

# Foster Care & Education

## Issue Brief

### SCHOOL STABILITY UNDER FOSTERING CONNECTIONS: MAKING BEST INTEREST DECISIONS

#### Introduction

Fostering Connections to Success and Increasing Adoptions Act of 2008 (Fostering Connections) places a duty on the child welfare agency to work for school stability for children in care.<sup>1</sup> The Act emphasizes the importance of remaining in the same school by requiring child welfare agencies to work for that goal *unless* “remaining in such school is not in the best interests of the child.”<sup>2</sup> This issue brief focuses on **how agencies should make the best interest determination**: who they should engage in the decision, what factors they should consider, and how to resolve disputes.

Enacted in October 2008, the “Fostering Connections to Success and Increasing Adoptions Act of 2008,” (Fostering Connections) is a comprehensive law designed to promote permanent family connections and improve the lives of youth in the child welfare system. Among other important provisions, the Act requires child welfare agencies to create “a plan for ensuring the education stability of the child while in foster care.” The Act emphasizes the importance of school stability as well as the need for collaboration between child welfare and education agencies.

This brief is part of a series of materials designed to be used together to support all stakeholders in implementing the education provisions of the Fostering Connections Act. To access the full series, please visit [The Legal Center for Foster Care and Education's Fostering Connections Toolkit](#).

<sup>1</sup> Fostering Connections to Success and Increasing Adoptions Act of 2008 (hereinafter “Fostering Connections”), Pub. L. 110-351, 122 Stat. 3949 (codified as amended in scattered sections of 42 U.S.C.).

<sup>2</sup> Fostering Connections § 204(a)(1)(B); 42 U.S.C. § 675(1)(G)(ii).

## The Duty of the Child Welfare Agency to Assess the Child's Best Interests

Fostering Connections requires child welfare agencies to document in each child's case plan that school stability has been carefully considered. Specifically, Fostering Connections requires that the case plan include "assurances that the [child welfare] agency has coordinated with appropriate local educational agencies... to ensure that the child remains in the school in which the child is enrolled at the time of placement" unless "remaining in such school is not in the best interests of the child...."<sup>3</sup> The Program Instruction released by the Administration for Children and Families (ACF Program Instruction) underscores that it is the duty of the child welfare agency to make this decision, noting that the "agency should determine if remaining in the same school is in the child's best interests."<sup>4</sup>

The child welfare agency is well-positioned to make school stability decisions as it can assess non-educational factors such as safety, sibling placements, the child's permanency goal, and the other components of the case plan. The agency also has the authority, capacity, and responsibility to collaborate with and gain information from multiple parties, including parents, children, schools, and the court in making these decisions.<sup>5</sup>

### Seeking Input from Stakeholders

In making the initial best interests determination, child welfare agencies should consult (and perhaps in some instances defer to) other players such as the student, the parent, and school staff who may well be more knowledgeable than the child welfare agency about what is best for the child educationally. As the ACF Program Instruction explains

We encourage the title IV-E agency to specify the parties other than the caseworker and the child's parents who should participate in discussions or decisions related to the educational stability plan. For example, the agency could delineate the circumstances in which the youth, school personnel or education advocates, foster parents, the child's attorney, guardian ad litem, and other persons involved in case planning for the child are a part of the educational stability planning process.... We encourage the title IV-E agency to develop a standard and deliberate process for determining best interests for this provision, guiding who is responsible for decision-making, and properly documenting the steps taken to make the determination.<sup>6</sup>

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<sup>3</sup> Fostering Connections § 204(a)(1)(B); 42 U.S.C. 675(1)(G)(ii).

<sup>4</sup> U.S. Dep't of Health and Human Servs. Admin. for Children and Families, Guidance on Fostering Connections to Success and Increasing Adoptions Act of 2008, 19 (July 9, 2010) (hereinafter "ACF Guidance"), available at [http://www.acf.hhs.gov/programs/cb/laws\\_policies/policy/pi/2010/pi1011.htm](http://www.acf.hhs.gov/programs/cb/laws_policies/policy/pi/2010/pi1011.htm).

<sup>5</sup> Before even reaching this decision, child welfare agencies must attempt to maintain children in placements in proximity to their original school. See Fostering Connections § 204(a)(1)(B); 41 U.S.C. § 674(1)(G)(ii).

<sup>6</sup> ACF Program Instruction, *supra* note 4, at 20.



