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# Caught Between Two Systems: How Exceptional Children in Out-of-Home Care and Denied Equality in Education

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# Caught Between Two Systems: How Exceptional Children in Out-of-Home Care Are Denied Equality in Education

Cynthia Godsoe<sup>†</sup>

“Too often it’s the same children, year after year, who bear the burden of rejection. They’re made to feel like strangers.”

— Vivian Gussin Paley, Teacher<sup>1</sup>

## INTRODUCTION

### *Jamie*

Jamie was placed in foster care at age six, when the severe head injuries resulting from his father’s abuse were discovered by an emergency room doctor.<sup>2</sup> After a few weeks, Jamie’s foster parents told the Child Protective Services (C.P.S.) social worker that they could no longer care for the child because he had difficulty understanding more complicated instructions and speaking, and his movements were sometimes spastic.

Jamie’s social worker secured him another foster care placement and he was enrolled in first grade at the local school. His teacher soon reported that he had difficulties speaking, appeared to be cognitively delayed, and had frequent outbursts in class. She referred him for a special education assessment. The C.P.S. worker could not locate Jamie’s mother to consent to such an assessment, nor could she obtain his father’s consent. No surrogate parent was appointed for Jamie’s education, and his foster parents told the worker that school affairs were not part of their role and they didn’t understand them. The

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1. VIVIAN GUSSIN PALEY, *YOU CAN’T SAY YOU CAN’T PLAY* 22 (1992).

2. These narratives are based in part on my clinical experiences working with children in the child welfare system at Lawyers for Children in New York, Legal Services for Children in San Francisco, and as a Court Appointed Special Advocate in Boston. I also learned a great deal by visiting and volunteering in a number of schools with inclusionary programs serving some foster youth in Massachusetts and California. Finally, I have also been informed by conversations and meetings with Foster Youth Services—a unique organization whose mandate is to bridge the very gaps I discuss here and focus on the educational needs of foster youth.

lack of consent from a parent or legal surrogate prohibited any assessment. Jamie remained in the regular first grade classroom for two years.

Finally, Jamie's new social worker requested that he be appointed an educational surrogate parent by the court. The surrogate requested an assessment. The assessment team concluded that Jamie is developmentally delayed, possibly due to his head injuries or pre-natal exposure to drugs. The team developed an Individualized Education Plan (IEP) for Jamie, which the surrogate parent signed. After several months of intensive special education services, Jamie was demonstrating marked improvement in both cognitive skills and speech.

A year later, Jamie was removed from his foster parents to a pre-adoptive placement with another family. His school records, including IEP, were lost in the transfer from one school district to another. Jamie cannot perform the same assignments as his third grade classmates can, and he cannot read. He stopped talking in class after one child made fun of his speech. Jamie's teacher hasn't noticed because her attention is taken up by the other louder students, and she is the only adult in the classroom. The principal has never told her that any of her students are in foster care. Jamie is increasingly withdrawn at home and his new foster parents are unsure if they still want to adopt him.

### *Megan*

Megan is fourteen years old and has been in the child welfare system since birth. She has moved around frequently, living alternatively with four different foster families, her mother for very brief stints, and her paternal grandmother. Megan's mother abuses drugs and is unable to care for her, but drops in on her a few times a year. Megan was recently moved to a group home which is about an hour away from the junior high school she has been attending.

As a result of this moving around, Megan has been enrolled at seven different schools since first grade. She has had problems in school since she was in fourth grade, problems that included primarily acting out in class and fighting with other students and teachers. These behavioral problems often coincided with changes in placement or court dates. She has also consistently performed at the bottom of her class, not out of a demonstrated difficulty with the material, but rather for failing to turn in homework and, as she got older, cutting school. Megan's teachers over the years seem to be unanimous in their characterization of her as a problem child. Megan has never received tutoring, counseling, or any support services at school until last month when she was placed in a special education classroom.

Her eighth grade teacher referred her for a special education evaluation at the beginning of this year. As Megan's mother's educational rights have not

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been limited,<sup>3</sup> the school did not appoint Megan a surrogate parent. Instead, when they could not locate her mother to secure consent for the assessment, the school district instituted a due process hearing to override the need for parental consent. Megan's new Court Appointed Special Advocate (CASA) has tried to advocate for her because she thinks Megan needs some extra support in the general education program, such as mentoring and tutoring after school, rather than placement in a special education program. But the CASA has repeatedly been told by school officials that they are not required to include her. The assessment team diagnosed Megan as having serious emotional disturbance (SED) and placed her in a separate special education classroom with children having SED and mild mental retardation. The youths in the class are learning material ranging from a fourth to a seventh grade level.

Megan hates her new class and has hardly attended school since she was placed there. One of the teachers at Megan's school told her CASA that they were considering placing Megan in a residential school because they're not sure what else to do with her. The CASA is worried that Megan will drop out of school altogether or run away.

Stories like Jamie's and Megan's are unfortunately all too common among children in out-of-home placement.<sup>4</sup> About half a million children are in out-of-home care in this country,<sup>5</sup> and many of them are erroneously placed in special education programs or have special education needs which go unrecognized and untreated.<sup>6</sup> There is a very high overlap between children in the child welfare system and children who are educationally at-risk.<sup>7</sup> Many of the

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3. This narrative is based upon a case in California, thus incorporating California law requiring that a parent's educational rights be terminated or limited separately from his or her other parental rights such as custody, so parents whose children are in the dependency system may still have educational rights as far as they are concerned. For further discussion of this requirement and the surrogate parent issue, see *infra* at Part I.C.

4. The term "out of home placement" is used here to include children in state custody as dependents whether placed in family foster care, kinship foster care or residential care such as group homes. I will often use "foster care system" to refer to the child welfare out-of-home placement system. This includes children placed in the child welfare system both voluntarily by their parents and by court order based on a finding of abuse or neglect. This Article does not address the intersection of children found "delinquent" and at educational risk, although this also is a very serious problem meriting research, concern and advocacy. for a discussion of delinquency and special education. See LOREN WARBOYS ET AL., CALIFORNIA JUVENILE COURT SPECIAL EDUCATION MANUAL 42 (1994).

5. An estimated 530,496 children lived in out-of-home care at the end of 1996. Michael R. Petit & Patrick A. Curtis, *Child Abuse and Neglect: A Look at the States*, in 1999 CWLA STAT BOOK at 72 (1999) [hereinafter 1999 CWLA STAT BOOK].

6. See the detailed discussion of this overlap *infra* at Part I.C.

7. The definition of "at risk" is difficult—do we mean outcome or factors that heighten or lower risk status?—There is also little consensus on the correct definition among educators and social scientists even once the scope has been determined. See Gladys M. Cormier, INCREASING KNOWLEDGE AND ASSESSMENT OF FOSTER CARE CHILDREN THROUGH IN-SERVICE TRAINING FOR ELEMENTARY SCHOOL EDUCATORS (Ph.D. dissertation, Nova University) (Ed 375 950, 1994) at 24-25. Here I will frame at-risk in terms of inclusionary education; i.e. at risk for referral to more segregated and restrictive educational surroundings, so part of this inquiry concerns what teachers consider to be "at-risk" in making their referrals. See also the related definition of "educational disability" used by Loren Warboys et al.

children in each system are our most vulnerable children, frequently disadvantaged by disability, poverty, and abuse and neglect.

These children often receive inadequate care in the two most important places in their lives—home and school. Under-funded and overburdened child protection and education systems fail in their mission of adequately overseeing children's healthy development in school and at home. Moreover, the systemic structures are at odds with each other both theoretically and practically, and do not take into account the full spectrum of needs of children in out-of-home care. There are few bridges between the systems: social workers may see their job as placing a child and trying to stabilize her home life, whereas teachers may envision their job as ending at the school house door. Both overlook the complex interrelationship between a child's home and school needs and care. Despite the clear disjunct between these systems and the startlingly high overlap of children in out-of-home care and children placed in restrictive education settings, little attention has been paid to this problem either by child welfare or special education personnel.<sup>8</sup>

The child protection system relies on foster care as a temporary home for children awaiting reunification or adoption. Yet most children stay in foster care for over a year<sup>9</sup> and many are never reunified with their biological families or adopted; instead they serve out their childhoods in foster care "limbo." Foster families are not granted rights in their relationships, unlike biological and adoptive families.<sup>10</sup> Moreover, emotional attachments between foster parents and children are often discouraged or even forbidden by the child welfare system.<sup>11</sup>

Parental rights lie at the very heart of the special education system—enforcement of a child's right to identification and services is premised on parental advocacy,<sup>12</sup> and assessment and service provision initially require pa-

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"to describe any disability which results in eligibility for special education and related services." WARBOYS ET AL., *supra* note 4, at 83 n.149.

8. "The issue of the educational needs of children in foster care is a critical need that's really been ignored," according to Mary Lee Ellen, director of child-welfare and mental health at the Children's Defense Fund, (quoted in Deborah L. Cohen, *Foster-Care Reforms Often Ignore Problems Children Face in School*, 10 EDUCATION WEEK, June 5, 1991 available at <http://www.edweek.org/ew/1991/103/002/h10> (last visited Nov. 12, 2000) [hereinafter Cohen, June 5]). The lack of consideration of this topic is clear in the lack of national statistics on this subject, and the apparent scant information or consideration in protocols of at least some education and child protection departments.

9. Petit & Curtis, *supra* note 5, at 108-9.

10. *Smith v. Organization of Foster Families for Equality & Reform (OFFER)*, 431 U.S. 816 (1977).

11. *In re Jewish Child Care Association*, 5 N.Y.2d 222 (Ct. App. 1959).

12. 20 U.S.C.A. § 1400(d)(3) (West 2000), Individuals With Disabilities Education Act (as amended by the IDEA Amendments of 1997) (hereinafter all citations to IDEA will incorporate the 1997 Amendments).

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rental consent.<sup>13</sup> This statutory structure fails to adequately consider the situation of children without parents willing or legally sanctioned to advocate in their interest. And youth themselves are not included in the process at all. As a result, children in out-of-home care are at risk both for under and over-identification with regard to special education. Many lack essential services, while others are placed in overly restrictive educational environments.<sup>14</sup>

In this Article, I will examine the intersection between children in out-of-home care and children at-risk educationally in an attempt to arrive at some suggestions for change in theory and practice which can better empower these children and ensure them equality in both realms. In Part I, I consider the statutory systems of foster care and special education, looking at the characteristics of the large number of children governed by both, and outlining the risk factors which they may share. Although the relationship between foster care and special education is bicausal,<sup>15</sup> my focus in this paper will be on children who are already in out-of-home care and who could be better served by accurate placement in appropriate special education programs or, alternatively, who could be better served by a meaningful review of their situation and removed from restrictive education settings where they do not belong. In Part II, I consider the legal paradigms of normalcy, difference, and equality that govern children's access to family, a safe and stable home, and special education services. These paradigms underlie rules and practices which serve as barriers to the effective inclusion and empowerment of doubly at-risk children. Applying some critiques of traditional equal protection doctrine, I will argue that the current framework does not allow children in out-of-home care meaningful equality in special education. In Part III, I outline some steps that may empower children and facilitate their access to equality at home and at school. The first step is the Article itself—in attempting to give voice to the unique needs of children who are exceptional both at home and at school, I hope to contribute to a dialogue among teachers, youth, social workers, parents and advocates that can move us toward ensuring equality for all of our children.

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13. School personnel may try to obtain approval to evaluate a child for special education referral without parental consent by initiating a due process hearing, dependent upon state law. See 20 U.S.C.A. § 1414(a)(1)(C)(ii) (West 2000). However, the default is often not to evaluate and refer children without parental advocacy, let alone without parental consent.

14. See further discussion of this point, *infra* at Part I.C.

15. For instance, children with disabilities making them eligible for special education are more likely to be abused than children without disabilities. See The Beach Center on Families and Disability, University of Kansas, *How To: Reduce Abuse and Neglect of Children With Disabilities* (citing a National Council on Abuse and Neglect study finding that children with disabilities experience abuse and neglect up to 1.7 times more often than other children).

## I. ADEQUATE CARE AT HOME AND AT SCHOOL: THE INTERACTION OF CHILD PROTECTION AND SPECIAL EDUCATION

### A. Foster Care Overview

The failure to protect children from intrafamily abuse and neglect and the concomitant dramatic increase in children placed in out-of-home care is a national "emergency."<sup>16</sup> The number of abused and neglected children has risen at astonishing rates in the last decade,<sup>17</sup> resulting in the abuse or neglect of over three million children in 1996.<sup>18</sup> Children have also been removed from their homes into foster care at a rapidly increasing rate.<sup>19</sup> Yet there is often difficulty finding a safe and stable place for them to live, as the number of family foster care providers has decreased recently.<sup>20</sup> The lack of long-term solutions via either reunification or alternative permanency plans, such as adoption, means that most children languish in foster care "limbo"<sup>21</sup> far longer than the legal maximum of eighteen months.<sup>22</sup> Children in foster care are sometimes further abused in placement<sup>23</sup> and are often traumatized by the instability and frequent changes in placement associated with out-of-home care.

This Part will outline the federal statutory scheme governing the out-of-home placement of children in state custody and describe the often seemingly irreconcilable policies of family preservation and permanency planning (including termination of parental rights and adoption) that underlie the federal approach. A brief profile of the children in foster care will conclude this Part.

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16. DEPARTMENT OF HEALTH & HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, U.S. ADVISORY BOARD ON CHILD ABUSE AND NEGLECT, *THE CONTINUING CHILD PROTECTION EMERGENCY: A CHALLENGE TO THE NATION* (1993) [hereinafter *A CHALLENGE TO THE NATION*].

17. Howard A. Davidson, *Applying an International Innovation to Help U.S. Children: The Child Welfare Ombudsman*, 28 *FAM. L. Q.* 117, 120 (Spring 1994) (stating that reports of child abuse rose by 50 percent between 1985 and 1992).

18. 1999 *CWLA STAT BOOK*, *supra* note 5 at 3. See also THE CHILDREN'S DEFENSE FUND, *THE STATE OF AMERICA'S CHILDREN: YEARBOOK 1997* 51 (1997) [hereinafter *C.D.F. YEARBOOK 1997*].

19. The number of children in out-of-home care increased by 89.5% from 1987 to 1996. 1999 *CWLA STAT BOOK*, *supra* note 5, at 72.

20. *Id.* (postulating that the number of foster care providers may be rising again).

21. This term was used by the Supreme Court in recognizing the problem of lengthy and multiple foster care placements in contrast to statutory aim of temporary care. See *Smith v. OFFER*, 431 U.S. 816, 836 (1976) (citing Professor Robert Mnookin).

22. Out of an estimated 600,000 children in care, it is estimated that 40,000-80,000 have been freed for adoption but remain unadopted. See Jill Sheldon, *50,000 Children Are Waiting: Permanency Planning and Termination of Parental Rights Under the Adoption Assistance and Child Welfare Act of 1980*, 17 *BCWLJ* 73 (1997). A study by the American Civil Liberties Union reported that 1 in 10 children remains in foster care for over 7.4 years. Children in the system live with three different families on average, although many are in over ten placements. *Id.* at 100, n.263.

23. 1999 *CWLA STAT BOOK*, *supra* note 5, at 31.

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### 1. *The Statutory Basis for Child Protection Through Out-of-Home Placement: The Adoption Assistance and Child Welfare Act of 1980 and the Adoption and Safe Families Act of 1997.*

Congress enacted the Adoption Assistance and Child Welfare Act of 1980<sup>24</sup> (hereinafter AACWA) to decrease the number of children in foster care and minimize the length of stay in placement. AACWA aimed to accomplish this by increasing permanency planning for children, particularly through an emphasis on family preservation coupled with the termination of parental rights only if necessary after the failure of concerted efforts toward family preservation.<sup>25</sup> This legislation followed the Supreme Court's acknowledgement of the 'foster care drift' problem in *Smith v. OFFER*,<sup>26</sup> documentation of the psychological harm that children may experience when they lack a permanent placement,<sup>27</sup> and a federal study reporting that the average length of foster placement was two and a half years, with thirty-eight per cent of children staying in foster care over two years.<sup>28</sup> AACWA embodied an effort to unify child protection under certain national standards.<sup>29</sup> These national standards were imposed through the conditioning of federal funding on the states' creation of programs to help at-risk families avoid removal of children from their homes.<sup>30</sup> To this end, a major component of the legislation required states to make "reasonable efforts" to reunite families before terminating parental rights.<sup>31</sup>

Yet, more children with more serious needs have been placed in the foster care system since AACWA was enacted.<sup>32</sup> Further, many of the children being placed in the foster care system never achieve a permanent home due to failed family reunification attempts (including a lack of proper family supports) and a

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24. Pub. L. No. 96-272, 4 1980 U.S.C.C.A.N. (94 Stat.) 1448 (codified as amended in sections of 42 U.S.C.).

25. S. REP. NO. 96-336, at. 3 (1980), *reprinted in* 1980 U.S.C.C.A.N. 1440, 1450.

26. *Smith v. OFFER*, 431 U.S. 816, 836-37 (1976) (recognizing that foster children in New York state were spending over four years in foster care on average, with most in at least two placements).

27. One very influential work in this field argues that every child needs a "psychological parent" for healthy emotional development, which is rarely achieved in foster care placement, and is usually best left to the biological parent(s). JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

28. S. REP. NO. 96-336, *supra* note 25, *reprinted in* 1980 U.S.C.C.A.N. at 1459-60 (discussing the 1977 Department of Health, Education and Welfare "National Study of Social Services to Children and Their Families").

29. Sheldon, *supra* note 22 at 77 (citing children's advocate Martin Guggenheim).

30. Adoption Assistance and Child Welfare Act, 42 U.S.C.A. § 671(a) (West Supp. 2000). Note that the Act was amended by the Adoption and Safe Families Act discussed *infra* text accompanying note 39.

31. 42 U.S.C.A. §671(a) (West Supp. 2000).

