

# Foster Care & Education

## *Issue Brief*

### **HOW THE IDEA AND THE FOSTERING CONNECTIONS ACT CAN WORK TOGETHER TO ENSURE SCHOOL STABILITY AND SEAMLESS TRANSITIONS FOR CHILDREN WITH DISABILITIES IN THE CHILD WELFARE SYSTEM**

#### **Introduction**

Children with disabilities have specific rights under the Individuals with Disabilities Education Act (IDEA) and other federal laws which require that children with disabilities receive special help to succeed in school. In addition, as children in foster care, these students are also entitled to school stability under the Fostering Connections to Success and Increasing Adoptions Act (the Fostering Connections Act) - and in some cases state laws – which seek to ensure school stability, prompt school enrollment, and regular school attendance for children in care of compulsory school-age.

Anyone who works with a child in care who has or who may have a disability – including staff from child welfare and education agencies, parents, foster parents, juvenile court judges, children’s and agencies’ attorneys – needs to understand how these two independent federal laws can help advocates ensure school stability and smooth transitions for this highly mobile population. Advocates also need to comprehend how these laws fit (or don’t fit) together.

Some of the following case studies will sound familiar to child advocates. Analyzing these situations, and ensuring that children get the help they need, requires familiarity with the rules that are discussed in this Q&A. See the end for the “answers” for **Sallie’s, Juanita’s, and Sam’s** problems.

Enacted in October 2008, the “Fostering Connections to Success and Increasing Adoptions Act of 2008” 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](#)**.



### Example #1

**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 behavioral problems at her foster home have resulted in 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 placement should be changed; but they are less clear 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 gets to decide whether Sallie should change schools? Who should be consulted? What factors should be considered? Are there any IDEA or Fostering Connections Act mandates that might help Sallie? If transportation is needed for Sallie to remain in the same school, who is responsible for arranging and paying for that transportation?

### Example #2

**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 dead. The child welfare agency and the juvenile court have determined that 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 in need of special education. The child's caseworker thinks that Juanita should stay in the same school she had been attending while she was living with her grandmother (before she was placed in care), and the caseworker wants to make sure that 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? Who has the authority to consent to a special education evaluation for Juanita and to decide what services she should receive? Can the court help? Who else has a role in deciding what is best for this student?

### Example #3

**Sam** has just been removed from his parents and placed with a foster family in another school district. The child welfare agency, in collaboration with his prior school's special education staff and in consultation with the GAL, considered whether remaining in the same school was in Sam's best interest and decided that a new school with a new peer group was badly needed. But when Sam's caseworker tried to enroll him in the new school district, the district demanded proof of Sam's age, that he was residing in the school district, and that Sam was immunized. 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. But the caseworker did not have the documents in Sam's file to enroll him promptly. Moreover, the school district would not admit Sam (or any other children eligible for special education) without copies of the students' IEPs and recent evaluations. The caseworker knows that, under the Fostering Connections Act, his agency is responsible for ensuring that Sam is immediately enrolled with all school records, but he doesn't know how to persuade the new school district to enroll Sam now.

**Q: What is the IDEA, what does it mandate, and which agencies are responsible for its implementation?**

**A:** The IDEA is a federal law that requires states to provide appropriate special education and developmental, corrective, and supportive services (known as “related services”) to all eligible children with disabilities (that is, children who have one or more of the disabilities listed in the law that results in a need for special education) to help them participate and succeed in school. The IDEA “Part B” mandates apply to eligible children from age 3 until they graduate from 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. All of these children and their parents (see page 4 for a discussion of who can be a “parent” under the IDEA) are also entitled to many procedural protections, including prior written notice from the local educational agency of any changes to the child’s program and access to a hearing and appeal system when disputes arise.

The state educational agency (usually the Department of Education) is ultimately responsible to the federal government for the state’s and local education agencies’ (usually school districts, but also including public charter schools and regional education agencies) compliance with the IDEA. In general, state and local child welfare agencies do not have direct obligations under the IDEA. But sometimes the child welfare or other state agencies’ help is needed for the state to comply with the IDEA. For example, the IDEA now requires that a child under age 3 for whom child abuse or neglect has been substantiated or who is identified as affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure *must be referred* to the early intervention system. 20 U.S.C. §§1435(c)(2)(G). Clearly the state needs help from the child welfare system to comply with these requirements.

