.org> (last visited Oct. 2, 2005). These often include information and forms for school enrollment and registration. See, e.g., Albany City School District, General Information, <http://www.albanyschools.org/Information/registration.htm> (last visited Oct. 2, 2005). Title 8, section 104.1(i) of the Official Compilation of Codes, Rules, and Regulations of the State of New York requires school districts, the Board of Cooperative Educational Services ("BOCES"), and other school entities to adopt a "comprehensive attendance policy" that includes, among other things:

(i) a statement of the overall objectives to be accomplished; (ii) a description of the specific strategies to be employed to accomplish these objectives; (iii) a determination of which pupil absences, tardiness and early departures will be excused and which will not be excused and an illustrative list of excused and unexcused pupil absences and tardiness.

N.Y. COMP. CODES R. & REGS. tit. 8, § 104.1(i)(2) (2003); see also N.Y.C. DEP'T OF EDUC., REGULATION OF THE CHANCELLOR A-210, §§ 1.1-2.3 (Dec. 29, 2000), available at <http://docs.nycenet.edu/docushare/dsweb/Get/Document-14/A-210.pdf> (outlining the attendance policy for New York City schools).

<sup>86</sup> N.Y. EDUC. LAW § 3205(1)(a).

<sup>87</sup> *Id.* § 3205(1)(c). "A person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides . . ." *Id.* § 3202(1). A child who turns six on or before December 1 must attend school in September of the year he or she turns six, and a child who turns six after December 1 must start school the following September. *Id.* § 3205(1)(c).

<sup>88</sup> *Id.* § 3205(3).

<sup>89</sup> See *infra* notes 90-98 and accompanying text.

<sup>90</sup> N.Y. EDUC. LAW §§ 3212(2)(a), (6), 3218 (2001).

proof of up-to-date immunization. Students may attend school up to fourteen days pending submission of proof. Children entering school from outside of New York may attend up to thirty days pending submission of proof. If no proof is provided, the school district is responsible for taking specific steps detailed in the law to ensure that the child is immunized.<sup>91</sup>

(3) *Health Certificates*. For children first entering school (and at periodic intervals thereafter), schools require proof that a child has received a current physical examination. If no proof is furnished, the school district must arrange for a medical examination of the child.<sup>92</sup>

(4) *Residency*. Schools require proof that a child resides within the school district and, when applicable, the attendance zone of the school building. Proof that a home is located within the district may be substantiated by documents such as a lease, tax bill, or utility bill.<sup>93</sup> Children in foster care family and group homes are entitled to attend school in the district in which the foster home is located.<sup>94</sup> That district is entitled to request tuition reimbursement from the school district in which the child resided when the child was first placed in foster care.<sup>95</sup> To facilitate this process, the local DSS

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<sup>91</sup> *Id.* § 914; N.Y. PUB. HEALTH LAW § 2164(6)–(9) (McKinney Supp. 2005).

<sup>92</sup> N.Y. EDUC. LAW §§ 903–04.

<sup>93</sup> See N.Y.C. DEP'T OF EDUC., REGULATION OF THE CHANCELLOR A-101, para. V.A (Apr. 14, 2005), available at <http://docs.nycenet.edu/docushare/dsweb/Get/Document-11/A-101.pdf>. Sometimes, school districts will refuse to enroll a child in foster care in its schools on the ground that the child does not truly reside in the district. See CTR. WITHOUT WALLS, *supra* note 3.

<sup>94</sup> See N.Y. EDUC. LAW § 3202(1), (4)(a)–(b); see also *McMahon v. Amityville Union Free Sch. Dist.*, 368 N.Y.S.2d 534, 545 (App. Div. 1975) (holding that, for purposes of New York Education Law section 3202(4)(a), a group home is considered a family home). Section 3202(4)(a) does not apply, however, to foster families that do not receive payment from DSS for the child's placement or to children in non-foster care kinship placements. N.Y. EDUC. LAW § 3202(4)(b). Section 3202(4)(b) requires school districts to look at whether the family home in which the child receives care is the "actual and only residence" of the child. The school district in which the foster family lives may not look to the child's former district for tuition reimbursement. *Id.* § 3202(4)(b), (e).

<sup>95</sup> N.Y. EDUC. LAW § 3202(4)(a). The Commissioner of Education sets a formula for calculating tuition that is based on the "additional operating cost to the school district resulting from the attendance of a child." *Id.* § 3202(4)(d). In this fashion, a child may move from school to school, but the district responsible for tuition does not change during the time the child remains in foster care. When children move into New York from out of state, however, the district in which their foster care home is located becomes their district of residence and is responsible for tuition costs. *Brown v. Union Free Sch. Dist. No. 8*, 398 N.Y.S.2d 710, 712 (App. Div. 1977). The Commissioner of Education has determined that a school district may not refuse to admit a student living in a foster home located in its district, despite the failure of the district in which the student formerly resided to pay tuition. *Little Flower Children's Servs.*, 20 N.Y. Educ. Dep't Rep. 114, 115 (1980). Notably, the law does not affirmatively state that the child must attend school in the district where the family home is

commissioner is required to notify the school district of residence that the child has been placed in foster care.<sup>96</sup>

(5) *Prior School Records.* Schools often request copies of the child's prior school records upon enrollment and should do so to ensure that children receive appropriate services. If records are unavailable or delayed, however, the school should not bar a child's enrollment. The school itself may request the records from the child's prior school district without parental consent.<sup>97</sup> In the future, under the newly instituted New York State Student Identification System (NYSSIS), school districts will be able to access information and school records regarding students transferring from another school within New York State.<sup>98</sup>

School districts are required to promptly enroll children released from residential facilities into public schools. A representative from each school district must be assigned to aid such children's enrollment into public schools and to ensure expedient transfer of school records, as well as to act as a contact person for the residential facilities and other interested agencies.<sup>99</sup>

To avoid enrollment delays, child welfare agencies should designate the persons responsible for gathering needed documents and enrolling the child in school. The person enrolling the child should bring documentation—such as a court order or formal letter

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located. Because the district of residence is responsible for tuition, some school districts will permit a child to continue to attend school in the district where the child resided at the time social services assumed responsibility for him or her.

<sup>96</sup> N.Y. EDUC. LAW § 3202(4)(f)(i). In addressing "interdistrict conflicts dealing with the assignment of financial responsibility for the education of children who are public charges," the Commissioner of Education has "credit[ed] the determination of the social services agency as controlling on the issue of identifying the 'sending district'" that is responsible for tuition reimbursement. *Westbury Union Free Sch. Dist. v. Amityville Union Free Sch. Dist.*, 431 N.Y.S.2d 641, 644 (Sup. Ct. 1980); *see Bd. of Educ. of the Ossining Union Free Sch. Dist.*, 17 N.Y. Educ. Dep't Rep. 10, 11 (1977). Courts have viewed the determination of the Commissioner of the social services district as determinative on motions for summary judgment. *See Three Vill. Cent. Sch. Dist. v. Brentwood Union Free Sch. Dist.*, 561 N.Y.S.2d 800, 802 (App. Div. 1990); *Westbury Union Free Sch. Dist.*, 431 N.Y.S.2d at 644. If school districts disagree about their responsibilities to instruct the child or pay tuition, the law provides an appeal process. N.Y. EDUC. LAW § 3202(4)(f)(iv).

<sup>97</sup> 34 C.F.R. §§ 99.31(a)(2), 99.34 (2004).

<sup>98</sup> *See discussion infra* notes 133–34 and accompanying text.

<sup>99</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 100.2(ff)(2) (2003). This section requires school districts to: promptly enroll and admit youth released or conditionally released from residential facilities; cooperate with the facilities and agencies in facilitating prompt enrollment; request the youth's educational records from the school attended while at the residential facility; and implement the educational plan for the student's release, as submitted to the family court under section 353.3(7)(c) of the Family Court Act, which governs children adjudicated as juvenile delinquents. *Id.* § 100.2(ff)(1); N.Y. FAM. CT. ACT § 353.3(7)(c) (McKinney Supp. 2005).

from DSS or the contract agency—substantiating the child’s foster care status and the person’s authority to enroll the child in school. In practice, the task of enrolling the foster child in school is performed by one of a variety of individuals, including DSS or contract agency caseworkers, the child’s foster parents, or the birth parents.<sup>100</sup> Some school personnel, however, may turn away a caseworker or a foster parent, or even a birth parent, absent adequate proof of authority to enroll the child. Some districts, on the other hand, have policies expressly authorizing caseworkers or foster parents to enroll children in school.<sup>101</sup> To affect enrollment practices on a broader scale, DSS and school districts can forge joint policies to address the unique circumstances of foster children, outlining who may enroll the child, the documents needed, and strategies to prevent delays in enrollment and school attendance. Outside New York State, in places such as Illinois, Vermont, Pennsylvania, California, New Jersey, and Florida, various legislation, regulations, and interagency agreements have effectively reformed enrollment practices.<sup>102</sup> In developing

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<sup>100</sup> The law does not clearly indicate who is responsible for enrolling children who are in foster care in school, although the OCFS regulations do provide that foster parents must agree to “arrange for children of school age to attend school regularly as required by the Education Law.” N.Y. COMP. CODES R. & REGS. tit. 18, § 443.3(b)(2) (2001). It may be argued that foster parents are authorized or even obliged to arrange to enroll children in school to fulfill this duty. New York’s education law calls for “persons in parental relation” to require their children to participate in compulsory education. N.Y. EDUC. LAW § 3212(2) (McKinney 2001). A 1930s court opinion established that, for purposes of determining a child’s school residence, “[t]he county was in a parental relation” to “dependent’ and ‘neglected’ children who were “under the care, custody, and control of the commissioner of charities and corrections.” *Domes v. Bd. of Supervisors*, 243 N.Y.S. 640, 642 (App. Div. 1930) (citations omitted).

<sup>101</sup> In New York City, for example, the Chancellor’s Regulations provide that, “[s]tudents in care of social welfare agencies . . . are to be admitted into schools in the same manner as other students.” N.Y.C. DEP’T OF EDUC., REGULATION OF THE CHANCELLOR A-101, para. I.C (Apr. 14, 2005), *available at* <http://docs.nycenet.edu/docushare/dsweb/Get/Document-11/A-101.pdf>. School principals are required to admit any child whom a parent, guardian, or agency social worker brings to school, even without appropriate documents. *Id.* para. I.C. Among other things, the principal must “conduct an investigation to determine the student’s previous school and status,” “contact the previous school to obtain the student’s records,” and is required to enroll the student in the school pending the investigation. *Id.* A 2000 study by Advocates for Children suggests, however, that these policies are not being properly implemented at the school level. *See* EDUCATIONAL NEGLECT, *supra* note 3, at 4. Other districts have policies that expressly authorize foster parents to enroll a child. *See, e.g.,* *Simms v. Roosevelt Union Free Sch. Dist. No. 8*, 420 N.Y.S.2d 96, 97 (Sup. Ct. 1979) (interpreting a school district policy that stated “[a] minor must be accompanied by his parent, guardian or foster parent” to register in school).

<sup>102</sup> *See, e.g.,* ILL. DEP’T OF CHILDREN & FAMILY SERVS., *supra* note 47, § 314.30(a) (describing an Illinois policy requiring caseworker intervention if a child is not enrolled in school within two days and additional procedures thereafter); VT. DEP’T FOR CHILDREN & FAMILIES, SOCIAL SERVICES POLICY MANUAL (2004), *available at* <http://www.state.vt.us/srs/>

enrollment policies, it may be useful to draw upon the model established under McKinney-Vento, which requires each school district to designate an individual to serve as a liaison to children who are homeless and facilitate their school enrollment.<sup>103</sup>

## VII. ACCESSING EDUCATION RECORDS

Though required by law to gather and maintain children's school records, many child welfare professionals fail to routinely do so. Education records contain critical information that may affect decisions regarding a child's foster care placement, as well as issues affecting the child's permanency, safety, and well-being. Access to education records is essential to reconstructing a child's school history and determining a child's school needs.<sup>104</sup>

Yet, when child welfare professionals do attempt to obtain education records, their efforts may be stymied. With good reason, school district personnel—who are bound by federal law to protect the confidentiality of school records—are reluctant to release students' records to anyone whose authority to receive them is in doubt.<sup>105</sup>

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manual/casework/151.html (describing a Vermont policy designating social workers responsible to immediately enroll children in school following any change in placement and not permitting social workers to delegate responsibility to others); 22 PA. CODE § 11.11(b), (c) (2005) (requiring schools to normally enroll children, including children living in facilities, institutions, or foster homes, the next business day after application, but no later than five business days, provided that the person enrolling the child supplies proof of age, residence, and immunization); see MCNAUGHT, *supra* note 15, at 112 (regarding California's designation of foster care education liaisons "to oversee placement, transfer, and enrollment" of pupils in foster care).

<sup>103</sup> 42 U.S.C. § 11432(g)(1)(J)(ii), (6)(A)(ii) (Supp. I 2001).

<sup>104</sup> Education records that typically provide important information about the child include: the "cumulative record," individually administered assessments or evaluations (social histories, physicals, educational, psychological, speech/language, occupational or physical therapy, etc.), individual education programs (IEPs), § 504 Accommodation Plans, special education progress reports, standardized test results, records on non-special education services the child receives, and disciplinary records.

<sup>105</sup> It is important for the school district to determine who has authority to access records, because the school district is bound to protect the confidentiality of children's educational records; should it improperly release records, the school district is vulnerable to a challenge that it has violated the Family Educational Rights and Privacy Act (FERPA). See *infra* note 107 and accompanying text. The federal regulations set out the complaint and enforcement processes whereby the Family Policy Compliance Office (FPCO) of the U.S. Department of Education serves as investigator and may issue decisions regarding district compliance with FERPA. 34 C.F.R. §§ 99.60–.66 (2004). In enforcing FERPA, the Secretary of Education may withhold or terminate funding, or can compel school district compliance "through a cease-and-desist order." *Id.* § 99.67(a). Parents and eligible students do not have a private cause of action against school districts for FERPA violations. See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290–91 (2002).

In practice, education records often fail to follow children as they enter new foster care and school placements. Records are reported lost or missing or are furnished too late. Unfortunately, when children move into new schools without records, the impact can be profound. Unaware of the child's personal and school history, staff at the new school may unwittingly place the child in an inappropriate academic setting or fail to deliver needed support.

The federal Family Educational Rights and Privacy Act (FERPA)<sup>106</sup> governs confidentiality and disclosure of education records. FERPA applies to all New York public schools, as well as any private schools that accept foster children as public placements.<sup>107</sup> FERPA grants parents, as well as students over the age of eighteen, the right to access school records and allows them some measure of control over disclosure of the records to third parties.

Under FERPA, the term "education records" means records<sup>108</sup> that are "(1) Directly related to a student; and (2) Maintained by an educational agency or institution or by a party acting for the agency or institution."<sup>109</sup> FERPA requires school districts to treat education records containing personally identifiable information about students with confidentiality and outlines procedures governing the disclosure of records to third parties.<sup>110</sup>

Parents are entitled to inspect and review their own child's

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<sup>106</sup> 20 U.S.C. § 1232g (2000); see 34 C.F.R. §§ 99.1–.67.

<sup>107</sup> The vast majority of schools attended by foster children are governed by FERPA. FERPA applies to educational institutions and agencies that receive federal funding through the Department of Education, including public schools (from preschool through high school), colleges, and universities. 34 C.F.R. § 99.1(a). In New York, FERPA applies to schools operated by public agencies and private schools operated by agencies that accept foster children as public placements. N.Y. COMP. CODES R. & REGS. tit. 8, §§ 116.1(a), 116.2(f) (2003). In some instances, foster children may attend private secular or parochial schools not subject to FERPA. In those instances, records access and disclosure would be determined by the individual school's policies.

<sup>108</sup> A record means "any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche." 34 C.F.R. § 99.3.

<sup>109</sup> *Id.* Some materials are excluded from the definition. Records that teachers or other school personnel keep in their "sole possession" as a "personal memory aid" and share with no one other than "a temporary substitute" are not considered "education records." *Id.* Nor are "[r]ecords that only contain information about an individual after he or she is no longer a student at [the] agency or institution." *Id.* See 34 C.F.R. § 99.3 for a detailed listing of other records that do not constitute "education records." Test protocols and other information related to psychological and psychometric testing "directly related to the student" are considered educational records. Fonda-Fultonville (NY) Cent. Sch., 31 IDELR 530, 530 (N.Y. Family Policy Compliance Office 1998).

<sup>110</sup> 34 C.F.R. §§ 99.30–.39.

education records.<sup>111</sup> Schools are required to honor parent requests for records within a reasonable period of time, but no later than forty-five days after the request is received.<sup>112</sup> FERPA affords parents the right to request an amendment of records and a hearing process to challenge denial of an amendment request.<sup>113</sup>

For children who fall under the aegis of the Individuals with Disabilities Education Act (IDEA),<sup>114</sup> the parental right to access records is more substantial and time sensitive. Schools must comply with requests for records “without unnecessary delay and before any meeting regarding an IEP” (individualized education program) or impartial due process hearing “and in no case more than 45 days after the request has been made.”<sup>115</sup> Under the IDEA, schools must respond to “reasonable requests for explanations and interpretations of the records” from parents.<sup>116</sup> Parents are also entitled to have their own representative inspect and review the child’s records.<sup>117</sup> On request, the school must provide parents with “a list of the types and locations of education records collected, maintained, or used” by the school.<sup>118</sup>

In responding to requests for records regarding children in foster care, schools must determine who is qualified to act as a “parent” under FERPA. FERPA defines the term “parent” to include not only a natural parent or guardian, but also an “individual acting as a parent in the absence of a parent or a guardian.”<sup>119</sup> In addition, under the law, more than one individual may qualify as a “parent” for purposes of accessing records. Non-custodial parents, for example, have the same records access rights as custodial parents, unless otherwise prohibited by an “order, State statute, or legally binding document . . . [that] revokes [their] rights.”<sup>120</sup> Based on this reasoning, the birth parents of a child in foster care who no longer

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<sup>111</sup> *Id.* §§ 99.10, 99.12. A non-custodial parent has the same rights under FERPA as the custodial parent, absent a court order or legally binding instrument providing otherwise. *Id.* §§ 99.3–4.

<sup>112</sup> *Id.* § 99.10(b). Schools must provide parents with copies of records if failing to do so would effectively deny parents access to them. *Id.* § 99.10(d)(1). They may charge parents a reasonable fee for copying the records unless the fee itself effectively prevents the parents from exercising their right to have access to the records. *Id.* § 99.11(a).

<sup>113</sup> *Id.* § 99.20.

<sup>114</sup> Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400–1482 (West Supp. 2005).

<sup>115</sup> 34 C.F.R. § 300.562(a).

<sup>116</sup> *Id.* § 300.562(b)(1).

<sup>117</sup> *Id.* § 300.562(b)(3).

<sup>118</sup> *Id.* § 300.565.

<sup>119</sup> *Id.* § 99.3.

<sup>120</sup> *Id.* § 99.4.

have custody of their children continue to have full access rights to their child's education records, absent an order or agreement providing otherwise.