32. 1999 CWLA STAT BOOK, *supra* note 5, at 72.



lack of adoptive families.<sup>33</sup> Both AACWA and the foster care system garnered widespread criticism. Foster care was, and continues to be, decried as futile and incredibly cost inefficient. Those involved in the foster care system at all levels—from child protective caseworkers to judicial court judges—have been criticized for not adequately protecting children and not ensuring them stable homes and families.<sup>34</sup> Commentators argued for different solutions, ranging from a focus on child safety above family preservation,<sup>35</sup> often including an expedited termination of parental rights and greater subsidies and support for adoption,<sup>36</sup> to increased support services for families combined with pro-adoption measures.<sup>37</sup>

In response to some of the failures of the child welfare system under AACWA, Congress passed the Adoption and Safe Families Act of 1997 (hereinafter ASFA).<sup>38</sup> ASFA represents a major shift from the family preservation philosophy embodied in AACWA. While AACWA prioritized family preservation, ASFA prioritizes children's safety and permanency planning<sup>39</sup> through quicker and easier adoptions.<sup>40</sup> ASFA posits a "dual track" child welfare system wherein states may (in theory at least) simultaneously satisfy the requisite due process of a child's biological parents while also seeking out potential adoptive families.<sup>41</sup> The permanency planning goal is met by accelerating permanency planning hearings, now required after twelve instead of eighteen months,<sup>42</sup> and mandating the initiation of termination of parental rights proceedings for any child in foster care for fifteen of the last twenty-two months (with very limited exceptions).<sup>43</sup> For the first time, states are given financial incentives to increase adoptions, thus decreasing the number of chil-

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33. Sheldon, *supra* note 22, at 80-82 (reporting on a study by Guggenheim finding an increase in new York's foster care population between 1987 and 1991 and a 73% increase in Michigan's between 1986 and 1992, combined in both states with increased rates of termination of parental rights and increasing numbers of children available for adoption, yet not adopted).

34. E.g., Jill Smolowe, *Making the Tough Calls*, TIME, Dec. 11, 1995, at 40-44.

35. E.g., HILLARY RODHAM CLINTON, IT TAKES A VILLAGE 143 (1995).

36. One adoption incentive project created by former foster youth Conna Craig, Assignment: Adoption, was successfully adopted in Massachusetts resulting in an increase in the number of adoptions from 599 to 1068 in two years. Sheldon, *supra* note 22, at 92-97. Massachusetts has continued to increase its adoption rate, placing 4500 foster children from 1993-97, almost double the placement rate for the previous four years. Bob Hohler, *Opening A Door to 'Stable, Loving' Homes* "Clinton Signs Law To Make Safety of Children Top Priority in Adoptions", BOSTON GLOBE, Nov. 20, 1997, at A1.

37. Donald N. Duquette et al., *We Know Better Than We Do: A Framework for Child Welfare Reform*, 31 U. MICH. J.L. REFORM 93 (1997).

38. Pub. L. No. 105-89 (codified in scattered sections of 42 U.S.C.A. (West Supp. 2000)).

39. E.g., Adoption and Safe Families Act, 42 U.S.C.S. § 671(a)(15) (West Supp. 2000) (stating that "in making such reasonable efforts, the child's health and safety shall be the paramount concern").

40. *Id.* § 673 (providing adoption incentive payments).

41. Adoption and Safe Families Act, 42 U.S.C.A. § 671(a)(15) (West Supp. 2000) Adoption and Safe Families Act (providing that family preservation "reasonable efforts" may be made simultaneously with efforts to place children with adoptive parents or guardians).

42. *Id.* § 675(5)(A)(ii).

43. *Id.* § 65(5)(E).

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dren in long-term foster care.<sup>44</sup> Congress has lowered the threshold for parents to prove themselves incapable of caring for their children and reduced the requisite amount of “reasonable effort” that states must make toward family preservation in extreme cases of abuse and neglect.<sup>45</sup> Finally, foster parents, pre-adoptive parents, and relative caregivers are newly granted the right to notice of foster care reviews and hearings, although they are not accorded full party status.<sup>46</sup>

Child welfare law and practice in many states anticipated and predated these federal legislative trends and, as a result, the aforementioned federal framework is augmented by some ad hoc, regional approaches. For instance, the often futile search for adoptive families and the attachment of children to long-term foster families has led to recognition of a “fostadoption” hybrid in some states wherein foster parents are simultaneously pre-adoptive parents.<sup>47</sup> This goes against years of child welfare policy pretending that foster care was exclusively a short-term placement.<sup>48</sup> Many states also passed legislation expediting permanency planning and facilitating the termination of parental rights.<sup>49</sup> Subsidized and standby guardianships, as well as increasing support of non-foster kinship care, have also been used by states to help children achieve stable and long-term homes.<sup>50</sup>

The development of the federal statutory framework and state practice and procedure is important because children and youth have very few, if any, substantive rights under the child protection system. Unlike the Individuals with Disabilities Education Act (IDEA) governing special education,<sup>51</sup> the statutes governing out-of-home placement do *not* create enforceable rights in private parties.<sup>52</sup> Children also have no right to protection from abusive parents, even if the child protection agency is involved with their family and aware of the risk.<sup>53</sup> Nonetheless, the shift in philosophy of federal child welfare policy and

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44. *Id.* § 670.

45. *Id.* § 671(a)(15).

46. Bill Grimm, *Adoption and Safe Families Act Brings Big Changes in Child Welfare*, 18 YOUTH LAW NEWS 1, 5 (Nov.-Dec. 1997).

47. Mireya Navvaro, *Battle for Baby J: Foster Mother Fights Family for Permanent Custody*, N.Y. TIMES, May 9, 1995, at A12.

48. “Fost-adopt” foster families, however, do not have increased legal protection of their relationships despite their hybrid role. Thus, children are still vulnerable to transfers in placement and a lack of permanency. For further discussion, see *infra* Part II.B.

49. States include Connecticut, New Jersey, New York, and Illinois. The state reforms follow several particularly tragic deaths from child abuse attributed to systemic inability to adequately protect children under current law. See Johnathan Rabinowitz, *Rowland Plan Would Ease Early Adoption in Abuse Cases*, N.Y. TIMES, January 5, 1996, at B1. See also Duquette et al., *supra* note 37, at 134-35.

50. See C.D.F. YEARBOOK 1997, *supra* note 18, at 56.

51. See discussion *infra* Part I.B.

52. *Suter v. Artist M.*, 503 U.S. 347 (1992).

53. See *DeShaney v. Winnebago County Dept. of Social Serv.*, 489 U.S. 189 (1989) (holding that a county has no duty under the due process clause to protect a child against violence from a parent). For

state practice and procedure to a permanency planning and child safety focus may increase the capacity of foster parents and others working with children in out-of-home care to advocate for the effective educational placement of these children.

## 2. *A Profile of Children in Out-of-Home Care*

About 716,000 children are in out-of-home care for at least part of each year, and this number is increasing rapidly.<sup>54</sup> Children with disabilities are vastly over represented in out-of-home care—the prevalence of disability among children in foster care is double that of the general school-age population.<sup>55</sup> This corresponds with the higher rates of abuse of children with disabilities, possibly due to added parental stress, both emotional and financial, in dealing with a child with a disability, and to feelings of isolation from the community.<sup>56</sup> The disabilities among children in out-of-home care, however, might also be due to the abuse and neglect which led to their placement in the child welfare system.

Poor children and children from certain racial groups and are also substantially over represented in foster care.<sup>57</sup> For instance, fifteen per cent of all children are African-American, while 44 percent of children in out-of-home care are African-American.<sup>58</sup> Native American children are likewise over represented in foster care, while Caucasian, Latino and Asian children are under-represented.<sup>59</sup> Children of color are also more likely to have longer placements in foster care than other children.<sup>60</sup>

Children and youth in out-of-home care of all abilities and races are at-risk for social and economic disadvantage both as youth or as adults. Children who have been abused or neglected, many of whom are in out-of-home care, are up to sixty-seven times more likely to be arrested for delinquent behavior between

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further discussion of this case and its impact on the equality children in out-of-home care, *see infra* Part II.C.

54. These numbers are for 1996, and represent a 89.5% increase from 1987. 1999 CWLA STAT BOOK, *supra* note 5, at 72.

55. Karen Shelley Smucker et al., *School-Related Problems of Special Education Foster-Care Students with Emotional or Behavioral Disorders: A Comparison to Other Groups*, 4 J. EMOTIONAL & BEHAV. DISORDERS 30 (1996).

56. Beach Center on Families and Disability, *supra* note 15; *See also* Matthew B. Bogin & Beth Goodman, *Special Education for Children in State Custody*, 7 CHILDREN'S LEGAL RTS. J. 8, 10 (1986).

57. 1999 CWLA STAT BOOK, *supra* note 5, at 110, 229. Of note, the over-representation of children from low income families may result in part from higher reporting among low income families.

58. 1999 CWLA STAT BOOK, *supra* note 5, at 95.

59. *Id.*

60. *Id.* at 110 (discussing children of color), 229 (discussing low-income children). The latter may be due to higher reporting among low income families, but the CWLA also asserts that abuse and neglect occurs more often in low income families due to the stressful nature of these environments.

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the ages of nine and twelve than other children.<sup>61</sup> The younger a child is when he or she is first arraigned, the greater the chance of future arrests, including as an adult.<sup>62</sup> Studies across the country have found that between thirty and forty percent of foster care graduates almost immediately become dependent on social assistance.<sup>63</sup> Former foster youth are also at risk for homelessness and long-term poverty.<sup>64</sup> Although many children in out-of-home care demonstrate no long term differences from other children,<sup>65</sup> many are extremely vulnerable to future harm and stigmatization.

Understanding the group characteristics of children in out-of-home care is relevant to our discussion of these children's experience in the education system because the racial, socioeconomic, and behavioral attributes of these children may influence their treatment in the education system. For example, the bias of many social service workers regarding race and economic status leads to the overrepresentation of certain children in foster care, just as the bias of many educational professionals against children in the foster care system leads to the latter's disproportional presence in the special education system.<sup>66</sup>

### B. Special Education Overview

#### 1. *The Statutory Basis for Special Education: The Individuals with Disabilities Education Act*

Federal law guarantees each child deemed to have "special needs"<sup>67</sup> a "free appropriate public education" (FAPE).<sup>68</sup> This entitlement was created to prevent the exclusion of disabled children from education.<sup>69</sup> Before school districts were legally required to educate children with disabilities in the 1970s, up to one million children were excluded from the public schools altogether, while another three and a half million were being denied public schooling appropriate to their needs.<sup>70</sup>

Two pivotal cases in the early 1970s first highlighted the large number of

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61. Child Welfare League of America, News Release, *Study Shows Children Reported Abused and Neglected Are 67 Times More Likely to be Arrested as Pre-Teens*, June 19, 1997.

62. 1999 CWLA STAT BOOK, *supra* note 5, at 238 (reporting that a child who first appears in court at age ten has a ninety-six percent chance of committing future offenses, while a child committing his first offense at age seventeen has only a thirty-six percent chance of committing future offenses).

63. Sheldon, *supra* note 22, at 98-99.

64. Kevin M. Ryan, *Stemming the Tide of Foster Care Runaways: A Due Process Perspective*, 42 CATH. U. L. REV. 271, 278 (1993).

65. *Id.* at 278-79.

66. For further discussion of this issue, see *infra* note 141 and accompanying text.

67. To be eligible for special education, a child must be educationally assessed to be a "child with a disability" as defined in IDEA. 20 U.S.C.A. § 1401(3) (West 2000). See also 34 C.F.R. § 300.7(a)(1) (specifying further the definition of disability for special education eligibility).

68. 20 U.S.C.A. §§ 1400(d)(1)(A), 1412(a)(1) (West 2000).

69. S. REP. NO. 94-168, at 8 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1432.

70. H.R. REP. NO. 93-805, at 50 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4093.

disabled children who were not permitted to enroll in the public school system: *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*<sup>71</sup> and *Mills v. Board of Education*.<sup>72</sup> In both cases, a federal court held that equal protection requires that children with disabilities be accorded the same access to a public education as other children, and that parents have due process rights related to their child's education.<sup>73</sup> To this end, the courts in *PARC* and *Mills* laid out procedural mechanisms for school districts to follow.<sup>74</sup> Congress responded to this concern for educational protections for disabled children with two pieces of legislation, Section 504 of the Rehabilitation Act<sup>75</sup> and, most significantly, the Education for All Handicapped Children Act, now the Individuals with Disabilities Education Act (IDEA).<sup>76</sup> The educational access right of children with disabilities, and the concomitant process of creating individualized education plans for these exceptional children, have been expanded over the years through both case law<sup>77</sup> and statute.<sup>78</sup>

While Section 504 forbids any entity receiving federal funding from discriminating against people with disabilities in its provision of services,<sup>79</sup> its lack of related funding or monitoring means that it is often disregarded by state and local educational agencies.<sup>80</sup> IDEA, a federal funding statute like the child welfare legislation discussed above, is thus the most powerful guarantor of the educational rights of exceptional children. Most recently revised by Congress in 1997, IDEA promises every child with special needs a free, appropriate, and least restrictive educational placement.<sup>81</sup> It guarantees this promise through

71. 334 F. Supp. 1257 (E.D. Pa. 1971).

72. 348 F. Supp. 866 (D.D.C. 1972).

73. *PARC v. Pennsylvania*, 334 F. Supp. at 1259-60 & 1264; *Mills v. Bd. of Educ.*, 348 F. Supp. at 875-76.

74. *PARC v. Pennsylvania*, 334 F. Supp. at 1260-62; *Mills v. Bd. of Educ.*, 348 F. Supp. at 878-81.

75. Pub. L. No. 93-112, 87 Stat. 355 (1973).

76. 20 U.S.C.A. § 1400 (West 2000) as amended by Pub. L. No. 105-17 (1997). The Education for All Handicapped Children Act, Pub. L. No. 94-142, was originally passed in 1975.

77. Within one year of *Mills*, over 30 federal court decisions upheld the principles expressed in *Mills* and *PARC*. See CENTER FOR THE FUTURE OF CHILDREN, THE FUTURE OF CHILDREN: SPECIAL EDUCATION FOR STUDENTS WITH DISABILITIES (Spring 1996) available at <http://www.futureofchildren.org> [hereinafter THE FUTURE OF CHILDREN: SPECIAL EDUCATION]. Many decisions since then have further elaborated and expanded upon the educational rights of disabled children.

78. Congress most recently amended IDEA in 1997. See *supra* note 76. Many states preceded the federal government in legislating educational rights and protections for disabled children, although many of these were not adequately enforced. Edwin M. Martin et al., *The Legislative and Litigation History of Special Education*, THE FUTURE OF CHILDREN: SPECIAL EDUCATION, *supra* note 77, at 26-28.

79. The Americans with Disabilities Act (ADA), passed in 1990, greatly expands the rights afforded to disabled people by banning discrimination in employment, public accommodations, transportation and telecommunications. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990). It is now being used by parents and advocates to expand and enforce the rights of children in special education. See THE FUTURE OF CHILDREN: SPECIAL EDUCATION, *supra* note 77, at 29.

80. THE FUTURE OF CHILDREN: SPECIAL EDUCATION, *supra* note 77.

81. 20 U.S.C.A. § 1414(a)(C)(ii) (West 2000).

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due process parental rights to be enforced via parental advocacy.<sup>82</sup> Schools are not, however, responsible for maximizing the educational outcomes of exceptional children. The Supreme Court has made it clear that satisfaction of a child's special education right is met by minimum equality of access, rather than by facilitating equality of outcomes or educational potential.<sup>83</sup> Thus, compliance with special education mandates is often focused on meeting procedural requirements as opposed to outcome goals.

IDEA requires that each eligible child receive a free appropriate public education (FAPE) in the least restrictive environment (LRE) possible. The scope of these requirements is determined based upon the unique needs of the child. The individualized nature of the entitlement means that there are no bright-line rules but rather a balancing test that must be carried out by educators, administrative hearing officers and judges. A state's receipt of federal funding under IDEA is contingent on that state maintaining a multi-layered system of procedural mechanisms, including state and local school district "child find" obligations to identify all children with disabilities,<sup>84</sup> and an annual meeting to create an individualized education program (IEP) for each exceptional child.<sup>85</sup> The process of formulating the IEPs brings parents and school officials together in considering the needs of each disabled child and lies at the heart of IDEA.<sup>86</sup> An IEP must consider more than the child's academic needs. It must also evaluate skills necessary to socialization, mental health stability, and transition to adulthood.<sup>87</sup>

IDEA also entitles exceptional children to the provision of services related to their ability to benefit from their special education placement,<sup>88</sup> although the scope of this requirement is somewhat unclear. A school district is required to provide:

transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.<sup>89</sup>

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82. *Id.* § 1415. See *infra* Part II.C for further discussion of the parental rights framework underlying IDEA.

83. *Board of Educ. v. Rowley*, 458 U.S. 176 (1982). See further discussion of this case *infra* at Part II.C.

84. 20 U.S.C.A. § 1412(a)(3) (West 2000).

85. *Id.* § 1414(d).

86. *Honig v. Doe*, 484 U.S. 305, 311 (1988).

87. *E.g. Howard S. v. Friendswood Independent School District*, 454 F. Supp. 634 (1978).

88. 34 C.F.R. § 300.24(a) (1999).

89. *Id.*

The list above is not intended to be exhaustive,<sup>90</sup> and the number of related services has increased over the years, as local education agencies (LEAs), courts, and the Department of Education continue to recognize the holistic and interdependent nature of an exceptional child's needs.<sup>91</sup> It is not always clear, however, which services are "educationally necessary" and which are necessary for other ends. The Supreme Court outlined its designation of a related service covered under IDEA as distinguished from an uncompensable medical service in *Irving Independent School District v. Tatro*.<sup>92</sup> The Court required a school to provide intermittent catheterization of a child with spina bifida, reasoning that "[a] service that enables a handicapped child to remain at school during the day is an important means of providing the child with the meaningful access to education that Congress envisioned."<sup>93</sup> Due to scarce resources, however, LEAs often assert that related services not traditionally provided by schools, such as parental counseling and complex health services, are not educationally necessary. These assertions frequently go unchallenged.<sup>94</sup>

This is of special concern with regard to children in out-of-home care because many of the "related services" ostensibly encompassed in this duty by educational agencies are very relevant to the needs of children in out-of-home care, such as psychological services, transportation, counseling, physical and occupational therapy, and social work services. Transportation, for instance, includes transportation to and from school,<sup>95</sup> which may be applicable to children in out-of-home care who are moved far from their school but require the stability of educational placement in order to benefit from special education services. Psychological services are frequently necessary for children having experienced abuse, neglect or the trauma of removal from the home. Courts have found psychiatric therapy to be a related service—even though it was being provided by a medical practitioner—and thus was potentially excludable under the IDEA regulations.<sup>96</sup> A child does not need to be diagnosed as having SED to receive such services; they are available to all exceptional children.<sup>97</sup> Social work services, whether with the child alone or with the family or foster family, are frequently necessary for a child in out-of-home care to benefit from her special education placement. The federal regulation explicitly includes services apparently directly suited to the needs of these children such

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90. 34 C.F.R. Pt. 300, App. A, at 66 (1999).