**Q: What is the Fostering Connections Act, what does it mandate regarding education, and which agencies are responsible for its implementation?**

**A:** Enacted by Congress in October 2008 as an amendment to Title IV-E of the Social Security Act, the Fostering Connections Act is a federal law designed to promote permanent family connections and to improve educational opportunity and outcomes for youth in the child welfare system. The Act mandates that all children of compulsory school age in care attend school. The Fostering Connections Act also 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. The Fostering Connections Act also requires prompt school enrollment with all school records when a school change is needed. 42 U.S.C. §§671(a)(30), 675(1)(G).

State and local child welfare agencies have the 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. However, there is no federal law that requires education agencies to help. Some states have filled this gap through state legislation or policies. *See Making it Work: Children Welfare and Education Agencies Collaborating to Ensure School Stability for Children in Foster Care* and other Fostering Connections Act resources created by the Legal Center for Foster Care and

Education including a State Implementation Toolkit, available at [http://www.americanbar.org/groups/child\\_law/what\\_we\\_do/projects/education/fosteringconnections.html](http://www.americanbar.org/groups/child_law/what_we_do/projects/education/fosteringconnections.html).

**Q: Who makes decisions for a particular child with a disability under the IDEA, and what types of decisions are necessary? What is the role of the child’s parent? What is the role of the foster parent? What is the role of the child welfare agency or caseworker? What is the role of the judge? What is a surrogate parent?**

**A:** Key IDEA decisions will need to be made for each child, and some actions even require prior written parental consent by a qualified decisionmaker. For example: Should a child be evaluated for the first time or be re-evaluated? Should an independent educational evaluation be requested if the school district’s evaluation is not sufficient or appropriate? Should the child begin to receive 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 appropriate to meet the child’s needs, meaning, is the IEP reasonably calculated to allow the child to receive educational benefit? Finally, where should the IEP be implemented, and is the placement offered the “least restrictive environment”? 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?

The child’s “parent” (as defined by the IDEA) must give written consent for an initial evaluation and for special education services to begin for the first time. The parent is a member of the IEP team, must receive notice of the meeting, and be given every opportunity to participate in the development the IEP that lists the special education and related services the child will receive. The child’s parent has the authority to agree with or to object to the IEP team’s proposal and to request mediation or a special education hearing to resolve the dispute.

The IDEA has its own very complicated definition of “parent.” See 34 C.F.R. §§300.30(a), 303.27(a). That definition includes the child’s birth or adoptive parent, a legal guardian, an individual with whom the child is living who is acting like the parent, a foster parent, a surrogate parent appointed by a school district or a court, or an individual appointed by a court to make educational decisions on behalf of a child. (For purposes of this Issue Brief, the term “IDEA parent” refers to the individual who meets the definition of “parent” under IDEA for the child).

Unless a court has decided that another person should make education decisions for a child, an engaged birth or adoptive parent is the child’s IDEA parent. If there is no engaged parent, the child’s foster parent can serve as the IDEA parent unless state law prohibits foster parents from performing this role. (It’s worth noting that, 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 authorize a foster parent to consent to the initial evaluation, see *Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations*, Question D-7 at page 21 (revised September, 2011), <http://idea.ed.gov/explore/view/p/.root,dynamic,QaCorner,3>).

If there is no person who qualifies as the IDEA parent, or if the child is an unaccompanied homeless youth, a local school district is required to appoint a surrogate parent who has no personal or professional



This publication was authored by the American Bar Association Center on Children and the Law, Education Law Center, and Juvenile Law Center.

[www.ambar.org/LegalCenter](http://www.ambar.org/LegalCenter)

interest that conflicts with the child's interest and has the knowledge and skills that ensure adequate representation of the child. The school district must make reasonable efforts to assign the surrogate parent within 30 days. No person who is an employee of an agency that is 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.