There appears to be no legal authority expressly addressing whether a child welfare agency qualifies as a child's parent under FERPA, but when the agency serves as the custodian or guardian of a child, it may be reasonable to treat it as such.<sup>121</sup> Nor is it clear whether a foster parent qualifies as a "parent" either, but there is some authority to suggest this may be the case.<sup>122</sup> A foster parent serving as the child's "parent" under the IDEA in special education matters, however, will acquire records access rights under FERPA.<sup>123</sup>

A third party that does not qualify as a "parent" under FERPA may still access a child's education records by obtaining the written consent of the parent<sup>124</sup> or a court order directing the school district to disclose the records.<sup>125</sup> It is recommended that, as a standard practice, as soon as a child enters the child welfare system, child welfare agencies obtain parental consent forms, when possible, and routinely request court orders authorizing the release of education records.

FERPA specifies additional circumstances in which schools may

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<sup>121</sup> It should be noted that, unlike the IDEA, FERPA does not expressly exclude state agencies from acting as a child's parent when the child is a ward of the State. *See* discussion *infra* Part IX. Arguably, at a minimum, when DSS is a child's "guardian," it may act as the child's parent for FERPA purposes. When DSS is the child's custodian, whether it may be considered an "individual acting as a parent in the absence of a parent or a guardian," 34 C.F.R. § 99.3, appears to be an open question. Federal and state laws regarding child welfare agencies, however, do expressly require these agencies to obtain and share children's education records. *See supra* Part V.

<sup>122</sup> *See* Family Educational Rights and Privacy, 61 Fed. Reg. 59,292, 59,294 (Nov. 21, 1996) (to be codified at C.F.R. pt. 99) (stating, in response to comments about the regulations, that "foster parents who are acting as a child's parent would have the rights afforded parents under FERPA").

<sup>123</sup> *See* the discussion of the role of a foster parent as "parent" *infra* Part IX. Because the IDEA now includes foster parent in the definition of parent, 20 U.S.C.A. § 1401(23)(A) (West Supp. 2005), it is all the more reasonable to interpret FERPA to include foster parents as well. In addition, in some instances, a foster parent is the child's relative or is appointed as the child's guardian pending adoption and in these instances should qualify to serve as the parent under the definition in FERPA. Moreover, even if the foster parent is not entitled to direct records access under FERPA, DSS is required to supply education records to the foster parents.

<sup>124</sup> 34 C.F.R. § 99.30(a). To be valid, a parent's prior written consent must be signed, dated, and state the records that may be disclosed and the purpose of the disclosure. It must also identify the party to whom the disclosure may be made. *Id.* § 99.30(a)-(b).

<sup>125</sup> *Id.* § 99.31(a)(9)(i). The school district must attempt to provide notice of the order to the child's parents, offering them a reasonable window of time within which to object. *Id.* § 99.31(a)(9)(ii).

share children's education records without parental consent.<sup>126</sup> Within the school setting, for example, education records may be shared with school personnel who have "legitimate educational interests" in the materials.<sup>127</sup> They may also disclose records "to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals."<sup>128</sup>

Under FERPA, school districts are permitted—without parental consent—to transmit a child's education records to a new school when the child transfers or intends to transfer.<sup>129</sup> This provision is a useful tool to facilitate the prompt transfer of student records, particularly because schools now have a duty to transmit certain education records as children move to new schools. Under the IDEA, schools are now required to facilitate the transfer of students within special education by taking reasonable steps to promptly obtain the children's records and to promptly respond to a request for records from a new school.<sup>130</sup> Under New York law, students receiving federal Title I school services under the Elementary and Secondary Education Act (ESEA) are entitled to the speedy transfer of their records when they move into a new school so that they may continue to receive Title I services.<sup>131</sup> In addition, under recent

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<sup>126</sup> See *id.* § 99.31 (setting forth exceptions to the prior consent requirements for the release of education records listed under § 99.30). For example, FERPA permits disclosure under a state law juvenile justice system exception. Where a state law authorizes disclosure and meets the terms laid out in FERPA, records may be shared with a state or local juvenile justice system agency. *Id.* §§ 99.31(a)(5), 99.38. New York does not currently have such a law.

<sup>127</sup> *Id.* § 99.31(a)(1).

<sup>128</sup> *Id.* § 99.36(a); see also *id.* § 99.31(a)(10). Section 99.36 is strictly construed and may not be used as a tool to evade requirements for prior written consent. *Id.* § 99.36(c).

<sup>129</sup> *Id.* § 99.31(a)(2). When a child seeks or intends to enroll in another school, school system, or postsecondary educational institution, the child's educational records may be sent to the new school without parental consent, so long as the school district's general notice to parents of all school children lays out this policy. *Id.* §§ 99.31(a)(2), 99.34(a)(1)(ii). It is common practice for school districts to provide such general notice to parents. Accordingly, this means that when children transfer to a new school, as foster children frequently do, their educational records may be forwarded to the new school by the former, without any parental involvement. As a result, schools should be able to comply with the requirements under the IDEA and Title I for the prompt transfer of students' records.

<sup>130</sup> 20 U.S.C.A. § 1414(d)(2)(C)(ii) (West Supp. 2005). For further discussion about the entitlement of children receiving services under the IDEA to continued services upon a school transfer, see discussion *infra* Part VIII.B.4.

<sup>131</sup> Under the ESEA, the federal government provides funding for state educational programs when they are coordinated with other programs, such as the IDEA. 20 U.S.C. § 6311(a)(1) (Supp. I 2001). Within their written plans to deliver Title I services, referred to as compensatory education services in New York, districts must include "a description of the procedure to ensure that school records of a newly enrolled pupil are obtained with the least possible delay from such pupil's former school and that such records are maintained in such

amendments to FERPA, school districts are required to forward a student's disciplinary records to the next school.<sup>132</sup>

The New York State Department of Education has recently implemented the New York State Student Identification System (NYSSIS), which will assign each student a unique identifier code.<sup>133</sup> NYSSIS "is an electronic information system that . . . enables school districts to retrieve identification numbers that have been previously assigned to students and to obtain new identifiers for students that do not have an existing identifier." The identifier "will be used by districts to report student-level data to the State Education Department" and "can also be used by districts to obtain or provide information from other districts when a student transfers in or out of a district."<sup>134</sup> As NYSSIS grows in use, it will facilitate the speedy transfer of information and records about children in foster care.

As students reach adulthood, they assume their parents' rights under FERPA. At age eighteen, children become "eligible student[s]" who may access their own records, and parents generally lose their access rights.<sup>135</sup> The only exception is for students receiving services under the IDEA who, because of their disability, are unable to provide informed consent. In that case, a parent or another appropriate individual may be appointed to represent the educational interests of the students.<sup>136</sup> In this event, neither the parents' rights under the IDEA nor those under FERPA will transfer to the student after the student reaches the age of majority.<sup>137</sup>

Across the country, states and localities have implemented "passport" programs to facilitate the transfer of important education and other information about children in foster care. In California, for example, "[t]he Community College Foundation has created

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pupil's school of attendance in accordance with standards set forth by the commissioner." N.Y. COMP. CODES R. & REGS. tit. 8, § 149-1.3(a)(14) (2003).

<sup>132</sup> 20 U.S.C. § 7165(b) (Supp. I 2001).

<sup>133</sup> STATE EDUC. DEP'T, UNIV. OF THE STATE OF N.Y., NEW YORK STATE STUDENT IDENTIFICATION SYSTEM (NYSSIS) USER GUIDE VERSION 4.0 (2004), available at <http://www.emsc.nysed.gov/nysstudents/nyssisguide.doc>.

<sup>134</sup> *Id.*

<sup>135</sup> 34 C.F.R. § 99.5(a) (2004); see also *id.* § 99.3 (defining "[e]ligible student" as "a student who has reached 18 years of age or is attending an institution of postsecondary education").

<sup>136</sup> *Id.* § 300.517(b). Presently, New York State has not established a procedure for such appointments. In practice, it appears that schools continue to treat parents of children who are not able to provide informed consent as parents and permit them continued access to school records.

<sup>137</sup> See *id.* § 300.517(b).

ePassport, a Smart Card internet-based health and education data tracking system, to provide a simplified means for youth in foster care to access and update their records any time and any place.”<sup>138</sup> In Washington, children in foster care may participate in the Foster Care Passport Program, which “is an automated, health and education record-keeping and tracking system for children in out-of-home care for more than 90 days.”<sup>139</sup> In that project, “Public Health Nurses . . . collect and input information about the child’s medical history and treatment, while social workers input social, behavioral and educational data. The information is given to foster parents or relative caregivers at the time of placement and is updated every six months or whenever a child moves.”<sup>140</sup>

#### VIII. MEETING THE INDIVIDUALIZED EDUCATIONAL NEEDS OF CHILDREN IN FOSTER CARE: AN OVERVIEW OF GENERAL AND SPECIAL EDUCATION SERVICES

Children enter foster care with a broad variety of gifts and needs and, like other children, benefit from the full array of school services, ranging from programs for the academically gifted to those for the severely challenged. Appropriate school services not only enhance the education of foster children, but may also affect child welfare and judicial decisions regarding foster care placement. Indeed, appropriate school programming may keep a child out of foster care or prevent placement in a more restrictive foster care setting.<sup>141</sup> Children who live in less restrictive foster care settings have greater prospects for achieving permanency and better long-term educational outcomes.<sup>142</sup>

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<sup>138</sup> Terri Kletzman, *The Community College Foundation Goes National with ePassport*, TECHNICALITY TIMES, June 2003, [http://www.technicalitytimes.com/Issue3/SmartCard\\_Jun\\_03.htm](http://www.technicalitytimes.com/Issue3/SmartCard_Jun_03.htm).

<sup>139</sup> Wash. State Dep’t of Soc. & Human Servs., Passport for Foster Children, <http://www1.dshs.wa.gov/basicneeds/cgs2ppfc.html> (last visited Oct. 2, 2005).

<sup>140</sup> *Id.* Other passport programs have been implemented, for example, in South Carolina. S.C. DEP’T OF SOC. SERVS., EDUCATION AND HEALTH PASSPORT, <http://www.sc.edu/ccfs/nexuskids/passport.pdf> (last visited Oct. 2, 2005). The Illinois Department of Children and Family Services has recently announced an initiative to institute an “education passport” database offering “comprehensive student profiles to ease school-to-school transition for youth in out-of-home care.” Ill. Dep’t of Children and Family Servs., *Chicago Public Schools and State Board of Education Partner to Improve Education Outcomes: Initiatives Directed to Support Children in Out-of-Home Care*, DCFS NEWS, Dec. 2, 2004, [http://www.state.il.us/DCFS/library/com\\_communications\\_pr\\_dec22004.shtml](http://www.state.il.us/DCFS/library/com_communications_pr_dec22004.shtml).

<sup>141</sup> See EDUCATIONAL NEGLECT, *supra* note 3, at 64–68.

<sup>142</sup> Edmund V. Mech & Carrie Che-Man Fung, *Placement Restrictiveness and Educational Achievement Among Emancipated Foster Youth*, 9 RES. ON SOC. WORK PRAC. 213, 221–23, 225

Foster children manifest disabilities at far higher rates than the general population.<sup>143</sup> Many foster children are medically fragile and experience health problems associated with poverty, such as low birth weight, lead poisoning, or malnutrition.<sup>144</sup> Others face health risks associated with parental neglect, physical or sexual abuse, or maternal substance abuse.<sup>145</sup> Consequently, children's disabilities run the full range of acute and chronic medical problems. Common disabilities include neurological and developmental delays, as well as behavioral and mental health problems.<sup>146</sup>

Not surprisingly, children in foster care receive special education services at much higher rates than other children. Studies document that children in foster care are placed in special education at a rate at least three times higher than the average for the general population.<sup>147</sup> While many children in foster care may need additional school resources to supplement their school program, placement of children at a rate of three times the national rate raises serious concerns. Such data suggest that children in foster care may be excessively included in special education and that too many are placed in overly restrictive settings.<sup>148</sup> Yet, ironically,

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(1999).

<sup>143</sup> *Developmental Issues for Young Children*, *supra* note 6 at 1145; Smucket & Kauffman, *supra* note 6.

<sup>144</sup> See Gail Chang Bohr, *Recent Developments in Health Care Law: For the Well-Being of Minnesota's Foster Children: What Federal Legislation Requires*, 31 WM. MITCHELL L. REV. 897, 904, 906 (2005) (identifying the high percentage of foster children suffering from physical health problems resulting from abuse); Kay P. Kindred, *Of Child Welfare and Welfare Reform: The Implications for Children When Contradictory Policies Collide*, 9 WM. & MARY J. WOMEN & L. 413, 426–28 (2003) (discussing the affects of poverty on children).

<sup>145</sup> See Comm. on Early Childhood, Adoption and Dependent Care, Am. Acad. of Pediatrics, *Health Care of Young Children in Foster Care*, 109 PEDIATRICS 536, 536 (2002) [hereinafter *Health Care of Young Children*].

<sup>146</sup> See *Developmental Issues for Young Children*, *supra* note 6, at 1145–47; Smucket & Kauffman, *supra* note 6; see also *supra* note 6 and accompanying text.

<sup>147</sup> See SMITHGALL ET AL., *supra* note 2, at 58–59, 61 (reporting that “nearly half . . . of sixth- through eighth-grade students in out-of-home care have been classified as disabled,” and that “students in out-of-home care are much more likely to be classified as having an emotional or behavioral disorder”); Goerge et al., *supra* note 7, at 435 (stating that “nearly 30% of the school-age foster care caseload [is] in special education”); Richard J. Sawyer & Howard Dubowitz, *School Performance of Children in Kinship Care*, 18 CHILD ABUSE & NEGLECT: INT'L J. 587, 594 (1994) (finding that children assigned to kinship care placements by the City of Baltimore Department of Social Services received special education services at a rate 3.5 times the national average).

<sup>148</sup> See Goerge et al., *supra* note 7, at 430–31; EDUCATIONAL STATUS OF FOSTER CHILDREN, *supra* note 2, at 4 (stating that “quantitative findings and qualitative research with professionals suggest that transitory behavioral problems stemming from placement disruptions or entry into care may lead to erroneous labeling of children as emotionally or behaviorally disordered”).

there is equal concern that many children in foster care with special education needs remain unidentified and, therefore, lack access to essential services.<sup>149</sup>

### A. General Education Services

Schools offer a variety of “general” or “regular” education services as supplemental support—academic or otherwise—for children in the general education classroom. Before placing a child in a special education program, typically, school districts must implement “pre-referral strategies,” using general education services to address a child’s needs.<sup>150</sup> Schools offer general education services as their financial and personnel resources allow—children and their parents have little guarantee of services or procedures to safeguard their delivery.

New York State’s learning standards serve as a backdrop to its schools’ education programs and services. The learning standards drive and shape the curriculum in New York’s schools and set the bar for measuring student achievement and school accountability. The state’s learning standards cover seven broad curriculum areas and describe the “knowledge, skills and understandings” that students are expected to master and exhibit over time.<sup>151</sup>

Schools are required to administer a comprehensive diagnostic screening to children entering kindergarten or a New York State school for the first time.<sup>152</sup> The purpose of the screening is to

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<sup>149</sup> See Godsoe, *supra* note 7, at 100–01; Goerge et al., *supra* note 7, at 429.

<sup>150</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(a) (2003); see also N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(d) (adopted Sept. 9, 2005), available at <http://www.vesid.nysed.gov/specialed/idea/revsiedterms905.pdf> (“Prior to development of a recommendation, the committee shall ensure that the appropriateness of the resources of the regular education program, including educationally related support services, and academic intervention services, has been considered.”). School districts may alternatively document why such strategies were not used. *Id.*

<sup>151</sup> *Id.* § 100.1(t) (2003).

<sup>152</sup> *Id.* § 117.3(a). The diagnostic screening includes, but is not limited to, the following components: “a health examination . . . or evidence of such in the form of a health certificate . . . certificates of immunization or referral for immunization . . . a determination of receptive and expressive language development, motor development, articulation skills and cognitive development . . . [and] a determination that the pupil is of foreign birth or ancestry and comes from a home where a language other than English is spoken.” *Id.* § 117.3(c). If possible, diagnostic screenings should be conducted before a child enters school, but no later than December 1 of the school year of entry; if the child enters school after December 1, the screening must take place within fifteen days of the transfer of the child. *Id.* § 117.3(b)(3). For students who score below the prescribed levels on the New York State third grade tests, a diagnostic screening must be conducted within thirty days of the availability of the test scores. *Id.* § 117.3(b)(4).

identify gifted students, disabled students, or students with limited English proficiency, and to refer them for appropriate evaluation or services in a timely manner.<sup>153</sup> Schools must also screen those transfer students who are new to New York's schools to determine their level of mastery of the state's learning standards and their need for special academic intervention services.<sup>154</sup> Students who fall below certain measures on standardized tests are also candidates for additional screening.<sup>155</sup> For children in foster care entering a new school without a record or results of prior diagnostic screening, it may be useful to request a screening to determine their current level of performance and need. In New York, in keeping with the No Child Left Behind Act of 2001,<sup>156</sup> schools also periodically administer statewide tests to determine whether children are meeting the state standards, and for those students who fail to meet those standards, schools will provide services.<sup>157</sup>

Children who need extra general education support may qualify for services delivered through a variety of programs. Schools may combine these services, which fall into the categories of academic intervention services, educationally related support services, and Title I services for low-income schools or students from low-income families. In limited instances, children who attend schools that are chronically in need of improvement may qualify for the option of school choice or supplemental educational services provided under

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<sup>153</sup> *Id.* § 117.3(e)–(g). Students who are suspected of being disabled (the regulation uses the outmoded term “handicapping condition”) must be referred to the school district’s Committee on Special Education (CSE) no later than fifteen calendar days after completion of the screening. *Id.* § 117.3(e). Students identified as possibly gifted must be referred to the school district’s superintendent within fifteen calendar days as well. *Id.* § 117.3(f). It should be noted, however, that funding for the gifted programs are subject to the availability of funds. N.Y. EDUC. LAW § 4451 (McKinney 2001). Therefore, there is no entitlement to services for the gifted. The referrals to the CSE or the Superintendent must be accompanied by the screening report. N.Y. COMP. CODES R. & REGS. tit. 8, § 117.3(e)–(f). Students with limited English proficiency are entitled to services detailed in Part 154 of the New York State Education Regulations. *Id.* § 117.3(g).

<sup>154</sup> *Id.* § 100.2(r).

<sup>155</sup> *Id.* § 117.3(a), (b)(4).

<sup>156</sup> *See id.* § 120.1.