91. STEPHEN B. THOMAS & CHARLES J. RUSSO, SPECIAL EDUCATION LAW: ISSUES & IMPLICATIONS FOR THE '90S 72 (1995).

92. 468 U.S. 883 (1984).

93. *Id.* at 891.

94. COMMUNITY ALLIANCE FOR SPECIAL EDUCATION & PROTECTION & ADVOCACY, INC., SPECIAL EDUCATION RIGHTS & RESPONSIBILITIES ch. 5 (February 2000) available at <http://www.pai-ca.org/pubs/401601.htm>.

95. 34 C.F.R. § 300.24(b)(15) (1999).

96. See THOMAS & RUSSO, *supra* note 91, at 76-77 (discussing cases).

97. WARBOYS ET AL., *supra* note 4, at 21.

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as “(iii) [w]orking in partnership with parents and others on those problems in a child’s living situation (home, school, and community) that affect the child’s adjustment in school” and “(iv) [m]obilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program.”<sup>98</sup> For children in out-of-home care, the “related services” provision potentially may be utilized to assist them achieve the stability and equality of opportunity that they often lack in terms of special education services.<sup>99</sup> However, because of the lack of clarity regarding the scope of the “related services” provision and the reluctance of cash-poor schools to provide such services, this provision has yet to be used to its fullest in benefiting exceptional children in out-of-home care.

Finally, from an enforcement perspective, IDEA functions by granting procedural rights to the parents of exceptional children. These include the right to consent to or decline an evaluation and placement of their child, examine the records regarding their child, receive written notice of placement changes, attend meetings regarding their child’s placement and provide input into the IEP, and the right to appeal or be referred to mediation with regard to any placement change.<sup>100</sup> IDEA regulations mandate that states and LEAs take many steps to encourage parental participation in the development and implementation of a child’s IEP, including providing advance notice and scheduling meetings at mutually-agreed upon locations and times, using other methods such as telephone conference calls to allow parents unable to meet a chance to participate, and documenting their efforts to encourage parental participation.<sup>101</sup> This system of procedural protections has been criticized for encouraging adversarial relationships between schools and parents.<sup>102</sup> Moreover, many parents know little about their rights under IDEA, despite the requirement on schools to inform them, and some feel that schools routinely exploit this lack of knowledge to violate the law.<sup>103</sup> Nonetheless, the system has also been praised for giving parents leverage to ensure an adequate placement for their children.<sup>104</sup>

### 2. *Profile of Exceptional Children*

One in every ten public school students receives special education services, totaling about six million children in 1995-96.<sup>105</sup> The number, both absolute

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98. 34 C.F.R. §§ 300.24(b)(13)(iii)-(iv) (1999).

99. For further discussion, see *infra* Part III.C.

100. 20 U.S.C.A. § 1415 (West 2000). The parental rights framework of IDEA is discussed further *infra* Part II.C.

101. 34 C.F.R. § 300.345(a) (1999).

102. Martin et. al, *supra* note 78, at 31.

103. *Id.*

104. Martha Minow, *Learning To Live With the Dilemma of Difference: Bilingual and Special Education*, 48 LAW & CONTEMP. PROBS. 157, 177 (1985) [hereinafter Minow, *Bilingual and Special Education*].

105. THE FUTURE OF CHILDREN: SPECIAL EDUCATION, *supra* note 77, *Executive Summary*.



and relative, of students with disabilities has grown from the mid-1970s when special education was first implemented.<sup>106</sup> This growth is attributed most persuasively to increases in social and physical stresses on children resulting from poverty, substance abuse, and family dysfunction,<sup>107</sup> notably the same stresses often affecting children in out-of-home-placement regardless of their eligibility for special education.<sup>108</sup>

The majority of children and youth covered under IDEA in grades K-12, 51 percent, receive services because of a learning disability (LD).<sup>109</sup> The breakdown of disabilities among other students receiving special education is as follows: twenty-two percent have speech or language impairments; eleven percent have mental retardation; nine percent are eligible because of SED; and seven percent have hearing or visual impairments, orthopedic impairments, et cetera.<sup>110</sup> Thus, almost all of the children receiving special education services do not fit the model of discrete and immutable physical impairment which underlies the statutory framework.<sup>111</sup> The more subjective nature of identification of these mutable disabilities is significant because it increases the potential impact of bias against children in out-of-home care. Specifically, children in out-of-home care may be mistakenly labeled as having one of these mutable disabilities merely as a result of their deviation from societal norms.

Like children in foster care, children living in poverty are over-represented in special education.<sup>112</sup> This occurs despite the fact that IDEA explicitly excludes from its coverage children whose learning disabilities are primarily due to "environmental, cultural, or economic disadvantage,"<sup>113</sup> relying in part on Title I of the Elementary and Secondary Education Act (ESEA)<sup>114</sup> to meet this need.<sup>115</sup> However, it is arguably impossible to separate out the detrimental effects of poverty on a child's development.<sup>116</sup> The recent amendments to IDEA

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106. Daniel P. Hallahan & James M. Kauffman, *Toward A Culture of Disability in the Aftermath of Deno and Dunn*, 27 J. OF SPECIAL EDUCATION 496, 498 (1994).

107. Daniel P. Hallahan, *Some Thoughts on Why the Prevalence of Learning Disabilities Has Increased*, 25 J. OF LEARNING DISABILITIES 523, 523-28 (1992).

108. See *infra* Part I.C discussing the overlap between children in out-of-home care and children who are at-risk educationally.

109. These numbers are from 1992-93. See *Special Education for Students with Disabilities: Analysis and Recommendations*, in THE FUTURE OF CHILDREN: SPECIAL EDUCATION, *supra* note 77, at 7.

110. *Id.*

111. Martin A. Kotler, *The Individuals With Disabilities Education Act: A Parent's Perspective and Proposal for Change*, 27 U. MICH. J.L. REFORM. 331, 358-60 (1994) (Citing the extent and range of children with non-permanent disabilities to argue for increased inclusion, a focus on outcomes and mobility out of special education).

112. *Special Education for Students with Disabilities: Analysis and Recommendations*, in THE FUTURE OF CHILDREN: SPECIAL EDUCATION, *supra* note 77, at 6.

113. 34 C.F.R. § 300.7(c)(10)(ii) (1999).

114. 20 U.S.C.A. § 6301 (West 2000).

115. *Special Education for Students with Disabilities: Analysis and Recommendations*, in THE FUTURE OF CHILDREN: SPECIAL EDUCATION, *supra* note 77, at 6-7.

116. *Id.* at 7.

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funding scheme implicitly recognize the correlation between poverty and the need for special education by granting some funds on the basis of the state's population of children living in poverty.<sup>117</sup> While there are a number of considerations that help to explain the disproportionately high percentage of children living in poverty who are also receiving special education services, the overrepresentation also demonstrates again that subjective biases, against children from low-income backgrounds, children of color, or children in out-of-home care, may result in higher identification of these children as disabled for special education purposes.

Students identified as having disabilities are more likely to be African-American, and less likely to be Hispanic, than their relative numbers in the general population.<sup>118</sup> As is the case with the overrepresentation of children in out-of-home care, one factor underlying this data is the cultural and racial bias informing assessment methods and the assessors themselves.<sup>119</sup> Although states are required to ensure that assessment and evaluation procedures are not discriminatory on a racial or cultural basis,<sup>120</sup> there are persuasive arguments that this racially disparate over-identification is in large part due to racist societal and legal constructions of disability and achievement which inform the assessment and evaluation tools and underlie the system of special education itself.<sup>121</sup>

Exceptional children are at high risk for delinquency and incarceration,<sup>122</sup> dropping out of school, and other harms. Nationwide, eight percent of exceptional children drop out before beginning high school, and another thirty percent drop out during high school. Students with mental retardation and SED are the least likely to attend post secondary education or to achieve the average rate of employment. Students doubly disadvantaged by poverty and disability fare the worst.<sup>123</sup>

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117. 20 U.S.C.A. § 1411(e)(3)(A)(i)(III) (West 2000).

118. *Special Education for Students with Disabilities: Analysis and Recommendations*, in THE FUTURE OF CHILDREN: SPECIAL EDUCATION, *supra* note 77, at 6-7.

119. Daniel J. Reschly, *Identification and Assessment of Students with Disabilities*, THE FUTURE OF CHILDREN: SPECIAL EDUCATION, *supra* note 77, at 40, 47-48.

120. 20 U.S.C.A. § 1414(b)(3) (West 2000).

121. Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237 (1995) [hereinafter Glennon, *Race, Education*].

122. WARBOYS ET AL., *supra* note 4, at 31-32 (reporting that studies show that between 28 and 46 percent of delinquent children have at least one disability as defined under IDEA and that up to 42 to 60 percent of incarcerated juveniles have previously been identified as needing special education services). The link between learning disability and juvenile delinquency has been extensively studied, much more so than the related link between dependency and disability.

123. All of the above information comes from a report of the National Longitudinal Transition Study of Special Education Students. See Mary M. Wagner & Jose Blackorby, *Transition From High School to Work or College: How Special Education Students Fare*, THE FUTURE OF CHILDREN: SPECIAL EDUCATION, *supra* note 77, at 103-20.

C. *Children at the Intersection*<sup>124</sup> of Foster Care and Special Education

This Article is focused on the intersectional children that are served by both the foster care and special education systems.<sup>125</sup> The lack of adequate information and service provision for the educational needs of children in the foster care system impacts both their school and home placements. Without assistance, few of these children will leave the child welfare system performing better educationally than when they entered.<sup>126</sup> Many of the risk factors magnifying the disadvantages of these intersectional children and youth appear to be due to, or exacerbated by, the contrasting mandates and gaps in service between the child protection and special education systems. Thus, the relationship between these systems and the social workers and teachers working therein must be studied in order to suggest some causal factors for, and ways to address, the alarming overlap between exceptional children and children in out-of-home care.

1. *Prevalence of Foster Children At-Risk for Restrictive Educational Placement*

There is a very substantial correlation between children in out-of-home care and children at-risk for educational problems.<sup>127</sup> Children in foster care have been assessed as having poorer cognitive abilities and lower levels of academic performance than their peers, often resulting in placement at below age-appropriate grade level.<sup>128</sup> One study of children in kinship care<sup>129</sup> found that they scored significantly under peer level in reading, math, and cognitive abilities, and that forty-one percent of the foster children had been retained at least one grade level.<sup>130</sup> Other studies have found that children in long-term foster care have a substantially lower chance of performing at or above grade

124. Kimberlé Crenshaw uses the term "intersectionality" to describe the unique status of individuals falling into more than one disadvantaged group, such as Black women. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, in *FEMINIST LEGAL THEORY: FOUNDATIONS* 383, 383-95 (D. Kelly Weisberg ed., 1993).

125. Robert M. George et al., *Special-Education Experiences of Foster Children: An Empirical Study*, 71 *CHILD WELFARE* 419, 424 (Sept.-Oct. 1992) (reporting one study finding that about thirty percent of children in out-of-home care receive special education services versus the ten percent national average among all children).

126. WARBOYS ET AL., *supra* note 4, at 78.

127. The high presence of other educational risk factors among children in foster care, including socioeconomic status and race, see *supra* notes 57-60 and accompanying text, may further increase this correlation among dependency and special education.

128. See studies cited in Sandra J. Altshuler, *A Reveille for School Social Workers: Children in Foster Care Need Our Help!*, 19 *SOCIAL WORK IN EDUCATION* 121, 122 (Apr. 1997).

129. In kinship foster care, a child is placed with his or her relatives. It should be noted that this is often the best situation for foster children in terms of stability and development, so these numbers could be even higher for children in more restrictive, i.e. less family-like, and less stable placements.

130. Richard J. Sawyer & Howard Dubowitz, *School Performance of Children in Kinship Care*, 18 *CHILD ABUSE & NEGLECT* 587, 591 (1994).

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level than other children.<sup>131</sup>

Children in out-of-home care not only under-perform their peers in academic skill assessments,<sup>132</sup> but also demonstrate greater levels of behavioral disorders and higher rates of absenteeism.<sup>133</sup> Teachers characterize children in out-of-home care as more problematic than other children in several respects.<sup>134</sup> One study found that teachers described “foster children” as having “poor or very poor” study habits and attention skills, as well as “major” behavioral problems, including acting out, aggression, and frequent demands for attention.<sup>135</sup> Further, within this general framework, there is a hierarchy of educational risk among foster children related to the stability of their situation. For instance, one study in Oregon found that children who experienced multiple foster placements throughout a school year had a lower chance of being above grade level or being engaged in extracurricular activities at school than children in more stable long-term foster placements.<sup>136</sup>

The educational problems that children in out-of-home care experience is reflected in their higher rates of referral to special education—over three times more often than children not in foster care.<sup>137</sup> A study in Baltimore found that almost thirty percent of children in kinship foster care were in special education programs,<sup>138</sup> and about thirty-two percent of foster children in Chicago were found to be in special education programs, in both instances much higher than the national special education rate of only ten percent.<sup>139</sup> Children in out-of-home care are particularly likely to have certain disabilities qualifying for special education including mental retardation—eighteen percent versus the one to two percent rate among all children—and severe emotional disability—thirteen to sixty-six percent versus the incidence rate of two to five percent

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131. Robert H. Ayasse, *Addressing the Needs of Foster Children: The Foster Youth Services Program*, 17 SOCIAL WORK IN EDUCATION 207, 208 (1995) (reporting on a study by the Children’s Service Division of Oregon, J. White et al., *A Study of the Educational Status of Foster Children in Oregon: Research and Statistics* (1990) [hereinafter Oregon study]).

132. Some of the performance differential may be a result of bias in the testing system or testers themselves. This is a significant area for change, as discussed further *infra* Part III, but until this happens the underperformance of children in out-of-home care in such assessments is cause for concern regardless of the cause because it demonstrates that the needs and strengths of these children are not accounted for in the current school structure.

133. Altshuler, *supra* note 128, at 122.

134. This may in part be due to stigmatizing stereotypes by teachers about children in out-of-home care. See generally Cormier, *supra* note 7. This prejudice and ignorance then form a barrier to effective education of children in out-of-home care.

135. Sawyer & Dubowitz, *supra* note 130, at 587-97.

136. *Id.* See also Ayasse, *supra* note 131, at 208 (reporting on Oregon study).

137. See George et al., *supra* note 125, at 424. This high prevalence also appears in other localities. For instance, the Massachusetts Department of Social Services estimates that twenty to forty percent of the approximately 20,000 children in foster care in Massachusetts are in special education programs. Telephone interview with Susan Stalk, the D.S.S. administrator in charge of coordination with Boston Public Schools (April 1997).

138. Sawyer & Dubowitz, *supra* note 130, at 590.

139. George et al., *supra* note 125, at 424.

among all children.<sup>140</sup>

(a) The Risk of Mistaken Identification for Special Education Referrals of Children in Out-of-Home Care

Children in out-of-home care are more likely than other children to be mistakenly identified for special education purposes—both over-identified and under-identified for services—because of the problematic disjunct between the overlapping special education and child welfare systems. Both outcomes are harmful—either by forcing children into an overly restrictive and potentially stigmatizing educational environment, or by denying them the special services that they need and to which they are entitled.

Over identification results from teachers and other personnel being more likely to make referrals in the case of foster children because biases against children in out-of-home care as a group, lack of information about an individual child's home situation, and/or lack of understanding about a child's needs and abilities all affect the inherently subjective assessment process.<sup>141</sup> Finally, the potential for over identification of children in out-of-home care is compounded by the high number of children of color and poor children in the child welfare system, who are further impacted by evaluators' biases based on race and class.

Over identification can have long-term detrimental effects on a child's reputation among peers, teachers, and future employers.<sup>142</sup> The harms of being identified as in need of special education were recognized in one settlement where children in out-of-home care were referenced without the benefit of due process and IDEA procedural safeguards to special education programs. The consent decree therein requires the local educational agency to expunge all special education information from the records of all children who were not properly identified or who were not appointed surrogate parents to advocate for them.<sup>143</sup>

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140. WARBOYS ET AL., *supra* note 4, at 39. The latter point regarding SED is discussed at greater length *infra* notes 155-173 and accompanying text.

141. Cormier, *supra* note 7. At least one suit alleged that all children placed in shelters, group homes and residential institutions were automatically labeled "behavior disordered . . . regardless of their educational needs." See *Katie I.*, et al. v. Ted Kimbrough, et al., Consent Decree No. 89 C 8584, in the United States District Court for the Northern District of Illinois, Eastern Division (1991) at 2-3 [hereinafter *Katie I. Consent Decree*], on file with author due to the very kind assistance of Adrienne Giorgolo in the Public Guardian's Office of Cook County, Juvenile Division.

142. The harms of being identified for special education services without an individualized assessment or due process under IDEA were recognized in the *Katie I.* settlement, which includes as part of the consent decree the expunging of special education information from the records of all children who were not properly identified or who were not appointed a surrogate parent to advocate for them. *Katie I. Consent Decree*, *id.* at 8-9.

143. *Id.* An analogous right to freedom from reputational harm in part motivated the Supreme Court's requirements of some due process in school suspensions, in *Goss v. Lopez*. *Goss v. Lopez*, 419 U.S. 565, 576 (1975).