**Q: Is there a way to expedite the initial evaluation of a child in state custody when no IDEA parent is available to give consent?**

**A:** In general, an IDEA parent (which can include a surrogate parent) must give informed parental consent before a local educational agency can conduct an initial evaluation of a child. An initial evaluation is the first evaluation of a child to determine his or her eligibility for special education. A school district is excused from obtaining informed parental consent for an initial evaluation if the child is: not living with an IDEA parent, is in the custody of a child welfare agency, does not have a foster parent who is permitted by state law to serve as an IDEA parent, and (i) despite reasonable efforts, the school district cannot discover the whereabouts of the parents, or (ii) parental rights have been terminated, or (iii) a judge has subrogated the parent's right to make education decisions and appointed a person (which could be a caseworker) to consent to the initial evaluation of the child. Following the initial evaluation, a surrogate parent must be appointed to make other special education decisions, including whether special education services can begin. 34 C.F.R. §300.300(a)(2).

**Q: Who makes decisions for a particular child under the Fostering Connections Act, and what types of decisions are necessary? What is the role of the child's parent? What is the role of the foster parent? What is the role of the child welfare agency or caseworker? What is the role of the judge?**

**A:** The Fostering Connections Act makes the child welfare agency responsible for developing a school stability plan for each child and for providing assurances that the agency has coordinated with the appropriate local education agencies "to ensure that the child remains in the same school in which the child is enrolled at the time of placement; or if remaining in such school is not in the best interests of the child ... to provide immediate and appropriate enrollment in a new school, with all of the education records of the child provided to the school." 42 U.S.C. §675(1)(G)(ii). In making the best interest determination, the child welfare agency should make every effort to consult with the child's parents, teachers, and others with pertinent information. For more information on this topic, see *Foster Care and Education Issue Brief, School Stability Under Fostering Connections: Making Best Interest Decisions* at [http://www.americanbar.org/content/dam/aba/migrated/child/education/publications/toolkit\\_combined\\_with\\_cover.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/child/education/publications/toolkit_combined_with_cover.authcheckdam.pdf).

**Q: What consideration should the child welfare agency give to the child's special education needs in making the "best interest" determination?**

**A:** The Fostering Connections Act directs that, in making decisions about a child's placement, the child welfare agency must take into account "the appropriateness of the [child's] current educational setting...." 42 U.S.C. §675(1)(G)(i). For a child who is or may be eligible for special education, this means exploring what kind of help the child needs, what services the child is receiving (general and special education), whether the programs and services in the IEP are appropriate, how the child is progressing, and whether the services in the

IEP are being delivered to the child in the least restrictive environment to the maximum extent appropriate to the needs of the child. If the child already has an IEP, these are things that could be discussed at an IEP meeting. If the child is leaving the school (or school district) because the child's best interests will be served by a school change, it might make more sense to discuss these matters at an IEP meeting at the new school.

In any case, an informed decision requires a review of the child's school records (in particular the child's special education evaluations, the IEP, and progress reports). The caseworker should also investigate the track record of the potential school district in meeting the needs of students with disabilities. Caseworkers or other agency staff need to develop knowledge about various local school districts, or to seek out others in the community with this expertise and use their experience to make an informed decision.

**Q: When does a child have a right to transportation under IDEA?**

**A:** The IDEA includes transportation as a "related service" that the local education agency must include in a child's IEP and provide if needed for a child to benefit from his or her special education program. The transportation must be appropriate for the child (for example, if the child is mobility impaired she may need a lift bus). Like all IDEA services, necessary transportation must be free to the child or family. However, the IDEA does not require transportation to maintain school stability when a child moves to a foster home in another school district or attendance area. The only exception would be if maintaining school stability is necessary for a child to benefit from her agreed upon special education program – for example, if the new school district agrees with the IDEA parent that the only appropriate special education program is the program the child was receiving in the old school district.

**Q: When does a child have a right to transportation under the Fostering Connections Act?**

**A:** The Fostering Connections Act requires child welfare agencies to keep children in their current schools unless a school change is in the children's best interest, but it does not specify who should pay for necessary transportation. However, the Fostering Connections Act does permit 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." 42 U.S.C. §675(4)(A). This means that federal dollars can be used to reimburse part of the costs only for certain children in foster care, so there are limits to the ability of these funds to support the full cost of transportation for all children who may need this service. Child welfare agencies can also include transportation as an administrative cost. See, *Foster Care and Education Issue Brief, When School Stability Requires Transportation: State Considerations* at [http://www.americanbar.org/groups/child\\_law/projects\\_initiatives/education/state\\_implementation\\_toolkit.html](http://www.americanbar.org/groups/child_law/projects_initiatives/education/state_implementation_toolkit.html).