<sup>157</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 100.4(g), (h)(2) (adopted Sept. 9, 2005), available at <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>. A new provision of the Individuals with Disabilities Education Act, as reauthorized in December 2004, provides that children with disabilities will participate in the general state and district-wide assessments with “appropriate accommodations and alternate assessments where necessary and as indicated in their respective [IEPs].” 20 U.S.C.A. § 1412(a)(16)(A) (West Supp. 2005). See *infra* Part VIII.B for an explanation of the reauthorization of the IDEA; see *infra* Part VIII.B.1 for a description of the IEP.

the federal No Child Left Behind Act.<sup>158</sup> Individual schools may also offer students other general education resources unique to their school or community. Some of the more common services are described as follows:

(1) *Academic Intervention Services (AIS)*. These are services provided to students who either are at risk of falling short of the New York State learning standards or fail to perform at expected levels on state assessments.<sup>159</sup> AIS include academic instruction, to help students meet substantive learning standards, as well as “student support services” such as “guidance, counseling, attendance, and study skills.”<sup>160</sup> AIS may be delivered during or beyond the school day.<sup>161</sup> Educationally related support services, speech improvement services, and Title I services may all be forms of AIS.<sup>162</sup>

(2) *Educationally Related Support Services (ERSS)*. These are services for students who evidence educational, behavioral, personality, or social difficulties that are situational and/or amenable to intervention.<sup>163</sup> ERSS are designed to help maintain children in the general education setting and enhance academic achievement and attendance.<sup>164</sup> ERSS may encompass a broad variety of permissible services including counseling, speech and language therapy, small group instruction, modified curricula, individualized tutoring, and consultation services to families and school personnel.<sup>165</sup>

(3) *Speech and Language Improvement Services*. Speech and language therapy services are a form of ERSS that may be provided to children enrolled in grades kindergarten through six.<sup>166</sup> Children are eligible when their speech presents a barrier to communication but does not adversely affect educational performance.<sup>167</sup>

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<sup>158</sup> 20 U.S.C. § 6316(b)(1)(E) (Supp. II 2002). The No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425, amended Title I of the Elementary and Secondary Education Act of 1965 (ESEA). Under the Elementary and Secondary Education Act, the federal government provides funding for educational programs for eligible disadvantaged children. 20 U.S.C.A. § 6301(5) (West 2003). In the New York Education Law, Chapter 1 or Title I services are referred to as compensatory education. N.Y. EDUC. LAW § 3602(12)(g) (McKinney 2001); see N.Y. COMP. CODES R. & REGS. tit. 8, §§ 120.3, 149-1.2 (2003).

<sup>159</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 100.1(g) (2003).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* § 100.2(ee)(4)(c).

<sup>162</sup> See *id.* §§ 100.1(g), 100.2(ee).

<sup>163</sup> N.Y. EDUC. LAW § 3602(32).

<sup>164</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 100.1(r).

<sup>165</sup> *Id.* § 100.2(v)(5).

<sup>166</sup> N.Y. EDUC. LAW § 912-b(1) (McKinney 2000).

<sup>167</sup> *Id.*; N.Y. COMP. CODES R. & REGS. tit. 8, § 100.1(p).

(4) *Title I and PCEN Services.* In New York State, low income students may receive services designed for “pupils with compensatory educational needs” (PCEN) as well as federal Title I services.<sup>168</sup> Schools with a high concentration of students in poverty may be designated as Title I schools and receive funding to deliver services to their students on a program-wide basis. Alternatively, low income children with “compensatory educational needs” may qualify for Title I services through district wide screenings or if they test below certain statewide reference points.<sup>169</sup> In New York, these services must be delivered with “minimal disruption of regular academic instruction and maximum integration of remedial teaching strategies with regular course work.”<sup>170</sup> The services may include “small group instruction . . . specialized assistance within the regular classroom . . . an adjusted instructional program . . . the use of educational technology . . . after-school or summer school remedial programs . . . or other remedial strategy approved by the commissioner.”<sup>171</sup>

(5) *No Child Left Behind School Choice.* Under the No Child Left Behind Act, schools identified as those in need of improvement after two years of failing to meet established state standards must offer students the choice to attend better performing schools (including charter schools) and must pay for transportation to the new school.<sup>172</sup> In addition, children who attend schools identified as “persistently dangerous” or who have been victimized by school violence are entitled to transfer to a safe school.<sup>173</sup> The school district must notify parents of the school’s status and offer the option of school choice.<sup>174</sup> Parents have the responsibility to contact the school to exercise this option.

(6) *No Child Left Behind Supplemental Educational Services (SES).* These are services available under the No Child Left Behind Act for low-income children who attend schools designated in need of improvement after failing to meet established state standards for three years. SES are delivered outside the regular school day by

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<sup>168</sup> N.Y. EDUC. LAW § 3602(12)(g).

<sup>169</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 149-1.2(b).

<sup>170</sup> N.Y. EDUC. LAW § 3602(12)(g)(2)(C).

<sup>171</sup> *Id.* § 3602(12)(g)(2)(B). Federal Title I funding is available to schools that target specific student populations, including students who are neglected, abused, and at risk. *See* 20 U.S.C. § 6315(b) (Supp. II 2002).

<sup>172</sup> 20 U.S.C. § 6316(b)(8)(A), (9).

<sup>173</sup> 20 U.S.C.A. § 7912(a) (West 2003).

<sup>174</sup> *See* N.Y. EDUC. LAW § 2802(7)(c) (McKinney Supp. 2005); N.Y. COMP. CODES R. & REGS. tit. 8, § 120.3.

providers approved by the New York State Department of Education and selected by parents. SES include “tutoring, remediation and other educational interventions.”<sup>175</sup> As with school choice, parents must request SES from the school for their children to receive these services.

Many children in foster care are likely candidates for general education support and services. When these services are not sufficient, however, these children may benefit from appropriate “special education” services.

### *B. Special Education Services*

In 1975, with millions of American children with disabilities warehoused in substandard school programs—or excluded from school altogether—the federal government enacted the Education for All Handicapped Children Act.<sup>176</sup> Now known as the Individuals with Disabilities Education Act (IDEA), the law guarantees children with disabilities a “free appropriate public education.”<sup>177</sup> Recently reauthorized and amended by the Individuals with Disabilities Education Improvement Act of 2004,<sup>178</sup> the IDEA prescribes the

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<sup>175</sup> U.S. DEPT OF EDUC., NO CHILD LEFT BEHIND: SUPPLEMENTAL EDUCATIONAL SERVICES NON-REGULATORY GUIDANCE 1 (2005), *available at* <http://www.ed.gov/policy/elsec/guid/suppsvcsguid.pdf>. In addition, the No Child Left Behind Act establishes a rigorous method for holding Title I schools accountable for meeting minimum levels of performance and progress on an annual basis. Title I schools that fail to meet required measures of annual yearly progress after two years are identified as schools in need of improvement. 20 U.S.C. § 6316(b)(1)(A). Students who attend such schools may elect to attend a higher performing school within the district. *Id.* § 6316(b)(1)(E). Schools that fail to meet the required measures for a third year must offer students “supplemental educational services.” *Id.* § 6316(e). Schools that must provide SES are those in either their second year of school improvement (having failed to make “adequate yearly progress” (AYP) for three or more years), in corrective action, or in restructuring status. *Id.* §§ 6311(b)(2)(C), 6316(e)(1).

<sup>176</sup> Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975).

<sup>177</sup> 20 U.S.C.A. § 1412(a)(1)(A) (West Supp. 2005). *See generally* BONNIE P. TUCKER & BRUCE A. GOLDSTEIN, LEGAL RIGHTS OF PERSONS WITH DISABILITIES: AN ANALYSIS OF FEDERAL LAW 12:1-18:32 (1992) (providing more detail on the IDEA, its history, and its provisions).

<sup>178</sup> In signing the legislation, the President of the United States declared that “[t]he Individuals with Disabilities Education Improvement Act of 2004 will help children learn better by promoting accountability for results, enhancing parental involvement, using proven practices and materials, providing more flexibility, and reducing paperwork burdens for teachers, states, and local school districts.” Press Release, White House, Statement by the President on the Individual with Disabilities Education Improvement Act of 2004 (Nov. 20, 2004), *available at* 2004 WLNR 12078574. The provisions of the reauthorized IDEA discussed in this Article became effective on July 1, 2005. 20 U.S.C.A. § 1400. For an easy to read summary of the Individuals with Disabilities Education Improvement Act, see generally COMM. ON EDUC. AND THE WORKFORCE, INDIVIDUALS WITH DISABILITIES EDUCATION ACT

general framework within which each state delivers special education. In New York, Article 89 of the New York Education Law governs the special education process.<sup>179</sup> Article 81 of the New York Education Law also addresses the special education entitlements of children placed or at risk of placement in residential facilities referred to as “child care institution[s].”<sup>180</sup>

This section explains the underlying principles of the IDEA and outlines New York’s procedures for identifying and servicing children in special education. It highlights the recent revisions to the federal law now included in the IDEA that particularly affect children in foster care, including the requirement to promptly transfer school records for mobile children receiving special education. This section describes the legal duty of the Family Court, DSS, and other state agencies to involve the schools whenever a child with an identified or suspected disability may be placed in a residential facility. It also discusses the schools’ duty to include social service agencies in special education planning for children in foster care who are at risk of a school-initiated residential placement.

In keeping with the 2004 revisions to the IDEA, the New York State legislature passed emergency legislation to amend Article 89 of the New York Education Law, effective July 1, 2005, in order to conform New York law to the IDEA.<sup>181</sup> The federal Department of

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(IDEA): GUIDE TO “FREQUENTLY ASKED QUESTIONS” (2005), *available at* <http://edworkforce.house.gov/issues/109th/education/idea/ideafaq.pdf>.

<sup>179</sup> See N.Y. EDUC. LAW § 4401 (McKinney 2001).

<sup>180</sup> *Id.* §§ 4001(2), 4002. A child care institution means:

[A]ny facility serving thirteen or more children licensed by the department of social services . . . operated by an authorized agency, or a residential treatment facility for children and youth . . . [and does] not include any facility operated by a state agency or department other than the office of mental health. It shall not include group homes or urban homes operated by or contracted for by the division for youth.

*Id.* § 4001(2); *see also* N.Y. SOC. SERV. LAW § 371(18) (McKinney 2003) (defining “[p]ublic institution for children” as “an institution which is established and maintained by a public welfare district for the purpose of providing care and maintenance therein for children and minors for whose care such district is responsible and who require care away from their own homes”); *id.* § 371(17) (defining “[g]roup home” as “a facility for the care and maintenance of not less than seven, nor more than twelve children, who are at least five years of age, operated by an authorized agency”); N.Y. COMP. CODES R. & REGS. tit. 18, § 427.2(f) (2001) (defining “[i]nstitution” as “a facility established for the 24-hour care and maintenance of 13 or more children, operated by a child care agency”).

<sup>181</sup> 2005 N.Y. Sess. Laws 113, 117 (McKinney). The New York State Education Department issued proposed regulations in June 2005 and has obtained public comment. The regulations have been approved and adopted on an emergency basis, and it is anticipated that the amendments will be adopted as permanent rule in December 2005. Vocational and Educational Services for Individuals with Disabilities (VESID), Amendment to the Regulations of the Commissioner of Education, <http://www.vesid.nysed.gov/specialed/idea/>

Education has published proposed regulations to implement the amended IDEA and has solicited public comment on their content.<sup>182</sup> In this section, we highlight the changes that are salient to the discussion and advise the reader to monitor the regulations pending their final adoption.

### 1. The Core Principles of the IDEA

The IDEA represents a commitment by the federal government to the general principle that all children, disabled or otherwise, are entitled to be educated in a fashion that meets their individual needs.<sup>183</sup> The following principles undergird the law:

(1) *Child Find*. The IDEA charges states and school districts with the responsibility to reach into their communities to identify, locate, and evaluate children with disabilities, including those attending private schools.<sup>184</sup> The IDEA expressly includes homeless children and “wards of the State” within the child find mission.<sup>185</sup> To locate these children, states and school districts ought to communicate and collaborate with local child welfare agencies, as well as the Family Court.

(2) *Free Appropriate Public Education*. All eligible children between the ages of three and twenty-one<sup>186</sup> are entitled to a “free appropriate public education” (FAPE).<sup>187</sup> Special education is

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amendannounce.htm (last visited Oct. 1, 2005); 27 N.Y. Reg. 6 (Sept. 28, 2005).

<sup>182</sup> Proposed Amendments to Regulations Governing the Individuals with Disabilities Education Improvement Act of 2004, 70 Fed. Reg. 35,782 (June 21, 2005) (to be codified at 34 C.F.R. pts. 300, 301, 304). It is presently anticipated that the final regulations will be adopted in December 2005.

<sup>183</sup> 20 U.S.C.A. § 1400(d)(1)(A).

<sup>184</sup> *Id.* § 1412(a)(3)(A).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* § 1412(a)(1)(A). This includes children who have been suspended or expelled from school. *Id.* Subchapter II of the IDEA governs education for children ages three to twenty-one. *Id.* Subchapter III of the IDEA also requires states to provide early intervention services for children under age three. *Id.* §§ 1432(5)(A), 1435(a)(2); *see also* 34 C.F.R. § 303.12 (2004) (defining IDEA eligibility requirements for infants and toddlers and describing general services available for infants and toddlers through IDEA). In New York, children ages three to five (up until kindergarten) receive special education services through the committee on preschool special education. N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(mm) (2001); N.Y. COMP. CODES R. & REGS. tit. 8, §§ 200.16, 200.16(d)(5), (e)(3) (adopted Sept. 9, 2005), *available at* <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>; N.Y. EDUC. LAW § 4410(1)(i), (3) (McKinney 2001). The right to a FAPE ends when a child receives a regular high school diploma or at the end of the school year in which the child turns twenty-one. *Id.* § 4402(3)(c).

<sup>187</sup> 20 U.S.C.A. § 1401(9). The IDEA defines FAPE as special education and related services that—(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of

“specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability” and includes not only special education instruction by teachers and other qualified personnel, but a wide variety of related and supplemental services, programs, and accommodations as well.<sup>188</sup> Beyond academics, education encompasses all aspects of the school curriculum, including extracurricular activities.

(3) *Comprehensive Evaluation*. To properly identify children with disabilities and to develop appropriate programs for them, school districts must conduct comprehensive multidisciplinary evaluations of the children.<sup>189</sup>

(4) *Individualized Education Program*. The IDEA requires school districts to develop an “individualized education program” (IEP) for each child receiving special education services.<sup>190</sup> A document that parents may legally enforce under the IDEA, the IEP is highly detailed and includes, among other things, a description of the child’s educational performance, needs, services, and goals.<sup>191</sup>

(5) *Team Decision-Making*. The IDEA requires school districts to assemble an “IEP Team” comprised of school personnel qualified to make decisions about special education eligibility and services.<sup>192</sup> In New York, the team is called the Committee on Special Education

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the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of [the IDEA]. *Id.*; see also 34 C.F.R. § 300.26(a) (defining “special education” and describing its curriculum). This definition does little to enlighten what a FAPE really is. The United States Supreme Court addressed this issue in *Board of Education v. Rowley*, establishing a two-part test to determine appropriateness. 458 U.S. 176, 206–07 (1982). First, the court must address whether the state complied with the procedures of the law. *Id.* at 206. Second, the court must address whether the IEP is “reasonably calculated to enable the child to receive educational benefits.” *Id.* at 206–07. The Court held that an appropriate education provides personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction . . . and, if the child is being educated in the regular classrooms of the public education system, [it] should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Id.* at 203–04. New York’s education regulations now clearly provide, however, that passing from grade to grade is not reason to deem a child ineligible for services. N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(c)(4) (adopted Sept. 9, 2005), available at <http://www.vesid.nysed.gov/special/idea/revisedterms905.pdf>. For further discussion about the meaning of FAPE, see generally Joyce O. Eckrem & Eliza J. McArthur, *Is the Rowley Standard Dead? From Access to Results*, 5 U.C. DAVIS J. JUV. L. & POL’Y 199 (2001).

<sup>188</sup> 20 U.S.C.A. § 1401(29).

<sup>189</sup> *Id.* § 1414(a)(1)(A), (b)(2).

<sup>190</sup> *Id.* § 1412(a)(4).

<sup>191</sup> *Id.* § 1414(d)(1)(A).

<sup>192</sup> *Id.* § 1414(d)(1)(B).

(CSE).<sup>193</sup>

(6) *Parental Participation*. Under the IDEA, the child's parents are cast as equal participants in developing, reviewing, and revising the child's IEP. They are members of the CSE and are encouraged to bring their own perspective and information about their child to the table. School districts are obligated to encourage and facilitate parental participation in the special education process.<sup>194</sup>

(7) *Least Restrictive Environment*. The IDEA requires schools to educate children with disabilities in the "least restrictive environment" (LRE) appropriate to their needs.<sup>195</sup> By requiring schools to place children within the LRE to the maximum extent appropriate, the IDEA promotes the inclusion of children in the general education environment. School districts must provide a continuum of placement options for children, but may place the child in a more restrictive setting when consistent with the nature or severity of the disability.<sup>196</sup>

(8) *Procedural and Due Process Safeguards*. The IDEA affords children and their parents a broad range of procedural safeguards designed to ensure that they have notice of their rights and a meaningful opportunity to participate in the special education process. The IDEA gives parents the right to challenge school district actions through a hearing process, but encourages settlement of disputes through mediation and prehearing resolution sessions.<sup>197</sup>

## 2. Navigating the Stages of the Special Education Process in New York

In New York school districts, the Committee on Special Education (CSE) is the IEP team that determines special education eligibility and services for children.<sup>198</sup> The CSE is comprised of school

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<sup>193</sup> N.Y. EDUC. LAW § 4402(b)(1) (2001); N.Y. COMP. CODES R. & REGS. tit. 8, § 200.3(a)(1) (adopted Sept. 9, 2005), available at <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>.

<sup>194</sup> 34 C.F.R. § 300.345 (2004); 34 C.F.R. pt. 300, app. A, at 103; see 20 U.S.C.A. § 1400(c)(5)(B).

<sup>195</sup> 20 U.S.C.A. § 1412(a)(5)(A).

<sup>196</sup> Children should be provided with supplementary aids and services to permit them to remain in the general education classroom. See *id.* § 1401(33).

<sup>197</sup> *Id.* § 1415(b).

<sup>198</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.3(a)(1) (adopted Sept. 9, 2005), available at <http://www.vesid.nysed.gov/special/idea/revisedterms905.pdf>. Some larger school districts in cities with a population over 125,000 inhabitants may also operate subcommittees to ensure timely evaluation and placement of students. *Id.* § 200.3(c). A subcommittee on special

personnel, as well as the child's parents, along with others specified in the law or who may have knowledge or information about the child.<sup>199</sup> Typically, a school administrator serves as the chairperson of the CSE. The CSE process moves from initial referral to evaluation, classification, recommendation, and IEP implementation, followed by annual review and periodic re-evaluation.<sup>200</sup> The special education process unfolds as follows:

(1) *The Referral.* Parents, students who are over eighteen or emancipated, school professionals, judges, physicians, and public agencies responsible for the welfare, health, or education of children—including DSS caseworkers<sup>201</sup>—may refer children suspected of having a disability to the CSE.<sup>202</sup> Referrals must be submitted in writing either to the CSE Chairperson or “the building administrator of the school which the student attends or is eligible to attend.”<sup>203</sup> Child welfare agencies and courts can facilitate CSE

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education may perform the functions of the CSE except that it may not consider a student for initial placement in either “a special class[.]” “a special class outside of the student's school of attendance[.]” “a school primarily serving students with disabilities[.]” or a school outside of the student's district.” *Id.* § 200.3(c)(4). The subcommittee is comprised of most, but not all the members of the CSE. *See id.* § 200.3(c)(2). New York's Special Act School Districts and child care institutions operate their own CSEs. *See generally* discussion *infra* note 287 and accompanying text.

<sup>199</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.3(a)(1) (adopted Sept. 9, 2005), *available at* <http://www.vesid.nysed.gov/special/idea/revisedterms905.pdf>.

