

# Foster Care & Education

## Q&A

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## School Stability for Students with Disabilities in Foster Care: The Intersection of Federal Laws

*by the Legal Center for Foster Care and Education*

### Introduction

Students experiencing foster care often face numerous educational challenges; they move frequently, and are more likely to be disciplined at school, less likely to read on grade level, and less likely to graduate on time.<sup>1</sup> For students in foster care with disabilities, these challenges become more acute. Nationally, it is estimated that students in foster care are 2.5 to 3.5 times more likely to receive special education services than their non-foster care peers, though it is likely that many more students in foster care may be eligible but go without needed services.

Fortunately, several federal laws provide protections for these students:

- Under the **Individuals with Disabilities Education Act (IDEA)**, children with disabilities have rights to services and supports to help them succeed in school.
- As children in foster care, these students are also entitled to school stability under
  - the **Every Student Succeeds Act (ESSA)**, and
  - the **Fostering Connections to Success and Increasing Adoptions Act (Fostering Connections Act)**.

The following Q&A helps educational advocates - including staff from child welfare and education agencies, parents, foster parents, juvenile court judges, children's, parents' and agencies' attorneys – understand and navigate the complex ways these laws intersect and overlap.

### Relevant Federal Laws

#### **What is the IDEA? What does it mandate? Which agencies must implement it?**

This federal law requires states to provide appropriate special education and developmental, corrective, and supportive services (known as “related services”) to all eligible children with disabilities to help them participate and succeed in school. A child is eligible if they have one or



more of the disabilities listed in the law and the disability results in a need for special education services.

IDEA “Part B” applies to eligible children from age three until they graduate high school with a regular high school diploma, cease to be eligible for public education under state law earlier than age 21, or through age 21. Infants and toddlers with developmental delays between the ages of birth and three are entitled to “early intervention” services under “Part C” of the IDEA. Similar to Part B, children eligible under Part C and their parents are entitled to procedural protections, including prior written notice from the local educational agency (LEA) of any changes to the child’s program and access to a hearing and appeal system when disputes arise.

The state educational agency (SEA) is ultimately responsible to the federal government for the state’s and LEAs’ compliance with the IDEA. LEAs are usually school districts but may also include public charter schools and regional education agencies.

In general, state and local child welfare agencies do not have direct obligations under the IDEA. But sometimes the assistance of a child welfare agency or other state agency is needed for the state to comply with the IDEA. For example, the IDEA requires that a child under age three for whom child abuse or neglect has been substantiated, or who has been identified as affected by illegal

substance abuse or withdrawal symptoms resulting from prenatal drug exposure, must be referred to the early intervention system.<sup>2 3</sup> Other indirect obligations include ensuring:

- an appropriate decision maker is identified,
- individuals with knowledge about the child’s education are invited or have an opportunity to share with the IEP team, and
- complementary supports for students with disabilities are ordered by the court or are provided by other providers.

### **What is ESSA? What does it mandate regarding students in foster care? Which agencies must implement it?**

Enacted in 2015, ESSA amends the Elementary and Secondary Education Act and embeds in federal education law provisions that promote school stability and success for youth in care. It also promotes collaboration between education and child welfare agencies to achieve these goals. SEAs and LEAs have primary responsibility for implementing ESSA’s provisions, in collaboration with state and local child welfare agencies.

ESSA’s foster care provisions require SEAs to include in their state plans the steps agencies will take – in collaboration with the state child welfare agency – to ensure school stability for youth in care, including:

- assurances that children enroll or remain in their “school of origin” unless a determination is made that it not in their best interest.
- immediate transfer of records for students who must change schools, and
- immediate enrollment for students in foster care even without typically required documents and records.



Enrolling schools must also immediately contact the child’s previous school to obtain records. ESSA also requires SEAs to report data on graduation rates and academic achievement disaggregated by students in foster care.

Because students in foster care may require transportation to their schools of origin, local education and child welfare agencies must jointly develop and implement clear written transportation procedures to ensure school stability will be provided, arranged, and funded for the duration of the children’s time in foster care. Transportation should be provided in a cost-effective manner and according to child welfare law provisions that permit using certain Title IV-E funds for school stability transportation. SEAs must provide assurances that LEAs have developed these procedures within their state plans.

ESSA also requires that each SEA designate an employee to serve as the state’s point of contact for child welfare agencies. The point of contact must be someone other than the state’s McKinney-Vento Act Coordinator. Among their responsibilities, the point of contact oversees state implementation of ESSA’s foster care provisions and ensures effective local implementation. LEAs must also designate local points of contact, who collaborate with the local child welfare agency points of contact on implementation.<sup>4</sup>

### **What is the Fostering Connections Act? What does it mandate regarding education? Which agencies must implement it?**

Passed in 2008 as an amendment to Title IV-E of the Social Security Act, the Fostering Connections Act is a federal law that promotes permanent family connections and improves educational opportunities and outcomes for youth in the child welfare system. The Act:

- mandates that all children of compulsory school age in care are enrolled in school;
- promotes school stability by requiring child welfare agencies to create “a plan for ensuring the education stability of the child while in foster care,” including remaining in the school the child was attending at the time of placement unless a school change is in the child’s best interest; and
- requires prompt school enrollment with all school records when a school change is needed.<sup>5</sup>

State and local child welfare agencies have primary responsibility for implementing the Fostering Connections Act. Achieving full compliance with the Fostering Connections Act also requires collaboration with, and the participation of, state and local education agencies. Many of these requirements are complementary, resulting in shared responsibility by child welfare and education agencies.

## **Education Decision Making for Students with Disabilities**

### **What types of education decisions might be needed under IDEA?**

Key IDEA decisions will need to be made for each child, with some actions requiring prior written consent by a qualified decision maker.

Examples of education decisions under the IDEA include:

- Should a child be evaluated for the first time or be reevaluated?