*Examples:*

A **New Jersey** law that went into effect in September, 2010 requires the child welfare agency, in making the best interests determination, to make reasonable efforts to consult with the child, the child's parent or guardian, the child's GAL, a representative from the current school and a representative from the school in the district in which the new placement is located.<sup>7</sup> Unless there is an immediate safety concern, the child welfare agency has five business days to make a best interest determination.<sup>8</sup>

In March, 2011, the **Virginia** legislature unanimously passed a bill to revise the state's Education Code to permit children in foster care to remain in the same school when in the child's best interests.<sup>9</sup> The bill directs the local child welfare agency to make the best interests determination "jointly with the local school division."<sup>10</sup> Policy guidance issued jointly on December 2, 2010 by the Virginia Department of Education and the Virginia Department of Social Services emphasizes that the local child welfare agency and the schools "must collaborate in determining the school placement that is in every child's best interest when his or her residence changes."<sup>11</sup> These two entities must also consult "with the child and other key partners" when making the best interests determination.<sup>12</sup> The guidance lists examples of "[e]ssential members for the team determination process," and states that the child welfare staff and school representatives should "make all reasonable efforts to involve other individuals who have knowledge of the child."<sup>13</sup> The essential team members include: the child; child's birth parent(s) or prior custodian; an individual the child would like to have participate; caseworker; school representative; and the parents for special education purposes (if applicable).<sup>14</sup> The school representative may also choose to consult with or involve: a school division representative from the child's new school at the time of placement in the new residence and/or the school of residence for the child's new residence; a parent for special education purposes; classroom teachers; a school social worker; school counselors; special education coordinators (if the child has an IEP or 504 plan); or coaches.<sup>15</sup> The caseworker may involve: the child's birth parent(s) or prior custodian; other family members; resource parent(s) or the current placement provider; the guardian ad litem; and other adults who are significant for the child and family.<sup>16</sup> The child welfare caseworker must also engage the child in the process.<sup>17</sup>

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<sup>7</sup> N.J. STAT. ANN. § 30:4C-26b(c) (West 2010).

<sup>8</sup> *Id.*

<sup>9</sup> 2011 Virginia Laws Ch. 154 (S.B. 1038) (amending VA. CODE ANN. §§ 16.1-281 and 22.1-3.4, and adding § 63.2-900.3).

<sup>10</sup> *Id.*

<sup>11</sup> Va. Dep't of Educ. & Va. Dep't of Soc. Servs., Joint Guidance on School Placement for Children in Foster Care, 1 (Dec. 2, 2010) (hereinafter "Va. Joint Guidance"), available at [http://www.dss.virginia.gov/family/fc/school\\_placement.pdf](http://www.dss.virginia.gov/family/fc/school_placement.pdf).

<sup>12</sup> *Id.* at 1.

<sup>13</sup> *Id.* at 4.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 4-5.

<sup>16</sup> *Id.* at 5.

<sup>17</sup> *Id.* at 4.



Clearly child welfare staff should consult with the legally authorized education decision-maker. **Unless someone else has been appointed by the court, or in some cases the school, a child’s education decision-maker for a child in care is most likely the child’s parent.** Engaging parents in a child’s education is an important way to foster the child-parent bond that will ultimately support reunification. When a parent is unable or unwilling to make the decision in the best interests of the child, however, the law allows for alternative decision-makers. Because these decision-makers are already charged with working on behalf of the child’s educational interests, the child welfare agency should usually defer to their judgment.

**Special Education Decision-Makers:** Every child in special education has a right under federal law to have a parent (which in the default of an active parent could be the foster parent) making decisions for him or her, or to have an education decision-maker appointed by a court or a school district. This is a complex area of law. For details on the law defining who can play this role, see the Legal Center for Foster Care and Education series of special education decision-making fact sheets at <http://www.abanet.org/child/education/publications/specialeducation.html>.

**General Education Decision-Makers:** Judges may also limit parental rights and appoint education decision-makers for general education purposes. Sometimes the authority to do so arises implicitly from the judge’s authority to act in the best interests and for the safety and well-being of the child. In other cases, state law explicitly grants this authority. For example, **California** law allows the court to limit the parents’ rights to make education decisions for children adjudicated dependent.<sup>18</sup> The court can then appoint an education decision-maker known as a “responsible adult.”<sup>19</sup> For a child eligible for special education, if the court is unable to appoint a responsible adult, the court may refer the child to the local educational agency for appointment of a surrogate parent for education decision-making purposes.<sup>20</sup> The court also has the authority to make educational decisions for the child, with input from interested parties when there is no responsible adult, surrogate parent or foster parent to do so.<sup>21</sup>

Each stakeholder participating in the school stability decision should be given key information about the law and the stakeholder’s role. He or she should also be given the guidelines and criteria by which the decision should be made.

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<sup>18</sup> CAL. WELF. & INST. CODE § 361(a) (West 2007).

<sup>19</sup> *Id.*

<sup>20</sup> CAL. WELF. & INST. CODE § 361(a)(5) (West 2007).