<sup>200</sup> N.Y. EDUC. LAW § 4401-a (McKinney 2001); N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4 (2003). The companion implementing regulations of the Commissioner of Education are set forth in title 8, part 200 of the Official Compilation of Codes, Rules and Regulation of the State of New York. The regulations governing discipline of students with disabilities are located at part 201. For an easy-to-read summary of the special education process in New York, see VOCATIONAL AND EDUC. SERVS. FOR INDIVIDUALS WITH DISABILITIES, STATE EDUC. DEP'T, UNIV. OF THE STATE OF N.Y., SPECIAL EDUCATION IN NEW YORK STATE FOR CHILDREN AGES 3–21: A PARENT'S GUIDE (2002), *available at* <http://www.vesid.nysed.gov/specialed/publications/policy/parentsguide.pdf>. This guide includes a fairly thorough description of the special education process. School districts should supply parents with a copy of this guide; copies may also be obtained from the New York State Office of Vocational and Educational Services for Individuals with Disabilities (VESID) at Special Education Policy Unit, Room 1624 OCP, Albany, N.Y. 12234 or from New York State's regional Special Education Training and Resource Centers (SETRCs). For updates on changes to the New York regulations, see State Educ. Dep't, Univ. of the State of N.Y., Information about Laws & Regulations, <http://usny.nysed.gov/lawsregs/> (last visited Oct. 1, 2005); Vocational & Educ. Servs. for Individuals with Disabilities, N.Y. State Educ. Dep't, Special Education-News, Announcements and Timely Information, <http://www.vesid.nysed.gov/specialed/timely.htm> (last visited Oct. 1, 2005).

<sup>201</sup> A DSS caseworker is considered a “designee of the public agency with responsibility for the welfare, health, and education of children.” *In re A Child Suspected of Having a Disability*, No. 99-88 (N.Y. Educ. Dep't 2000), *available at* <http://www.sro.nysed.gov/1999/99-088.htm>.

<sup>202</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(a)(1).

<sup>203</sup> *Id.* § 200.4(a). While a parent, student, or judicial officer may simply refer the child to the CSE without stating the reasons, all others must “state the reasons for the referral and

referrals for children in foster care by adopting standard referral forms and court orders.

(2) *Notice and Consent.* Upon receiving a referral, the school district must notify the child's parents and provide them with a general notice outlining the procedural safeguards available under the law.<sup>204</sup> The school district must also request parental consent to evaluate the child.<sup>205</sup> If the district is unable to obtain consent from the parent, it may use the due process procedures specified in the regulations to pursue the evaluation.<sup>206</sup> The school district must evaluate the child and develop and implement the IEP within sixty school days from the date it receives the consent to evaluate.<sup>207</sup>

Generally, for children who are "wards of the state,"<sup>208</sup> the school district must make a reasonable effort to obtain consent to evaluate from a parent, but may proceed without parental consent.<sup>209</sup> The school district may conduct an evaluation without obtaining

include any test results, records or reports upon which the referral is based." *Id.* § 200.4(a)(2)(i). The referral must also:

[D]escribe in writing, intervention services, programs or instructional methodologies used to remediate the student's performance prior to referral, including any supplementary aids or support services provided for this purpose, or state the reasons why no such attempts were made; and . . . describe the extent of parental contact or involvement prior to the referral.

*Id.* § 200.4(a)(2)(ii)–(iii). This is required in order to document referral strategies used with the student.

<sup>204</sup> *Id.* §§ 200.4(a)(6), 200.5(a)(1), (a)(3)(vi).

<sup>205</sup> *Id.* § 200.5(a)(2), (b)(1)(i). "Consent means: . . . the parent has been fully informed[;] . . . understands and agrees in writing to the activity for which consent is sought; and . . . is made aware that consent is voluntary" and revocable, except that the revocation is not retroactive. *Id.* § 200.1(d). When children are in foster care, the school may face the question of who qualifies to serve as the child's parent. For a thorough discussion of this issue, see *infra* Part IX.

<sup>206</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(b)(1)(i)(c), (b)(3) (adopted Sept. 9, 2005), available at <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>. The IDEA expressly authorizes school districts to use the IDEA's due process mechanisms for this purpose. 20 U.S.C.A. § 1414(a)(1)(D)(ii) (West Supp. 2005). When consent is not forthcoming, caseworkers, the courts, and others interested in the child should routinely urge the district to schedule due process hearings for children. If the school fails to initiate a due process hearing to obtain consent, Family Court can encourage the school to push along the process and mandate that the school district perform its duty under the education law. N.Y. FAM. CT. ACT § 255 (McKinney 1999).

<sup>207</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(e)(1) (2003). An exception to the sixty-day requirement exists if the CSE recommends "placement in an approved in-state or out-of-state private school," in which case the school district has thirty days from the time the board of education receives such recommendation from the CSE. *Id.* The IDEA requires school districts to complete evaluations of children within sixty days of consent or within the timeframe established by the state. 20 U.S.C.A. § 1414(a)(1)(C)(i)(I).

<sup>208</sup> *Id.* § 1401(36)(B).

<sup>209</sup> *Id.* § 1414(a)(1)(D)(iii)(I)–(II). See *infra* note 315 and text accompanying note 326 (defining the terms "parent" and "ward of the state").

parental consent in the case of foster children whose biological parents' rights have been terminated.<sup>210</sup> The IDEA also permits the school to honor any consent provided by an individual appointed by a judge to assume the parents' right to make educational decisions.<sup>211</sup>

(3) *Evaluation.* The school district must evaluate the referred child in all areas of suspected disability, and the initial evaluation must include, at minimum, a psychological evaluation, a physical examination, a social history, a classroom observation, a vocational assessment for children over twelve, and any other appropriate evaluations.<sup>212</sup> Parents who disagree with the district's evaluations are entitled to submit outside evaluation material for the CSE's review and to request an independent evaluation of the child at district expense.<sup>213</sup>

Children in foster care can be easily misdiagnosed. Behaviors arising from maltreatment, neglect, or reaction to their separation from family, for example, can mimic the behaviors of emotionally disturbed children.<sup>214</sup> In addition, learning problems of children with complex social histories may be attributed inaccurately to their life circumstances rather than genuine medical, developmental, emotional, or learning disorders. For these reasons, it is important that school districts and child welfare professionals collaborate in

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<sup>210</sup> 20 U.S.C.A. § 1414(a)(1)(D)(iii)(II)(bb). Until the 2004 amendments to the IDEA, the school district was required to appoint a surrogate parent for children who were wards of the State and whose parents could not be located; this surrogate parent could then give consent to evaluate the child. 20 U.S.C. §§ 1414(a)(1)(C), 1415(b)(2) (2000), *amended by* 20 U.S.C.A. §§ 1414(a)(1)(D)(ii), 1415(b)(2)(A)–(B) (West Supp. 2005). The new provisions bypass the consent requirement, permitting districts to timely proceed with the evaluations. 20 U.S.C.A. § 1414(a)(1)(D)(ii). The school district must still appoint a surrogate parent, however, within thirty days of determining that the child needs a surrogate parent. *Id.* §1415(b)(2)(A)–(B).

<sup>211</sup> *Id.* §§ 1414(a)(1)(D)(iii)(II)(cc), 1415(b)(2)(A)(i).

<sup>212</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(b)(1), (3), (6)(viii) (adopted Sept. 9, 2005), *available at* <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>. Other evaluations may include, for example, "health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities." 34 C.F.R. § 300.532(g) (2004). After the initial evaluation, schools may provide medical services for evaluation and diagnostic purposes only. 20 U.S.C.A. § 1401(26)(A); 34 C.F.R. § 300.24(a).

<sup>213</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(g)(1) (2003). The district must supply the parent with information about where to obtain the independent evaluation and the district's criteria for independent evaluations. *Id.* § 200.5(g)(1)(i). The district must also agree to finance the evaluation or, if it declines to do so, initiate an impartial hearing at which the district carries the burden of showing that its evaluation is appropriate or that the parent's independent evaluation does not meet the same criteria the school district uses when it evaluates a child. *Id.* § 200.5(g)(1)(iv). Even if the district does not pay for the parent's independent evaluation, it must consider the evaluation in providing the child with a FAPE. *Id.* § 200.5(g)(1)(v)(a).

<sup>214</sup> EDUCATIONAL STATUS OF FOSTER CHILDREN, *supra* note 3, at 4.

exchanging information needed to adequately assess children.<sup>215</sup>

(4) *Determining Eligibility for Services.* The CSE must meet to determine whether the child is eligible for services and, if so, what services the child should receive.<sup>216</sup> Under the IDEA, the parent is invited to participate as a full member of the CSE.<sup>217</sup> Foster children, biological and foster parents, child welfare professionals, and CASAs may all be important participants in the CSE meetings.<sup>218</sup> Both the child's parents and the CSE are authorized to invite other people having special knowledge or expertise regarding the student to join the committee.<sup>219</sup>

To be eligible for services, a child must fall within one of thirteen categories of disability defined in the law.<sup>220</sup> Not all children who

<sup>215</sup> See *supra* Part V.

<sup>216</sup> N.Y. COMP. CODES R. & REGS. tit. 8, §§ 200.1(c), 200.4(c) (adopted Sept. 9, 2005), available at <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>. The CSE is required to provide the parent with at least five days advance notice of the CSE meeting and, when requested, accommodate the parents' schedule and translation needs. *Id.* § 200.5 (c)(1), (d)(1)(ii), (d)(5). It must be noted that the new state regulations permit parents to accept the notice via e-mail if the school offers the option. *Id.* Historically, members of the CSE were required to attend all meetings, but the IDEA now provides that members

shall not be required to attend an IEP meeting, in whole or in part, if the parent . . . [and the school district] agree that the attendance of such member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.

20 U.S.C.A. § 1414(d)(1)(C)(i). A member whose area of the curriculum or related services is being discussed may be excused in writing by the parent and the school district if the member submits written prior input into the development of the IEP to the parent and the IEP Team. *Id.* § 1414(d)(1)(C)(ii)–(iii).

<sup>217</sup> 20 U.S.C.A. § 1414(e); N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(d)(1) (adopted Sept. 9, 2005), available at <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>. The role of parent as an equal member is significant. In 1997, pursuant to the IDEA, parents were elevated from visitor to membership status within the CSE, signifying the importance of the parent's contribution to the decisions of the CSE. 20 U.S.C. § 1414(f) (2000); Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, sec. 614(f), § 1414(f), 111 Stat. 37, 88.

<sup>218</sup> OCFS' Foster Parent Manual instructs that "[f]oster parents are expected to attend meetings held by the CSE, along with the child's parents and the caseworker, and to support the child with his or her educational needs." N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., *supra* note 63, at 35.

<sup>219</sup> 20 U.S.C.A. § 1414(d)(1)(B)(vi). For children in foster care at risk of residential placement, the CSE must invite DSS and other applicable agency representatives to the meeting. N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(d)(4)(i)(b) (2003).

<sup>220</sup> *Id.* § 200.1(zz)(1)–(13). The categories include "autism [sic]," "deafness," "deaf-blindness," "emotional disturbance," "hearing impairment," "learning disability," "mentally [sic] retardation," "multiple disabilities," "orthopedic impairment," "other health-impairment," "speech or language impairment," "traumatic brain injury," and "visual impairment including blindness." *Id.* The IDEA expressly rejects the "discrepancy" model of assessing learning disabilities, so that school districts "shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability" in specific areas of skill or performance. 20 U.S.C.A. § 1414(b)(6)(A). In September 2005, New York amended the definition of learning disability to eliminate the discrepancy standard. N.Y. COMP. CODES

are disabled are entitled to receive services under the IDEA.<sup>221</sup> If the CSE decides the child is not eligible to receive special education, it must document the reasons the student is ineligible.<sup>222</sup>

(5) *Developing the IEP.* Once the CSE classifies the child, it must develop an IEP for the child at the meeting.<sup>223</sup> The IEP is a comprehensive document which details, among other things, the child's classification, the child's levels of performance and needs, and the recommended placement, program, and services, as well as annual goals.<sup>224</sup> The IEP is the foundation of the child's school program; school districts are legally obliged to provide services that

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R. & REGS. tit. 8, §§ 200.1(zz)(6), 200.4(c)(6) (adopted Sept. 9, 2005), *available at* <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>. Attention Deficit Disorder ("ADD") and Attention Deficit Hyperactivity Disorder ("ADHD") are not specific categories of disability, but the federal regulations incorporate these disorders under the category of "[o]ther health impairment." 34 C.F.R. § 300.7(c)(9)(i) (2004). New York has established a separate set of criteria for identifying a preschool student as having a disability. N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(mm)(1)(i) (2003). Additionally, a preschool student may be identified as having a disability if she meets the criteria set forth in any of the disability categories for school-aged children except "emotional disturbance," "learning disability," "mental retardation," "multiple disabilities," or "speech or language impairment." *Id.* § 200.1(mm)(1)(ii), (zz)(4), (zz)(6)–(8), (zz)(11).

<sup>221</sup> Some disabled children who do not qualify for services under the IDEA may qualify for services under section 504 of the Vocational Rehabilitation Act of 1973, 29 U.S.C. § 794 (2000). *See infra* Part VIII.C.

<sup>222</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(d)(1). The recommendation to not classify the child must be passed on to the building administrator, who should determine whether the child should receive "educationally related support services." *Id.* § 200.4(d)(1)(i). The process of classifying a child can be a subject of great controversy. There may be disagreements about interpreting the evaluation data and differing views about the child's functioning and needs. There may be conflict over the appropriate classification for the child (such as learning disabled versus emotional disturbance or mental retardation), particularly where different classifications may subject a child to greater stigma or may result in expectations of performance with which parents or school personnel are uncomfortable. LAURA F. ROTHSTEIN, *SPECIAL EDUCATION LAW* 47–48 (3d ed. 2000).

<sup>223</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(d)(2) (adopted Sept. 9, 2005), *available at* <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>. For excellent detailed guidance on developing an IEP, see generally STATE EDUC. DEPT., UNIV. OF THE STATE OF N.Y., *SAMPLE INDIVIDUALIZED EDUCATION PROGRAM (IEP) AND GUIDANCE DOCUMENT* (2002), *available at* <http://www.vesid.nysed.gov/specialed/publications/policy/iep/Sample%20IEP%20Guidance%20Document.pdf>.

<sup>224</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(d)(2) (adopted Sept. 9, 2005), *available at* <http://www.vesid.nysed.gov/specialed/idea/revisedterms.pdf>. The IDEA requires that the IEP include a statement of "measurable annual goals" and except "for children with disabilities who take alternate assessments aligned to alternate achievement standards," eliminates the former requirement that the IEP include additional "benchmarks or short-term objectives" related to these goals. 20 U.S.C.A. § 1414(d)(1)(A)(i)(I)–(II) (West Supp. 2005), *amending* 20 U.S.C. § 1414(d)(1)(A)(i)–(ii) (2000). New York's education regulations were recently amended to comport with the IDEA. *See* N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(d)(2)(iii) (adopted Sept. 9, 2005), *available at* <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf> (explaining that short-term instructional objectives and benchmarks are no longer mandatory elements of the IEP, except for students who take alternate state assessments and preschool students with disabilities).

are identified in the IEP and may be subject to legal challenges by parents for failure to abide by its terms.<sup>225</sup>

In developing the IEP, the CSE must ascertain the child's individual needs by examining his or her "present levels of performance and expected learning outcomes," taking into consideration the child's academic achievement, functional performance and learning characteristics, social development, physical development, and management needs.<sup>226</sup> In determining the child's placement and services, the CSE will be guided by the principle of "least restrictive environment" (LRE).<sup>227</sup>

(6) *The Continuum of Services.* In New York, children may receive individualized services and programs within a range of options, often referred to as a "[c]ontinuum of services," that roughly move from least to most restrictive.<sup>228</sup> These services, which may be

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<sup>225</sup> N.Y. COMP. CODES R. & REGS. tit. 8, §§ 200.4(e)(3), (7), 200.5(i) (adopted Sept. 9, 2005), available at <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>.

<sup>226</sup> *Id.* § 200.1(w)(3)(i) (providing detailed definitions of each item considered by the CSE).

<sup>227</sup> *Id.* §§ 200.4(d)(4)(ii), 200.1(cc) (2003). The IDEA requires school districts to educate children with disabilities to the "maximum extent appropriate" with other students who do not have disabilities. *Id.* § 200.1(cc)(2). In applying LRE principles, the CSE must first look to provide the needed special education services within the regular education classroom and provide the child with an education program that mirrors the general education curriculum. N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(d)(2)(v)(1)–(3) (adopted Sept. 9, 2005), available at <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>. Under LRE principles, the CSE may place the child in special education classes or in separate schools or otherwise remove the children from the regular education environment "only when the nature or severity of the disability is such that even with the use of supplementary aids and services, education cannot be satisfactorily achieved." N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(cc) (2003). The CSE must document the extent to which the child "will not participate in regular education programs." N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(d)(2)(viii) (adopted Sept. 9, 2005), available at <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>. School placements should be as close as possible to the student's home, and unless otherwise provided in the IEP, "the student shall be educated in the school he or she would have attended if not disabled." N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(d)(4)(ii)(b) (2003). The IDEA permits consideration of "any potential harmful effect on the student or on the quality of services that he or she needs." *Id.* § 200.4(d)(4)(ii)(c). In discussing LRE, educators or others may refer to "mainstreaming," "inclusion," or "integrated" classes or services. Mainstreaming is placing a student whose main placement is a separate special education class in a general education class for a portion of the day. Inclusion generally means placing a child with disabilities in the general education class and providing special education services within that setting. A child can also be placed in a small special education class which, as a group, is part of a larger general education classroom. These are typically referred to as "integrated" or "inclusive" classes. Nat'l Info. Ctr. For Children & Youth with Disabilities, *Planning for Inclusion*, 5 NICHCY NEWS DIGEST NO. ND24 (July 1995), available at <http://www.nichcy.org/pubs/outprint/nd24txt.htm>.

<sup>228</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.6 (2003). Every district in New York State is subject to the requirements set forth in section 200.6; however, New York City schools must also abide by the mandates set forth in the Chancellor's Regulations. See generally BD. OF EDUC. OF THE CITY OF N.Y., SPECIAL EDUCATION SERVICES AS PART OF A UNIFIED DELIVERY SYSTEM (describing the system of services available to disabled students in New York City)

provided in combination with one another, include consultant teacher services,<sup>229</sup> related services,<sup>230</sup> resource room programs,<sup>231</sup> special classroom placements with prescribed student to teacher to aide ratios,<sup>232</sup> residential programs,<sup>233</sup> and home or hospital instruction.<sup>234</sup> Children may also receive supplementary aids and services,<sup>235</sup> assistive technology,<sup>236</sup> and curriculum and testing modifications.<sup>237</sup> In addition, in New York, transportation is a special education service.<sup>238</sup> Children with IEPs may also be eligible for twelve-month programming<sup>239</sup> and are entitled to “transition services” designed to facilitate their movement from school to post-school activities.<sup>240</sup>

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(on file with author).

<sup>229</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.6(d). Consultant teacher services include direct services to the student and indirect services to the student’s regular teacher. *Id.* §§ 200.6(d), 200.1(m). Consultant services must be provided on the IEP for a minimum of two hours per week. *Id.* § 200.6(d)(2).