- Should an independent educational evaluation be requested if the school district’s evaluation is not sufficient or appropriate?
- Should the child begin receiving special education and related services?
- What type of services should the child receive?
- Does the Individualized Education Program (IEP) that the school district is offering contain the right services and in the right amount?
- Is the IEP reasonably calculated to enable a child to make appropriate progress in light of the child’s circumstances?
- Where should the IEP be implemented, and is the placement offered the “least- restrictive environment?”
- Is the school district providing all services required under the IEP?
- If a placement, the provision of services, or some other matter is in dispute, should mediation or a special education due process hearing be requested?

### **Who makes special education decisions for students in foster care with disabilities under the IDEA?**

The child’s “parent” as defined by the IDEA (see below) makes special education decisions for students in foster care with disabilities. The IDEA parent may be the child’s biological or adoptive parent or another adult.

### **Who is a “parent” under the IDEA?**

Under the IDEA, “parent” means:

1. A biological or adoptive parent of a child;
2. A foster parent, unless state law, regulations, or contractual obligations with a state or local entity prohibit a foster parent from acting as a parent;
3. A guardian generally authorized to act as the child’s parent, or authorized to make educational decisions for the child (but not the state if the child is a ward of the state);
4. An individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child’s welfare; OR
5. A surrogate parent who has been appointed according to 34 C.F.R. §300.519 and § 639(a)(5) of the Act.

A birth or adoptive parent, when “attempting to act as the parent,” must be presumed to be the parent for IDEA purposes, unless a court has terminated or abridged that parent’s right to make educational decisions. If there is no such birth or adoptive parent, any of the other individuals who meet the IDEA definition of “parent” can be considered the parent. A judge may appoint a specific person who meets the IDEA definition of parent to make educational decisions on behalf of a child. This includes the child’s foster parent, who can also serve as the IDEA parent without a court order unless state law prohibits foster parents from being viewed as the IDEA parent.<sup>6</sup> Unless a court has divested the parent of decision-making authority, a parent’s refusal to agree to the initial evaluation of a child does not alone authorize another IDEA parent (such as a foster parent) to consent to the initial evaluation. If there are concerns that the parent’s refusal is not in the child’s best interest, other steps can be taken to reconsider the parent’s role as the education decision maker.



If there is no birth or adoptive parent “attempting to act,” foster parent (if state law allows), or other court-appointed adult to make special education decisions for a student with disabilities in foster care, the school must appoint a surrogate parent for the child. The surrogate parent may not have a personal or professional interest that conflicts with the child’s interest and must have the knowledge and skills to adequately represent the child. According to federal law, the school district must make reasonable efforts to assign the surrogate parent within 30 days, although some states have a shorter timeframe. No person who is an employee of an agency involved in the education or care of a child can be appointed as a child’s surrogate parent by either a court or a school district. As an alternative, a juvenile court can also appoint a surrogate parent (see more below).

### **What is the role of a child’s IDEA parent?**

The rights afforded through IDEA flow to the IDEA parent of the student with disabilities. Therefore, it is the IDEA parent who must give written consent for evaluations and for special education services to begin. The IDEA parent, a member of the IEP team, must receive notice of the meetings and be given every opportunity to participate in developing the IEP that lists the special education and related services the child will receive. The IDEA parent is authorized to agree with or object to the IEP team’s proposal and to request mediation or a special education hearing to resolve a dispute.

### **What is the role of the foster parent?**

If there is no birth or adoptive parent “attempting to act” or the court has limited the birth or adoptive parent’s rights to make education decisions, the child’s foster parent can be the IDEA parent unless state law prohibits foster parents from performing this role. Even in these states, a court can order a foster parent to serve as the IDEA decision maker (typically in the role of surrogate parent). When a birth or adoptive parent continues to be the IDEA parent after a child’s placement into foster care, foster parents can still play a role. For example, foster parents may be invited to attend the IEP meeting to share what they observe and know about the child’s strengths and needs, or can work with a parent with education rights or other IDEA parent to support their decision making relating to the student. Remember that even when someone else is the IDEA parent, foster parents must still ensure students attend school and complete homework and may make certain day-to-day education decisions under the “reasonable and prudent parent standard” outlined in federal law.<sup>7</sup>

### **What is the role of the caseworker or child welfare agency?**

Although child welfare agency caseworkers cannot be IDEA parents and cannot sign as a parent or consent to IEPs, they can serve an important role. Caseworkers can and often should be invited to an IEP team meeting to share information about the child. Caseworkers should also support the birth or adoptive parent as the IDEA parent by keeping parents involved and empowered to make education decisions for their children. Special education procedures can be confusing, and the caseworker can provide essential advice and support. The caseworker can make sure the school district treats the parent of a child in care the same way it treats any other parent. Caseworkers can ensure there is an education decisionmaker for children at all stages of a child welfare case. Child welfare agencies can also work with local school districts to ensure there is a pool of well-trained surrogate parents. In rare instances, an IDEA parent may not want a caseworker to attend an IEP meeting. In these instances, competing interests need to be



navigated, including the custodial agency’s obligation to plan for the child’s education along with the IDEA parent’s view and feelings about their participation. Finally, an exception related to consent for initial evaluations allows the court to appoint ANYONE to consent for an initial evaluation, including a caseworker.<sup>8</sup>

### **What is the role of the court?**

Judges can monitor whether IDEA requirements are being met, identify children who would benefit from special education services early, and ensure a qualified person is in place to consent to and make education decisions about special education services. Under the IDEA, when a child is in the custody of a child welfare agency, a judge can limit the birth or adoptive parent’s right to make education decisions for the child and when necessary, can identify an education decision maker or appoint a surrogate parent who can make education decisions for children while their cases are open. Judges can also order parties to the child welfare case to take certain action within the special education process. While courts can’t direct school personnel to act or dictate what happens within an IEP meeting, judges can order child welfare agencies to arrange or provide additional services to support the student outside school.

### **Who can consent to an initial evaluation for students in foster care who are suspected of having a disability under the IDEA?**

Anyone can request that an evaluation be conducted, but there are additional rules about who must consent to the evaluation taking place. An initial evaluation is the first evaluation of a child to determine his or her eligibility for special education. The child’s IDEA parent must give written consent for an initial evaluation and for special education services to begin for the first time. When a child in the custody of a child welfare agency is suspected of having a disability and has no IDEA parent, a court may appoint any person to consent to the initial evaluation. For this limited purpose - and only in states where children in foster care are considered “wards of the state” – a judge may designate anyone (including a caseworker) to consent to the child’s initial evaluation. This is a very limited exception to the general rule that caseworkers can never be IDEA decision-makers. If a judge designates a caseworker to consent to the initial evaluation, an IDEA parent must be identified or a surrogate must be appointed quickly, because they will need to be in place to consent to services after the initial evaluation is completed.