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

## Establishing the Criteria for the Decision

The child welfare agency needs clear guidelines to assist it in making the school stability determination. The ACF Program Instruction lists examples of factors that may influence this decision:<sup>22</sup>

- the child's preference to change schools or remain in the same school;
- the safety of the child;
- the appropriateness of educational programs in the current school; and
- how each school is serving or can serve the child's needs, including special education and other interests.

Additional factors include:

- preferences of the child's parent or education decision-maker;
- the expected length of the child's current placement and the child's permanency plan;
- the number of schools the child has attended over the past few years and this year, and how the school transfers have affected the child emotionally, academically and physically;
- how anxious the child is about upcoming moves and about being in out-of-home care;
- how each school can respond to the child's academic strengths and needs;
- whether the timing of the school transfer would coincide with a logical juncture such as after testing, after an event that is significant to the child, or at the end of the school year;
- how changing schools would affect the student's ability to earn full academic credit, participate in sports or other extra-curricular activities, proceed to the next grade, or graduate on time;
- how the length of the commute to the school of origin would impact the child;
- the schools siblings attend.<sup>23</sup>

For a checklist guiding the decision-maker through the school selection decision, see Legal Center for Foster Care and Education and the National Center for Homeless Education, *Best Practices in Homeless Education: School Selection for Students in Out-of-Home Care* (Fall 2009), available at [http://www.serve.org/nche/downloads/briefs/school\\_sel\\_in\\_care.pdf](http://www.serve.org/nche/downloads/briefs/school_sel_in_care.pdf).

<sup>22</sup> ACF Program Instruction, *supra* note 4, at 20.

<sup>23</sup> Adapted from Legal Center for Foster Care and Education and the National Center for Homeless Education, *Best Practices in Homeless Education: School Selection for Students in Out-of-Home Care* (Fall 2009), available at [http://www.serve.org/nche/downloads/briefs/school\\_sel\\_in\\_care.pdf](http://www.serve.org/nche/downloads/briefs/school_sel_in_care.pdf). This issue brief provides more information on the best interests determination and may be useful to readers.

**NOTE: The Cost of Transportation Should NOT Be a Best Interests Factor**

The ACF Program Instruction specifically states that the decision-maker should not consider the cost of transportation when determining which school serves the child's best interests.<sup>24</sup>

*Examples:*

A recently passed law in **New Jersey** provides that “best interests” factors shall include, but are not limited to: safety considerations; the proximity of the resource family home to the child’s present school; the age and grade level of the child as it relates to the other best interests factors; the needs of the child, including social adjustment and well-being; the child’s preference; the child’s performance, continuity of education and engagement in the school the child presently attends; the child’s special education programming if the child is classified; the point of time in the school year; the child’s permanency goal and likelihood of reunification; the anticipated duration of the placement; and other factors that may surface through future regulations.<sup>25</sup>

Guidance issued by the **Pennsylvania** Department of Public Welfare establishes that “some factors that suggest that a school move may be appropriate are: the child’s new living arrangement is likely to become permanent, the move coincides with a natural transition time (vacation/holiday closure), and the child would be better served by the new school; the child’s social or academic needs would be better met at the new school; a significant commute to the original school would have a negative impact on the child; or the child’s safety would be compromised by remaining in the current school.”<sup>26</sup>

Joint policy guidance from the **Virginia** Departments of Education and Social Services notes that when making the best interests determination, the “child’s safety and permanency plan shall be paramount,” and lists factors similar to those described above.<sup>27</sup> The guidance directs agencies to employ the “Best Interest Determination for Foster Care School Placement Form”<sup>28</sup> and to place it in the child’s student file and the child welfare case file.<sup>29</sup>

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<sup>24</sup> ACF Guidance, *supra* note 4, at 20.

<sup>25</sup> N.J. STAT. ANN. § 30:4C-26b(f) (West 2010).

<sup>26</sup> Office of Children Youth and Families, Commonwealth of Pennsylvania, Dep’t of Pub. Welfare, Bulletin 3130-10-04, 9 (Sept. 17, 2010) (hereinafter “OCYF Bulletin”).

<sup>27</sup> Va. Joint Guidance, *supra* note 11, at 5.

<sup>28</sup> *Id.*; see also Va. Dep’t of Ed. and Va. Dep’t of Soc. Servs., Best Interest Determination for Foster Care School Placement Form (2010), available at <http://www.dss.virginia.gov/files/division/dfs/fc/forms/032-04-0067-00-eng.doc>.

<sup>29</sup> Va. Joint Guidance, *supra* note 11, at 5.

## Resolving Disputes

Because the best interest determination can have a profound impact on the child's well-being, states will need clear dispute resolution processes to address disagreements about the school selection decision.