<sup>230</sup> *Id.* § 200.6(e). Related services include a variety of “developmental, corrective, and other supportive services as are required to assist a student with a disability” and may include, for example, physical therapy, occupational therapy, audiological and speech language therapy, traditional and rehabilitation counseling services, social work services, interpreting services, and therapeutic recreation. N.Y. COMP. CODES R. & REGS. tit. 8, 200.1(qq) (adopted Sept. 9, 2005), *available at* <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>.

<sup>231</sup> *Id.* §§ 200.6(f), 200.1(rr) (2003) (explaining that resource room programs supplement the regular or special classroom instruction of students by providing individual or small group instruction and that the small groups may not exceed five students, except in New York City).

<sup>232</sup> *Id.* § 200.6(g)(4). The higher the management needs of the children in the class, the lower the student to teacher/aide ratio. Currently, the mandated ratios range from fifteen students and one teacher (15:1); to twelve students, one teacher, and one aide (12:1:1); to eight students, one teacher, and one aide (8:1:1); to six students, one teacher, and one aide (6:1:1); to twelve students, one teacher, and three aides (12:1:3, particularly targeted for children with intensive physical needs). *Id.* Students in special education classes may meet separately or may be “integrated” into a regular education classroom for part or all of the school day. Nat’l Info. Ctr. for Children & Youth with Disabilities, *supra* note 227. A child’s IEP may therefore call for a special education class, but the child may have an inclusive program.

<sup>233</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.6(i)(1)(iii)(d) (2003).

<sup>234</sup> *Id.* § 200.6(h).

<sup>235</sup> *Id.* § 200.1(bbb). These supports are designed to promote less restrictive placements. *Id.*

<sup>236</sup> *Id.* § 200.1(e)–(f).

<sup>237</sup> *Id.* § 200.4(d)(2)(xiii).

<sup>238</sup> *Id.* § 200.1(ww). Transportation is also a related service in the IDEA. 20 U.S.C.A. § 1401(26)(A) (West Supp. 2005).

<sup>239</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.6(j)(1).

<sup>240</sup> 20 U.S.C.A. § 1414(d)(1)(A)(i)(VIII)(bb); *see infra* notes 331–86, and accompanying text (discussing transition service entitlements in special education and their overlap with transition services provided through the child welfare system); N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(d)(4)(i)(c) (requiring the school district to invite the student and representatives of the agencies likely to be responsible for providing or paying for transition services to the CSE meeting when the purpose of such meeting is to address transition services; even if the

(7) *Parental Consent to Initial Placement.* The school district must have the consent of the parent to initially place a child in special education and provide a child with twelve-month programming.<sup>241</sup>

(8) *Implementation.* The CSE forwards its recommendation regarding each child to the school district's board of education for approval.<sup>242</sup> The board of education has authority to reject the CSE recommendation and even convene another CSE meeting,<sup>243</sup> but this authority is rarely used. The school district must implement the child's program within sixty school days from the day that it receives consent to evaluate a child not previously identified as disabled or, for a child with a disability under CSE review, within sixty school days of the referral.<sup>244</sup> When the CSE recommends placement in a private school, however, the board must implement the IEP within thirty school days from the date the recommendation is received.<sup>245</sup>

(9) *Annual Review.* The CSE must reconvene at least once per year to review the child's progress and needs and to develop an IEP for each school year.<sup>246</sup> If the CSE declassifies a child who is no longer eligible for services, the child will be entitled to declassification services to aid in the transition out of special education.<sup>247</sup>

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student does not attend, the district must consider "the student's preferences and interests" and "[i]f an agency invited to send a representative . . . does not do so, the district shall take steps to involve the other agency in the planning of any transition services").

<sup>241</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(b)(1)(iii). The IDEA codifies the stated policy of the U.S. Department of Education barring school districts from using the IDEA due process hearing procedures to override a parent's refusal to consent to special education services. The IDEA relieves districts of their responsibility to provide a FAPE to children whose parents refuse to consent to services. 20 U.S.C.A. § 1414(a)(1)(D)(II)–(III); Memorandum from Lawrence C. Gloeckler, Deputy Comm'r for Vocational & Educ. Servs. for Individuals with Disabilities, N.Y. State Educ. Dep't, to Dist. Superintendents et al. (July 2003), available at <http://www.vesid.nysed.gov/specialed/publications/policy/parentconsentregs.pdf> (stating that the IDEA "does not permit public agencies to use the IDEA due process hearing procedures to override a parental refusal to consent to initial services").

<sup>242</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(d)(5).

<sup>243</sup> *Id.* § 200.4(e)(2)(i).

<sup>244</sup> *Id.* § 200.4(e)(1).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* § 200.4(f); see 20 U.S.C.A. § 1414(d)(3)(D) (permitting school districts and parents to agree to amend or modify the IEP without convening an IEP Team meeting after the required annual meeting has occurred). New York's regulations were recently amended in accordance with this change in federal law. N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(g) (adopted Sept. 9, 2005), available at <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>; see also 20 U.S.C.A. § 1414(d)(5)(A)(i) (permitting states to submit proposals to pilot a program for developing three-year IEPs, rather than IEPs that are reviewed and modified annually).

<sup>247</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(d)(1)(iii) (2003). New York mandates

(10) *Reevaluation*. The CSE may arrange a reevaluation of the child any time it is warranted or upon request of the parent or teacher.<sup>248</sup> A reevaluation must take place at least every three years, but unless the parent and CSE agree, no more than once a year.<sup>249</sup> The re-evaluation should be sufficient to determine the student's individual needs, educational progress and achievement, ability to participate in a regular education instructional program, and continuing eligibility for special education.<sup>250</sup>

### 3. Due Process Safeguards

If a school district fails to comply with the procedures under the special education law or does not provide a child with a FAPE, parents may invoke the due process procedures of the IDEA by submitting a due process complaint notice to the district and requesting an impartial hearing.<sup>251</sup> The IDEA does encourage resolution of special education disputes without resort to impartial hearings through mediation<sup>252</sup> and pre-hearing "resolution sessions."<sup>253</sup> For conflicts involving children in foster care, mediation and resolution sessions may offer a unique opportunity to gather all interested parties in a single room to talk about a child's education needs and services. Once a mediation or impartial hearing is requested, a student is entitled to "remain in the then

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declassification support services for children leaving special education and their teachers. N.Y. EDUC. LAW § 3602(19)(d)(7) (McKinney 2001). The scope of services that may be provided is broad and may include the assistance of teacher aides. The law provides that "[w]hen a committee on special education determines that a pupil no longer needs special education services and is ready for a full-time regular education program, such committee shall identify and recommend the appropriate declassification support services for the first year in the regular education program." *Id.*

<sup>248</sup> 20 U.S.C.A. § 1414(a)(2)(A).

<sup>249</sup> *Id.* § 1414(a)(2)(B).

<sup>250</sup> *Id.* § 1414(a)(2)(A)(i), (b)(2)(A).

<sup>251</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(i)(1) (adopted Sept. 9, 2005), *available at* <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>; 20 U.S.C.A. § 1415(b)(7), (c) (requiring that the party initiating an impartial hearing first submit "due process complaint notice" to the other party and that the other party submit a timely response); *see* 20 U.S.C.A. § 1415(f)(2)–(3) (establishing the rules pertaining to disclosure of the student's evaluations and recommendations, and the restrictions on who may conduct impartial hearings).

<sup>252</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(h), (i)(2) (adopted Sept. 9, 2005), *available at* <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>; 20 U.S.C.A. § 1415(e). The mediation must be conducted by an impartial, trained mediator selected by the local community dispute resolution center. The mediation process must be timely scheduled and is confidential. When the parties reach an agreement, it is binding on the parties and amends the IEP. N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(h) (adopted Sept. 9, 2005), *available at* <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>; 20 U.S.C.A. § 1415 (e).

<sup>253</sup> 20 U.S.C.A. § 1415(f)(B).

current placement,” referred to as a pendency or status quo placement.<sup>254</sup>

The regulations of the New York State Commissioner of Education spell out the rules that govern the hearing process.<sup>255</sup> The impartial hearing officer is required to hold the hearing and issue a decision within forty-five calendar days from the date by which the impartial hearing must be commenced.<sup>256</sup> A parent who prevails at a hearing against a school district may be entitled to reimbursement of attorneys’ fees.<sup>257</sup> The current IDEA raises the stakes for the attorneys of parents who pursue an impartial hearing or litigation that is considered “frivolous, unreasonable, or without foundation,” among other things. In these instances, a court may require the parents’ attorney to pay the cost of the school district’s attorneys’ fees.<sup>258</sup>

In New York State, if

the impartial hearing officer determines that the interests of the parent are opposed to or are inconsistent with those of the student, or that for any other reason the interests of the student would best be protected by appointment of a guardian *ad litem*, the impartial hearing officer shall appoint [one] . . . unless a surrogate parent shall have been previously assigned.<sup>259</sup>

The guardian *ad litem* must be “a person familiar with the provisions of [the New York special education regulations] who is appointed from the list of surrogate parents or who is a *pro bono* attorney appointed to represent the interests of a student in an impartial hearing.”<sup>260</sup> “The impartial hearing officer shall ensure that the procedural due process rights afforded to the student’s

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<sup>254</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(m)(1) (adopted Sept. 9, 2005), *available at* <http://www.vesid.nysed.gov/specialed>; *see* 20 U.S.C.A. § 1415(j) (stating that absent agreement between the state or local educational agency and the parents, the child will remain in his or her current placement); *see also* 20 U.S.C.A. § 1415(k)(4) (explaining that while a hearing to challenge an interim alternative educational setting for a child who violates a school code of student conduct is pending, the child will remain in the interim setting until the hearing officer makes a decision, or until the expiration of the requisite statutory time period).

<sup>255</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(i) (adopted Sept. 9, 2005), *available at* <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>.

<sup>256</sup> *Id.* § 200.5(i)(5).

<sup>257</sup> *Id.* § 200.5(f)(4)(xii); 20 U.S.C.A. § 1415(i)(3)(A)–(C).

<sup>258</sup> 20 U.S.C.A. § 1415(i)(3)(B)(i)(II)–(III).

<sup>259</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(j)(3)(ix) (adopted Sept. 9, 2005), *available at* <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>.

<sup>260</sup> *Id.* § 200.1(s).

parent . . . are preserved throughout the hearing whenever a guardian *ad litem* is appointed.”<sup>261</sup>

Parents who believe that a school placement is inappropriate for a child may unilaterally place the child in a private school setting and, under certain circumstances, obtain reimbursement from the school district for tuition.<sup>262</sup>

#### 4. The Mobile Child: School Transfers for Children with IEPs

Addressing the plight of mobile children, the 2004 amendments to the IDEA require school districts to provide a FAPE to children transferring into the district with an IEP.<sup>263</sup> Regardless of whether the child previously lived in-state or out-of-state, the new school district must, in consultation with the child’s parents, provide the child with services comparable to those described in the previous IEP.<sup>264</sup> For children making intrastate transfers, the new school must continue to deliver comparable services until it either “adopts the previously held IEP or develops, adopts, and implements a new IEP.”<sup>265</sup> Because special education laws and standards differ between the states, a school receiving a child from out-of-state must provide comparable services until it conducts a new evaluation of the child (unless this is deemed unnecessary) and, if appropriate, creates a new IEP.<sup>266</sup>

To facilitate this process and avoid a gap in services, schools are required to take reasonable steps to promptly obtain the records of children in special education. Schools receiving a request for

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<sup>261</sup> *Id.* § 200.5(j)(3)(ix) (adopted Sept. 9, 2005), available at <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>.

<sup>262</sup> *Id.* § 200.5(f)(4)(viii); see Application of the Bd. of Educ. of the Hyde Park Cent. Sch. Dist., No. 02-052 (N.Y. Educ. Dep’t State Review Officer Mar. 11, 2003), available at <http://www.sro.nysed.gov/02-052.htm> (setting forth, as prerequisites to reimbursement, that services provided by the Board of Education prior to removal are inadequate or inappropriate, the services selected by the parent are appropriate, and “equitable considerations support the parent’s claim”); see also 34 C.F.R. § 300.403(c)–(d) (2004) (noting that, under certain conditions, a court or hearing officer may require a public agency to reimburse parents for school tuition when the parent appropriately places the child in a private school).

<sup>263</sup> 20 U.S.C.A. § 1414(d)(2)(C)(i).

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* § 1414(d)(2)(C)(i)(I). The IDEA incorporates the already established policies set forth in Office for Special Education Programs (OSEP) Opinion Letters. See, e.g., Letter to Anonymous, 25 IDELR 525, 527 (OSEP 1996); Letter to Nerney, EHLR 213:267, 213:267 (OSEP 1989); Letter to Reynolds, EHLR 213:238, 213:239 (OSEP 1989); Letter to Campbell, EHLR 213:265, 213:266 (OSEP 1989).

<sup>266</sup> 20 U.S.C.A. § 1414(d)(2)(C)(i)(II). This provision of the IDEA is a shift from the policy of the Office of Special Education Programs. OSEP Memorandum 96-5, 24 IDELR 320, 321 (OSEP 1995).

records must also promptly respond.<sup>267</sup> To ensure that this takes place, child welfare agencies need to have information about the child's educational history at their fingertips and to inform the schools when children are removed or enrolled.

When children transfer to a new school district before an evaluation is completed, the IDEA requires school districts to work together to coordinate the assessment process as expeditiously as possible.<sup>268</sup>

### 5. CSE Review of Children in Foster Care at Risk of Special Education Residential Placement

When children in foster care are at risk of a CSE-initiated residential placement, the CSE is obligated to bring DSS into the discussion.<sup>269</sup> The CSE must invite an agency designee to attend its CSE meetings to discuss the child's placement and alternative placement options, including community support services available to the family.<sup>270</sup> If agency representatives cannot attend the meeting, the CSE is required to attempt to use other means to enable them to participate.<sup>271</sup> The CSE is also required to send the

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<sup>267</sup> See 20 U.S.C.A. § 1414(d)(2)(C)(ii).

<sup>268</sup> 20 U.S.C.A. § 1414(b)(3)(D); *see id.* § 1414(a)(1)(C)(ii) (exempting a school district from complying with the IDEA's new requirement that it complete a child's initial evaluation within sixty days of receiving parental consent when a child moves into a new school district, but only if the new school "is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and subsequent local educational agency agree to a specific time when the evaluation will be completed").

<sup>269</sup> N.Y. EDUC. LAW § 4402(1)(b)(4)(b) (McKinney 2001); N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(d)(4)(i)(b) (2003). The CSE must also notify the Office of Mental Retardation and Developmental Disabilities and the Office of Mental Health. N.Y. EDUC. LAW § 4402(1)(b)(4)(c).

<sup>270</sup> N.Y. EDUC. LAW § 4402(1)(b)(4)(c); *see* N.Y. SOC. SERV. LAW § 34(3)(h) (McKinney 2003). The State Commissioner of OCFS, formerly the Department of Social Services, is required to, in consultation with the department of education, the department of health, the division for youth, the office of mental retardation and developmental disabilities and the office of mental health, establish guidelines for the acceptance by social services officials of notices that children in foster care are at risk of educational placements, as provided for in [N.Y. EDUC. LAW § 4402(1)(b)(4)]. Such guidelines shall be designed to assure that the social services district receiving such a notice inquire into the educational needs of the child and the circumstances of the foster care placement, and to assure that the social services district responds as appropriate to any request by a committee on special education to participate in the proceedings of the committee. N.Y. SOC. SERV. LAW § 34(3)(h).

<sup>271</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(d)(4)(i)(b); *cf.* N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(d)(1)(iii), (d)(7) (adopted Sept. 9, 2005), *available at* <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf> (noting that when a parent cannot attend a CSE meeting, the school district must use other methods to secure the parent's participation, including videoconferences or conference calls).

child's parents information on agencies that may assess the family's needs and provide community support services.<sup>272</sup>

## 6. Mandatory CSE Review of Children with Disabilities at Risk of Family Court and Agency Placement in Child Care Institutions

In New York, both child welfare agencies and the Family Court may place children with intensive needs in “[c]hild care institution[s],”<sup>273</sup> which are residential facilities that service thirteen or more children and operate under the auspices of either DSS or the New York State Office of Mental Health (OMH).<sup>274</sup> The OMH child care institutions are known as residential treatment facilities (RTFs).<sup>275</sup>

In keeping with the IDEA, Article 81 of New York's Education Law guarantees a FAPE to all disabled children ages five through twenty-one placed in child care institutions.<sup>276</sup> It requires judges and other agencies, including DSS, to take measures to secure children's educational entitlements before and during their placement in these residential facilities.<sup>277</sup>

Before placing any child thought to have a disability in a child care institution,<sup>278</sup> Family Court and DSS are required to ask the CSE<sup>279</sup> to evaluate the child and issue a written recommendation

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<sup>272</sup> N.Y. EDUC. LAW § 4402(1)(b)(4)(a).

<sup>273</sup> *Id.* § 4001(2).

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*; N.Y. SOC. SERV. LAW § 2(32) (McKinney 2003); N.Y. MENTAL HYG. LAW § 1.03(33) (McKinney 2002).

<sup>276</sup> N.Y. EDUC. LAW § 4002(1); 34 C.F.R. § 300.1(a) (2004).

<sup>277</sup> N.Y. EDUC. LAW § 4005(1)(a)–(c); *see also* King v. Pine Plains Cent. Sch. Dist., 918 F. Supp. 772, 778–79 (S.D.N.Y. 1996), *aff'd on other grounds sub nom.* King v. State Educ. Dep't, 182 F.3d 162, 162 (2d Cir. 1999). In an unappealed portion of the ruling concerning article 81 of the New York Education Law, the federal district court observed that disabled children placed in private schools by Family Court, the local social services agency, or other state agencies “have the same rights and are entitled to the same procedural safeguards as disabled children placed in public schools.” *Pine Plains Cent. Sch. Dist.*, 918 F. Supp. at 778 n.1.

<sup>278</sup> N.Y. EDUC. LAW § 4005(1)(a). Article 81 of the Education Law uses the phrase “thought to have a handicapping condition”—a term that is a throwback to the original language of the federal and New York special education laws. The term “child with a disability” has replaced “child with a handicapping condition” in the IDEA and Article 89 of the New York Education Law. 20 U.S.C.A. § 1401(3); N.Y. EDUC. LAW § 4401(1). Article 81 has never been amended to reflect this change.

<sup>279</sup> N.Y. EDUC. LAW § 4005(1)(a)–(b). The requirements also apply to OCFS, which is responsible for the placement of children who are adjudicated juvenile delinquents and persons in need of services (PINS), and the pre-admission certification committees, which, operating under the auspices of the Office of Mental Health, place children in residential treatment facilities. *Id.* § 4005(1)(c)–(d). The Probation Department may, on behalf of the Family Court, issue the request to the CSE. *Id.* § 4005(1)(a). The request must go to the

and report<sup>280</sup> within forty-two days of the request.<sup>281</sup> If the CSE fails to comply, the court may use its broad powers to compel CSE compliance.<sup>282</sup> The court and DSS must then consider the information gathered from the CSE in determining the “most appropriate placement for the child.”<sup>283</sup> In this fashion, the court and DSS need not make foster care placement decisions in a vacuum; the child’s educational needs and school based resources can be considered in determining the necessary level of foster care.