### **Who can consent to an IEP?**

The IDEA parent can consent to an IEP. The child’s IDEA parent will also consent to services starting after the initial evaluation. If there is no person who meets one of the other categories under the parent definition of IDEA, a surrogate must be appointed either by the school or the court to consent to the beginning of services and every IEP thereafter. Caseworkers or other child welfare agency employees are prohibited from consenting to IEPs.

## **Education Decision Making for School Stability (ESSA/Fostering Connections)**

### **What types of education decisions might be needed under ESSA and the Fostering Connections Act?**

Under ESSA and the Fostering Connections Act, education and child welfare agencies must work together to ensure school stability for students experiencing foster care. Upon a student’s entry into foster care and at every subsequent change in living placement, the LEA and child



welfare agency must jointly determine whether it is in a student's best interest to remain in the school of origin. This is called a best interest determination (BID). A child's education decision maker should be given the opportunity to engage in the BID and provide input. Many jurisdictions have created dispute resolution processes in the event the education decision maker disagrees with the BID outcome.

### **Under federal law, who makes decisions regarding school stability?**

Many child welfare agencies already have processes for making best interest decisions under the Fostering Connections Act and therefore typically guide the decision-making process about whether it is in the child's best interest to change schools. An education point of contact or education liaison at the child welfare agency and/or the child's caseworker will typically coordinate the best interest determination, often working collaboratively. Joint federal guidance directs that child welfare agencies seek input from others involved with the child, including the parents, foster parents, education decision makers, relevant school personnel, caseworkers, and other people who know the child well. When a consensus cannot be reached, child welfare agencies should make the final decision about best interest, as outlined in the joint guidance, unless state law or policy dictates otherwise. A party to the child welfare case who disagrees with that decision could bring the agency's decision before the court for review.<sup>9</sup>

### **What is the role of a child's birth or adoptive parent?**

The birth or adoptive parent should be consulted to provide information about the child that informs the best interest determination. However, unless state law or policy say otherwise, the child's parent or educational decision maker will not make the final best interest determination for a child. A dispute resolution procedure may be in place if a parent disagrees with the outcome.

### **What is the role of the foster parent?**

Foster parents and guardians can play an important role in best interest determinations because they support the child's education on a daily basis. When they are knowledgeable about the child's educational placement, foster parents and guardians' input should be considered when determining whether remaining in the school of origin is in a child's best interest. It is important to discuss what impact, if any, school placement may have on the foster placement. However, the child's best interest (not the foster parent's best interest) should guide the decision.

### **What is the role of the school or school district?**

Although the child welfare agency is typically the agency that coordinates and facilitates best interest determinations, schools and school personnel play an important role, particularly for students with disabilities. School personnel can provide important information about the child's educational strengths and needs, the child's attachment to the school community, and whether the child is currently in an appropriate school setting. For students with disabilities, school personnel are important sources of information about the child's progress with their special education services and what impact a school change may have on the child's education.

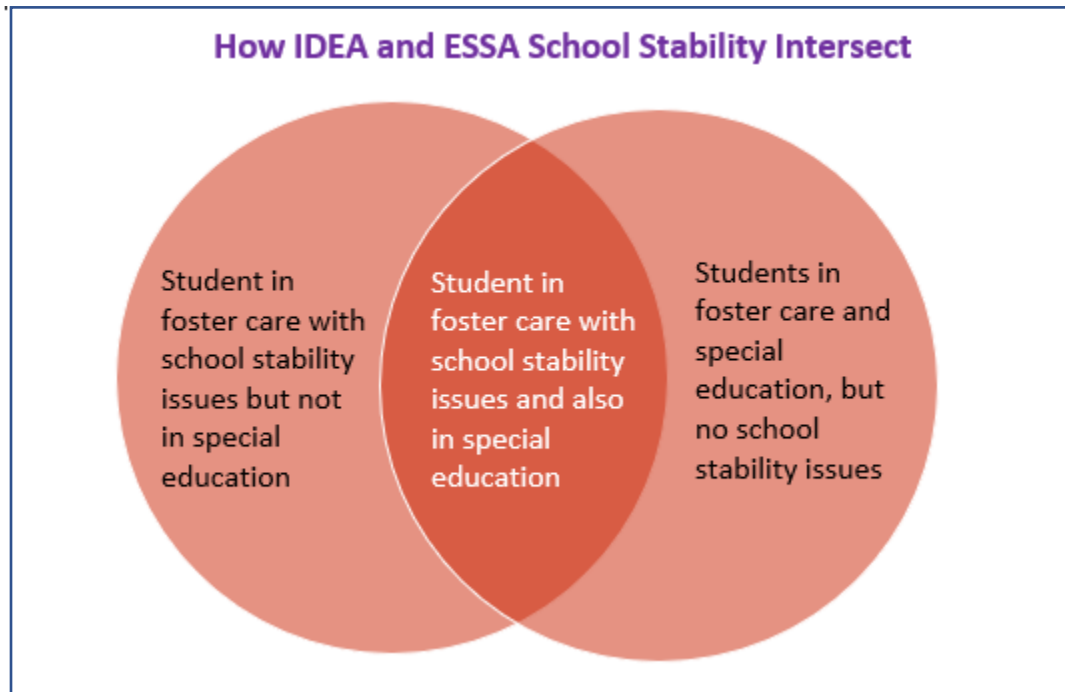
### **What is the role of the court?**

In many jurisdictions, courts oversee the best interest determination process, sometimes overturning best interest determinations made by child welfare agencies. More broadly, judges



can inquire about school stability, ensure child welfare agencies are considering proximity to the child’s school of origin and appropriateness of the current school when making living placement changes, and consider the child’s education needs at every step of the court process.