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On the other hand, existing at the juncture of the special education and child welfare systems puts children with disabilities in out-of-home care at greater risk of under-identification, as well. Many factors cause this increased risk. The absence of adult advocates in the educational system for foster children—resulting from a lack of parental support and the prohibitions on other adults, such as child protection workers, filling this role—and these children's frequent changes of location mean that many do not receive the evaluations and referrals that they require. Further, despite federal law<sup>144</sup> and some state law<sup>145</sup> requiring that educational needs be taken into account in child welfare case planning, child protective workers often do not or cannot make it a priority. Educators often rely on parents to advocate for their children, as laid out in IDEA, and so may not focus on identifying special needs children themselves. Personnel at schools and child protection agencies may either innocently overlook indicators of a learning or other disability, or purposely overlook such indicators to avoid the costs of furnishing testing and/or services. One study found that although thirty-nine percent of foster children in Oregon had IEPs, only sixteen percent were receiving any special education services.<sup>146</sup> Finally, a lot of valuable information about a child's educational needs and history is lost in frequent moves. Communication gaps and even antagonisms between schools and child protection agencies exacerbate the under identification.<sup>147</sup>

Some of the aforementioned factors may lead to either form of mistaken labeling—over identification or under identification—depending upon the situation. For instance, the funding structures of the special education and child welfare systems sometimes result in the misidentification of children as needing special education because service providers and advocates wish to access federal IDEA funding, even though the children could be effectively served in the less restrictive regular educational system, because there is inadequate general educational, child welfare, or other social service funding. Alternatively, at other times the fact that state and local educational agencies sometimes impose funding restrictions on children in special education means that all eligible children are not identified, even though this contradicts the child-find, free appropriate public education, and other central provisions of

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144. 42 U.S.C.A. § 671(a)(16) (West Supp. 2000) (requiring that each foster child's case plan include his or her health or education records).

145. *E.g.*, California Department of Social Services Manual of Policies and Procedures §§ 31-420.15-17 (mandating that child protection agencies consider the appropriateness of maintaining a child's current school placement, health and emotional issues, and special education needs, respectively, in choosing a foster care placement), § 31-435.14-16 (requiring child protection agencies to consider in permanency planning a child's special needs, the appropriateness of maintaining the current school placement, and health and emotional factors).

146. Ayasse, *supra* note 131, at 208 (citing Oregon study).

147. George et al., *supra* note 125 (highlighting the enormous discrepancy between school and child protection agency records; the former indicated that circa thirty percent of foster children received special education services while the latter documented only five percent as receiving these services).

IDEA.<sup>148</sup>

(b) The Multi-factored Nature and Bi-Causation of Out-of-Home Placement and Special Education Referral

The relationship between special education and foster placements is bicausal—the reasons that children have trouble in educational settings may also affect their home lives and vice versa. For instance, the higher rates of disability and mental health needs among children in out-of-home care<sup>149</sup> is one major factor in their referrals out of the regular educational system. Children may be disabled or have mental health needs due to abuse, neglect, or the fact of out-of-home placement alone, and these disabilities and mental health needs then have repercussions on their education. Alternatively, disabled children can be more difficult to care for, and are substantially more likely to be abused or neglected by parents or other adults.<sup>150</sup> In the latter situation, a child may have been at-risk for special education referral due to disability or mental health needs before being removed from his or her home and entering out-of-home care.

The end result is that children in both foster care and special education programs are more at risk for academic and behavioral problems than children in only one of these categories.<sup>151</sup> This extra risk is evidenced by the fact that foster children in special education programs are almost five times more likely to be in more restrictive placements—residential treatment centers and group homes—than foster children in mainstream classrooms.<sup>152</sup> Although the relationship between a child's educational and residential placement is rarely considered, the two greatly impact each other. Stability, self-confidence, and achievement in school are particularly important for children whose home life is not secure. For instance, one study of foster care graduates found that the youths who finished high school were more likely to secure employment and achieve financial independence than those who didn't.<sup>153</sup> The high prevalence of foster children at risk for restrictive education placement is, in part, due to

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148. For instance, California law allows cost to be taken into account in determining a child's placement, without expressly stating that this is only permitted under IDEA when choosing between two or more appropriate placements. CAL. EDUC. CODE § 56505(h) (West Supp. 2000).

149. WARBOYS ET AL., *supra* note 4, at 31 (stating that a national study estimated 20.5% of children in out-of-home care are disabled).

150. Children with disabilities are 1.7 times as likely to be abused or neglected as children without disabilities. This statistic breaks down so that children with disabilities are 2.8 times as likely to suffer emotional neglect, 1.8 times and 1.6 times as likely to suffer sexual abuse, and physical neglect respectively. WARBOYS ET AL., *supra* note 4 at 32-33. Note also the long discriminatory and cruel history of viewing the abuse of disabled people as appropriate treatment or punishment. *E.g.*, JAMES M. KAUFFMAN, CHARACTERISTICS OF BEHAVIOR DISORDERS OF CHILDREN AND YOUTH 46-48 (1989) (discussing the history of neglect and abuse of children with emotional and behavioral disorders).

151. Smucker et al., *supra* note 55, at 31.

152. George et al., *supra* note 125, at 430.

153. Ayasse, *supra* note 131, at 209.

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the bicausal relationship between out-of-home placement and special education needs and both must be taken into account to ensure that children obtain the best possible residential and educational placements.

### (c) The Subjectivity of Diagnosing Emotional and Behavioral Disorders

Foster children may also be at an unusually high risk of placement in restrictive education settings because they are often identified as suffering from emotional and behavior disorders, which not only form a basis for reference to special education, but are subjectively diagnosed. Those foster children termed disabled or in need of special education are overwhelmingly identified as having emotional or behavioral disorders<sup>154</sup>—up to fifty percent in some studies.<sup>155</sup> Foster children are about three to five times more likely to be termed SED than children in the general population, and up to fifteen times more likely to be identified as needing special education services as a result.<sup>156</sup>

Behavioral and emotional disorders are even more difficult to objectively identify and assess than other disabilities, such as learning disabilities.<sup>157</sup> Definitions vary depending upon the definer and his, her, or its purpose.<sup>158</sup> IDEA, for example, uses the term “serious emotional disturbance” (SED), or “emotional disturbance,”<sup>159</sup> despite repeated attempts to change to the less-stigmatizing and more accurately descriptive terms “behaviorally disordered”<sup>160</sup> or “emotional and behavioral disorders.”<sup>161</sup> Identification is based upon the presence of one or more factors, including a marked and lengthy incapacity to learn that cannot be explained by “intellectual, sensory, or health factors,” an “inability to build or maintain satisfactory interpersonal relationships with peers and teachers,” “[i]nappropriate types of behavior or feelings under normal<sup>162</sup> circumstances,” “pervasive” unhappiness or depression, or “[a] tendency to develop physical symptoms or fears associated with personal or school problems.”<sup>163</sup> The definition specifically excludes children who are “socially maladjusted.”<sup>164</sup> This definition has proven difficult to apply and has resulted in widely disparate state standards and concomitantly disparate esti-

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154. Although “seriously emotionally disturbed” is the terminology under IDEA and its regulations, I prefer to use “emotional and behavioral disorders” (EBD) as a less stigmatizing and more descriptive term.

155. George et al., *supra* note 125, at 429.

156. Smucker et al., *supra* note 55, at 30.

157. KAUFFMAN, *supra* note 150, at 18-21. See *infra* Part II.A for a discussion of the socially constructed nature of disability and deviance.

158. *Id.*

159. 20 U.S.C.A. § 1401(3)(A)(i) (West 2000). See also 34 C.F.R. § 300.7(a)(1) (1999).

160. KAUFFMAN, *supra* note 150, at 70.

161. WARBOYS ET AL., *supra* note 4, at 6 & n. 16.

162. See *infra* Part II.A-B for a discussion of how normalcy is framed to exclude children in out-of-home care.

163. 34 C.F.R. § 300.7(c)(4)(i) (1999).

164. *Id.* § 300.7(c)(4)(ii).



mated levels of emotional and behavioral disorders (EBD) prevalence.<sup>165</sup>

Even more so than with other categories of disability, the uncertain and manipulable nature of the IDEA definition of behavior and emotional disorder has led both to a significant under identification of children with EBD on a systemic level,<sup>166</sup> and to a false identification and labeling of children on an individual basis. The impossibility of distinguishing SED from "social maladjustment," and the financial incentives that sometimes exist for not identifying children who the local educational agency cannot afford to serve,<sup>167</sup> means that children are not systemically screened for EBD, and emotionally disturbed children often go unserved. Since many of the risk factors common to children with EBD, such as "chaotic and disruptive homes," parents with "poor mothering [or fathering] abilities," and "poor parent-child interactions,"<sup>168</sup> are often experienced by children in out-of-home care, it is likely that many children whose EBD goes undiagnosed and/or untreated hail from the child welfare system. Yet, in other instances there are inducements for over identification of children with these behavioral tendencies as well. Because nearly every child "at some time and in some social context" displays emotional or behavioral problems, teachers may "mistake their own ineptitude in managing students" for EBD,<sup>169</sup> or may evaluate children against the standards of a "normal" social environment which is very different from their reality—a particularly likely problem with the assessment of children in out-of-home care.

Thus, many children in out-of-home care either have EBD or have behavior tendencies easily misinterpreted as EBD. Children with EBD are among the most marginalized of children needing special education services. The number of children suffering from EBD is on the rise, while services vital to them, such as Social Security Insurance (SSI), are being cut.<sup>170</sup> These children can disrupt the classroom far more than children with physical or cognitive disabilities and tend to be the most difficult for teachers to deal with. Studies show that teachers have the most negative attitudes toward this group of children and place them in segregated settings more quickly than more withdrawn children.<sup>171</sup> As a result, children with EBD are included in general education less than children

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165. WARBOYS ET AL., *supra* note 4, at 6; *see also* KAUFFMAN, *supra* note 150, at 23-27.

166. WARBOYS ET AL., *supra* note 4, at 6; *see also* KAUFFMAN, *supra* note 150, at 23-27, 38-39 (stating that a very conservative national estimate of children requiring special education services for EBD is about three to six per cent, but that only about one percent receive services.)

167. The LEA must provide special education services for every child it identifies as eligible, so there is arguably a disincentive to the full identification of children with disabilities.

168. NIKKI MANGANORE, RISK FACTORS IN STUDENTS WITH BEHAVIORAL AND EMOTIONAL DISORDERS for H-385. (1997) (On file with the author). *See also* KAUFFMAN, *supra* note 150, at 162 (stating that family characteristics interact with other environmental factors, such as poverty, to affect a child's chances of having an EBD).

169. KAUFFMAN, *supra* note 150, at 30.

170. C.D.F. YEARBOOK 1997, *supra* note 18, at 56.

171. Gwendolyn Cartledge & Carolyn Talbert Johnson, *Inclusive Classrooms for Students With Emotional and Behavioral Disorders: Critical Variables*, in 35 THEORY AND PRACTICE 51-52 (1996).

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with other disabilities.<sup>172</sup> The very high number of children in out-of-home care that either have or are identified as having EBD makes them particularly at risk for educational segregation.

### 2. *Educational Risk Factors Shared by Children in Out-of-Home Care*

Children in foster care who are educationally at-risk are uniquely burdened by their double status.<sup>173</sup> They share the disadvantages and stigma both of children in the foster care system and of children in special education. In fact, their disadvantages at home and school are not merely additive. Rather, the two interact to achieve a type of multiplier effect, unfortunately worsening the child's opportunities for better care in both spheres. Yet foster children who are educationally at-risk also have singular needs, and, despite their incredible diversity, share common risk factors arising from their situation beyond the sum of those facing foster children and those facing children in special education. These risk factors include legal status, lack of effective advocacy and caretaker involvement, geographic instability, family trauma and a high incidence of mental illness, and the negative stereotypes and lack of awareness with regard to the situation of children in foster care. These unique needs are often overlooked and these children left unprotected by the legal and political paradigms which channel them into one identity and overlook their multidimensional experiences.<sup>174</sup> Below, I outline some of these characteristics, leading to my argument in Part III that special steps need to be taken to adequately identify and provide special education services for children in out-of-home care, without resorting to stigmatizing generalizations.

#### (a) Legal Status

The legal status of children in out-of-home care creates educational risk factors, including lack of recognition of a child's foster care status by her teacher, unreliable access to services, and delay in service provision as a result of funding disputes. All children in out-of-home placements share, by definition, a legal status which is different than that of children not in the child welfare system. This information is significant with regard to the educational system in many ways: for accessing certain funding sources (i.e., family preservation "wraparound" services), for safety (i.e., who to call in an emergency), and for teacher-family coordination (who comes to parent-teacher night?).

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172. KAUFFMAN, *supra* note 150, at 70.

173. This is in addition to other stigma that they may face based upon race, gender, class, disability, or other factors.

174. For further discussion of the inadequacies of current equality theory to address the needs of those persons at the intersection of multiple identities, see Part II.A *infra*, outlining in part the pivotal analysis of Kimberlé Crenshaw in this regard.

More-over, teachers often find knowing about a child's status in the child welfare system very important to the successful inclusion of these children in their classrooms.<sup>175</sup> Despite laws mandating child welfare agencies or the juvenile court to disclose such information,<sup>176</sup> in practice it is often withheld or accidentally lost in the process of enrollment.<sup>177</sup> Moreover, lack of fixed protocols and uncertainty over who should take responsibility for doing so at the ground level—the foster parent or social worker—cause further delays and gaps in a child's school records.

Even beyond its relevance to general education, child protection status has an especially profound impact on a child's access to special education services. Notice to and consent of a parent or legal guardian is initially required at several key points in meeting the educational needs of exceptional children—for evaluation, implementation of an IEP, or a change in placement.<sup>178</sup> Moreover, children without parental advocates or surrogates may often fall through the cracks in terms of referrals and services, following the old adage that “when all are nominally responsible, none is truly responsible.”<sup>179</sup> For instance, teachers often have more responsibility to request a team evaluation for foster children, since so many players are involved (foster parents, social worker, natural parents), each with unclear rights to the child (legal versus physical versus educational custody) that often no one acts and the child is left with substantial needs unmet. Because the child protection and special education systems “traditionally have run on two separate tracks,” neither system is prepared to take responsibility for or fully cooperate in fulfilling a child's entire set of needs.<sup>180</sup>

The complex legal status of children in out-of-home care may also make it difficult to access the appropriate special education funding mechanisms. Interagency disputes, particularly over funding, can stymie progress in a child's attempt to access special education and other services. Under federal law, states and LEAs must provide all special education services free to eligible

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175. This problem of not having enough information about a child's home situation was highlighted by all eight teachers I spoke or worked with in California and Massachusetts.

176. California law, for instance, requires child welfare workers to inform educational authorities when a child with a disability is placed in foster care, including the provision of relevant information about the status of the parents' educational rights, or the movement of a child from one placement to another. CAL. EDUC. CODE § 56156(b) (West 1989 & Supp. 1990); CAL. GOV'T CODE § 7579.1 (West 1995). The juvenile court sometimes shares this responsibility. CAL. GOV'T CODE § 7579 (West 1995).

177. This is a pressing and widespread problem. See, e.g., Foster Youth Services, SpEd Placement Process Meeting, Concord, CA (March 4, 1998) (on file with author).

178. 20 U.S.C.A. §§ 1414(C), 1415 (West 2000).

179. Frank J. Macchiarola et al., *The Judicial System & Equality in Schooling*, 23 FORDHAM URB. L.J. 567, 574 (1996) (quoting Herbert J. Walberg & Herbert J. Walberg III, *Loving Local Control*, 53 EDUCATIONAL RESEARCHER 19, at 26 (1994)). The extreme mobility of foster children also contributes to the failure by schools to “flag them” as at-risk cases by schools. See Deborah L. Cohen, *Foster Youths Said to Get Little Help With Educational Deficits*, 10 EDUC. WK., June 12, 1991, at 8 [hereinafter Cohen, June 12].

180. Cohen, June 12, *supra* note 179, at 10.

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children, including residential placements that are part of an IEP.<sup>181</sup> Yet residential placements made for other reasons, such as a juvenile court decision, must be paid for by a child's parents or a child welfare agency.<sup>182</sup> School district and child welfare personnel also dispute the costs of, for instance, related services such as mental health.<sup>183</sup> Further disputes arise between school districts as to the child's residency and which district must pay the costs of special education services.<sup>184</sup> The wrangling over costs leaves many foster children without full access to the educational services that they merit.

### (b) Lack of Effective Advocacy and Caretaker Involvement

Many children in out-of-home care lack effective educational advocates. Since the special education system is premised on grassroots enforcement by parents of children's educational rights,<sup>185</sup> the lack of an effective advocate can significantly frustrate the ability to receive an adequate and fair referral and subsequent provision of special education services. Barriers in communication and complex institutional practices make it difficult for parents who are able and willing to provide their children with safer, more stable homes to advocate effectively for their educational needs; the task can be insurmountably formidable for parents already disadvantaged by race or class biases, or for foster parents with little motivation to intervene or with little experience dealing with their new charge and the local school district. However, the involvement of the foster parent who takes care of the child in question is essential not only to securing evaluations and services under IDEA, but also to assisting teachers and other service providers in achieving a child's educational and developmental goals.<sup>186</sup> Children in out-of-home care face substantial hurdles to caretaker involvement in this regard, which can decrease their chances of benefiting from an individual educational plan. Although IDEA requires states and LEAs to develop procedures to protect children in out-of-home care, such as the assignment of a surrogate educational parent,<sup>187</sup> the lack of effective identification and monitoring of the special education needs of children in out-of-

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181. 34 C.F.R. § 300.302 (1999).

182. WARBOYS ET AL., *supra* note 4, at 155.

183. *Id.* at 150.

184. *E.g.*, Brockton Pub. Schs., 26 IDELR 238 (No. 97-2292, June 17, 1997) (ruling that Massachusetts law makes the district in which the child's parents reside responsible for paying for special education residential placement rather than the district wherein child resides with her foster parents); Board of Educ. of Community Unit Sch. Dist. No. 428, De Kalb County v. Board of Educ. of High Sch. Dist. No. 214, Cook County, 26 IDELR 12 (No. 2-96-1112, May 16, 1997) (holding that Illinois Law requires the school district in which a child's "natural parents" reside to pay for special education, regardless of where the child and her foster parents live); *see also* Caitlin v. Ambach, 558:165 (N.D.N.Y. 1986). The use of school residency requirements to deny children and youth educational equality of opportunity is discussed further *infra* in Part II.C.