**Q: What impact does the IDEA have on who makes school stability decisions under the Fostering Connections Act and vice versa?**

**A:** As noted above, it is the IEP team, with the participation of the IDEA parent, that determines whether a child has a disability and what kind of special education and related service, at what location, the child will receive. The child's caseworker is not an IEP team member, although he or she could be invited by the parent or the local education agency to participate as a person who has "knowledge or special expertise regarding the child." 34 C.F.R. §300.321(a)(5). If the local education agency invites a child's caseworker to an IEP team

meeting, it must obtain the parent's consent to discuss or reveal personally identifiable information from the child's school records at the IEP team meeting.

Although the IDEA parent is an important participant at IEP team meetings, it is the IEP team that actually decides what services are to be offered, subject to the IDEA parent's right to refuse consent to the child's initial receipt of special education or to contest the proposal through the special education hearing and appeal process. It is important to understand that the IEP team has no authority to make the Fostering Connection Act's school stability decision, *i.e.*, whether the child should remain in the current school or whether a change of schools is in the child's best interest. The IDEA parent may have crucial information that informs the school stability decision – but it is the child welfare agency that has the authority to make the Fostering Connections Act's determinations.

### **Q: How do the Fostering Connections Act and the IDEA work when a child in care is placed in a residential facility?**

**A:** Unfortunately, a significant number of children in care are placed by courts or other public agencies in residential facilities, either for special help or because no foster family is available. Residential facilities include residential mental health programs, group homes, drug and alcohol treatment centers, and evaluation centers. Sometimes the children remain in the residential setting for only a short time, and sometimes the children remain for years. Disproportionately these children are either identified as eligible for special education services or should be so identified. Children who are eligible for special education who live in residential facilities have the same right to appropriate special education programs, placement in the least restrictive environment, and procedural safeguards – to all IDEA protections – as children living with their birth or foster parents.

Even when a child's next placement is a residential setting, the child welfare agency must make a school stability/best interest determination for the child. This is especially crucial if the placement is short term. In that case, the child's school setting should change only if there is a determination that it is 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 state rules differ and the child's needs may dictate otherwise, the initial presumption for a child with a disability should be that the child will attend a regular public school with whatever support is needed if the child can receive appropriate services and make educational progress in that setting.

### **Q: What happens when a child with an IEP transfers to another school district within the same state? Are these rules different if the child's next placement is a residential facility?**

**A:** When a child with an IEP transfers to another school district in the same state, 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 in accordance with IDEA procedures. 34 C.F.R. §300.323(e). The same rules apply if a child is placed in a residential setting in another school district.

**Q: What happens when a child with an IEP transfers to a school district in another state?**

**A:** If a child with an IEP transfers to a school district in a different state and enrolls in a new school within the same school year, the new district (in consultation with the IDEA parent) must provide the child with FAPE, including services comparable to the services in the IEP developed by the old school district until (if the new district chooses) it conducts an evaluation, adopts the old IEP, or develops a new IEP in accordance with IDEA procedures. 34 C.F.R. §300.323(f).

**Q: When must evaluations for special education be completed? What happens when a student changes school districts while the special education evaluation is still ongoing?**

**A:** 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. You should learn the timeline in your state. 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 specific new deadline. 34 C.F.R. §300.301(d). The old and the new districts must ensure that children’s assessments are coordinated and that evaluations are prompt and complete. 34 C.F.R. §300.304(c)(5).

**Q: When must the child’s education records be available in the new school district?**

**A:** The Fostering Connections Act mandates that, when a child changes schools, he or she must be promptly enrolled in the new school with all school records. 42 U.S.C. §675(1)(G)(ii)(II). The IDEA does not set a deadline for the transfer of school records, but it does state that “the new [school district] in which the child enrolls must take reasonable steps to promptly obtain the child’s records, including the IEP and other records relating to the provision of special education and related services... and the previous agency in which the child was enrolled must take reasonable steps to promptly respond to the request from the new public agency.” 34 C.F.R. §300.323(g). State law or policy sometimes sets deadlines on records transfers. For example, in Pennsylvania the old school district or public charter school has 10 business days in which to transfer school records requested by the new school district. 22 Pa. Code §11.11(b).