## Intersection of IDEA and School Stability Decisions



### **What factors should be considered when making best interest determinations for students in foster care? How may those factors be weighed differently for students with disabilities?**

As outlined in the joint federal guidance following the passage of ESSA, the following factors should be considered when making a best interest determination:

- Preferences of the child;
- Preferences of the child’s parent(s) or education decision maker(s);
- Child’s attachment to the school, including meaningful relationships with staff and peers;
- Placement of the child’s sibling(s);
- Influence of the school climate on the child, including safety;
- Availability and quality of the services in the school to meet the child’s educational and socioemotional needs;
- History of school transfers and how they have impacted the child;
- How the length of the commute would impact the child, based on the child’s developmental stage;
- Whether the child is a student with a disability under the IDEA who is receiving special education and related services or a student with a disability under Section 504 who is receiving special education or related aids and services and, if so, the availability of those required services in a school other than the school of origin<sup>10</sup>; and
- Whether the child is an English language learner and is receiving language services, and if so, the availability of those services.





While each of these factors should be considered for every child in foster care in need of a BID, the factors highlighted above are particularly important for students with disabilities. Data show that students with disabilities in foster care are more mobile than their peers, so child welfare agencies and schools must collaborate to ensure particular attention is given to these students during the BID process. Students with certain disabilities might struggle with changes in environment and maintaining consistent classes and teachers is often crucial to students' progress. If a child is doing well and making progress with the services currently being provided, care should be taken to ensure continued enrollment in the school of origin, or the availability of similar services at a new school if the child must move. While continuity of school environment and services is important, some students with disabilities may experience difficulties with long school commutes, so length of commute must be considered. As with all students in foster care, transportation costs cannot be considered during the BID.

In all cases, an informed decision requires reviewing the child's school records (the child's special education evaluations, IEP, and progress reports). The BID team, and particularly the child welfare agency, should also investigate the potential school district's track record in meeting needs of students with disabilities. Caseworkers or other agency staff need to know about various local school districts or seek out others in the community with this expertise and use their experience to make an informed decision.

### **What is the role of a special education decision maker or IDEA parent in a best interest decision?**

IDEA parents and special education decision makers play a critical role, even if they lack final decision-making authority in best interest decisions. They can share valuable information about the child's special education needs, whether those needs are being met in the current school placement, and what types of services and supports the child will need in a new school environment. Furthermore, if a child's school placement changes, IDEA parents and special education decision makers are crucial to ensuring:

- a student's IEP can be implemented in the new school, including comparable services if necessary;
- all of the child's educational needs can be met in the new placement; and
- the child can still receive services in the least restrictive educational setting.

## **Other Key Areas of Intersection between the IDEA/ESSA/Fostering Connections Act**

### **Transportation**

#### **Do students in foster care with disabilities have a right to transportation under the IDEA?**

The IDEA includes transportation as a "related service" that the LEA must include in an IEP if it is determined to be necessary for a child to benefit from their special education program. The transportation must be appropriate for the child. For example, if a child has a disability that requires a wheelchair, a lift bus may be required. When transportation is a related service in an IEP, the LEA is required to provide it.<sup>11</sup> Like all IDEA services, necessary transportation must be



free to the child or family. The IDEA does not speak to transportation to maintain school stability when a child moves to a foster home in another school district or attendance area (this is addressed in Fostering Connections Act and ESSA). However, if maintaining school stability is necessary for a child to benefit from the agreed-upon special education program, then complying with IDEA may also require ensuring school stability in that special education placement.

### **When do children in foster care have the right to transportation under ESSA and the Fostering Connections Act?**

Under ESSA and the Fostering Connections Act, when a child enters foster care or changes living placements, there is a presumption that the child will remain in the school of origin, unless a school change is in the child’s best interest. ESSA requires LEAs receiving Title I funds to collaborate with child welfare agencies to ensure transportation for children in foster care is provided, arranged, and funded.

Fostering Connections permits child welfare agencies to claim Title IV-E maintenance dollars for IV-E eligible children to support “reasonable travel for the child to remain in the school in which the child enrolled at the time of placement.”<sup>12</sup> This means that federal IV-E dollars can sometimes be used to partially reimburse the school of origin transportation costs for certain IV-E eligible children in foster care.

Under ESSA, all LEAs must develop and implement clear written procedures—developed with the relevant child welfare agencies—that ensure prompt and cost-effective transportation to ensure school stability. LEAs must ensure transportation is provided for children in foster care even if it does not transport other students. These procedures must include provisions for students in care who move from one district to another or across state lines. Children are entitled to school stability transportation for the duration of their time in foster care.

Finally, although every child in foster care is entitled to school stability when in their best interest and the transportation needed to facilitate that, arrangements to coordinate, provide, and fund this transportation vary at the local level according to local agreements.

### **Which agency pays for a student’s transportation to the school of origin?**

LEAs must collaborate with child welfare agencies to ensure transportation for children in foster care to their schools of origin is arranged, provided, and funded. Every LEA has developed and implemented clear written procedures to ensure prompt, cost-effective transportation to support school stability. These procedures must include provisions for eligible children in foster care who move from one school to another, including across school district and state lines. Children are entitled to transportation to support school stability for the duration of their time in foster care and until the end of the school year in which they exit foster care. LEAs must cover the standard cost of transporting a child in foster care to the school of origin. Only the “additional costs” incurred to ensure school stability are to be addressed through the joint procedures. Under ESSA, if additional costs are incurred in providing transportation to maintain children in foster care in their schools of origin, the LEA may agree to pay the cost of such transportation, the local child welfare agency may agree to reimburse the LEA for the cost, or the LEA and the child welfare agency may agree to share the cost of such transportation.<sup>13</sup>



For every student in foster care, efforts must be made to ensure the transportation adopted by the LEA is cost effective. To this end, LEAs shall consider whether transportation can be provided by using the LEA's own preexisting bus routes (e.g., adding a bus stop on an existing route). LEAs should explore the district's routes in combination with those of surrounding districts to determine if transportation can be provided at no or minimal cost. Working with the child welfare agency, LEAs shall consider whether the child's caretakers or foster parents could transport the child, including mileage reimbursement. Additionally, nothing in these procedures supersedes students receiving transportation if otherwise legally required (i.e., transportation written into an IEP as a related service under the IDEA).