185. See further discussion of this at *infra* Part II.C.

186. WARBOYS ET AL., *supra* note 4, at 96.

187. 20 U.S.C.A. §§ 1415(b)(2), 1439(a)(5) (West 2000).

home care demonstrates that these processes are not currently being utilized effectively.<sup>188</sup>

Many additional obstacles make effective educational advocacy by adults in foster children's lives very rare. The paradigmatic advocate under IDEA, a parent, is usually not available to fill this role for a child in out-of-home placement. At least one state, California, requires that parental rights be separately limited or terminated specifically with regard to a child's education—i.e. removal from the home for abuse or neglect is not sufficient.<sup>189</sup> In many cases, however, parents who retain educational rights have abandoned their children or are incapable of effectively advocating for their children's educational needs due to, for instance, substance abuse.<sup>190</sup> Moreover, those parents who do retain their parental rights with regard to education do not often receive help and guidance in becoming effective advocates.<sup>191</sup> Non-parental caretakers face similar challenges. Although child welfare workers are required by law to provide foster parents or group homes with the health and education records of the children in their care,<sup>192</sup> they do not always do so, and foster parents or other caregivers are left inadequately informed to properly advocate for children.

Federal,<sup>193</sup> and sometimes state,<sup>194</sup> law forbids state actors involved in a child's education and care to serve as the educational "parent" of a ward of the state, thereby creating a further hurdle for securing effective advocacy on behalf of a child in the child welfare system. (Moreover, despite recent changes, foster parents are still not automatically granted parental rights in the educational realm).<sup>195</sup> All agents of a public or private agency caring for or educating a child are included in this bar, such as social workers, foster agency employees, school employees, and probation officers. This rule is intended to protect children from conflicts of interest when advocates serving as parents are employed by the same entity as they are advocating against (i.e. the government). In practice, however, it often leaves children in out-of-home care

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188. George et al., *supra* note 125.

189. *E.g.*, CAL. GOV'T CODE § 7579.5(a) (West 1995).

190. However, a system like California's can result in beneficial cooperation between parents and social workers where education can be the one piece of their child's life in which parents can effectively participate.

191. WARBOYS ET AL., *supra* note 4, at 78.

192. *E.g.*, CAL. WELF. & INST. CODE § 16010 (Supp. 2000) (mandating the inclusion of "a health and education summary" in the case plan of each child in the dependency system, directing the child protection agency to give this plan to the child's caretakers within 30 days of her initial placement in foster care, requiring the child's caretaker to maintain education and health records, and ordering the court to direct parents appearing before it to provide the child protective agency with complete health and education information).

193. 20 U.S.C.A. § 1415(b)(2) (West 2000); *see also* 34 C.F.R. § 300.20(a)(2) (1999) (stating that the term parent as used in IDEA does not include "the State if the child is a ward of the state"). *Cf.* 34 C.F.R. § 300.515(c)(3) (1999) (allowing the appointment of employees of nonpublic agencies that provide noneducational care for the child as surrogate parents if they meet other criteria).

194. *E.g.*, CAL. GOV'T CODE § 7579.5(g) (West 1995).

195. *Infra* notes 378-391 and accompanying text.

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unprotected since many of those who would be their best advocates—such as social workers and group home employees—are banned from assisting them.

Exceptions to this rule have been carved out in some states.<sup>196</sup> A few recent rulings indicate that group home employees, for instance, would not automatically be disqualified from serving as educational surrogate parents if they met the other requirements of knowledgeability and lack of a conflict of interest. Instead, the reviewing agency or court should look at the facts on a case-by-case basis.<sup>197</sup> Moreover, even if they are not serving as surrogate parents, social workers, group home employees, and others may also be included in the IEP process with the consent of a child's parent or school. Yet, these inroads are far from complete. California, for instance, continues to maintain an absolute bar against employees of a public agency involved in the care or education of the child serving as educational surrogates, regardless of the facts of a case.<sup>198</sup>

Finally, parents may not just be unavailable for advocacy, but may actually thwart the process of appropriate educational referrals and services for their children. Because of their lack of clearly empowered advocates, children in out-of-home care are, perhaps to a greater extent than other children in need of special education referrals, vulnerable when parents or caretakers deliberately withhold information from school officials for fear of being blamed for their child's educational problems. The current paradigm gives such parents, who do not have their children's best interests in mind, tremendous power to put their children at risk educationally and to prevent the provision of equal educational services.

### (c) Geographic Instability and School Residency Requirements

The tremendous geographic instability experienced by children in foster care puts them at risk educationally. These children often move homes multiple times per year and these moves usually require a school change as well. Sometimes these moves result from crises and happen within a few hours. Children may stay in temporary foster homes or emergency care shelters for weeks or even months. Many children in this situation do not receive the services they need from the neighborhood, shelter, or group home school which are not willing to take on the costs of evaluations for a temporary student, or cannot handle matters beyond the crisis of finding a home placement or caring for the children in their custody.<sup>199</sup>

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196. Kish, 211 EHLR 182 (OSEP 1978) (allowing noneducational state or county employee to serve as educational surrogate based upon a case-by-case analysis).

197. Letter to Thompson, 23 IDELR 890 (OSEP 1995).

198. CAL. GOV'T CODE § 7579.5(g) (West 1995).

199. The *Katie I.* case discussed throughout this Article, for instance, focused mainly on the most transient and at-risk sector of children in out-of-home care who are in shelter and other very temporary care. *Katie I.* Consent Decree, *supra* note 141.

If children do stay at the same school after a move, they often have extensive 'travel time' between home and school. Frequent moves can cause some of these children to miss a great deal of school time, and this is exacerbated by school time missed as a result of court dates, visitation, and other child protection related matters. Further, as noted previously, the inconsistency of records transfers is notorious and often results in a child's educational profile being lost and his or her placement in an inappropriate program. Although child welfare agencies are usually required to transfer health and education records of foster children to their new foster homes,<sup>200</sup> in practice this often does not occur in a reasonable time, if ever.<sup>201</sup> Some of these problems related to geographic instability constitute risk factors even when considered independently. For instance, the number of schools attended and the percentage of time absent from school are two of the variables in at least one test for at-risk children.<sup>202</sup>

Yet, a discussion of the experience of frequent moving is not complete without considering the emotional toll that dislocation and relocation can exact. Moves can be very disruptive to children's relationships and development and "undo" previous gains in their academic and social growth. The constant relocations of foster children create tremendous instability both at home and school. As one teacher says, "When a child doesn't know where he is going to be, there's just no way he can function in a classroom."<sup>203</sup> At home, they must adjust to new caregivers and siblings, and the atmosphere of a new household. At school, they must constantly readjust to new friends and teachers, as well as to different instructional methods and inconsistent or overlooked evaluations.<sup>204</sup> Rick Weissbourd points out that children who move frequently are sometimes forced to rely excessively on family members, which may be unhealthy, and potentially more damaging when the family itself is legally unstable as in foster families.<sup>205</sup> The risk-factor of geographic instability is common to all foster children at some point, although it can vary a great deal depending upon the stability of the child's placement and service plan, and the individual's development and resilience. Despite individual differences, however, the "moving factor" should not be underestimated: one study found the category of foster children to be more indicative of educational failure than the related category of EBD, and hypothesized that geographic instability was a major cause.<sup>206</sup> This instability has led one group of experts to analogize foster chil-

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200. See, e.g., CAL. WELF. & INST. CODE § 16010(b) (West 1991) (requiring child welfare workers to transfer records to foster parents upon changes in placement).

201. WARBOYS ET AL., *supra* note 4, at 95.

202. Smucker et al., *supra* note 55, at 33.

203. Cohen, June 12, *supra* note 179, at 15 (quoting Elaine Murphy, a second grade teacher in Contra Costa County, California).

204. Ayasse, *supra* note 131, at 207-08.

205. RICHARD WEISSBOURD, *THE VULNERABLE CHILD: WHAT REALLY HURTS AMERICAN CHILDREN AND WHAT WE CAN DO ABOUT IT* (1996) at 106-110.

206. Smucker et al., *supra* note 55, at 34.

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dren to the children of migrant farm workers.<sup>207</sup> Geographic instability can be even more disruptive for foster children than children of migrant families, however, because the former are moving from one parent to the next, not just among locations.

### (d) Family Trauma and Higher Prevalence of Mental Illness and Behavioral Disorders

Children in out-of-home care, by definition, have suffered some disruption in their family and other personal relationships. Most of the children in foster care are there due to parental abuse, neglect, or abandonment, which can have devastating effects on a children's ability to trust and bond with adults and even peers.<sup>208</sup> Foster children are often separated from siblings and other relatives as well as their parents, and thus lack any of the security that family relationships bring. The trauma of removal from one's home and separation from family has a tremendous effect on a child's interaction with adults and other children, as well as ability to focus on other issues such as schoolwork.<sup>209</sup> As noted previously, the factors may cause many children in out-of-home care who are not learning or otherwise disabled to appear to show signs of emotional and behavioral disorder. The mental health stresses on children in out-of-home care both create the possibility that they will be improperly designated as disabled for special education services, and produce actual educational risks for these children, which do not rise to the level of a disability, but which should be addressed.

The pressure of deviating from the theoretical societal norm of the two-parent nuclear family still exists for the fairly small proportion of children in foster care who achieve lasting, even eventually adoptive, placements. One study posits that children in divorced, single-parent households are more at risk for special education referrals than children in nuclear two-parent families.<sup>210</sup> Foster care placement involves substantially greater trauma and stigma than divorce. Teachers and school administrators often worsen the isolation of children in out-of-home care by using curricula focusing on the nuclear family<sup>211</sup> or structuring school-family activities around children with biological mothers and fathers. The fact that children in out-of-home care are reacting to family pressures that testers and teachers may not know about or acknowledge can greatly increase the potential for the over identification of these children for

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207. George et al., *supra* note 125, at 421.

208. Ayasse, *supra* note 131, at 207.

209. *Id.*

210. John R. Beattie & Gregory O. Maniscalco, *Special Education and Divorce: Is There a Link?*, 1 TECHNIQUES: A J. FOR REMEDIAL EDUC. & COUNSELING (1985).

211. Jim Mahsuz, Director of the Family Center, talked of one foster child who was traumatized by an assignment requiring children to draw their family trees, "beginning with their parents." Interview with Jim Mahsuz, Director of Family Center, in Somerville, Mass. (April 1997).



special education.

As well as being more likely to be diagnosed with behavioral disorders than children not in foster care, children in out-of-home care are also far more likely than other children to have mental health needs. The prevalence of mental illness is much higher among children who are dependents of the state than among children with similarly deprived backgrounds who remain in parental or informal family care.<sup>212</sup> Not surprisingly, abuse or neglect and removal to the child welfare system thus prove to have their own unique and damaging effects on a child apart from other risk factors such as socioeconomic status. Even children in foster care without EBD or mental health diagnoses appear to have more problems following the mainstream classroom routine and interacting well with their teachers and peers. Teachers describe substantially more foster children than other children—up to nine times as many—as having problems with attention, self-image, and depression.<sup>213</sup> Attention deficit problems are another concern, with children in foster care seeming more prone to easy distractions while doing work in-class or at home.

Some of these diagnoses or depictions may be due to the bias of educators and other professionals, but the vastly increased prevalence of emotional and behavioral disorders and other emotional needs among foster children make them characteristics worth considering, both to identify and prevent problems before unnecessary referrals are made, and to check this bias by ensuring that diagnoses are made based upon careful evaluation and criteria applicable to that individual child.<sup>214</sup> Some of the emotional and behavioral problems that foster children show may be part of a fairly predictable developmental cycle which occurs following removal from the home.<sup>215</sup> As such, it may not be cause for removal from the classroom at all, but rather a signal for the teacher to help the child through this difficult time with appropriate support and referrals.

#### (e) Negative Stereotypes and Lack of Awareness About Foster Children

Foster children are often the victims of harmful negative stereotyping. Demeaning children's abilities based on their home situation or blaming them for family problems is unfortunately far too frequent, and the prejudices and ignorance of others is an important shared characteristic among foster children. This stereotyping becomes particularly important in the educational context,

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212. Mel Schneiderman et al., *Mental Health Services for Children in Out-of-Home Care*, 77 CHILD WELFARE 29, 30 (1998).

213. Smucker et al., *supra* note 55, at 35.

214. An analogous theory lies at the heart of the successful and renowned Comer model—that poor, minority children must be evaluated and then taught from their baseline of social skills and development which may be different from the white, middleclass mainstream. See James P. Comer, *Educating Poor Minority Children*, 259 SCIENTIFIC AMERICAN at 42-48 (1988).

215. Cormier, *supra* note 7, at 34-35.

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where teachers' subjective impressions can have great weight in determining a child's school placement and their expectations can greatly impact a child's potential to achieve.<sup>216</sup> As one foster parent advocate puts it, "The reality is that teachers expect foster-care kids to be trouble."<sup>217</sup>

Some teachers have negative biases against children in foster care, especially those with EBD, and harbor misconceptions about their development and qualities as a group.<sup>218</sup> One study recorded teachers making comments such as "[f]oster children cannot learn because they were prenatally exposed to illegal drugs," "[a]ll foster children will lie, steal and will kill," and "[a]ll foster children have done something wrong or bad and that's why they are in foster placement."<sup>219</sup> When children in out-of-home care "act out" their emotions in reaction to the trauma they have suffered, teachers may see the behavior as "bad or uncooperative," rather than as natural and often remediable through care and attention rather than special academic services.<sup>220</sup> Teachers and school personnel may single out and stigmatize children in out-of-home care—whether consciously or unconsciously. Tales range from using a loudspeaker to direct children in out-of-home care to a van designated only for "foster kids," to giving them different colored lunch tickets.<sup>221</sup>

Much of this prejudice and insensitivity arises out of a lack of knowledge about the experiences and development of children in out-of-home care. Educators often isolate foster children because they do not understand them or think that they are incapable of changing. A teacher at one Washington D.C. elementary school explained that she suspended and dismissed foster children from class while giving other children a "second chance" because she was not going to "waste" her time with these "fools." Her frustration at not knowing how to handle these students turned into antipathy at the children themselves.<sup>222</sup> Many educators are overwhelmed by the new and diverse needs of their students and are not trained or provided enough time to competently identify and deal with at-risk foster children.

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216. Regarding the latter proposition, that teacher expectations can be very influential in determining student success or failure, see Macchiarola et al., *supra* note 179, at 577-78.

217. Cohen, June 12, *supra* note 179 (quoting Gordon Evans, information director for the National Foster Parents Association of Houston). All of the approximately twenty social services personnel and teachers contacted for this project described the negative stereotyping of foster children in schools as widespread and very harmful.

218. Sawyer & Dubowitz, *supra* note 130, at 596.

219. Cormier, *supra* note 7, at 21-23, 57-58.

220. Cohen, June 12, *supra* note 179, at 9 (quoting Eileen Mayers Pastor, Director of Family Foster Care for the Child Welfare League of America).

221. *Id.*

222. Cormier, *supra* note 7, at 17.

## II. EQUALITY AND DIFFERENCE AT HOME AND AT SCHOOL

Children in out-of-home care with special educational needs embody what Martha Minow has termed the 'dilemma of difference' in its starkest form—how can the law give every child the safety and support he or she needs to thrive at home and in school without stigmatizing him or her?<sup>223</sup> For instance, identifying a child as disabled under IDEA entitles him or her to individualized educational assistance, thus potentially enabling the child to better achieve success and integration in society, but it simultaneously labels him or her as handicapped and subjects him or her to the stigmatization and isolation that that label often brings.<sup>224</sup> The debate over difference takes place against a backdrop of tremendously scarce resources. Labels of special needs can bring the bearer rights and funding, making difference a source of power. Yet even the identification of process rights based upon membership in a category may not ensure equality of result in a significant fashion.

This Part addresses various equality theories and their relationship to the situation of children in out-of-home care with special educational needs. First, I consider equal protection law and the work of critical theorists discussing equality related to other disadvantaged societal groups, such as women, people with disabilities, and people of color. This leads to several important insights about the constructed nature of otherness and the inability of current equal protection law to protect people falling into multiple or overlapping categories. Next, I outline the conceptions of similarity and difference underlying the child welfare and special education systems. Both systems focus on after-the-fact intervention rather than prevention, and function through individual labeling rather than universal service provision. Nonetheless, inclusion in a mainstream environment to the maximum extent possible is a guiding equality principle in education. Children are granted few, if any, rights but rather are presumed to be served by the merger of their rights with those of their legal parents. This reliance on parental advocacy is, however, at great odds with the structure and assumptions underlying the child welfare system. Child protection is built upon a framework of foster families whose legal rights with regard to their foster child are weak, if not nonexistent. Finally, this discussion will then inform an analysis of some equality principles that could be used to address the unique situation of children in out-of-home care who face educational challenges.

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223. See generally MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW (1990) [hereinafter MINOW, MAKING ALL THE DIFFERENCE].

224. *Id.* at 36.

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### A. *Equal Protection and Difference*

The existing rights-based model of equal protection emphasizes the bipolarity of sameness and difference,<sup>225</sup> treating those deemed similarly situated the same and those deemed dissimilar differently. Based upon a liberal ethos of individual self-determination, current doctrine also fails to recognize the complex and mutually impacting relationships between people and societal institutions in shaping and constraining identity. This model has been criticized for classifying individuals on the basis of normalcy and difference rather than recognizing relationships and social constructions of categories,<sup>226</sup> neglecting to recognize the complex and unique oppression of individuals with intersectional and multifaceted identities, and overly relying on formalism, thereby failing to address substantive inequalities.<sup>227</sup> Although this paper does not argue that more enlightened treatment of exceptional children in out-of-home care can be compelled on the basis of constitutional equal protection argument,<sup>228</sup> the critique of equality models outlined below is informative in assessing the unique discrimination against these children with regard to their statutory rights to special education. This critique is then incorporated into strategies and suggestions for change that have the potential to achieve broader and more substantive equality of opportunity for these children.