**Q: What are the IDEA’s and the Fostering Connections Act’s rules on transition planning?**

**A:** Both the IDEA and the Fostering Connections Act require “transition planning.” The IDEA’s focus is on preparing the student 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 cushion the youth’s exit from the child welfare system and prepare him or her 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. 34 C.F.R. §300.320(b). 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. 34 C.F.R. §300.321(b). Many states mandate that transition planning start earlier, usually at age 14. *See, e.g.*, 22 Pa. Code §14.131(a)(5).

Under prior law, by age 16 the youth's case plan must contain a description of the services needed to help the youth's 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 provide the youth with assistance and support in developing a transition plan that, at the direction of the child, is detailed and personalized and includes specific options on housing, insurance, and education; local opportunities for mentors and continuing support services; and work force supports and employment services. *See* 42 U.S.C. § 675(5)(H.)

Youth exiting from their local school district and the child welfare system have seismic challenges ahead. Effective, coordinated transition planning can help. Caseworkers, parents, judges, children's lawyers, and school staff need to make sure that each child receives, as early as possible, the education and other supports he or she needs to make a successful 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 is downright daunting.

## **Q: What are Sallie's, Juanita's, and Sam's rights under the Fostering Connections Act and the IDEA, and what should the caseworker, attorney, or other child advocates do to enforce these rights?**

### **Sallie**

- The child welfare agency is charged with deciding, in collaboration with the local school district, whether the child should remain in the same school or whether a school change is in the child's best interest. In making this decision the child welfare agency should consult with EVERYONE with information that can help. In most cases that includes the parent as well as the child's attorney and "Guardian *Ad Litem*" (GAL). Most importantly, do not forget to consult with the child to determine his or her desires and wishes about remaining in the same school or changing schools.
- Since Sallie is receiving special education services, the agency should also consult with the IDEA parent. In this case, the IDEA parent may be Sallie's mother (who is still involved). If reunification with Sallie's mother is the goal in the near future, making sure that she stays engaged in the special education process is critical to a smooth transition once reunification takes place. If Sallie's mother is not the IDEA parent, her foster parent is probably serving in this role. But since Sallie is in the process of changing foster homes, it is important to make sure that Sallie has a decisionmaker throughout the

process – for example, that could be her new foster parent or someone appointed by the court during the interim or for the long term.

- In determining whether it is in a child’s “best interest” to change schools, the appropriateness of the child’s current school program is an important factor. The caseworker should explore whether Sallie’s current education and special education programs are working for her or could be made to work with some obtainable changes. Check out the special education program in the school district in which the proposed placement is located. Since the current program seems to be working well, the caseworker should probably try to keep Sallie in the same school either by identifying a new placement in the same school district/attendance area, or by getting the current school/school district to agree to keep Sallie even if she moves outside the district/attendance area. Remember, the Fostering Connections Act (and experience and research) emphasizes the importance of school stability for a child in care and requires a *rebuttable* presumption in favor of the child remaining in the same school. Examples of 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, will her current school be able to support that future transition?
- If Sallie needs transportation to stay in the same school, the Fostering Connections Act permits the child welfare agency to use Title IV-E funding to transport the child. If the new school district agrees that it cannot meet Sallie’s special education needs and that she should remain in the program in the old school district, Sallie’s transportation should be requested as a “related service” that should be included in Sallie’s IEP and provided without cost by the new school district. The IDEA parent should be involved in advocating for that if appropriate. Some states have adopted laws, policies, or memoranda of understanding that clarify which agency must provide or fund transportation to maintain school stability.