### **Which agency pays for transportation to a school of origin when transportation is listed as a related service in an IEP?**

When a student is entitled to transportation as a related service, the LEA of attendance typically pays the cost for transportation. When a child is in foster care, has an IEP with transportation as a related service, and requires transportation to the school of origin, the LEA of origin remains responsible for paying the transportation costs, and IDEA funds may still be used to reduce or offset the cost to the LEA, even though the child may reside out of district. Although "additional costs" for transportation to schools of origin are typically shared through an LEA's cost-sharing agreement with the local child welfare agency, when transportation is provided because it is a related service in an IEP, the cost falls to the LEA of origin.

## **Impact of School Mobility on IDEA Evaluations and Services**

### **What happens to a child's IEP when the child moves as a result of a foster care living placement change?**

When a child with an IEP transfers to another school district and enrolls in a new school within the same school year, the new district must, in consultation with the child's IDEA parent, provide the child with a "free appropriate public education" (FAPE). In this situation, FAPE includes services "comparable" to the services in the IEP developed by the old school district until the new district adopts the old IEP or develops a new IEP according to IDEA procedures. If a child with an IEP transfers to a school district in another state, the new school district may choose to reevaluate the child but must provide FAPE as outlined above in the meantime.<sup>14</sup>

When students in foster care change schools due to living placement changes, they are entitled to immediate enrollment, even without typically required documents, including IEPs. Child welfare agencies and schools should ensure all records are transferred promptly.

### **What happens when a child in foster care moves during an evaluation period?**

The IDEA generally requires states to complete initial evaluations within 60 calendar days of receiving an IDEA parent's written consent to the initial evaluation. However, states can set longer or shorter timelines, making it important to learn relevant state timelines. This timeline can be extended if the child enrolls in another school district before the evaluation has been completed, but only if the new district is "making sufficient progress to ensure a prompt completion of the evaluation," and the IDEA parent and the district agree to a new deadline.<sup>15</sup> The old and the new districts must ensure that children's assessments are coordinated and evaluations are prompt and complete.<sup>16</sup>



For highly mobile students, such as students in foster care, the U.S. Department of Education’s Department of Special Education and Rehabilitative Services urges school districts to complete expedited evaluations and eligibility determinations, ideally in 30 days whenever possible. Expedited evaluations and eligibility determinations reduce the likelihood that a child moves during an evaluation period.

## Residential Facilities

### **How do the IDEA, ESSA, and Fostering Connections Act protect students in foster care with disabilities who live in residential facilities?**

Children who are eligible for special education and live in residential facilities have the same right to IDEA protections - appropriate special education programs, placement in the least restrictive environment, and procedural safeguards— as children living with their birth or foster parents.

Residential facilities can include residential mental health programs, group homes, drug and alcohol treatment centers, and evaluation centers. Children in foster care, especially older youth, are often placed by courts or other public agencies in residential facilities, either for special help or because no foster family is available. Children may remain in the residential setting for only a short time or a longer period. The Family First Prevention Services Act of 2018 focuses on reducing use of residential facilities for youth in foster care, and ensuring they are used only when necessary.<sup>17</sup> Children living in residential settings are disproportionately identified as eligible for special education services or have not yet been identified as eligible but should be.

Under ESSA and the Fostering Connections Act, even when a child’s next placement is appropriately determined to be a residential setting, the child welfare agency must make a school stability/best interest determination for the child. Students with or without IEPs should never be automatically enrolled in residential facility schools without a best interest determination. This is important when the placement is short term. In that case, the child’s school setting should change only if it is determined to be in the child’s – not an agency’s – best interest to change schools. If it is not in the child’s best interest to continue in the same school while attending the residential program, the next question is where the child should attend school. Although the child’s needs may dictate otherwise, the initial presumption for a child with a disability should be that the child will attend the least restrictive environment—often a regular public school with whatever support is needed to make educational progress in that setting.

### **What happens when a student in foster care with an IEP is moved to a residential facility?**

When a student with a disability is moved into a residential facility, the child welfare agency with care and custody of the child should conduct a best interest determination to decide if it is in the child’s best interest to remain in the school of origin. If not, the student should attend the nearest community school that can meet the student’s special education needs. If it is in the child’s best interest to change schools, the new school must enroll the student immediately, even without typically required documents. Upon enrollment, the enrolling school must either adopt the student’s IEP or create a new IEP according to IDEA procedures.<sup>18</sup> This is also true if the child is enrolled at the facility’s on-ground school.



### **What happens when a student in foster care with an IEP moves out of a residential facility?**

Students transitioning out of residential facilities are entitled to the same protections under IDEA, ESSA, and Fostering Connections as a student in foster care being moved between any other placement. The child welfare agency must always conduct a best interest determination upon a change in living placement. Typically, students transitioning out of residential facilities will either attend community schools near their new living placements that can meet their special education needs, or a student may reenroll at the school the student attended before placement into the residential facility, if the state’s definition of “school of origin” allows.

### **Coordinated Transition Planning for Highly Mobile Students**

#### **What is required regarding transition planning under the IDEA, ESSA, and the Fostering Connections Act?**

The IDEA and the Fostering Connections Act both require “transition planning for older youth.” The IDEA focuses on preparing a student with disabilities for life after high school graduation or upon the student’s aging out of or exiting the special education system. The Fostering Connections Act’s transition requirements are designed to support older youths’ exit from the child welfare system and prepare them for an independent adulthood.

Under the IDEA, beginning no later than the first IEP to be in effect when the child turns 16, a student’s IEP must include appropriate measurable postsecondary goals (based on appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills) and the transition services needed to reach those goals.<sup>19</sup> The student must be invited to attend any meeting at which transition goals and services are being discussed; if the student does not attend, the school district must take steps to ensure that the student’s preferences and interests are considered.<sup>20</sup> Many states mandate that transition planning start earlier, usually at age 14.<sup>21</sup> Other key agencies can be invited to these meetings as well, such as vocational rehabilitation or adult developmental disability agencies, to ensure coordination and a smooth transition to adult supports if needed.