#### 1. *The Social Construction of "Otherness"*

Certain human characteristics previously thought of as intrinsic and "immutable" biological attributes, such as race, gender, and disability, have been shown to be at least partially constructed by unstated norms, prejudices, and relationships governed by societal rules.<sup>229</sup> The current legal paradigm posits these categories of characteristics as natural, inevitable divisions between what is normal and what is "other"<sup>230</sup> without recognizing the social construction of

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225. *Id.* at 146-47.

226. *See id.*; see also Glennon, *Race, Education*, *supra* note 121, at 1290-1313.

227. *See, e.g.*, Crenshaw, *supra* note 124 at 386. *See also* ROBIN WEST, *CARING FOR JUSTICE* 153 (1997).

228. Disability is neither a suspect or semi-suspect category under the Constitution, and thus merits only rational review. *See* *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (finding that disability is not a suspect classification and thus does not merit heightened equal protection scrutiny). Family status in terms of illegitimacy has earned intermediate scrutiny as a semi-suspect category. *See* *Mills v. Habluetzel*, 456 U.S. 91 (1982).

229. *See, e.g.*, Thomas Armstrong, *ADD as a Social Invention*, *EDUC. WK.*, Oct. 18, 1995, at 40; Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *YALE L.J.* 1 (1995); Ian Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 *HARV. C.R.-C.L. L. REV.* 1 (1994) (discussing the social construction of race); Michael A. Rebell, *Structural Discrimination and the Rights of the Disabled*, 74 *GEO. L.J.* 1435 (1986).

230. An early elaboration of this concept can be found in Simone de Beauvoir's seminal work, *THE SECOND SEX* (Knopf 1993) (1953). For an informative discussion of the construction of racial mi-

such categories and their inherent relationship to political power and oppression. In so doing, the law both explicitly<sup>231</sup> and implicitly defines people's identities in a manner which either bestows rights and privileges or confers disadvantages and stigma.<sup>232</sup> For instance, the children discussed herein are defined as "other" by virtue of their legal status as children in out-of-home care merely because they are not in the "normal" social construction of home care. With this designation as "other" come both stigmatization and barriers. The law thereby simultaneously ignores and helps to create the individual and systemic biases against persons deemed different by turning a blind eye to the social forces that shape some categories while treating these categories as fundamental and immutable and investing them with great legal import.

This exclusionary principle of difference pervades our society—from legal rules and decisions to communal institutions, including the classroom.<sup>233</sup> And the labeling and segregation that often accompany a designation as different can be devastating to the self-image of persons deemed different. They often internalize the fear, anger and disgust visited upon them by others<sup>234</sup> and can engage in self-destructive or anti-social behavior as a result.<sup>235</sup> This reaction can be particularly pronounced when it occurs across multiple socially-constructed categories, such as disability and race.<sup>236</sup> For instance, Theresa Glennon has demonstrated how the social constructions of race and disability have interacted with systemic and individual biases of schools and educators to effectively resegregate children of color into separate special education classes.<sup>237</sup>

This difference paradigm posits difference in the individual, thereby stigmatizing him or her. Thus, as Martha Minow has argued, the law categorizes and draws lines between "normal" and "abnormal," rather than recognizing differences as socially relative and equally valuable.<sup>238</sup> Difference is deemed deviant by comparison to a normalcy posited as superior and natural.<sup>239</sup> The in-

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norities as "others" through American law, see Charles R. Lawrence III, *Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819 (1995).

231. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896) (designating race based upon percentage of blood for purposes of perpetuating racial segregation). See also *M.T. v. J.T.*, 355 A.2d 204 (1976) (discussing the construction of gender in upholding a marriage between a man and a post-operative transsexual).

232. See generally MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS & THE LAW 59-84 (1997) [hereinafter MINOW, NOT ONLY FOR MYSELF].

233. See generally PALEY, *supra* note 1.

234. See IMAGES OF THE DISABLED, DISABLING IMAGES (Alan Gartner & Tom Joe eds., 1987).

235. See Charles H. Post, *The Link Between Learning Disabilities and Juvenile Delinquency: Cause, Effect and 'Present Solutions'*, 32 JUV. & FAM. CT. J., Feb./Mar. 1981, at 58, 60-61.

236. See Minow, *Bilingual and Special Education*, *supra* note 104, at n.147 (quoting Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967)).

237. See generally Glennon, *Race, Education* *supra* note 121.

238. MINOW, MAKING ALL THE DIFFERENCE, *supra* note 223.

239. Minow, *Bilingual and Special Education*, *supra* note 104, at 203.

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dividual rights approach thereby reinforces existing power structures.<sup>240</sup> An alternative social relations approach would recognize the mutual relationship among people, in other words a child in foster care is different from a child living with his parents just as a child living with his parents is different from a child in foster care. Each needs the other to define himself.<sup>241</sup>

The first step toward a social relationship approach is recognizing the extent to which difference is socially-constructed and changes depending upon the context. To demonstrate this point, Martha Minow cites the widespread use of sign language by both hearing and deaf persons on Martha's Vineyard in the seventeenth to early twentieth centuries because of high hereditary levels of deafness.<sup>242</sup> Definitions of race and sex have changed over time.<sup>243</sup> Our conception of disability has proven to be particularly flexible, being simultaneously limited with technological advances and expanded with a recognition of "new" disabilities,<sup>244</sup> such as cosmetic disfigurements and drug and alcohol addiction.

There are several advantages to revealing the socially and legally-constructed nature of various categories. For one, the burden of difference can be lifted from the individual and placed onto the social and legal institutions that stigmatize and classify. Second, group membership can increasingly be seen as a choice rather than an inherent, potentially disabling condition. This not only avoids the inherent privacy invasion and oppression in assigning group membership, but may also be empowering or politically mobilizing.<sup>245</sup> This philosophy underlies the increasingly widespread self-definition by deaf individuals that "being deaf is a culture and a source of pride,"<sup>246</sup> rather than being a disability. Finally, a revelation of the artificial and discriminatory construction of categories allows individuals to demonstrate their experiences of treatment at the hands of others, and concomitantly unite around social reform.<sup>247</sup> Recognizing the causal contribution of others' perspective on, and treatment of, certain groups has led to advances in anti-discrimination law such as the protection under the Americans with Disabilities Act for individuals who are *regarded* as being limited in the performance of one or more life activities due to a physical or mental impairment, even if they are not in actuality im-

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240. MINOW, MAKING ALL THE DIFFERENCE, *supra* note 223, at 108-09.

241. Minow, *Bilingual and Special Education*, *supra* note 104, at 203-04.

242. MINOW, MAKING ALL THE DIFFERENCE, *supra* note 223, at 85 (discussing Nora Groce's book *Everyone Here Spoke Sign Language*).

243. See, e.g., the cases cited in note 231, *supra*.

244. Some disabilities are new phenomena, but most are simply a reframing of issues previously (and often still) thought of as moral failures into public health problems.

245. WEST, *supra* note 227, at 11-12.

246. Andrew Solomon, *Defiantly Deaf*, N.Y. TIMES, Aug. 29, 1994, §6 at 40.

247. Robert Funk, *Disability Rights: From Caste to Class in the Context of Civil Rights*, in IMAGES OF THE DISABLED, DISABLING IMAGES, *supra* note 234, at 14-15 (discussing these underlying rationales for the use of a social disability model in the American disability movement).

paired.<sup>248</sup> This expansion of equality protection results from congressional recognition of the social construction of disability, in part “resulting from stereotypic assumptions not truly indicative of the individual ability of [individuals with disabilities] to participate in, and contribute to, society.”<sup>249</sup>

The law’s failure to recognize the social construction of “otherness” is particularly significant for children in out-of-home care who are at-risk educationally because much of their identity is explicitly legally constructed (being in the child welfare system) and is then stigmatized. Special education labels are also applied to children whose behavior does not fit the norm, although not constituting a disability in any medically determinable sense.<sup>250</sup> This is particularly true of the categories under special education which have more ambiguous boundaries, such as emotional/behavioral disorder (EBD). Using the treatment of disability as a model, it might be possible to force recognition of the social construction and stigmatization of the “difference” ascribed to children in out-of-home care. Disability, like being placed in the child welfare system, is a functional concept, and thus is a relative rather than intrinsic characteristic.<sup>251</sup> Disability can be analogized in some ways to a child’s legal family status, although legal family status is even more flexible than disability. As family definitions change both over the long term in society, and within a child’s life, for instance through adoption, someone’s status as a foster child will also change, potentially becoming less stigmatizing. Recognizing the social construction and stigmatization of difference with regard to children in out-of-home care can not only help exceptional children in out-of-home care mobilize around a group identity for change, but can also help us all move toward systemic change.

## 2. *The Failure To Recognize Intersectional Identities*

The legal categorization of people narrowly into one group for equal protection analysis ignores the complex reality of individual identities made up of many overlapping group memberships. The use of bounded, protected identity categories in the rights model “obscures claims that cannot be understood as resulting from discrete sources of discrimination.”<sup>252</sup> The rights model fails to identify and alleviate the unique oppression of, for instance, women of color,<sup>253</sup> and disabled women.<sup>254</sup> Moreover, dominant anti-discrimination doctrine fo-

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248. 42 U.S.C.A. § 12102(2)(c), Americans with Disabilities Act (West 2000).

249. *Id.* § 12101(a)(7).

250. Glennon, *Race, Education*, *supra* note 121, at 1291.

251. *Id.* at 1304.

252. Crenshaw, *supra* note 124, at 383.

253. *See generally* Crenshaw, *supra* note 124.

254. *See, e.g.*, Anita Silvers, *Reprising Women’s Disability: Feminist Identity Strategy and Disability Rights*, 13 BERKELEY WOMEN’S L. J. 81 (1998); Susan Wendell, *Toward a Feminist Theory of Disability*, 4 HYPATIA 104 (1989).

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cuses only on the most privileged members of any group, thereby ignoring the multiple and unique sufferings of the most subordinated people.<sup>255</sup>

This exclusion of intersectional individuals is perpetuated not only by the structure of the legal system, but also by the politics of movements advocating for social change for one or the other identity. Both Kimberlé Crenshaw and Angela Harris critique the feminist movement for failing to incorporate the experiences and needs of black women.<sup>256</sup> This essentialism in feminism “[leaches woman] of all color and irrelevant social circumstance, [bracketing] issues of race as belonging to a separate and distinct discourse,” thus positing woman as white and white women’s problems as inclusive of the problems of all women.<sup>257</sup> Yet, any social movement needs some basis of commonality to function effectively. Thus, Harris calls for the recognition of a multiplicitous self, acknowledgement that differences are relational, and a community built out of “will and creativity.”<sup>258</sup>

Children in out-of-home care with special education needs are also at the intersection of two classifications.<sup>259</sup> Both the legal structure and advocates within the system often ignore the dual nature of these children’s identities, thereby obscuring their unique and multi-faceted needs. By presuming an intact parent-child relationship, IDEA and special education personnel overlook children who have been removed from parental care. By focusing solely on a child’s home situation, and assuming that this is distinct from her educational needs, child protection legislation and advocacy also neglect the interests of these intersectional children.

The special education and child protection systems need to be expanded to accommodate the multi-faceted identities of the many children involved in both. Coalitions between these two systems and their advocates must be built, as they will not inevitably emerge.<sup>260</sup> Attempts at coalition-building can be informed in this regard by the disability rights movement. Like child welfare status or educational risk, disability differs from race, sex, or national origin in often failing to be an individual’s primary group identification.<sup>261</sup> This is in large part attributable to the fact that identification as disabled, like identifica-

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255. Crenshaw, *supra* note 124, at 383-87.

256. Crenshaw, *supra* note 124, at 383 (also discussing the failure of anti-racist politics to incorporate the experiences and needs of black women). *See also* Angela P. Harris, *Race and Essentialism*, 42 STAN. L. REV. 581 (1990).

257. Harris, *supra* note 256, at 592.

258. *Id.* at 608.

259. For an elaboration of this point, *see supra* Part I.C. This is not to suggest that exceptional children in out-of-home care are in the same situation as, say, African-American women, because the former are in a category – children in out-of-home care – that does not receive heightened scrutiny for equal protection analysis, unlike the latter which receives heightened scrutiny on two axes (race and gender).

260. *See* Harris, *supra* note 256, at 612-15.

261. *See* Silvers, *supra* note 254.



tion as a foster child, may occur later in life. As a result, the disability movement has had to consciously focus on common ground, particularly by focusing on their societal stigmatization, while simultaneously allowing for a diversity of other identities and lifestyles.<sup>262</sup> This same balance between the cohesion necessary for political change with the individuality essential to full inclusion is a prerequisite to the coordination of the child protection and special education systems.

3. *The Ignorance of Substantive Equality and the Perpetuation of the Dilemma of Difference*

The current equal protection model is, finally, severely limited by its failure to account for equality of outcome. The rights model has been widely criticized for its failure to recognize substantive inequities in society and for its focus instead on formalism, process, and the illegitimate use of protected categories as decision-making factors.<sup>263</sup> The dominant anti-discrimination theory assumes that if race and sex are not illegitimately used in decisions, a neutral, and thus fair, outcome will result. Procedural protections, however, not only fail to improve substantive equality, but may themselves be applied unevenly.<sup>264</sup> In special education, for example, the focus on procedural compliance and deference to educational agency decision makers has resulted in a low standard of substantive compliance and reluctant and weak judicial oversight.<sup>265</sup>

Formal equality requires individuals to be identified as different in order to receive different treatment, since it takes as its premise that like should be treated alike. This tense partnership between labels and rights in the dominant legal paradigm presents a "Hobson's choice" to advocates.<sup>266</sup> Children's advocates, for instance, need to label their clients in order to obtain funding and procedural protections, but in so doing risk oversimplifying or stigmatizing children and forcing them and their families into categories that don't fit. As one school social worker framed it: "The system forces us to catastrophize things, to stigmatize and label [children] in order to get funding and services."<sup>267</sup> In both child protection and special education, advocates are faced

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262. *Id.*

263. See Crenshaw, *supra* note 124 at 386. The need for a more nuanced equal protection system encompassing a "spectrum of standards" was articulated by Justice Marshall in his dissenting opinion to *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 98-99 (1973).

264. See Theresa Glennon & Robert G. Schwartz, *Foreword: Looking Back, Looking Ahead: The Evolution of Children's Rights*, 68 TEMP. L. REV. 1557, 1560-61 (1995).

265. William H. Clune & Mark H. Van Pelt, *A Political Method of Evaluating the Education for All Handicapped Children Act of 1975 and the Several Gaps of Gap Analysis*, in CHILDREN WITH SPECIAL NEEDS 9, 54-64 (Katherine T. Bartlett & Judith Welch Wegner eds., 1987).

266. Glennon & Schwartz, *supra* note 264, at 1565.

267. Interview with Dee Dee Costello, a social worker at the Tobin School in Roxbury, MA (Mar., 1997).

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with a procedural dilemma of difference in deciding whether to encourage the identification of all children with special needs so they receive vitally needed services, or to avoid identification in order to escape stigmatization and restrictive placements.

Beyond whether or not to label, service providers must determine which label to use. The benefits and detriments children receive vary enormously depending upon the system under which they are first labeled.<sup>268</sup> There are also substantial risks in mislabeling a child, such as overly restrictive placements and segregation. IDEA recognizes these risks, especially when labeling is based upon biases against or ignorance about children of color.<sup>269</sup> Although labeling can be reduced, it is “an inevitable part of the discourse” under the current individual entitlement framework of special education.<sup>270</sup> At least one study found that attempting to ban the labeling of students simply resulted in unofficial and “covert” labeling, as well as a lack of effective monitoring of service provision.<sup>271</sup> Thus, the pattern of excessive formalism and procedurally-driven treatment continues.

The dilemma of difference and the focus on procedure as opposed to outcome is particularly vexing for children in out-of-home care who are educationally at risk. According children in out-of-home care the same procedural protections as other children, such as parental consent and involvement, is meaningless when they often have no stable adult equivalent to a parent<sup>272</sup> to advocate for them. The focus on process in the special education system has obscured the disparity in substantive equality of opportunity for exceptional children in out-of-home care. Yet, a shift to focusing on outcome instead of procedure prompts the question, “[d]oes equality mean treating everyone the same, even if this similar treatment affects people differently?”<sup>273</sup> Only labeling can bring these children the services they need to approach equality of outcome of other children, yet stigma and exclusion may accompany the services. Martha Minow suggests transcending this unsolvable choice between stigma and appropriate treatment by questioning the very definition of difference. Once difference ceases to be relational to some “norm” and sited in the individual, we can begin to move beyond the negative labels and segregation to address the institutional structures and group settings that can best meet each

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268. Glennon & Schwartz, *supra* note 264, at 1565-66.

269. 20 U.S.C.A. § 1409(j)(1)(B)(i) (West 2000).

270. See generally, James M. Kauffman & Patricia L. Pullen, *Eight Myths About Special Education*, 28 FOCUS ON EXCEPTIONAL CHILDREN 1, 12 (Jan. 1996).

271. *Id.*

272. Here I am including both children in out-of-home care without stable adult advocates in their lives due to multiple placements or other unstable adult relationships, or children in out-of-home care whose adult caretakers such as foster parents are not empowered or included in IDEA parental advocacy system.

273. MINOW, MAKING ALL THE DIFFERENCE, *supra* note 223, at 9.

child's different needs.<sup>274</sup> This may create new categories in place of the old, such as foster care, but these categories may be used to help children by changing the entire setting to accommodate them rather than removing the child as a piece that doesn't fit. We need to move beyond a formalistic focus on neutrally operating rules to look at the entire system itself and how it works to further subordinate already marginalized groups.

### *B. Legal Construction of the "Normal" Family and Child Powerlessness*

The law recognizes only certain relationships among people as "family" connections. By according certain groups family status, the legal structure creates the "normal" family and treats other groupings as deviant and unworthy of protection. The conceptualization of the "normal" family does not reflect the historical or current reality of American relationships and households. Moreover, it does not recognize functional families, such as foster families, and thus leaves a gap in adequate caregiving for children. The paradigm of the "normal" family combines with children's lack of independent standing and individual rights to deprive children in out-of-home care of a stable home placement and adults empowered to advocate for them. Because the special education system does not encompass children without a stable home and parental advocates, the law's construction of the family and denial of children's rights contributes to the educational inequalities of children in the child welfare system.