A dispute resolution system should, at minimum:

- Establish where the child goes to school pending the dispute resolution. In California, for example, the child stays in his or her current school until the dispute is resolved.<sup>30</sup> This minimizes the number of moves a youth must make.
- Provide a written explanation to stakeholders – or at least to the education decision-maker for the youth.<sup>31</sup>

### *Examples:*

Under **Connecticut** law, any party may object to the child welfare agency's best interest decision within three business days after receiving notice of the determination.<sup>32</sup> Until the time for disagreement has passed, and during any dispute resolution process, the child remains in the school of origin.<sup>33</sup> Any aggrieved party has the right to request, in writing, a hearing before the commissioner of Children and Youth Services.<sup>34</sup> The commissioner must then provide a formal hearing, complete with an opportunity to present evidence and file briefs, within thirty days.<sup>35</sup> In the dispute process, the child welfare department bears the burden of proof that the school placement serves that child's best interests.<sup>36</sup> The commissioner must then issue a final decision within fifteen days.<sup>37</sup> Parties may appeal to the superior court for juvenile matters.<sup>38</sup>

In **New Jersey**, if the child welfare agency finds that it is in the child's best interest to continue attending his or her current school, that decision is deemed conclusive. If not, the child welfare agency must notify the child's law guardian and parent or legal guardian within two days of the basis for the school move and the location of the new school placement (unless safety reasons preclude revealing this information).<sup>39</sup> A parent, legal guardian, or law guardian then has five business days to apply for court review of the agency's decision that it is in the child's best interest to change schools.<sup>40</sup> Any party who asks the court to review the agency's best interest determination must provide notice to the agency and

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<sup>30</sup> See e.g. CAL. EDUC. CODE § 48853(c) (West 2006).

<sup>31</sup> See e.g. 42 U.S.C. § 11432(g)(3)(B)(ii); CAL. EDUC. CODE § 48853.5(d)(3) (West 2011).

<sup>32</sup> CONN. GEN. STAT. ANN. § 17a-16a(b)(3)(A) (West 2010).

<sup>33</sup> CONN. GEN. STAT. ANN. § 17a-16a(b)(3)(B) (West 2010).

<sup>34</sup> CONN. GEN. STAT. ANN. § 17a-15(c) (West 1994).

<sup>35</sup> *Id.*

<sup>36</sup> § 17a-16a(b)(3)(A).

<sup>37</sup> CONN. GEN. STAT. ANN. § 17a-15(e) (West 1994).

<sup>38</sup> *Id.*

<sup>39</sup> N.J. STAT. ANN. § 30:4C-26b(j) (West 2010).

<sup>40</sup> N.J. STAT. ANN. § 30:4C-26b(d)(2) (West 2010).



all other involved parties.<sup>41</sup> The court must then hold a hearing and make its decision in an expedited manner.<sup>42</sup> At the hearing, the child welfare agency bears the burden of proof, based on a preponderance of the evidence, that it is in the child's best interest to enroll in the new school.<sup>43</sup> While the court's decision is pending, the child must attend his or her current school.<sup>44</sup>

If a case worker and school representative in **Virginia** disagree about which school is in the child's best interests, the child remains in the school he/she was attending at the time of placement in a new residence until the dispute is resolved.<sup>45</sup> The child welfare agency arranges and pays for transportation to that school during that time.<sup>46</sup> If the parties cannot resolve the dispute, it goes up the chain of command – first to the case worker's supervisor and local school administrator, then to the school district superintendent and child welfare administrator (or their designees), and then to the state agencies. There are short timelines for each stage of this process and submitting written requests to the next level.<sup>47</sup> All written documentation must be placed in the child's case file.<sup>48</sup>

An effective dispute resolution procedure may also engage a multi-stakeholder group. For example, a **San Luis Obispo County, California** interagency agreement that preceded Fostering Connections requires all participants to engage actively in dispute resolution.<sup>49</sup> In the event that they cannot resolve their differences within two work days, the issue is brought to a Resolution Council, which includes a Foster Youth Services Coordinator, two representatives from Placing Agencies, two school district representatives and two community partners.<sup>50</sup>

## Conclusion

States and local jurisdictions need clear procedures for determining whether it is in the child's best interest to change schools despite Fostering Connections' presumption in favor of school stability. Carefully developed school selection procedures will ensure that children attend schools in which they are most likely to succeed academically and socially. This in turn will promote better educational outcomes, and ultimately better life outcomes, for youth in care.

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<sup>41</sup> N.J. STAT. ANN. § 30:4C-26b(b) (West 2010).

<sup>42</sup> § 30:4C-26b(d)(2)

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Va. Joint Guidance, *supra* note 11, at 8.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 11.

<sup>48</sup> *Id.*

<sup>49</sup> San Luis Obispo County, Interagency and Community Agreement For the Coordination and Tracking of County Compliance with the 2001 McKinney-Vento Homeless Education Assistance Improvements Act and the 2004 California Assembly Bill AB 490 (2005).

<sup>50</sup> *Id.* at 8.