Under child welfare law, by the time the youth turns 16, the youth’s case plan must describe the services needed to help the youth transition from foster care to independence, including planning and services related to education. The Fostering Connections Act strengthened this mandate by requiring, as part of the case review system, that at least 90 days before a youth is discharged from care at age 18 or older, a transition plan be developed with the youth. The child welfare agency must help the youth develop a transition plan that, at the youth’s direction, is detailed and personalized and includes specific options on housing, insurance, and education; local opportunities for mentors and continuing support services; and workforce supports and employment services.<sup>22</sup>

Youth exiting from their local school district and the child welfare system face considerable challenges. Effective and coordinated transition planning can help. This is particularly true when coordinating an IDEA transition plan with a child welfare transition—two independent plans that should inform each other. Caseworkers, parents, judges, children’s lawyers, and school staff must ensure each child receives the education and other supports he or she needs to successfully



transition to further schooling, employment, and independence. The earlier effective transition planning and services start, the better for the youth. The end of free education and special education is difficult for all children with disabilities. For children with disabilities who do not live with family, the transition can be daunting without the right coordinated support.

## **Conclusion**

While the case scenarios above may seem familiar to education advocates, the answers often depend on local agreements, state laws, and individual circumstances. Both the federal laws supporting students with disabilities in foster care and the cases themselves can be incredibly complex, making this area of law difficult to navigate. However, with a solid understanding of how these laws intersect, child welfare and education professionals can provide effective advocacy that ensures students in foster care with disabilities receive the educational resources, supports, and stability to successfully complete their K-12 education.



## **CASE SCENARIOS**

### **Example #1: Sallie**

**Sallie** has a specific learning disability and recently began getting special education services in the school district where she lives with her foster parents. Her grades and behavior in school have improved, but behavior problems at her foster home have led to a request that the child welfare agency relocate Sallie. The caseworker and Sallie’s guardian ad litem (GAL) – a court appointed advocate for the child – agree that Sallie’s living placement should change, but they are unsure whether she should change schools. Sallie’s mother is also involved, although she is not able to have Sallie live with her at this time.

#### **Who decides whether Sallie should change schools?**

The child welfare agency and the school district are charged with working collaboratively to consider whether the Sallie should remain in the same school or whether a school change is in her best interest. In making this decision typically the child welfare agency will lead the process and should consult with Sallie and every adult who may have pertinent information about the child (including the appropriate school personnel), gathering all information needed to make a well-informed best interest determination. If there is disagreement, typically the child welfare agency has the authority to make a final best interest determination, however this determination is always reviewable by the court and many jurisdictions have dispute resolution procedures in place.

#### **Who should be consulted?**

Child welfare agencies should consult the biological parents as well the child’s attorney and GAL, CASAs, relatives, foster parents, teachers, caseworkers, and the court-appointed education decision maker or surrogate parent when applicable. Most importantly, the child should be consulted to determine her if she wants to remain in the same school or change schools.

Since Sallie is receiving special education services, the agency must also consult the person with education decision-making authority, often known as the IDEA parent. In this case, the IDEA parent may be Sallie’s mother (who is still involved). If Sallie’s mother still has education decision-making rights, making sure she stays engaged in the special education process is critical – especially if reunification is the goal. If Sallie’s mother is not the IDEA parent, her foster parent is permitted to (in most states) and is likely serving in this role. Since Sallie is in the process of changing foster homes, it is important to make sure she has a clearly determined IDEA parent throughout the process and moving forward. For example, that could be her new foster parent, or someone appointed by the court during the interim or for the long term.

#### **What factors should be considered?**

The best interest determination (BID) must weigh a number of factors, including the appropriateness of the educational setting and proximity to the school in which the child is enrolled at the time of the placement change. Additionally, if the child has special education needs protected under the IDEA or Section 504 of the Rehabilitation Act of 1973,<sup>23</sup> the BID must consider these needs in the BID process.



In Sallie’s case, additional BID factors should be considered, including the availability and quality of services in her current and potential schools; her social-emotional needs, such as her attachment to school staff; and the impact of a school move, particularly considering her special education needs. Other factors that should be considered include: How does Sallie feel about her current school? Does she have a good relationship with teachers, staff, or students at the school? What is Sallie’s permanency plan? Is reunification with her mother a goal for the near future? If so, can her current school support that future transition? Note that although transportation costs should not be a factor in the BID, that length of commute, especially given Sallie’s special education needs, may be an important consideration.

**Are there any IDEA, ESSA, or Fostering Connections Act mandates that might help Sallie?**

Students in foster care with IEPs are protected by both the school stability provisions in ESSA and the protections for students with disabilities under IDEA. The importance of school stability, supported by experience and research, is reflected in the school stability provisions of Fostering Connections and ESSA, which create a rebuttable presumption favoring the child remaining in the same school. As long as the school of origin continues to provide the student with FAPE in the least restrictive environment, the IDEA will also support that continued school placement.

**If transportation is needed for Sallie to remain in her school of origin, who is responsible for arranging and paying for that transportation?**

If Sallie needs transportation to stay in her school of origin, ESSA provides that the LEA must work with the child welfare agency to ensure transportation is provided, arranged, and funded (this process should be detailed in all LEA’s ESSA plans). The Fostering Connections Act permits the child welfare agency to use Title IV-E funding to reimburse for a portion of this transportation for certain children (those who are IV-E eligible). However, if the new school district agrees that it cannot meet Sallie’s special education needs and that she must remain in the program in the old school district for her IEP needs to be met, Sallie’s transportation could be requested as a “related service” under IDEA and should be memorialized in Sallie’s IEP. The IDEA parent should be involved in advocating for transportation as a related service if that is what is needed.





## Example #2: Juanita

**Juanita** has just entered foster care after being removed from her grandmother’s home. She is living with a foster family and has several significant mental health diagnoses. Her mother has addiction problems and has disappeared. Juanita’s father is deceased. The child welfare agency and the juvenile court have determined Juanita needs mental health treatment that can only be provided at a residential treatment facility. Surprisingly, in view of her serious mental health issues and consistently poor school performance, Juanita has never been evaluated or identified as needing special education. The child’s caseworker thinks Juanita should stay in the same school she attended while she was living with her grandmother (before she was placed in care). The caseworker wants to make sure Juanita is promptly evaluated and starts getting special education help.