The CSE report and recommendations may substantially affect the foster care placement determination. A judge may view the educational resources available at school as a tool to maintain a child in a less restrictive foster care setting, fulfilling not only the requirements of the child welfare law, but improving the child’s chance for educational success.<sup>284</sup> In some instances, a judge may even conclude that the CSE, rather than the court, is a more

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child’s “school district of residence.” *Id.* This is “the public school district in which the child was or is living at the time a public agency is considering placement of the child in a child care institution, or at the time a child is placed with the division for youth [which is now known as OCFS].” *Id.* § 4001(11). This is distinct from the child’s “school district of origin,” which is the “district of which a child was or is a resident at the time of such child’s placement in the care and custody of a public agency.” *Id.* § 4001(10).

<sup>280</sup> See N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(a), (h)(1) (adopted Sept. 9, 2005), available at <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>. This is not technically a referral to the CSE, but rather a request for an evaluation and a recommendation. *Id.* The request does, however, trigger the same evaluation as a referral would. *Id.* At any time in any proceeding, the court is permitted to refer a child to the CSE as well. *Id.*

<sup>281</sup> The Education Regulations govern the CSE’s response to a section 4005 request for a report and recommendations. *Id.* § 200.4(h). The regulations require the CSE to provide the “information and recommendation to the requesting agency within 42 days of the date of receipt of such a request, provided that the [CSE] can obtain the consent of the student’s parent to conduct an evaluation.” *Id.* § 200.4(h)(1). The CSE must “forward a copy of the agency’s request, as well as a request for parental consent for an evaluation, to the parent of the student at the address indicated in the request from the agency.” *Id.* § 200.4(h)(2)(i). If “the parent does not grant consent or fails to respond to a request for consent, the [CSE] shall notify the board of education that they may utilize [due process] procedures . . . to permit the district to conduct an evaluation without the consent of the parent.” *Id.* § 200.4(h)(2)(ii). It should be noted that while under the Commissioner’s regulations parental consent is essential for an evaluation of the child newly referred to the CSE, it need not be obtained for a reevaluation of a child “if the school district can demonstrate that it has taken reasonable measures to obtain that consent, and the student’s parents failed to respond.” N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(b)(1)(i)(b) (2003).

<sup>282</sup> N.Y. EDUC. LAW § 4005(1)(a) (authorizing the court to use the broad powers conferred under Family Court Act section 255 to compel school district compliance with these provisions when the CSE fails to make a recommendation).

<sup>283</sup> *Id.*

<sup>284</sup> Research shows that children in less restrictive foster care settings complete high school and move on to higher education in greater numbers. Mech & Che-Man Fung, *supra* note 142, at 221, 225.

appropriate forum for addressing the child's needs.<sup>285</sup>

To facilitate a child's transition to a residential setting, the court and DSS are required to pass the CSE reports and recommendations along to the facility.<sup>286</sup> Child care institutions that operate their own schools each have a CSE, which must perform the requisite CSE duties<sup>287</sup> and may appoint surrogate parents for children.<sup>288</sup> Children in residential facilities retain their special education due process entitlements.<sup>289</sup>

During the child's stay in a child care institution, both the facility

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<sup>285</sup> See *In re Shelly M.*, 453 N.Y.S.2d 352, 353 (Fam. Ct. 1982) (showing that in a PINS proceeding, the Family Court may decline to follow the recommendation of the Probation Department to place the child out of her home when, upon a section 4005 referral to the CSE, the CSE classified the child as "emotionally disturbed" and recommended a special education program for her). Sometimes residential placement by the CSE, when appropriate, can keep a child out of foster care altogether. Children may be channeled into residential care through several doors—chiefly, through the courts and DSS in neglect and abuse, or JD and PINS proceedings, through the school district's CSE, or by the New York State Office of Mental Health (OMH) into residential treatment facilities (RTFs). Some children may qualify to enter through any of the doors while others may qualify to enter through only one. This raises questions about funding and the efforts by some schools to encourage court-based rather than CSE-recommended residential placements. In given instances, a CSE placement may better serve a child and/or a family when the child has substantial needs that cannot be met at home and the child's IEP requires a residential placement.

<sup>286</sup> N.Y. EDUC. LAW § 4005(1)(e). Likewise, when the court finds the child to be a juvenile delinquent or PINS, and places the child with the New York State OCFS (referred to in the statute as the Division for Youth, whose duties in this regard have been assumed by OCFS pursuant to section 500(1) of the New York Executive Law), it must forward to OCFS all relevant evaluative records in its possession, including diagnostic and educational records. N.Y. EXEC. LAW § 507-b(2) (McKinney 2005). The child's education records should be afforded confidentiality "in accordance with regulations of the commissioner." N.Y. EDUC. LAW § 4005(1)(e).

<sup>287</sup> N.Y. EDUC. LAW § 4005(2)(a); N.Y. COMP. CODES R. & REGS. tit. 8, § 116.1(a) (2003). The home or facility is required to complete an educational evaluation of a child within ten days of admission "for the purpose of providing an immediate educational program," pending further evaluation. N.Y. COMP. CODES R. & REGS. tit. 8, § 116.2(g)(1). "[I]nformation obtained from the pupil's previous school district or other comparable sources may be used to supplement or in lieu of conducting the assessments required." *Id.* § 116.2(g)(2). The home or facility must also establish procedures to assure that the staff receives educational information about the child. *Id.* § 116.2(h).

<sup>288</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 116.6(d).

<sup>289</sup> See generally N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5 (adopted Sept. 9, 2005), available at <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf> (presenting due process procedures). Parents or guardians of children in child care institutions are permitted to request a formal impartial hearing to enforce entitlements. *Id.* § 200.5(j). Additionally, "[i]f the educational evaluation, educational placement decision or the annual report for the child is not acceptable to the parents or guardians of the child, the child, or the social services district or the division for youth, appeals may be made by such parties." N.Y. EDUC. LAW § 4005(2)(b). Though the statute affords DSS and OCFS standing to initiate an impartial hearing, it presents interesting questions about the unique role of the agencies in this process—particularly in light of the law barring the state from serving as surrogate parents for children. N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(n)(2)(i) (adopted Sept. 9, 2005), available at <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>.

and DSS are required to keep families and schools abreast of the child's status and progress. The facility must update the child's parents or guardians, as well as DSS, OCFS, and the schools, by sending them copies of various educational records and reports.<sup>290</sup> It must also designate an educator on its staff to maintain contact with the school district CSE.<sup>291</sup> DSS must also periodically transmit certain school records to the child's parents, as well as the school districts of residence and origin.<sup>292</sup>

When a child is ready to exit a child care institution, school districts are required to facilitate the child's prompt enrollment in public school. School districts must have a staff member assigned to facilitate enrollment and the transfer of records and to serve as a contact for residential facilities, as well as state and local agencies.<sup>293</sup>

### *C. Section 504 Accommodation Plans*

Some children with disabilities are not eligible for services under the IDEA or Article 89 because they do not meet the eligibility criteria under the IDEA's thirteen categories of disability or because their disability does not adversely affect their education to the extent required by the IDEA. For example, a child missing a hand might require accommodations in gym class, assistance in learning to write or use assistive technology, and help in the lunch room. A child with attention deficit hyperactivity disorder who is performing well academically might need specific classroom management and organizational interventions. A child with juvenile diabetes might need accommodations that ensure his or her blood glucose levels are checked and that snacks are on hand in the classroom.

These children may qualify for services under section 504 of the Federal Rehabilitation Act of 1973.<sup>294</sup> As an anti-discrimination

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<sup>290</sup> N.Y. EDUC. LAW § 4005(2)(a)(iv); N.Y. COMP. CODES R. & REGS. tit. 8, § 116.2(h). The CSE of the child care institution is required to follow the procedures governing the CSE process "including the involvement of the parents or guardians of the child." N.Y. EDUC. LAW § 4005(2)(a).

<sup>291</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 116.6(c).

<sup>292</sup> N.Y. EDUC. LAW § 4005(2)(a)(iv).

<sup>293</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 100.2(ff)(2).

<sup>294</sup> Rehabilitation Act of 1973, Pub. L. No. 93-112 § 504, 87 Stat. 355, 394 (1973) (codified as amended at 29 U.S.C. § 794(a)-(d) (2000)). The companion federal regulations, promulgated by the Office of Civil Rights (OCR), are located at 34 C.F.R. pt. 104 (2004). Section 504 was enacted before the IDEA. Generally, children who are eligible for services under the IDEA automatically fall within the scope of section 504; for these children, school district compliance with the IDEA ensures compliance with section 504. 34 C.F.R. §

statute, section 504 prohibits agencies or entities that receive federal funds<sup>295</sup> from discriminating on the basis of disability. It imposes on them an affirmative duty to reasonably accommodate anyone with a disability. Public school districts fall within the reach of section 504 and must have policies and procedures in place to ensure its implementation.<sup>296</sup> Defining disability more broadly than the IDEA, section 504 covers anyone who “has a physical or mental impairment which substantially limits one or more of such person’s major life activities,”<sup>297</sup> including functions such “as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”<sup>298</sup> Section 504 also protects “any person who . . . has a record of such an impairment” or “is regarded as having such an impairment.”<sup>299</sup>

A child who is eligible for section 504 services is entitled to a FAPE and receives a section 504 accommodation plan fashioned by a multidisciplinary school team.<sup>300</sup> A section 504 plan can include a wide variety of educational programs, services, and modifications.<sup>301</sup> However, the law does not require the section 504 plan to be as detailed as the IEP.<sup>302</sup> Moreover, though section 504 offers parents significant due process rights, the IDEA assigns the child’s parents a stronger and equal role in the education planning process and prescribes a more substantial range of due process entitlements to challenge a school district’s actions.<sup>303</sup>

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104.33(b)(2).

<sup>295</sup> 29 U.S.C. § 794(a).

<sup>296</sup> *Id.* § 794(b)(2)(B).

<sup>297</sup> *Id.* § 705(20)(B)(i).

<sup>298</sup> 34 C.F.R. § 104.3(j)(2)(ii).

<sup>299</sup> 29 U.S.C. § 705(20)(B)(ii)–(iii). Section 504 thus protects individuals who are discriminated against because of perceptions about their disability. For example, a student who is HIV positive but asymptomatic may be perceived as disabled and suffer discrimination in the school environment.

<sup>300</sup> 34 C.F.R. §§ 104.33(a), 104.35(c)(3).

<sup>301</sup> *Id.* § 104.33(b). These might include, for example, classroom modifications, instructional strategies, behavior management techniques, test modifications, equipment, modified curricula and assignments, monitoring and addressing medical needs, and transportation. Section 504 plans may provide substantial services, including residential placement. *Id.* § 104.33(c)(3).

<sup>302</sup> 20 U.S.C. § 1414(d)(1)(B) (2000); 34 C.F.R. § 104.33(b)(2).

<sup>303</sup> *See generally* 20 U.S.C.A. § 1415 (West Supp. 2005) (detailing the procedural safeguards afforded to children with disabilities and their parents). To comply with section 504, schools must still provide “a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person’s parents or guardian and representation by counsel, and a review procedure.” 34 C.F.R. § 104.36.

*D. Models to Promote Advocacy for Children in Foster Care*

The due process safeguards of the IDEA and section 504 of the Rehabilitation Act afford parents the opportunity to enforce their children's entitlement to a FAPE. In special education matters, there is room for much disagreement between parents and school personnel regarding matters such as eligibility for services, the child's placement and program, the nature and degree of services provided in the IEP, and school district compliance with IDEA procedures and the IEP. Even the most sophisticated parents may struggle to master the complexities of the IDEA and to develop strategies to effectively advocate for their children. In matters involving the special education of children in foster care, child welfare professionals, CASAs, foster parents, and biological parents often have concerns about special education.

Children in foster care need not only a parent figure, but access to advocacy as well. To address this need, some jurisdictions have initiated programs to provide direct and indirect advocacy for children in foster care. In Tennessee, for example, in response to a class action lawsuit, the state "child welfare agency... has designated 12 education attorneys and 14 education specialists" to attend IEP meetings, to train child welfare caseworkers and attorneys, to assist caseworkers, and to "provide direct advocacy when needed."<sup>304</sup> In New York City, the Kathryn A. McDonald Education Advocacy Project, affiliated with the Legal Aid Society, provides training for attorneys, caseworkers, parents, and foster parents, as well as direct educational advocacy to children in foster care.<sup>305</sup>

#### IX. PARENTING AND DECISION-MAKING ROLES IN THE EDUCATION OF CHILDREN IN FOSTER CARE

Parental involvement in a child's school life is a critical component of school success. For many children in foster care, however, the parent role is left vacant. Despite the constellation of adults involved in their lives, these children often have no one to support their school efforts, communicate with teachers, or advocate on their behalf.<sup>306</sup> To complicate matters, in both the school and

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<sup>304</sup> MCNAUGHT, *supra* note 15, at 107–08.

<sup>305</sup> *Id.* at 104.

<sup>306</sup> Blome, *supra* note 8, at 48, 50; FINKELSTEIN ET AL., *supra* note 8, at 26–27, 35. Studies of children in foster care document that many are not timely evaluated for services, do not

child welfare settings there is often uncertainty about who has legal authority to make education-related decisions.<sup>307</sup>

Children in foster care have unique life circumstances affecting their legal and relational ties to their birth family, foster family, and the child welfare agencies responsible for their care.<sup>308</sup>

In practice, child welfare agencies, birth parents, and foster parents often engage in “shared parenting.”<sup>309</sup> As a result, at times it can be challenging to draw a bright line between the roles and legal authority of each. Who may serve as the child’s legal parent depends on whether the matter falls within the general or special education arena. In the special education realm, DSS and its contract agencies are agents of the state and do not qualify to act as the child’s parent, whatever the circumstances. In general education matters, however, there is no such bar.

#### A. General Education

DSS is typically the “custodian” or “guardian” of a child in foster care and stands *in loco parentis* to the child. As such, it bears responsibility for decisions regarding the child’s education.<sup>310</sup>

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receive services included on their IEPs, have inappropriate or overly restrictive placements, and do not continue to receive special education services when they move from one school to another. CTR. WITHOUT WALLS, *supra* note 3.

<sup>307</sup> FINKELSTEIN ET AL., *supra* note 8, at 48.

<sup>308</sup> For example, some children have parents whose parental rights remain intact, while others do not. Some children are placed in foster care with relatives while others live with virtual strangers. Children working toward reunification with parents may maintain a different relationship with their birth families than those who will likely be freed for adoption. By court order, preadoptive families may actually be the legal guardians of their foster children. Children living in residential facilities may lack both birth and foster parents.

<sup>309</sup> The Foster Parent Manual developed by OCFS describes the foster parent as part of a “‘team’ working together for the sake of the family.” N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., *supra* note 63, at 3. It states that the team generally “consists of the foster parents, the birth parents, the child, the caseworker, and the law guardian” and “may also include service providers, health care providers, and other family members.” *Id.*; see Susan Vivian Mangold, *Extending Non-Exclusive Parenting and the Right to Protection for Older Foster Children: Creating Third Options in Permanency Planning*, 48 BUFF. L. REV. 835, 838, 841–42 (2000) (describing the “non-exclusive parenting” arrangement care among biological parents, foster parents, the State, and private agencies).

<sup>310</sup> See N.Y. COMP. CODES R. & REGS. tit. 8, § 441.13 (2001) (requiring child care agencies to ensure that children in foster care receive appropriate education); *Domes v. Bd. of Supervisors*, 243 N.Y.S. 640, 642 (App. Div. 1930) (identifying the county as being in “parental relation” to “dependent” and “neglected” children in the county’s “care, custody, and control”); *In re Kevin M.*, 724 N.Y.S.2d 816, 823–24 (Fam. Ct. 2001) (holding that DSS, as the legal custodian of the foster child, had “improperly delegated . . . decisions concerning [the child’s] right to receive an adequate education” to the foster parent who had withdrawn the child from public school).

Though foster parents perform many of the daily education-related activities for children in their care, they do so under the aegis of DSS and typically do not have independent authority to make decisions in general education matters.<sup>311</sup>

When DSS is the custodian (rather than the guardian), the birth parents typically retain their parental rights as the child's guardians. As a result, depending on the circumstances, birth parents may play a small or large role in making education decisions for their children. When a child's permanency plan contemplates a return home, it is particularly important for child welfare professionals to consult with the birth parents regarding important education decisions and, as a part of concurrent planning, to integrate them into the education planning process.

When the birth parents' rights have been terminated, however, DSS is the child's guardian and education decision-maker for general education purposes. In some instances, the court may designate another individual—such as a pre-adoptive parent—as the guardian.

New York's General Obligations Law offers a useful tool that permits parents to play a role in determining their child's education decision-maker. Section 5-1551 of the General Obligations Law, which became effective June 30, 2005, grants parents the power to designate another person to act as a "person in parental relation" to their child.<sup>312</sup> Under the New York Education Law, a person in parental relation has the same obligations and rights as a parent.<sup>313</sup> In appropriate circumstances, child welfare agencies and the courts may encourage and aid parents to designate a person who is suited to the task.

### *B. Special Education*

Parents are key to building and sustaining successful special

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<sup>311</sup> *In re Kevin M.*, 724 N.Y.S.2d at 824.

<sup>312</sup> When the birth parents of a child in foster care are unable or unwilling to act as the child's parents, they may make such a designation, while retaining the power to subsequently revoke the decision. In the document, the parent may specify and/or limit the powers given to the person. N.Y. GEN. OBLIG. LAW § 5-1551 (McKinney 2005).

<sup>313</sup> See N.Y. EDUC. LAW § 2 (10) (McKinney 2005) (defining "persons in parental relation" to include "the parents, guardians or other persons, whether one or more, lawfully having the care, custody or control of such child, including persons who have been designated pursuant to title fifteen-A of article five of the general obligations law as persons in parental relation to the child"). Throughout the New York Education Law, references to parental rights and obligations include this term. See, e.g., N.Y. EDUC. LAW §§ 409-h(2), 2802(7)(c) (McKinney Supp. 2005).

education school programs for children. Parents are expected to be their children's advocates by participating in the special education process and taking steps to ensure that schools follow the law. They have the power to give and withhold consent to evaluation and services and to invoke due process procedures to challenge school district actions. Given the importance of the parents' role, it is no surprise that the IDEA includes the word parent at least one hundred times.<sup>314</sup>

To increase the odds that each child has a parent in the special education process, the IDEA defines the term "parent" broadly.<sup>315</sup> The term includes the "natural, adoptive, or foster parent" (unless the State bars a foster parent from serving as a parent).<sup>316</sup> It also includes a person "acting in the place of a natural or adoptive parent" and the child's "guardian," but, as noted above, prohibits the State from serving as the parent—even when the State itself is the child's legal guardian.<sup>317</sup> The IDEA also authorizes the school district and the courts to appoint a "surrogate parent" to act as a child's parent under the circumstances described below.

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<sup>314</sup> Nancy A. Hubley, *Children Without Parents: The IDEA's Surrogate Parent Mandate*, Individuals with Disabilities Education Law Report, Special Report No. 17, at 1 (LRP Pub'ns 1997).