#### *1. Paradigm of the "Normal" Family and Preeminent Parental Rights*

Defining "family" is very difficult,<sup>275</sup> and depends upon the situation of the actors – children, parents, state agencies – involved. The law has limited its conception of family to those in biological relationships<sup>276</sup> and those following "official rules of family formation," such as adoption and marriage.<sup>277</sup> The latter will outweigh the former when traditional societal institutions appear to be threatened. For instance, the Supreme Court has accorded parental rights to a husband and denied them to the biological and, in part, psychological father in the name of the sanctity of traditional legal relationships such as marriage.<sup>278</sup> Limited case law<sup>279</sup> and statutory authority<sup>280</sup> incorporate a func-

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274. *Id.* at 79-97.

275. 1 FAMILY MATTERS: READINGS ON FAMILY LIVES AND THE LAW (Martha Minow ed., 1993) [hereinafter FAMILY MATTERS].

276. See, e.g., *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding a local ordinance restricting land use to single-family dwellings and defining family as either one or more blood relatives or no more than two unrelated persons living together in a single housekeeping unit).

277. FAMILY MATTERS, *supra* note 275, at 19.

278. See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

279. One line of cases, for instance, requires "unwed fathers" to take some action beyond mere biological parenting to merit full due process before losing custodial rights. See, e.g., *Lehr v. Robinson*,

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tional definition of family. However, for the most part the law posits the “nuclear family,” consisting of two heterosexual parents with children, as the norm against which other groupings are measured and thereby fails to recognize (and even stigmatizes) other relationships.<sup>281</sup> Although the Supreme Court recognized family rights beyond the nuclear family in *Moore v East Cleveland*<sup>282</sup> when it struck down a zoning ordinance limiting residential occupancy to single families defined to exclude a grandmother from living with her two grandchildren,<sup>283</sup> *Moore* is arguably treated as an aberration rather than a widely recognized and functioning family kin situation.<sup>284</sup> Subsequent case law has narrowly construed the rights of extended family members to raise their children.<sup>285</sup> This limited legal definition of the family is particularly inapplicable to children in non-parental care, since the rights of their actual caretakers or “psychological parents” are rarely, if ever, recognized.<sup>286</sup>

Ironically, the legally-recognized family has very little to do with the realities of *most* American households and communities. Many people live with other adults whom they are not married to, whether in heterosexual or gay and lesbian partnerships. Many children are cared for by single parents, other relatives, or people to whom they are not biologically connected. “Kinship” communities of relatives and friends function like families<sup>287</sup> without the legal imprimatur.<sup>288</sup> The diverse reality of households and relationships in our society reveals the legally-recognized family to be a fiction—albeit one that underlies the statutory schemes governing foster care and special education, and carries with it very significant rights and powers.

Family-based rights are framed in terms of parental (biological or adoptive)

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463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979). This line of reasoning has not yet been applied to mothers, presumably because their biological parenting role is deemed to be more substantial and their identity is easier to ascertain, thereby precluding delays in child protection proceedings to establish maternity.

280. The Family Medical Leave Act of 1993, for instance, defines sons or daughters to include adoptive, biological, foster and step-children, and legal wards, as well as children for whom the employee serves in loco parentis. See 29 U.S.C.A. § 2611(12) (West 1999).

281. See, e.g., *Troxel v. Granville*, 120 S. Ct. 2054 (2000) (finding unconstitutional a court’s grant of visitation rights to a child’s paternal grandparents as violative of mother’s due process rights). For a fuller discussion of this subject, see Martha A. Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 UTAH L. REV. 387 (1993).

282. 431 U.S. 494 (1977).

283. *But see Lyng v. Castillo*, 477 U.S. 635 (1986) (refusing to recognize close relatives as a suspect of quasi-suspect class for Equal Protection purposes).

284. Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy*, 68 TEMP. L. REV. 1649 (1995).

285. See, e.g., *Mullins v. Oregon*, 57 F.3d 79 (9th Cir. 1995) (declining to recognize a liberty interest in a grandmother to adopt her grandchild).

286. See discussion of foster family cases *infra* at Part II.C.

287. Carol Stack, *Personal Kindreds*, in FAMILY MATTERS 23 (stating that “the folk system of parental rights and duties determines who is eligible to be a member of the personal kinship network of a newborn child”).

288. See Randi Mandelbaum, *Trying to Fit Square Pegs into Round Holes: The Need for a New Funding Scheme for Kinship Caregivers*, 22 FORDHAM URB. J. L. 907 (1995).

liberty and privacy in the selection of lifestyles for themselves and their children.<sup>289</sup> Deemed “far more precious than property rights . . . more significant and priceless than liberties that demure merely from shifting economic arrangements,”<sup>290</sup> parental rights are particularly strong when related to decision-making power about a child’s education.<sup>291</sup> Parental and family integrity interests have even been held to outweigh those of a child in certain child welfare proceedings.<sup>292</sup> Finally, parental rights are primarily constructed as “all or nothing”—there is little separation of various responsibilities to and rights over children.<sup>293</sup> The current legal structure’s inability to allow various family rights to vest in different individuals does not fit the reality of many children’s lives, wherein several different adults, who may or may not be their parents, play important caretaking and emotional roles. This is particularly true for children in out-of-home care who may have biological parents, social workers, foster parents, judges, and non-parental relatives all trying to make decisions for their welfare.

## 2. *Children’s Lack of Independent Rights to Their Family Relationships*

Children’s status as legal minors denies them the full rights of adults. They do not have standing to bring legal actions on their own behalf, including actions relating to who should have custody or parental authority over them. Instead, they must access the legal system through a guardian *ad litem*, or “next friend.”<sup>294</sup> Children’s lack of independent standing is based on legal discernment of a coincidence between parents’ and children’s interests and a presumption that parents will serve the best interests of their children most effectively.<sup>295</sup> This legal structure protects individual families against state intrusion, and, theoretically, allows a diversity of different lifestyles, religions,

289. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (striking down a law requiring Amish families to educate their children in state-approved public or private high schools); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (asserting parents’ right to choose non-public education for their children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (upholding parents’ right to choose foreign language instruction for their children).

290. *Lassiter v. Dep’t. of Soc. Serv. of Durham County*, 452 U.S. 18 (1981) (Blackmun, J. dissenting) (citations omitted).

291. It is no coincidence that all three ‘parental rights’ cases cited *supra* in note 289 are education cases.

292. *Santosky v. Kramer*, 455 U.S. 745 n.11, 765-66 (1982) (finding parents’ substantive rights to be more threatened by termination proceedings than children’s family integrity rights); see also *DeShaney v. Winnebago County Dept. of Soc. Serv.*, 489 U.S. 189, 203 (1989) (stating that if state child protection actors had “moved too soon” to remove child from parental custody despite past and foreseeable future abuse, they would have risked violating father’s parental rights).

293. One exception to this principle is the retention of independent educational rights under California law by parents found to have abused or neglected their children.

294. See, e.g., *Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993) (holding in part that a minor does not have standing to bring a termination of parental rights suit against his natural parents).

295. *Santosky*, 455 U.S. at 760, 765.

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and cultures to thrive. Many children will be protected and advocated for under this system. Children in foster care, however, will likely not be, since parental incapacity to care for them is a prerequisite to their placement. Unfortunately, the law continues to presume a merger of parental and children's interests when determining parental fitness, even after a child is removed from the home.<sup>296</sup>

Children do not, further, have a substantive due process right to protection from parental abuse while in parental custody, even after extensive documentation of abuse by a child protection agency and foreseeable risks for continued abuse upon a return to parental care.<sup>297</sup> While the Supreme Court has recognized the state's duty to "assume some responsibility for [the] safety and general well-being" of persons in state custody, potentially including children and youth in out-of-home care,<sup>298</sup> and some circuit courts have found that children involuntarily placed in foster care have a constitutional right to reasonably safe living conditions,<sup>299</sup> the state may only intervene in its *parens patriae* role.<sup>300</sup> The *parens patriae* duty is relatively limited and has not been interpreted as putting the child in the best possible situation of family care.<sup>301</sup> Instead, the state may only intervene after a finding of parental failure to adequately care for a child is made.<sup>302</sup> Throughout the child protection process, parents' substantive due process rights are protected by a series of procedural rights<sup>303</sup> and the requirement that child protection agencies make reasonable efforts to reunite families.<sup>304</sup> Some commentators have argued that the minimal standards

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296. *Id.*

297. *DeShaney*, 489 U.S. 189.

298. *Id.* at 199. The Court in *DeShaney* declined to hold on state responsibilities to children in foster care as the issue was not directly presented in the case. *Id.* at n.9. However, other Supreme Court rulings support a constitutional right to freedom from harm and basic necessities on the part of children in out-of-home care. *E.g.*, *Youngberg v. Romeo*, 457 U.S. 307 (1982).

299. *See, e.g.*, *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987).

300. The common law doctrine of *parens patriae* (literally "parent of the country") posits the state as the guardian of all persons "under legal disability" such as minors and the insane. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

301. *Santosky*, 455 U.S. at 759.

302. Most courts follow the "jurisdictional-dispositional standard" in child protection cases, which consists of a two-step process imposing a threshold finding of parental unfitness before *any* consideration of the children's interests. ALAN SUSSMAN & MARTIN GUGGENHEIM, *THE RIGHTS OF PARENTS* 100 (1980). The court does not balance the interests of the parents and the children, rather it pits the parent against the state in a contest not unlike a criminal trial. After findings of parental unfitness and "reasonable efforts" by the state agency, the court holds a dispositional hearing to determine what action the "best interests of the child" suggest. Some state systems do not even address the best interests of the child and instead terminate parental rights on the basis of a parental rights standard alone. In the latter case, a finding of parental unfitness is the only relevant factor.

303. *E.g.*, *Stanley v. Illinois*, 405 U.S. 645 (1972) (finding unconstitutional a law presuming unwed fathers unfit parents without an individual hearing). For an outline of procedural protections for parents in child abuse and neglect cases, see Peter J. McGovern, *Child Neglect and the Termination of Parental Rights: A Final Remedy in Need of Reconsideration*, 8 AM. J. FAM. L. 215 (1994).

304. See Part I.A *supra* for a discussion of the changes to this requirement under the Adoption and Safe Families Act of 1997.

of care required of parents are too low,<sup>305</sup> while others see these protections as essential or even insufficient to protect parents' rights, especially parents already disadvantaged by race or poverty.<sup>306</sup>

The desire to balance the protection of children with enforcement of parental rights has led to the previously discussed dual purpose of permanency planning (including termination of parental rights and adoption) and family preservation which underlies child welfare legislation. These goals often appear irreconcilable<sup>307</sup> and attempts to balance them have in practice led to a largely crisis-driven rather than preventive approach to child protection which helps neither families nor children. The Adoption and Safe Families Act of 1997 represents a major shift in child protection policy by emphasizing permanency planning over family preservation, although both are still required. The new legislation may improve the potential for equality in education for foster children due to its focus on permanency and steps toward empowering foster families.<sup>308</sup> However, children in out-of-home care currently are often denied the same access to home and parental advocacy as other children due to their lack of standing and limited independent substantive rights, and the breakdown in the parent-child relationship that results in their placement in foster care.

### 3. *Restrictions on Foster Families from Adequately Replacing or Supplementing Biological Families*

In stark contrast to biological and adoptive families, foster families have historically been accorded few if any rights.<sup>309</sup> This stems from the potential clash with traditional (i.e. biological or adoptive) parental rights<sup>310</sup> and the current legal structure's refusal to split up the bundle of family rights. Thus, the statutory structure and child welfare process conceive of foster parents as temporary caregivers for children on the way to permanent care with biological or

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305. E.g., Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 Duke J. Gender L. & Pol'y 63, 67 (1995) (quoting Barbara Bennett Woodhouse in arguing that the scope of permissible action give parents virtual property rights over their children, despite the disavowal of the common law notion of children as chattels).

306. Douglas J. Besharov, *How Child Abuse Programs Hurt Poor Children: The Misuse of Foster Care*, 22 CLEARINGHOUSE REV. 218 (1988); see also *Roe v Connecticut*, 417 F. Supp. 769 (D. Ala. 1976) (finding a violation of parental due process where a child protection agency removes a child from the home without threat of imminent harm but rather because the custodial parent is living with an unmarried man of another race); see also Nanette Schorr, *Foster Care and the Politics of Compassion in 117 FAMILY MATTERS*, *supra* note 275.

307. See *FAMILY MATTERS*, *supra* note 275, at 187 (outlining one point of view which finds a child protection socialworker "faces an inevitable and insuperable conflict between offering genuine assistance to the family and serving as an investigator obliged to report violations and empowered to trigger the removal of the child from the parents' home").

308. See *supra* Part I.A for a fuller discussion of these aspects of the new legislation.

309. See *Smith v. OFFER*, 431 U.S. 816 (1977).

310. *Id.* at 846 (stating that tension between rights of biological and foster parents is "virtually unavoidable"); see also Kristin J. Brandon, *The Liberty Interests of Foster Parents and the Future of Foster Care*, 63 U. CIN. L. REV. 403, 423-26 (1994).

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adoptive parents, despite the overwhelming evidence to the contrary.<sup>311</sup> Foster families have historically been preferred to institutional care for children because they resemble the “natural” family, yet they are constantly being distinguished from the legal family and even kin because they are paid, licensed, and directed by the state.<sup>312</sup> Foster parents have often been denied any claims to custody of a child in their care, and have even been berated by judges when they wanted to adopt children in their care for “conduct[ing] themselves in a fashion inconsistent with their agreement and, indeed, diametrically opposed to their trust.”<sup>313</sup>

The Supreme Court, in *Smith v. OFFER*, conducted a searching analysis of the status and role of foster families and recognized that “a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship,” thus distinguishing foster families from “a mere collection of unrelated individuals” unworthy of any protection.<sup>314</sup> However, the Court left open the question of whether a foster family has a liberty interest requiring the same procedural or substantive due process protections as biological and adoptive families.<sup>315</sup> Instead, it found certain minimal procedures to suffice as due process protection for the foster family prior to removal of a foster child.<sup>316</sup> Despite declining to outline the scope, if any, of foster families’ rights, the Court distinguished them from “natural” families by the foster family’s origin from state contracts, rather than history, tradition, and “intrinsic human rights” like the “natural” family.<sup>317</sup> The Court reasoned that the state statutes and contracts outlining foster care as a temporary measure argued against investing a liberty interest in the foster family in the case at hand,<sup>318</sup> but it did not rule out the possibility that such a liberty interest could be found to exist under a different set of circumstances.<sup>319</sup> Finally, the Court expressed the general concern that the child welfare system may be biased against biological parents who are low-income and racial mi-

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311. See *supra* notes 17-22 (discussing number and condition of children in foster care).

312. *Smith*, 431 U.S. at 863. Consider also the use of payee status to determine the scope of foster parent abilities to serve as surrogate educational parents. See Letter to Thompson, 23 IDELR at 890 (stating that whether the foster parent’s compensation for care-giving constitutes his or her sole source of income is a factor for consideration in determining foster parent’s eligibility to serve as educational surrogate parent).

313. *In re Jewish Child Care Ass’n*, 5 N.Y.2d 222, 228 (Ct. App. 1959).

314. *Smith*, 431 U.S. at 844-45 (distinguishing foster families from a group of unrelated individuals such as that at issue in *Village of Belle Terre*).

315. *Id.* at 842-47.

316. *Id.* at 847.

317. *Id.* at 845. Of course, the “natural” family is often created through state institutions such as marriage and adoption. See also David J. Herring, *Exploring the Political Roles of the Family: Justifications for Permanency Planning for Children*, 26 LOY. U. CHI. L.J. 183, 215, 227 (1995) (arguing that the foster family’s control by the state does not allow it to fulfill one of the family’s political roles of “producing socially diverse citizens as a control on majority factions”).

318. *Smith*, 431 U.S. at 845-46.

319. *Id.*



norities, and favor foster parents who are often “higher-status.”<sup>320</sup>

Lower federal and state courts<sup>321</sup> have differed in their resolution of the foster family liberty interest question left open in *Smith v. OFFER*. Several circuits have found that foster families do not have a liberty interest because of their temporary and state-created nature.<sup>322</sup> The Fifth Circuit, for instance, reasoned that the concept of foster parenting and the vesting of parental rights are utterly contradictory—“the only time potential parents could assert a liberty interest as psychological parents would be when they had developed precisely the relationship that state law warns against [in] the foster context.”<sup>323</sup> The Seventh Circuit recently endorsed this reasoning and found that promises by the state child welfare agency to foster parents that foster parenting would improve their chances of adopting and that a child in their care was “97% adoptable” did not change the foster parents’ lack of liberty interest in their foster family.<sup>324</sup> These rulings place foster families in a conundrum—they agree to and ideally do provide a child with a safe, stable, maybe even pre-adoptive home, but are contractually bound not to develop an attachment or resist giving up the child at the state’s command.

There is some indication, however, that a recognition of parental rights in foster parents is developing. Several district courts have found a limited liberty interest in the foster family relationship, thereby moving closer to a functional family definition.<sup>325</sup> The cases seem to turn on the facts specific to each case, including the existence of deep ties between the foster parents and the child (including blood ties in one case of kinship care),<sup>326</sup> and the absence of biological parents willing or able to care for the child.<sup>327</sup> The district courts focused on the emotional ties that may develop in foster families, one court reasoning that “[i]t is artificial to treat a relationship that time and events have transformed into the most profound relationship known to mankind—mother

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320. *Id.* at 834, 838.

321. *E.g.*, *Johnson v. Burnett*, 538 N.E. 2d 892 (Ill. App. Ct. 1989) (finding that foster parents have no liberty interest in the foster family relationship under Illinois law).

322. *E.g.*, *Procopio v. Johnson*, 994 F.2d 325 (7th Cir. 1993); *Backlund v. Barnhardt*, 778 F.2d 1386, 1389-90 (9th Cir. 1985); *Drummond v. Fulton County Dep’t. of Family & Children’s Serv.*, 563 F.2d 1200, 1207-08 (5th Cir. 1977).