### **Can Juanita stay in the same school with special education services after she is placed at the residential treatment facility?**

The short answer is yes – she MAY be able to stay, but it will need to be determined that it is the appropriate placement under ESSA and Fostering Connections related to school stability AND under IDEA. The school must also satisfy FAPE and least restrictive environment criteria. Juanita’s right to school stability under ESSA and the Fostering Connections Act continue even if placed in a residential treatment facility, rather than remaining in a foster home. Under ESSA and Fostering Connections the education agencies and the child welfare agency serving Juanita must work collaboratively to ensure her school stability. The two agencies must work together to determine whether a school change is in Juanita’s best interest, with a presumption in favor of school stability.

Juanita still has certain rights under IDEA if she is placed in a residential facility, including those related to FAPE and least restrictive environment.

### **If Juanita attends the on-site educational program, which district funds her educational program?**

If it is determined that under IDEA she may need to be educated at the onsite educational program (i.e., this is determined to be the least restrictive environment that meets her needs), additional questions can arise as to which school district – the district where she is a resident, where the facility is located, or where she is attending school – is responsible for conducting the initial evaluation, ensuring she gets FAPE in the least restrictive environment, and funding for her special education program. Look to state law for the answers to these important questions as the rules vary widely by jurisdiction.<sup>24</sup>

### **Who is authorized to consent to a special education evaluation for Juanita and decide what services she should receive? Can the court help?**

To ensure that Juanita is evaluated and, if eligible, she starts getting special education services, it is necessary to determine who will serve as Juanita’s “IDEA parent” since her parents are not available. Options include Juanita’s brand-new foster parent (if not prohibited by state law); or a surrogate parent appointed by the school district or the court, possibly Juanita’s grandmother since she knows Juanita. Juanita needs an IDEA parent to request and consent to an initial evaluation, consent to implementing the initial IEP so special education services can start, and to



represent the child in the special education process. If no one can act as IDEA parent, a court can appoint someone (including a caseworker) to consent to the initial evaluation. However, Juanita will still need a surrogate parent and the responsible school district (or the court) must appoint one within 30 days.

**Who else has a role in deciding what is best for this student?**

- X Juanita's parents are not available to help with this decision
- ✓ Juanita is available and should be consulted.
- ✓ Staff from Juanita's current school
- ✓ Juanita's current foster family
- ✓ Juanita's grandmother
- ✓ Any attorney appointed to represent Juanita
- ✓ Other advocates



### Example #3: Sam

**Sam** is a student receiving special education services who has just been removed from his parents and placed with a foster family in another school district. The child welfare agency, in collaboration with Sam's prior school's special education staff and in consultation with the GAL, considered whether remaining in the same school was in his best interest and decided that a new school with a new peer group was needed. However, Sam was in the middle of a reevaluation at his prior school at the time of his living placement change, which was not completed. When Sam's caseworker tried to enroll him in the new school district, the district demanded proof of Sam's age and residency and wanted the prior school to complete the reevaluation before allowing him to enroll in the new school. The district also prohibited enrollment if the caseworker could not produce a copy of Sam's IEP and most recent evaluation. The school district stated that these requirements apply to all new enrollees, regardless of whether they are eligible for special education or are in foster care. The caseworker did not have the documents in Sam's file to satisfy the enrollment demands of the new school district.

#### **Can the new school district refuse to enroll Sam?**

The short answer is no. Doing so violates ESSA and the IDEA. ESSA mandates that when children who are in foster care change schools the new school cannot refuse to enroll the student for lack of necessary documentation. The new school must immediately enroll the student and contact the student's previous school to obtain their school records, including IEPs (which the old school has a responsibility to immediately provide). Parental consent is not required to release school records from a previous school to an education agency in which a child is enrolling.<sup>25 26</sup> ESSA defines immediate enrollment as "enrollment as soon as possible in order to prevent educational discontinuity." In Sam's case, his social worker should remind the school district of their responsibilities under ESSA – a refusal to enroll violates federal law.

The new school district's practice of not allowing Sam to enroll without his completed reevaluation and IEP documents also violates IDEA, which prohibits disability-based discrimination if children eligible for special education are required to produce additional records to enroll in the district. Children eligible for special education qualify as "otherwise handicapped person[s]" under §504 and as "qualified individual[s] with a disability" under Title II of the ADA.<sup>27</sup> It could be argued that requiring additional documents before Sam and other children with disabilities can enroll in school violates the rule that "[n]o qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance."<sup>28</sup>

#### **Once enrolled, what happens to Sam's IEP?**

The new school district has the duty to provide services that are "comparable" to what Sam has been receiving. Once the school enrolls and obtains Sam's records, the caseworker should work with the school to quickly transfer the IEP and other records needed to ensure Sam has an appropriate school placement. Additionally, Sam's new school should promptly review and revise Sam's old IEP.



## Can the new school district require the previous school district to complete Sam’s re-evaluation?

Typically, evaluations must be completed within 60 days of the IDEA parent consenting to the evaluation, though some states have set shorter or longer timelines. The enrolling school district may go beyond the state-mandated timeline only if it is “making sufficient progress to ensure a prompt completion of the evaluation,” and the IDEA parent and the district agree to a specific new deadline.<sup>29</sup> The old and the new districts must ensure that children’s assessments are coordinated and that evaluations are prompt and complete.<sup>30</sup> The new school district may not deny Sam enrollment based on his incomplete evaluation and must work with the previous school district to ensure the evaluation is completed timely. Because of issues like this, it is best practice for any school district evaluating a student in foster care, or any other highly mobile student, to adhere to an expedited evaluation schedule – typically 30 days – as outlined by a Dear Colleague Letter released by the U.S. Department of Education.<sup>31</sup>

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<sup>1</sup> See “Fast Facts: Data at a Glance” at [https://fostercareandeducation.org/DesktopModules/Bring2mind/DMX/Download.aspx?portalid=0&EntryId=2134&Command=Core\\_Download](https://fostercareandeducation.org/DesktopModules/Bring2mind/DMX/Download.aspx?portalid=0&EntryId=2134&Command=Core_Download)

<sup>2</sup> 20 U.S.C. §§1435(c)(2)(G).