<sup>315</sup> 20 U.S.C.A. § 1401(23) (West Supp. 2005). Until the recent amendments to the IDEA, the IDEA itself barely defined the term parent. The statute simply stated that the term parent includes both "a legal guardian" and an "individual assigned" to be a child's "surrogate parent" under the IDEA. 20 U.S.C. § 1401(19) (2000). The U.S. Department of Education, in its IDEA regulations implemented in 1999, filled the void, defining the term broadly so as to increase the chances that all children have an adult to represent their interests in special education matters. *See Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities*, 64 Fed. Reg. 12406, 12406-07 (Mar. 12, 1999) (explaining the amendments to the definition of "parent"). The current IDEA regulations define the parent as:

(1) A natural or adoptive parent of a child; (2) A guardian but not the State if the child is a ward of the State; (3) A person acting in the place of a parent (such as a grandparent or step-parent with whom the child lives, or a person who is legally responsible for the child's welfare); or (4) A surrogate parent who has been appointed in accordance with § 300.515.

<sup>34</sup> C.F.R. § 300.20(a) (2004).

As to foster parents, the IDEA regulations provide that:

[u]nless 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.

*Id.* § 300.20(b).

<sup>316</sup> 20 U.S.C.A. § 1401(23)(A) (West Supp. 2005).

<sup>317</sup> 20 U.S.C.A. § 1401(23)(B)–(C).

New York's new regulations, adopted in response to the 2004 amendments to the IDEA, now define parent to include the birth or adoptive parent, a guardian, or a surrogate parent. In addition, the regulations permit a person in parental relationship to the child, as defined in Education Law section 3212, to serve as the parent.<sup>318</sup> The New York regulations also authorize a foster parent to act as a parent unless state law, regulations, or contractual obligations with a state or local entity prohibit the foster parent from acting as a parent. No such prohibitions currently exist. The regulations also provide that a person identified by judicial decree or order to act as the parent to make educational decisions on behalf of the student will be treated as the parent.<sup>319</sup>

By including "foster parents" (unless prohibited by state law) in the definition of parent, the IDEA expands the definition of parent beyond the limits previously included in the federal regulations. Both the 1999 federal regulations and the New York regulations, before their recent amendment, permitted a foster parent to serve as the child's parent only if the natural parents' educational decision-making rights were "extinguished" and the child and foster parent had a long-term relationship. In rejecting this limitation, the IDEA optimizes the chances that all children will have a parent or parent-like figure performing the job of a parent in the special education process. On the other hand, it creates the worrisome concern that schools might treat foster parents as a child's parents even when the child's birth parents retained their rights. In effect, schools might presumptively strip birth parents of their decision-making authority.

The New York regulations, as well as the proposed federal regulations implementing the IDEA, assuage concerns about the competing authority of birth and foster parents. The New York regulations provide that "the birth or adoptive parent must be

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<sup>318</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1 (ii)(1) (adopted Sept. 9, 2005), *available at* <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>. Education Law section 3212 provides that:

a person in parental relation to another individual shall include his father or mother, by birth or adoption, his step-father or step-mother, his legally appointed guardian, or his custodian. A person shall be regarded as the custodian of another individual if he has assumed the charge and care of such individual because the parents or legally appointed guardian of such individual have died, are imprisoned, are mentally ill, or have been committed to an institution, or because, they have abandoned or deserted such individual or are living outside the state or their whereabouts are unknown.

N.Y. EDUC. LAW § 3212(1) (McKinney 2001).

<sup>319</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(ii)(4) (adopted Sept. 9, 2005), *available at* <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>.

presumed to be the parent unless the birth or adoptive parent does not have legal authority to make educational decisions for the student.”<sup>320</sup> Thus, the determination of who serves as the parent is hierarchical, requiring schools to first look to the birth or adoptive parent and thereafter to the foster parent. If the birth parents retain the right to make educational decisions, the foster parent may not be treated as the parent.

Along similar lines, the proposed federal regulations provide that when more than one party qualifies under the IDEA to act as the child’s parent, the school must treat the natural or adoptive parent as the parent, unless that parent does not have legal authority to make educational decisions for the child.<sup>321</sup> The New York regulations require schools to honor the education decision-making rights of birth parents, even if the birth parents do not affirmatively “attempt” to act as the child’s parent in the special education process.<sup>322</sup>

For children in foster care who have no one eligible to act as their parents under the IDEA, the school or a court overseeing the child’s care must appoint a “surrogate parent.”<sup>323</sup> The surrogate parent “represent[s] the child in all matters relating to—(1) The identification, evaluation, and educational placement of the child; and (2) The provision of FAPE to the child.”<sup>324</sup> A surrogate may be appointed “whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the

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<sup>320</sup> *Id.* § 200.1(ii)(3).

<sup>321</sup> Assistance to States for the Education of Children with Disabilities, 70 Fed. Reg. 35782, 35785 (proposed June 21, 2005) (to be codified at 34 C.F.R. pt. 300).

<sup>322</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(ii)(3) (adopted Sept. 9, 2005), *available at* <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>.

<sup>323</sup> 34 C.F.R. § 300.515(b) (2004).

<sup>324</sup> *Id.* § 300.515(e). School districts are not permitted to appoint a surrogate parent merely because the child’s parent is uncooperative, non-responsive, or lives far away. The underlying rationale for this provision is that the State, acting as a custodian or guardian for a child, does not act in the same capacity as an individual, but rather assumes guardianship as an administrative function. *See O’Grady v. Centennial Sch. Dist.*, 401 A.2d 1388, 1389–91 (Pa. Commw. Ct. 1979) (noting that “[a] custodian . . . has the right to the physical custody of the child, the right to determine the nature of the care or treatment of the child . . . subject to the . . . rights and duties of the parents”); *see In re J.D.*, 510 So. 2d 623, 629 (Fla. Dist. Ct. App. 1987) (rejecting the “position that the surrogate usurps altogether the parent’s role in deciding the child’s educational placement”); *cf. Dundee Cent. Sch. Dist.*, 509 EHLR 191, 192 (SEA N.Y. 1987) (providing that the State can better protect children with handicapping conditions “by permitting a hearing officer to appoint a surrogate parent when [it is determined] that the interests of the parent are opposed to or inconsistent with those of the child or that the interest of the child would better be protected by an assignment of a surrogate parent”).

child is a ward of the State.”<sup>325</sup> The IDEA defines a “ward of the State” to include “a child who, as determined by the State where the child resides, is a foster child, is a ward of the State, or is in the custody of a public child welfare agency.”<sup>326</sup> Because the definition further excludes a foster child who otherwise has a “parent” as defined under the IDEA (which would include a birth parent or foster parent), it will apply only to those foster children who have no foster parent, such as those who reside in a group home or residential facility.

To ensure that children receive a speedy surrogate parent appointment, the IDEA now requires that schools make reasonable efforts to assign a surrogate parent within thirty days after determining that a child needs a surrogate.<sup>327</sup> New York regulations require, however, that the appointment be made within ten business days.<sup>328</sup>

The IDEA, as amended in 2004, opens a new door to judicial involvement in selecting education decision-makers for children in special education. It not only authorizes judges to appoint surrogate parents, but also directs school districts to honor a consent to evaluate given by any individual to whom the judge has “subrogated” (that is, assigned) the rights of the parents to make educational decisions.<sup>329</sup> Taking this a step further, the newly adopted New York regulations, as well as the proposed federal regulations, defer to the authority of any court decrees or orders that identify a person to act as a child’s parent or to make educational decisions for the student.<sup>330</sup>

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<sup>325</sup> 20 U.S.C.A. § 1415(b)(2)(A) (West Supp. 2005).

<sup>326</sup> *Id.* § 1401(36).

<sup>327</sup> *Id.* § 1415(b)(2)(B); *see also* 34 C.F.R. § 300.515(a)–(b) (describing the statutory duty of a public agency to provide a surrogate parent).

<sup>328</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(n)(3)(iii) (adopted Sept. 9, 2005), *available at* <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>; *see id.* § 200.5(n)(2), (3)(v) (listing the qualifications required to become a surrogate parent). Notably, a surrogate parent appointed under the IDEA does not replace the parent in any other sense. A federal district court in New Hampshire has ruled that although state laws control all other aspects of the care of a child whose parents are not available, the appointment of a surrogate parent does not terminate the rights of a student’s natural parents to participate in the educational process of their children. *John H. v. MacDonald*, 558 EHLR 366, 370 (D.N.H. 1987). The surrogate parent may not be an employee of the State educational agency, the local educational agency (that is, the school district), or any other agency involved in the education or care of the child. The State, as guardian, has its own duties to the child and, in representing the child as a surrogate parent, may have a conflict of interest. N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(n)(2) (adopted Sept. 9, 2005), *available at* <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>.

<sup>329</sup> 20 U.S.C.A. § 1414(a)(1)(D)(iii)(II)(cc).

<sup>330</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(ii)(4) (adopted Sept. 9, 2005), *available at*

By acknowledging the authority of the courts, the IDEA may encourage courts to play a more active role in monitoring the education of children in care—within both general and special education. In New York, the 2005 Governor's Permanency Bill not only encourages but requires that courts do the same at each and every permanency hearing.

At each hearing, the Family Court will review the permanency hearing reports submitted by DSS or the child welfare agency, including the updates on the child's educational status and the educational and vocational components of the child's permanency plan. In the court's findings or order of disposition, the judge must not only include the steps that DSS or the agency must take to implement these components of the plan, but is also empowered to modify the plan itself. As part of the process, it would be appropriate for the court to conduct inquiries about education decision-making and to use its authority to ensure that each child has a parent or other individual with the will and capacity to make meaningful educational decisions on the child's behalf. In comparison to the school district, the court is well-suited to this task. It has broader authority and more tools at its disposal to explore the history and needs of the child and family, to inquire about the roles and authority of the key players in the child's life, and to craft an order unique to the child's circumstances.

As a best practice, we recommend that school districts, DSS, and Family Court jointly adopt a protocol to routinely address education tasks and decision-making for children in foster care. School personnel and child welfare professionals should consult with each other regarding the status and availability of the birth and foster parents and determine, on an interim basis, who is eligible and able to serve as parent. Thereafter, the child's service and/or permanency plan should outline educational responsibilities and roles and identify who will assume them. Courts should adopt a protocol to routinely address education decision-making in the courtroom at the first possible opportunity and, thereafter, at periodic intervals.

## X. TRANSITION TO ADULTHOOD

Adolescents in foster care travel different paths to adulthood. Though some find permanency with parents or relatives, or through

adoption, many others must brave the perilous transition directly from foster care into adulthood.<sup>331</sup> Historically, foster youth have often been discharged from care without adequate preparation, planning, and resources.<sup>332</sup> They exit foster care into adult independent living with a high risk of poverty, homelessness, and unemployment and are vulnerable to influences that promote criminal behavior. A study of Wisconsin youth one year to eighteen months after exiting care conveys the dismal reality: of those surveyed, twelve percent had been homeless and thirty-two percent had received public assistance. Twenty-seven percent of females and ten percent of males had been incarcerated at least once, and twenty-five percent of females and fifteen percent of males reported serious physical victimization.<sup>333</sup> Many individuals surveyed also reported difficulties in accessing medical care.<sup>334</sup> Other studies of youth exiting foster care have yielded similar data.<sup>335</sup>

Close to one-third of children in foster care are teenagers; nearly forty percent of children leaving care each year are teens.<sup>336</sup> ASFA, by its recent mandates, offers hope that these adolescents will not be discharged into the adult world without support. ASFA places demands on child welfare professionals to do a better job achieving family-based permanency plans for adolescents. New York's Governor's Permanency Bill eliminates independent living as a permanency goal, instead providing that youth may be given

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<sup>331</sup> *Foster Youth Transitions*, *supra* note 14, at 686. Some children with very significant impairments or disabilities may need to access adult residential services. New York's Social Services regulations address the needs of these children through a distinct planning process. N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12(g) (2001).

<sup>332</sup> *Foster Youth Transitions*, *supra* note 14, at 714–15.

<sup>333</sup> *Id.* at 711–713.

<sup>334</sup> *Id.* at 708.

<sup>335</sup> See Richard P. Barth, *On Their Own: The Experiences of Youth After Foster Care*, 7 CHILD AND ADOLESCENT SOC. WORK J. 419, 422, 424, 426, 430 (1990) (citing a study of fifty-five former foster care youth in which thirty-eight percent had not completed high school, twenty-five percent were unemployed, twenty-nine had been homeless or moved frequently, and twenty-six percent had spent time in jail or prison). See generally L. ANTHONY LOMAN & GARY L. SIEGEL, A REVIEW OF LITERATURE ON INDEPENDENT LIVING OF YOUTHS IN FOSTER AND RESIDENTIAL CARE (2000), available at <http://www.nrcys.ou.edu/PDFs/Publications/IndLivLit.pdf> (providing a detailed review and discussion of studies and data on children exiting care).

<sup>336</sup> Susan Vivian Mangold, *Transgressing the Border Between Protection and Empowerment for Domestic Violence Victims and Older Children: Empowerment as Protection in the Foster Care System*, 36 NEW ENG. L. REV. 69, 114 (2001) (citing STAFF OF H.R. COMMITTEE ON WAYS AND MEANS, 105TH CONG., 1998 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 786 (Comm. Print 1998)).

“assistance needed to . . . learn[] independent living skills.”<sup>337</sup> Federal law does not, however, discourage efforts to prepare foster children for independent living. To the contrary, ASFA, along with the federal Foster Care Independence Act, promote efforts to prepare all foster children for independent living—regardless of their permanency plans.<sup>338</sup>

In New York, child welfare laws require the development of meaningful plans for all adolescents transitioning out of care into adulthood. At the same time, the laws governing education require school districts to provide all students with educational and career guidance and to give special education students a broad spectrum of transition services to promote their movement into the adult world. Foster children with disabilities may also qualify for vocational rehabilitation services or other government benefits and programs.<sup>339</sup> Together, the child welfare, education, and vocational rehabilitation laws can be powerful tools to access resources that ease foster youth into meaningful, productive adult lives.<sup>340</sup> Because child welfare and school personnel are often assigned the same mission, it is important to understand the responsibilities of each and ensure that the two systems collaborate in the effort. It is imperative that child welfare and school district personnel communicate in the transition planning process.<sup>341</sup>

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<sup>337</sup> S. 5805, 2005–2006 Leg., Reg. Sess. (N.Y. 2005).

<sup>338</sup> Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.); Foster Care Independence Act of 1999, Pub. L. No. 106-169, 113 Stat. 1822 (codified in scattered sections of 42 U.S.C.) (providing states with funding that will enable programs to promote independent living).

<sup>339</sup> For example, adolescents may qualify for Vocational Rehabilitation Services offered under the Vocational Rehabilitation Act and the Office of Vocational and Education Services, or Social Security benefits. 29 U.S.C. §§ 723, 794 (2000); see RONALD M. HAGER, POLICY AND PRACTICE BRIEF: THE TRANSITION FROM SCHOOL TO WORK, available at <http://digitalcommons.ilr.cornell.edu/edicollect/40/> (last visited Oct. 1, 2005).

<sup>340</sup> For written material on transition planning strategies, concepts, and implementation guidelines, see Admin. for Children & Families, U.S. Dep’t of Health & Human Servs., Program Instruction on the Chafee Foster Care Independence Program, <http://www.acf.dhhs.gov/programs/cb/laws/pi/pi0102.htm> (last visited Oct. 1, 2005); N.Y. Vocational and Educ. Serv. for Individuals with Disabilities and Special Educ., Transition: Implementation Tools, <http://www.vesid.nysed.gov/specialed/transition/impt.htm> (last visited Oct. 1, 2005) [hereinafter TRANSITION SERVICES]; Wis. Statewide Transition Initiative, <http://www.wsti.org/resourcepdf.cfm> (last visited Oct. 1, 2005). See also Thomas Wade Young & Jae M. Lee, *Responding to the Lament of Invisible Children: Achieving Meaningful Permanency for Foster Children*, J. KAN. BAR ASS’N, June/July 2003, at 46, 50 (suggesting that, with the help of school personnel and active participation in planning a child’s permanency goals, various positive outcomes may be achieved for children in need of services necessary for achieving their permanency goals).

<sup>341</sup> *Reveille for School Social Workers*, *supra* note 3, at 123.

*A. Child Welfare Law*

As part of the Foster Care Independence Act, the John H. Chafee Foster Care Independence Program offers states flexible federal funding to promote independent living for youth between the ages of eighteen and twenty-one.<sup>342</sup> While Chafee does not mandate particular services to children, it does hold the promise of financing efforts to address the independent living needs of foster youth in areas such as housing, employment, health and traditional life skills, as well as education.<sup>343</sup> In distributing Chafee funds, states are required to work with community partners to develop independent living programs.<sup>344</sup> A fundamental component of Chafee is the expectation that youth in foster care take on significant roles and responsibilities in designing and carrying out their own independent living programs.<sup>345</sup> In addition, Chafee offers substantial vouchers for post-secondary education for youth in foster care.<sup>346</sup>

In New York, the Family Court has a responsibility to periodically examine the needs of foster children age sixteen and older for services to assist their transition from foster care to independent living.<sup>347</sup> New York's Social Services Law offers a variety of services to facilitate a child's transition from foster care to adulthood, including DSS funding for vocational preparation programs,<sup>348</sup>

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<sup>342</sup> Foster Care Independence Act of 1999, Pub. L. No. 106-169, 113 Stat. 1822, 1824 (codified in scattered sections of 42 U.S.C.). For detailed discussions of the laws, see, e.g., National Foster Care Awareness Project, *Frequently Asked Questions About the Foster Care Independence Act of 1999 and the John H. Chafee Foster Care Independence Program (2000)*, [http://www.aecf.org/publications/pdfs/faq\\_feb.pdf](http://www.aecf.org/publications/pdfs/faq_feb.pdf) [hereinafter *Frequently Asked Questions About the Foster Care Independence Act of 1999*]. See KAREN CARROLL, NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *THE FOSTER CARE INDEPENDENCE ACT OF 1999 AND THE JOHN H. CHAFEE FOSTER CARE INDEPENDENCE PROGRAM: TECHNICAL ASSISTANCE BRIEF (2002)*, available at [http://www.pppncjfcj.org/pdf\\_TA\\_chaffeebrief/fullversion\\_chaffeebrief.pdf](http://www.pppncjfcj.org/pdf_TA_chaffeebrief/fullversion_chaffeebrief.pdf).

<sup>343</sup> CARROLL, *supra* note 342, at 5.

<sup>344</sup> 42 U.S.C. § 677(b)(2)(D) (West Supp. 2005).

<sup>345</sup> *Frequently Asked Questions About the Foster Care Independence Act of 1999*, *supra* note 342, at 12.

<sup>346</sup> Under the Foster Care Independence Act of 1999, states may use federal Chafee funds to provide vouchers for postsecondary education for eligible youth. Grants cannot exceed "the lesser of \$5,000 per grant year or the total cost of attendance as defined in section 472 of the Higher Education Act," and states (or localities, as mandated by the state) must contribute twenty percent of the costs. See The Catalog of Federal Domestic Assistance, Chafee Education and Training Vouchers Program (ETV), [http://12.46.245.173/pls/portal30/catalog.FORMULA\\_GRANTS\\_RPT.show](http://12.46.245.173/pls/portal30/catalog.FORMULA_GRANTS_RPT.show) (last visited Oct. 1, 2005).

<sup>347</sup> In New York, the Family Court is required to examine these needs during proceedings for initial foster care placements and in foster care review proceedings. N.Y. SOC. SERV. LAW § 392(5-a)(h) (McKinney 2003).