### Juanita

- Due to the change in her placement (from her grandmother’s home to her new foster home), and regardless of whether she remains with her foster family or is placed for a time in a residential treatment facility, her rights under the Fostering Connections Act do not change and the child welfare agency should make a determination as to whether a school change is in Juanita’s best interest with a presumption in favor of school stability. Juanita’s parents are not available to help with this decision, but Juanita is and should be consulted. Staff from Juanita’s current school will also have important information and should also be consulted.
- Under the IDEA, Juanita is entitled to a FAPE in the least restrictive environment even if she is living in a residential treatment facility. To ensure that Juanita is evaluated and, if eligible, that she starts getting special education services, it is necessary to determine who will be serving as Juanita’s IDEA parent since her parents are not an option. Should it be Juanita’s brand new foster parent (if that is not prohibited by state law)? Or does a surrogate parent need to be appointed by the school district or the court (and is the grandmother a good choice to play that role)? Juanita needs an IDEA parent to request and consent to an initial evaluation, to consent to the implementation of the initial IEP so that special

services can start, and to represent the child in the special education process. If Juanita needs a surrogate parent, the responsible school district must try to appoint one within 30 days.

- Although Juanita does not lose her IDEA rights if she is placed in a residential facility (even if she ends up attending an on-site program at the facility), questions can arise as to which school district (*e.g.*, where she is a resident, where the facility is located, or where she is actually attending school) is responsible for conducting the initial evaluation, ensuring that she gets a FAPE in the least restrictive environment, and funding her special education program. *Look to state law for the answers.* 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. Even if Juanita is living at a residential treatment facility, it is up to the IEP team to determine what special education and related services Juanita needs and what is the least restrictive environment in which those services can be delivered to Juanita, *i.e.*, to what extent can she be educated with students who do not have disabilities – with supplementary aids and services – and still make educational progress in accordance with the goals and objectives outlined in her IEP. Only if she cannot make educational progress in her special education program in a regular class or regular school setting should she be educated in a separate program.

### Sam

- School district enrollment is usually controlled by state laws and policies. The Fostering Connections Act does not preempt these state rules, so it is important that child welfare agencies include in the child’s records all documents that are needed to enroll a student. Depending on your state laws and policies, these requirements may include evidence that the child is actually living in the school district, is of school-age, and is immunized. The major exception to this rule is if the child is “awaiting foster care placement” or living in a shelter and thus is “homeless” under the McKinney-Vento Act. Children who are experiencing homelessness must be immediately enrolled in school even if they don’t have all of the documentation that would otherwise be necessary. While this varies widely by state, some children in foster care are eligible under the McKinney-Vento Act. For more on the McKinney-Vento Act see *Foster Care and Education Issue Brief: How Fostering Connections and McKinney-Vento Can Support School Success for All Children in Out-of-Home Care* at [http://www.americanbar.org/content/dam/aba/migrated/child/education/publications/qa\\_fc\\_and\\_mv\\_ov\\_rlap\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/child/education/publications/qa_fc_and_mv_ov_rlap_final.authcheckdam.pdf).
- Although no one wants the lack of records to be an impediment to Sam’s enrollment in the new school district, Sam’s caseworker and attorney certainly want to make sure that the new school district has the records and information it needs to educate Sam effectively. Sam’s most recent IEP is especially important since the new school district has the duty to provide services that are “comparable” to what Sam has been receiving. The best option is for the new school district to request Sam’s records immediately and directly from the old school, since parental consent is not required to release school records to an education agency in which a child is enrolling. 34 C.F.R. §99.31(a)(2). Check your state’s laws to see if there is deadline for records’ transfers.

- There is a good argument that the new school district’s practice of not allowing Sam to enroll without his IEP documents violates federal laws that prohibit disability-based discrimination if only children eligible for special education are required to produce additional records in order to enroll in the district. Clearly, 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. 34 C.F.R. §104.3(1)(2), 42 U.S.C. §12131(2). It could well 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.” 34 C.F.R. §104.4(a). See also 42 U.S.C. §12132.

## **Conclusion**

Clearly, children with disabilities that affect their learning face significant challenges in the school setting. The IDEA represents a significant federal commitment to help states assist these children to achieve at high levels and to prepare youth for higher education, employment, and successful integration into their communities. These challenges increase geometrically when the children have experienced abuse or neglect, are in the care or custody of the child welfare system, or experience placement instability. The good news is that advocates for these children have many legal tools that can help to eliminate these challenges and barriers – but only if those advocates inform themselves about these legal requirements and advocate effectively and forcefully for the children in their care. We hope this Issue Brief will help in those efforts.