<sup>3</sup> For more information about IDEA Part C for infants and toddlers in the child welfare system, see “Infants and Toddlers with Disabilities in the Child Welfare System: What Advocates Should Know about IDEA Part C” at [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/child\\_law\\_practiceonline/child\\_law\\_practice/vol\\_32/january-2013/infants-and-toddlers-with-disabilities-in-the-child-welfare-syst/](https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol_32/january-2013/infants-and-toddlers-with-disabilities-in-the-child-welfare-syst/)

<sup>4</sup> For more information about ESSA’s foster care provisions, see the Every Student Succeeds Act Implementation Toolkit at [https://www.fostercareandeducation.org/DesktopModules/Bring2mind/DMX/Download.aspx?portalid=0&EntryId=2080&Command=Core\\_Download](https://www.fostercareandeducation.org/DesktopModules/Bring2mind/DMX/Download.aspx?portalid=0&EntryId=2080&Command=Core_Download)

<sup>5</sup> 42 U.S.C. §§671(a)(30), 675(1)(G).

<sup>6</sup> 34 C.F.R. §§300.30(a), 303.27(a). (<https://sites.ed.gov/idea/regs/b/a/300.30>)

<sup>7</sup> Under the Sex Trafficking and Strengthening Families Act of 2014, Supporting Normalcy for Children in Foster Care provision, caregivers are required to use a “reasonable and prudent parent standard” when determining whether to allow a child in foster care to participate in educational, extracurricular, enrichment, cultural, and social activities. The aim of this legislation is to give children in foster care the same opportunities and experiences as their non-foster care peers. For more information, see “The Reasonable and Prudent Parent Standard” at [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/child\\_law\\_practiceonline/child\\_law\\_practice/vol-35/october-2016/the-reasonable-and-prudent-parent-standard/](https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-35/october-2016/the-reasonable-and-prudent-parent-standard/)

<sup>8</sup> To see the federal regulations about this exception, see <https://sites.ed.gov/idea/regs/b/a/300.45>.

<sup>9</sup> See the joint federal guidance: <https://oese.ed.gov/files/2020/02/edhhsfostercarenonregulatorguide.pdf>

<sup>10</sup> A school change can detrimentally impact a student with a disability’s access to needed services when the new school cannot support the mandates of the child’s current IEP. In these cases, needed services are often reduced or eliminated when the new school updates the child’s IEP. Although schools are required to provide “comparable services,” this can be a challenge when a school does not have the capacity to provide the same amount or quality of services that the student received at the previous school.

<sup>11</sup> When a child with an IEP that includes transportation as a related service changes living placements but continues to attend the school of origin, it is typically the LEA of origin that will pay for the transportation, though



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this is subject to state or local policies or agreements. LEAs may be hesitant to include transportation as a related service for highly mobile students due to the likelihood that a student may move farther away and require transportation to the school of origin. This is an opportunity for advocacy for the child’s education advocate.

<sup>12</sup> 42 U.S.C. §675(4)(A).

<sup>13</sup> To see more about “additional costs” as defined in the joint federal guidance, see:

<https://oese.ed.gov/files/2020/02/edhhsfostercarenonregulatorguide.pdf>

<sup>14</sup> 34 C.F.R. §300.323(e).

<sup>15</sup> 34 C.F.R. §300.301(d).

<sup>16</sup> 34 C.F.R. §300.304(c)(5).

<sup>17</sup> For more information about the Family First Prevention Services Act, see the ABA Center on Children and Law’s FFPFA toolkit: [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/family-first-act-resources/](https://www.americanbar.org/groups/public_interest/child_law/resources/family-first-act-resources/)

<sup>18</sup> 34 C.F.R. §300.323(e).

<sup>19</sup> 34 C.F.R. §300.320(b).

<sup>20</sup> 34 C.F.R. §300.321(b).

<sup>21</sup> See, e.g., 22 Pa. Code §14.131(a)(5).

<sup>22</sup> See 42 U.S.C. § 675(5)(H).

<sup>23</sup> Section 504 of the Rehabilitation Act of 1973 is a civil rights law that prohibits discrimination against individuals with disabilities. Under Section 504, students may receive school-based accommodations to ensure that students with disabilities receive equal **access** to an education. For more information about Section 504 plans, see this FAQ published by the U.S. Department of Education’s Office of Civil Rights:

<https://www2.ed.gov/about/offices/list/ocr/504faq.html>

<sup>24</sup> For example, in Pennsylvania it is the school district in which the residential facility is located that has primary responsibility for ensuring compliance with the IDEA and state special education law for eligible children in facilities; the programs are then funded primarily by the resident school districts or the state if the resident districts cannot be determined. 24 P.S. §§1306(c), 1308.

<sup>25</sup> 34 C.F.R. §99.31(a)(2).

<sup>26</sup> Parental consent is also not required for the school district to release the records to Sam’s caseworker. For more information about confidentiality and student records for students in foster care, see “The Uninterrupted Scholars Act: How Do Recent Changes to FERPA Help Child Welfare Agencies Get Access to School Records?”

[https://www.fostercareandeducation.org/portals/0/dmx/2013/02/file\\_20130211\\_145758\\_xjnFqt\\_0.pdf](https://www.fostercareandeducation.org/portals/0/dmx/2013/02/file_20130211_145758_xjnFqt_0.pdf)

<sup>27</sup> 34 C.F.R. §104.3(l)(2), 42 U.S.C. §12131(2).

<sup>28</sup> 34 C.F.R. §104.4(a). See also 42 U.S.C. §12132.

<sup>29</sup> 34 C.F.R. §300.301(d).

<sup>30</sup> 34 C.F.R. §300.304(c)(5).

<sup>31</sup> See: <https://sites.ed.gov/idea/files/idea/policy/speced/guid/idea/memosdcltrs/12-0392dclhighlymobile.pdf>