<sup>348</sup> *Id.* § 398(6)(k). DSS is authorized, if not required, to provide "suitable vocational

placement of children in “federally funded job corps program[s],”<sup>349</sup> and DSS financial contributions toward college room and board.<sup>350</sup> Youth in foster care who are over age sixteen may also receive an independent living stipend and are permitted to save their monthly earned income for future use.<sup>351</sup> OCFS is presently drafting new regulations to address the transition needs of foster youth<sup>352</sup> that will likely replace and strengthen the current OCFS regulations requiring DSS to provide independent living services, including “structured programs of vocational training and independent living skills” to most foster youths who fall between the ages of sixteen and twenty-one.<sup>353</sup>

Around the country, family and juvenile courts are taking the lead to ensure that adolescents in foster care are better prepared for adulthood through innovative benchmark hearings. In New York, drawing on models used elsewhere in the country, the Erie County Family Court has introduced “benchmark permanency hearings”<sup>354</sup> to ensure that each youth has the opportunity for lifetime personal connections and a successful transition to adulthood. Through the hearing process, a team of individuals, including the youth, develops a unique comprehensive transition plan which will inform the youth as to benchmarks essential to independent living in adulthood and

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training” for a minor with the “talent, aptitude and ability necessary to benefit therefrom, provided such minor could not otherwise obtain such training. Expenditures may be made for tuition, books, supplies, and all other necessary items to enable such minor to obtain such training.” *Id.*

<sup>349</sup> *Id.* § 398(6)(g)(1).

<sup>350</sup> *Id.* § 398(10). DSS may make foster payments contributing towards room and board to a college or university in lieu of payments to foster parents or an authorized agency. *Id.* § 398(10).

<sup>351</sup> *Id.* § 398(6)(j). Foster children who earn income are entitled to retain their income “for future identifiable needs” in keeping with regulatory provisions. *Id.* The Social Services regulations, currently under revision, also provide for an independent living stipend, subject to funding availability, for children sixteen years or older to promote participation in independent living services and acquisition of financial skills for independent living. *See* N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12(f)(2)(i)(b) (2001).

<sup>352</sup> OFFICE OF CHILDREN & FAMILY SERVS., HANDBOOK FOR YOUTH IN FOSTER CARE 49–64 (2004), available at <http://www.ocfs.state.ny.us/main/publications/Pub5028.pdf>.

<sup>353</sup> *See* N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12(f)(2)(i)(a) (providing, among other things, a detailed explanation of how independent living services are delivered). Presently, children with a permanency goal of independent living who are ages sixteen through twenty-one qualify for services. The reach of the regulations is fairly broad in that many children in foster care ages sixteen through twenty-one are deemed to have a discharge goal of “independent living”; any child with a goal of discharge to a parent, relative, or adoption who has been in foster care at least twelve of the last thirty-six months qualifies for independent living services. *Id.* § 430.12(f).

<sup>354</sup> AM. BAR ASS’N CTR. ON CHILDREN & THE LAW, NATIONAL WELFARE RESOURCE CENTER ON LEGAL AND JUDICIAL ISSUES (2004), <http://www.abanet.org/scripts/cip/states.jsp?stste=NY>.

serve as the template for professionals and other supporters to assist the youth in developing needed skills in a methodical, supportive manner. The youth and a significant person selected by the youth attend the hearing, along with the child welfare professionals, attorneys, foster parents, a school liaison, and other appropriate service providers.<sup>355</sup> Similar benchmark hearing programs have been initiated elsewhere, including Chicago and Washington, D.C.<sup>356</sup>

The Jim Casey Youth Opportunities Initiative has developed “The Opportunity Passport” to organize resources and create opportunities for young people leaving foster care.<sup>357</sup> The Opportunity Passport program helps these youth to: “learn financial management; obtain experience with the banking system; save money for education, housing, health care, and other specified expenses; and gain streamlined access to educational, training, and vocational opportunities.”<sup>358</sup> It provides them with a personal debit account for short-term expenses, a matched savings account to use for education and housing expenses, and “door openers,” which provide youth with access to opportunities such as registration for community college courses or job training.<sup>359</sup> A variety of cities across the nation are currently piloting the Opportunity Passport.<sup>360</sup>

### *B. Education Law*

At the same time that child welfare professionals help youth in foster care pave their way to adulthood, school districts should be doing the same. In New York, all public school students must receive school guidance services.<sup>361</sup> In grades seven through twelve, students should participate annually in an individual or small

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<sup>355</sup> *Id.*

<sup>356</sup> See COUNCIL FOR COURT EXCELLENCE, DISTRICT OF COLUMBIA CHILD WELFARE SYSTEM: COMPLIANCE WITH THE ADOPTION AND SAFE FAMILIES ACTS AND THE DISTRICT OF COLUMBIA FAMILY COURT ACT 53 (2004), available at <http://www.courtexcellence.org/pdf/publications/ChildWelfareSystCongressionalReport2004.pdf>; THE FAMILY COURT OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, STATUS REPORT 2003, at 196 (2003), available at [http://www.dccourts.gov/dccourts/docs/family/family\\_annualreport2003.pdf](http://www.dccourts.gov/dccourts/docs/family/family_annualreport2003.pdf); Press Release, Office of the Chief Judge, Circuit Court of Cook County, Chief Judge O’Connell Launches Two Pilot Programs in Child Protection Division (Jan. 29, 2001), available at [http://www.cookcountycourt.org/pressreleases/arch\\_view.asp?id=287](http://www.cookcountycourt.org/pressreleases/arch_view.asp?id=287).

<sup>357</sup> National Conference of State Legislatures, The Opportunity Passport, <http://www.ncsl.org/programs/cyfl/passport.htm> (last visited Oct. 1, 2005).

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

<sup>360</sup> *Id.*

<sup>361</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 100.2(j)(1) (2003).

group session to review their educational progress and career plans.<sup>362</sup> Schools are also required to provide individual or group advice and counseling to help students address a variety of school-related needs, including postsecondary education and career plans.<sup>363</sup> The substance and value of these services varies from school to school, depending on its size, resources, and level of compliance with the regulations. In addition to guidance services, schools must offer students work and career-oriented coursework in the general education curriculum.<sup>364</sup>

As for children with disabilities, the IDEA calls for comprehensive transition planning and services.<sup>365</sup> In keeping with the legislative purpose to prepare children with disabilities for “further education, employment, and independent living,”<sup>366</sup> the IDEA, along with New York law, mandates transition services to help students live, work, learn, and participate in the adult world.<sup>367</sup> Transition services are

a coordinated set of activities . . . that is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child’s movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation [and] includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional

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<sup>362</sup> *Id.* § 100.2(j)(1)(ii)(a).

<sup>363</sup> *Id.* § 100.2(j)(1)(ii)(c).

<sup>364</sup> *Id.* § 100.1(t)(1)(vii). New York’s learning standards include a curriculum area of “[c]areer development and occupational studies.” *Id.* Under the regulation, a student must demonstrate an ability to apply academic, practical, personal, and technical skills in a manner that will ultimately produce success in the workplace. *Id.*

<sup>365</sup> 20 U.S.C.A. § 1414(d)(1)(A)(i)(VIII) (West Supp. 2005); N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(d)(2)(viii)–(ix) (adopted Sept. 9, 2005), *available at* <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>.

<sup>366</sup> 20 U.S.C.A. § 1400(d)(1)(A); *see* 34 C.F.R. § 300.1(a) (2004).

<sup>367</sup> 20 U.S.C.A. § 1414(d)(1)(A)(i)(VIII); N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(d)(2)(viii)–(ix) (adopted Sept. 9, 2005), *available at* <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>. The IDEA and New York Education Law mandate transition services as part of the IEP for children who receive special education under the IDEA. For more detailed information on the transition services, planning process, and requirements in New York State, see TRANSITION SERVICES, *supra* note 340. The reader should be cautioned that, as of this date, the guide is not fully up-to-date regarding recent amendments to the law, but is nonetheless a valuable resource.

vocational evaluation.<sup>368</sup>

Transition services must be “based on the individual child’s needs, taking into account the child’s strengths, preferences, and interests.”<sup>369</sup>

Beginning with the IEP in effect when the student reaches age sixteen and thereafter, the IEP must identify “measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills.”<sup>370</sup> The IEP should identify the student’s “transition services (including courses of study) needed to assist the child in reaching those goals.”<sup>371</sup>

The CSE should develop the transition services plan with input from the student, the parents, school staff, and agencies that may play a role in the child’s transition. The CSE must invite the student to any meeting to discuss transition planning to ensure that the student’s preferences and interests are placed on the table.<sup>372</sup> “If the student does not attend, the district shall take steps to ensure that the student’s preferences and interests are considered.”<sup>373</sup> Schools must also invite representatives of the agencies likely to provide or pay for transition services and take steps to ensure their involvement if they are unable to attend.<sup>374</sup> For children in foster care, the CSE should routinely invite DSS to participate in

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<sup>368</sup> 20 U.S.C.A. § 1401(34)(A), (B); *see also* 34 C.F.R. § 300.29(a); N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(fff) (adopted Sept. 9, 2005), *available at* <http://www.vesid.nysed.gov/specialed/idea/reviseaterms905.pdf>.

<sup>369</sup> 20 U.S.C.A. § 1401(34)(B); 34 C.F.R. § 300.347(b)(2).

<sup>370</sup> 20 U.S.C.A. § 1414(d)(1)(A)(i)(VIII)(aa); 34 C.F.R. § 300.347(b). In New York, the CSE must address transition service needs annually beginning with the first IEP to be in effect when the student turns fifteen. N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(2)(ix) (adopted Sept. 9, 2005), *available at* <http://www.vesid.nysed.gov/specialed/idea/reviseaterms905.pdf>. The CSE may initiate transition planning earlier when appropriate. *Id.*

<sup>371</sup> 20 U.S.C.A. § 1414(d)(1)(A)(i)(VIII)(bb). Official commentary in the federal regulations notes that “a disproportionate number of students with disabilities drop out of school before they complete their secondary education” (almost twice as many as those students without disabilities). 34 C.F.R. pt. 300, app. A, at 107. In order to reduce these numbers, “it is important that the IEP team work with each student with a disability and the student’s family to select courses of study that will be meaningful to the student’s future and motivate the student to complete his or her education.” *Id.*

<sup>372</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(d)(4)(i)(c) (2003). The CSE must send written notice of the CSE meeting to the parents at least five days prior to the meeting. *Id.* § 200.5(c)(1). The notice must contain details about the meeting and lay out the parents’ entitlements. “[I]f the purpose of the meeting is to consider transition services, the meeting notice must also: (a) indicate this purpose; (b) indicate that the district will invite the student; and (c) identify any other agency that will be invited to send a representative.” *Id.* § 200.5(c)(2)(vii)(a)–(c).

<sup>373</sup> *Id.* § 200.4(d)(4)(i)(c).

<sup>374</sup> *Id.*

transition planning meetings.

In developing the transition plan, the CSE must draw on information about the child acquired through the child's standard CSE evaluations as well as vocational evaluation and assessments.<sup>375</sup> In New York, school districts must conduct a vocational assessment of all children age twelve or older who are referred to or already participating in special education.<sup>376</sup> More detailed vocational assessments, vocational exploration, and vocational evaluations can and should be completed, when needed, to provide more information on the child's skills, needs, and interests.<sup>377</sup> Other evaluations of skills, abilities, and interests may be helpful as well.<sup>378</sup>

Transition services can be provided in a multitude of ways, whether as special education or other related services. The delivery of transition services is intended to be a collaborative effort, drawing on community resources and agencies that operate beyond the schoolhouse gates. Based on the individual student's needs, transition services may be developed with the input of and referrals to various state agencies such as the Office of Vocational and Educational Services for Individuals with Disabilities (VESID), the Office of Mental Health (OMH), the Office of Mental Retardation and Developmental Disabilities (OMRDD), the Commission for the Blind and Visually Handicapped (CBVH), the Office of Alcohol and Substance Abuse Services (OASAS), or the Social Security Administration.<sup>379</sup> The school can be creative in accessing resources

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<sup>375</sup> *Id.* § 200.4(d)(2)(ix) (adopted Sept. 9, 2005), available at <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>.

<sup>376</sup> *Id.* § 200.4(b)(6)(viii) (defining the assessment as "a review of school records and teacher assessments, and parent and student interviews to determine vocational skills, aptitudes and interests").

<sup>377</sup> The required vocational assessment is typically known as a Level 1 Assessment. See TRANSITION SERVICES, *supra* note 340. A Level 2 Assessment is an exploration, which involves the collection of vocationally relevant information from administering inventories, assessments, and other forms of data collection. *Id.* A Level 3 Assessment is a comprehensive vocational evaluation which can include situational assessments and on-the-job evaluations. *Id.*

<sup>378</sup> A variety of evaluations may assist in developing transition service plans. For example, a functional behavioral assessment (FBA) can target behaviors and interventions that will enable a youth to overcome challenging behaviors outside the school environment. Evaluations in related services areas (such as speech/language, occupational therapy, or counseling) or an evaluation of assistive technology needs can also be beneficial. N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(b)(5)–(6), (d)(2) (adopted Sept. 9, 2005), available at <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>.

<sup>379</sup> TRANSITION SERVICES, *supra* note 340; Vocational & Educ. Servs. for Individuals with Disabilities, Provider Guidelines for Supported Employment, <http://www.vesid.nysed.gov/supportedemployment/guidelines.htm> (last visited Oct. 8, 2004). State agencies have

and opportunities for its students, engaging any variety of public and private agencies to fulfill a child's needs. If the participating agency fails to provide the transition services contained in the IEP, however, the district remains accountable; it must initiate a CSE meeting as soon as possible to identify alternative strategies to meet the transition objectives and, if necessary, revise the IEP.<sup>380</sup> If a school district fails to fulfill the transition plan set forth in the IEP, the parent has legal recourse, as discussed above.<sup>381</sup>

The CSE plays an important role in linking disabled students who are likely to need adult services once they leave school with the state agencies that might service them. The CSE should help such students obtain eligibility determinations and service recommendations before they exit school. The CSE must notify parents of students (or the students, if eighteen or over) placed in residential school programs of the date the students are no longer entitled to tuition-free education.<sup>382</sup> The CSE must also notify parents of students who receive "special services or programs 100 percent of the school day," receive "individualized attention or intervention because of intensive management needs or a severe handicapping condition," and "may need adult services as determined by the [CSE]."<sup>383</sup> The notice must describe

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memoranda of understanding with the State Education Department (SED) that contemplate cooperation among agencies and seamless transitions as a child moves from one service system to another. *Id.* There is a Memorandum of Understanding between OMH and SED and another between OMRDD and SED to coordinate services. *Id.* There is also a joint agreement between VESID, EMSC (SED's Office of Elementary, Middle, Secondary and Continuing Education), and CBVH (the State Commission on the Blind and Visually Handicapped) which lays out responsibilities for school and vocational transition services. *Id.* The practical function of these agreements appears to vary from community to community (if not school district to school district).

<sup>380</sup> The law does not absolve a participating agency of its "responsibility to provide or pay for any transition service that the agency would otherwise provide to students with disabilities who meet its eligibility criteria." N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(e)(6) (2003); *see also* 34 C.F.R. § 300.348 (2002).

<sup>381</sup> *See supra* note 289 and accompanying text.

<sup>382</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(i) (adopted Sept. 9, 2005), *available at* <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>. The notice must go out by November 1st of the school year in which the student turns eighteen. *Id.* § 200.4(i)(1)(i). Under the IDEA, students are eligible for a FAPE up until they receive a regular high school diploma, or through the school year in which they turn twenty-one. 34 C.F.R. §§ 300.121(a), 300.122(a)(3)(i), 300.123; N.Y. COMP. CODES R. & REGS. tit. 8, § 100.9(e) (2001); *Russman v. Bd. of Educ.*, 260 F.3d 114, 120 (2d Cir. 2001) (explaining that a "recipient [of an IEP diploma] shall continue to be eligible to attend public schools . . . without payment of tuition until the student has earned a high school diploma or until the end of the school year of such student's 21st birthday, whichever is earlier").

<sup>383</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(i)(1)(ii)(a)–(c) (adopted Sept. 9, 2005), *available at* <http://www.vesid.nysed.gov/specialed/idea/revisedterms905.pdf>. The notice must be sent upon the first annual review after the student reaches age fifteen. *Id.* § 200.4(h)(1)(ii).

the opportunity and procedure for obtaining from a State agency . . . at least six months before such student attains the age of 21 [or] . . . a determination of the student's need for adult services and a recommendation of all appropriate programs . . . which may be available when the student becomes ineligible for tuition-free educational services.<sup>384</sup>

To take advantage of this process, however, a parent or student must sign a consent form authorizing the school district to send the student's name and relevant information in a report to the Commissioners of the Office of Mental Health, the Office of Mental Retardation and Developmental Disabilities, the Office of Children and Family Services, or the Department of Education.<sup>385</sup> This CSE responsibility complements the duty of DSS to refer certain disabled children in foster care to the same state agencies for adult services.<sup>386</sup>

In transition planning, the duties of child welfare professionals and educators significantly overlap. The child welfare and school systems each operate under a similar legal mandate to prepare adolescents to enter the adult world by providing them with education, training, resources, and links to adult service systems. Transition planning for children in foster care—particularly those with identified disabilities—presents a fruitful opportunity for effective collaboration among DSS, contract agencies, school districts, and other service providers.

## XI. CONCLUSION

The federal law calls on each state to treat the education of children in foster care as a key priority. Current federal and state laws, though imperfect, provide valuable tools to address children's educational needs. In New York State, it is time for child welfare practices to meet the promise of New York law.<sup>387</sup>

When children are placed in foster care, their schooling should be a central concern. Child welfare policies and practices should ensure that a child's education is a critical element in placement

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<sup>384</sup> *Id.* § 200.4(h)(1)(ii).

<sup>385</sup> If agencies dispute their responsibilities, the information must be released to the Council on Children and Families to resolve the dispute. *Id.* § 200.4(h)(2)(ii)(i).

<sup>386</sup> See N.Y. SOC. SERV. LAW § 398-c (McKinney 2003) (outlining the steps by which the commissioner must determine a child's need for adult services in response to reports).

<sup>387</sup> In addition, we call for legislative reform—particularly in the area of school transfers—so that children in foster care, like children who are homeless, are better assured educational stability each time they move.

decisions and permanency planning. We also recommend that courts, child welfare professionals, law guardians, and CASAs employ the checklist developed by the Judicial Commission on Justice for Children to ask about a child's educational needs periodically and at critical junctures. We suggest that biological parents and foster parents be supplied with information about their children's educational needs and entitlements and that, in every case, parental roles and responsibilities relating to school be clearly delineated. On a system-wide level, all players who have a role in furthering the educational interests of children in foster care will benefit from comprehensive and cross-system training.

Adults who speak out about the rocky path they have traveled from foster care to successful adulthood often attribute their life success to their education and a caring teacher.<sup>388</sup> By helping children in foster care access a stable and appropriate education, we can better ensure them enhanced well-being and life success.

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<sup>388</sup> See, e.g., ANTWONE QUENTON FISHER & MIM EICHLER RIVAS, *FINDING FISH* (2001) (detailing the perils of foster care and a path to success); THERESA CAMERON, *FOSTER CARE ODYSSEY: A BLACK GIRL'S STORY* (2002) (providing a biographical view of life from foster care to Harvard University).