323. *Drummond*, 563 F.2d at 1208. It is interesting to note that the opposite treatment is sometimes accorded biological mothers under surrogate parenting contracts, i.e. it is understood that they are not able to give up children who they birth even if they take no caretaking role. In both foster parent and surrogate parent situations, the emotional bonds are presumed to come from biological birth rather than caretaking.

324. *Procopio*, 994 F.2d at 327-29.

325. *E.g.*, *Rodrigues v. McLoughlin*, 1999 WL 9834, No. 96 Civ. 1986 (S.D.N.Y. Jan. 8, 1999) (recognizing “a liberty interest in only a discretely identifiable set of foster parents”); *Brown v. County of San Joaquin*, 601 F. Supp. 653 (E. D. Cal. 1985); *Rivera v. Marcus*, 533 F. Supp. 203 (D. Conn. 1982).

326. *Rivera*, 533 F. Supp. at 207.

327. In *Brown*, the parental rights had been terminated, and in *Rivera*, the biological mother wanted the foster mother to care for her children.

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and child—as the purely legal relationship that it originally was.”<sup>328</sup> This court also recognized a “hierarchy of rights” in families in place of the traditional all-or-nothing system.<sup>329</sup> Thus, foster families may have a liberty interest in their relationships after the rights of the biological parents are terminated.<sup>330</sup>

Under the legal construction of ‘family’ and the presumed merger of parental and children’s rights outlined above, denying foster families or parents a liberty interest in practice also means weakening the rights of children in out-of-home care because no adults are adequately empowered to care for them. Moreover, a lack of protection for foster family relationships means that children lack permanency because moving them around is not just possible, but easy. Children do not have the right to an optimal placement in state custody.<sup>331</sup> They also do not have foster families who are fully empowered or authorized to adequately care for them.<sup>332</sup> Yet, to achieve equality within the current framework of parental rights, as embodied in IDEA for instance, children in out-of-home care need someone empowered legally to advocate for them in lieu of their biological parents.

Thus, the existing legal conception of “family” confronts children in out-of-home care with a double bind: they are protected only by family rights vested in their biological parents, yet these parents have failed to care for them, and neither the children themselves nor their foster parents and other caregivers are empowered to fulfill this role. Denial of a recognized and empowered family potentially robs children of many things such as the development of proper associational skills,<sup>333</sup> a sense of family or belonging, and advocacy for educational services. This results in the under- and overrepresentation of children in out-of-home care in special education—their needs are either ignored or misunderstood so as to prompt overly restrictive placement.

Nonetheless, the dual track in the Adoption and Safe Families Act, child protection trends such as “fostadoption,” and the willingness to recognize a limited liberty interest in foster families are all potential sources of increased legal recognition and empowerment of foster families. Encouragingly, foster parents are increasingly being permitted to fulfill expanded roles for children in

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328. *Brown*, 601 F. Supp. at 664.

329. *Id.* at 664.

330. *Id.*

331. *Lipscomb v. Simmons*, 962 F.2d 1374, 1382-83 (9th Cir. 1992). This can be seen as analogous to the Supreme Court’s decision that a special education placement need not maximize a child’s educational placement, but rather may be “reasonably calculated to enable the child to receive educational benefits.” *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982).

332. It is important to note that granting foster parents the same “rights” in a child as biological parents can lead to the reinforcement of the current non-child-centered system and potential for abuses of power and action not in the best interests of the child, and perhaps the entire legal structure needs to change to better accommodate children’s voices and needs. This view was expressed by at least one participant in *Smith v. OFFER*. See David L. Chambers & Michael S. Wald, *Smith v. OFFER, in IN THE INTERESTS OF CHILDREN 67* (Robert H. Mnookin ed., 1985).

333. *Herring*, *supra* note 317, at 238-39.

their care, sometimes even including that of educational surrogate parent prior to the termination of biological parental rights.<sup>334</sup> These efforts toward providing children in out-of-home care with substitute parental figures empowered to care for and advocate on behalf of them are a good first step to achieving increased educational equality for foster children.

### C. *Educational Access and Inclusion for Children in Out-of-Home Care*

Providing all children with the same access to education through integration is a very significant equal rights principle<sup>335</sup> and is embodied in the special education context in the Least Restrictive Environment (LRE) requirement of IDEA<sup>336</sup> and the inclusion movement. Yet achievement of this principle is often frustrated with regard to children in out-of-home care as a result of the differing philosophies and methods of implementation of the child protection and special education systems. As noted previously, the child protection system is limited by a construction of family which does not include foster families. Thus, children do not have sufficient standing or empowered advocates to demand due process or equal treatment in special education since enforcement under IDEA is largely premised on parental advocacy.<sup>337</sup> Further, lack of an effective advocate under IDEA is especially problematic because the special education system is premised on labeling. Where a child is without an effective advocate or independent rights, he is at the mercy of a system which can mistakenly assign him a label and thereby stigmatize and segregate him.<sup>338</sup> These conflicting principles governing equality in education again raise the "dilemma of difference" conundrum: how can we accommodate different strengths and needs without stigma?<sup>339</sup>

#### 1. *Access and Inclusion as the Route to Educational Equality*

##### (a) Equal Access to Education

The battle for educational equality for children of all races is one of the most celebrated legal stories of our time.<sup>340</sup> In the landmark case *Brown v. Board of Education*, the Supreme Court asserted that separate education is "in-

334. See discussion of this trend *supra* Part I.C.

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

336. 20 U.S.C.A. § 1412(5)(B) (West 2000).

337. Nothing in this Article is meant to question the effectiveness of parental advocacy as a means of enforcement and grassroots communal involvement in education for many children. Rather, I am looking to expand this effective method to include all children.

338. This is the whole premise underlying special education, *i.e.*, that services are only available to children who have been tested and found eligible due to disability.

339. See generally MINOW, MAKING ALL THE DIFFERENCE, *supra* note 223.

340. For a compelling and thorough account of *Brown*, 347 U.S. 483 and the history of African-Americans' struggle for equality in America, see RICHARD KLUGER, SIMPLE JUSTICE (1976).

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herently unequal,”<sup>341</sup> ending, at least in theory, centuries of race-based school segregation. The *Brown* Court recognized the importance of education for future success in employment and full civic participation, calling it “perhaps the most important function of state and local governments.”<sup>342</sup> The Court based its holding largely on the devastating effects of segregation on individual children, which “generate[s] a feeling of inferiority as to their status in the community that may affect [their] hearts and minds in a way unlikely ever to be undone.”<sup>343</sup> The principle of equal access to education articulated in *Brown* has since been extended to children previously excluded by discrimination based on gender<sup>344</sup> and disability.<sup>345</sup>

However, the wide scope of the right to equal access in education suggested in *Brown* has subsequently been considered in different contexts and, in some cases, narrowed. The Court has found that children and youth have interests in education and its benefits important enough to require some due process before it can be taken away even for a short time in the form of a temporary suspension.<sup>346</sup> Despite its recognition in *Brown* that educational opportunity “is a right which must be made available to all on equal terms,”<sup>347</sup> however, the Supreme Court later “retreat[ed] from [its] historic commitment”<sup>348</sup> by holding that education is not a fundamental right<sup>349</sup> when it ruled that a school-financing system based on local property taxation was constitutional under rational equal protection review.<sup>350</sup> Thus, the Court condoned vastly different levels of educational services to children residing in different school districts without regard to the severe inequities in equality of outcome that resulted.

The Court’s declination to protect equality of outcome has allowed for the continued existence of policies that result in significant inequality of outcome. Access barriers to educational equality continue to exist, for example, in the form of residency requirements.<sup>351</sup> Such requirements often have the effect of denying children who are homeless and in out-of-home care access to public

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341. 347 U.S. at 495.

342. *Id.* at 493.

343. *Id.* at 494.

344. *United States v. Virginia*, 518 U.S. 515 (1996) (holding the Virginia Military Institute’s exclusion of women to be unconstitutional).

345. *See* *PARC v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971); *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).

346. *Goss v. Lopez*, 419 U.S. 565, 576 (1975) (guaranteeing public school students some due process before a suspension based on their property interest in education and liberty interest in reputation).

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

348. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 71 (1973) (Marshall, J., dissenting).

349. Most state constitutions, however, confer a fundamental right to education upon their citizens. *Butt v. State*, 4 Cal. 4th 668 (1992); *Serrano v. Priest*, 5 Cal. 3d 584 (1971).

350. *Rodriguez*, 411 U.S. at 35 & 59 (1973).

351. A full discussion of this issue is beyond the scope of this Article, but may be found in Glen Renner & Julia J. Hyun, *Public School Residency Requirements for Students Living on Their Own or With Non-Parent, Non-Guardian Caretakers*, Center for Law and Education (1993).

education.<sup>352</sup> Funding disputes among school districts and child welfare agencies<sup>353</sup> and difficulties in obtaining requisite proof of residence<sup>354</sup> can delay school enrollment for children in foster care. While school districts can be required to enroll children even pending funding disputes (the Department of Education's Office for Civil Rights has stated that refusal to enroll a child in foster care with special education needs pending reimbursement of costs by another educational agency violates the IDEA regulations<sup>355</sup>), such disputes continue to delay enrollment. Further, beyond funding disputes, a lack of information or advocacy on the part of a child's caretakers is sometimes exploited by schools to deny children access. For instance, children in a majority of states are now permitted to enroll in the public school of the district in which they actually reside even if their parent or legal guardian does not live in the district, as long as the residence is not solely for the purpose of entering a certain school district.<sup>356</sup> However, school officials may persist in telling foster parents or social workers that there is no space for a child in their school even though this is not a permissible ground for exclusion if the child is a resident of the district.<sup>357</sup>

There are few restraints on how residency requirements can be applied. Residency requirements are generally constitutional on their face<sup>358</sup> and, although they may be found to violate either the due process or equal protection clauses if overly limiting<sup>359</sup> or if applied in a discriminatory fashion,<sup>360</sup> school districts that exclude a child because of a residency dispute are not always required to provide a due process hearing to determine domicile.<sup>361</sup> Further, there are no IDEA provisions that specifically address residency requirements. While IDEA regulations do require a child to be placed as close to home as possible and be educated in her neighborhood school unless this is inconsistent with her IEP,<sup>362</sup> courts have largely construed this mandate to require only in-

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352. For a discussion of this problem in school districts from California to New Jersey, see Maria Foscarinis & Lydia Ely, *Broken Lives: Denial of Education to Homeless Youth*, 9 CHILDREN'S LEGAL RTS. J. 2, 2-3 (1988).

353. See cases discussed *supra* Part I.C.

354. This problem was extensively discussed at the Special Education Placement Process Meeting among Foster Youth Services, Social Services and school personnel, Mt. Diablo, Calif. (March 4, 1998) (Minutes on-file).

355. *Bensalem Township (PA) Sch. Dist.*, 16 EHLR 893 (OCR 1990).

356. *Renner & Hyun*, *supra* note 351, at 2-7 & 11-19 (discussing case law and state statutes).

357. Again, this is a problem that has repeatedly come up in clinical work and in the experiences of those participating in the Foster Youth Services meetings. This bullying behavior on the part of school officials is also a common occurrence for homeless families trying to enroll their children. See Foscarinis & Ely, *supra* note 352, at 4.

358. See *Martinez v. Bynum*, 461 U.S. 321 (1983).

359. See, e.g., *Horton v. Marshall Pub. Sch.*, 769 F.2d 1323 (8th Cir. 1985).

360. *Byrd v. Livingston Indep. Sch. Dist.*, 674 F. Supp. 225 (E.D. Tex. 1987).

361. See, e.g., *Horton v. Marshall Pub. Sch.*, 769 F.2d at 1334. But see *Harrison v. Sobol*, 705 F. Supp. 870 (S.D.N.Y. 1988).

362. 34 C.F.R. § 300.552(b)(3), (c) (1999).

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clusion in mainstream education to the maximum extent possible in non-neighborhood schools and have allowed school districts to centralize certain special education programs.<sup>363</sup> Nonetheless, this regulatory mandate may still be used to require some stability of placement for children in out-of-home care, as outlined further below in Part III.C.

### (b) Least Restrictive Environment Requirement of IDEA

The commitment to integration espoused in *Brown v. Board of Education* is reflected in the “least restrictive environment” (LRE) requirement regarding special education placement. IDEA mandates that:

To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability . . . is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.<sup>364</sup>

Educators must balance the goal of securing services “appropriate” to an individual child’s needs with the goal of placing a child in the most mainstream setting possible. This mandate was reinforced in the IDEA Amendments of 1997, which require that every individualized education program (IEP) contain “an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class”<sup>365</sup> and a statement of program changes or supports that will assist the child to be educated with nondisabled children.<sup>366</sup> IDEA regulations also require that an LEA not provide just a bipolar choice of general or special education placement, but rather offer a continuum of placements and services characterized by varying levels of restriction.<sup>367</sup> The LRE requirement is also motivated and informed by a recognition of the detrimental affects of labeling and segregation on children’s self-esteem, social skills, and educational achievement. Congress explicitly acknowledged the harm of labeling and further emphasized these integration principles in its recent amendments to IDEA.<sup>368</sup>

Circuit Courts have developed substantially different tests to determine whether the LRE requirement has been met. Several circuits posit placement in the regular classroom with supplemental aids as the requisite first step, with consideration of a separate placement allowable only if that is not possible.<sup>369</sup>

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363. See, e.g., *Flour Bluff Indep. Sch. Dist. v. Katherine M.*, 91 F.3d 689 (5th Cir. 1996); *Schuldt v. Mankato Indep. Sch. Dist.* No. 77, 937 F.2d 1357 (8th Cir. 1991).

364. 20 U.S.C.A. § 1412(a)(5)(A) (West 2000).

365. 20 U.S.C.A. § 1414(d)(1)(A)(iv) (West 2000).

366. 20 U.S.C.A. § 1414(d)(1)(A)(iii) (West 2000).

367. 34 C.F.R. § 300.551 (1999).

368. 20 U.S.C.A. § 1400(5)(F) (West 2000).

369. *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989) (proposing a two-part test asking whether education in the regular classroom can be achieved satisfactorily with supplemental

Some circuits expressly promote inclusion even where it is not academically superior to a special education placement because of the non-academic benefits of inclusion.<sup>370</sup> Still other circuits have emphasized that strictly equal consideration is due to the two parts of the special education placement equation—appropriate education and mainstreaming.<sup>371</sup> Yet, it is important to remember that all of the circuits proceed under the Supreme Court’s characterization of the “free appropriate public education” as a minimum of access rather than a maximization of potential and educational results.<sup>372</sup>

The split among the circuits about the level of inclusion required under IDEA reflects the larger debate among educators and advocates about the benefits and detriments of different levels of mainstreaming.<sup>373</sup> Inclusion has proven to improve academic outcomes for many disabled students,<sup>374</sup> while segregation into special education programs can set up children with disabilities for failure. For instance, youth with emotional/behavior disorders (EBD) (including a large number of children in out-of-home care), who are generally placed in more restrictive settings than children with other disabilities,<sup>375</sup> are frequently denied access to a general academic curriculum although their disability is behavioral and does not implicate their ability to learn such a curriculum. Academic weaknesses resulting from exclusion are then used to justify further exclusion.<sup>376</sup>

Another benefit of inclusion which is of particular significance for children in out-of-home care (who are frequently also members of other stigmatized groups, such as children with EBD and children of color), is that inclusion is believed to benefit the social competence of both mainstream and disabled students through integration.<sup>377</sup> Inclusion both diminishes the resegregation of

services and if not, whether the school has mainstreamed satisfactorily), adopted in the Third and Eleventh Circuits. See *Oberti v. Bd. of Educ.*, 995 F.2d 1204 (3d Cir. 1993); *Greer v. Rome City Sch. Dist.*, 950 F.2d 688 (11th Cir. 1991).

370. *Bd. of Educ. v. Holland*, 14 F.3d 1398, 1404 (9th Cir. 1994).

371. *Briggs v. Bd. of Educ.*, 882 F.2d 688, 691-93 (2d Cir. 1989).

372. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 188-89 (1982).

373. The LRE requirement, and integration principles in special education, can be approached from two different perspectives—mainstreaming or inclusion. Mainstreaming programs place children with disabilities for part of the day in a general education classroom and part in a special education setting. Inclusion, alternatively, aims to change the whole educational setting, by focusing more on the incorporation of support services into the regular classroom for children with disabilities. See Jennifer Houston Wilkinson, Student Article, *The Movement for Inclusion: Teaching Acceptance Along With Alphabets*, 20 LAW & PSYCHOL. REV. 291, 296. In this discussion, I will use the terms ‘inclusion’ or “inclusionary education” to refer to both methods, or any “attempt to educate the child, to the maximum extent appropriate, in the school and classroom with the child’s age-mates. See Cartledge & Johnson, *supra* note 171, at 51.

374. Macchiarola et al., *supra* note 179, at 579-80 (citing multiple studies).

375. See *supra* Part I.C.

376. Eileen L. Ordovery, *Inclusion of Students with Disabilities Who Are Labelled “Disruptive”*: *Issue Papers for Legal Advocates, #1: Background and Overview*, Center for Law and Education (1997), at 2.

377. *Id.*

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children of color into special education due to biased tests and testers<sup>378</sup> and reduces the stigma associated with special education. Inclusion is largely premised on the recognition of the stigma of segregation and its particularly devastating effect on children's "hearts and minds" as first voiced in *Brown v. Board of Education*.<sup>379</sup> Children who are treated as stupid, or singled out because they are deficient, will begin to think of themselves in that way. Although there is some evidence that inclusion may cut both ways in terms of stigma—it decreases stigma by mainstreaming students with their peers, but may increase stigma as students are forced to reveal their difference in the classroom with peers who are not disabled<sup>380</sup>—schools can take steps to minimize stigma in integrated classes and, thereby, allow all children to benefit from the extra resources in terms of staff and educational tools that inclusion can bring. The New Haggerty School in Watertown, Massachusetts, for instance, brings all service providers, such as speech and physical therapists and reading tutors, into its integrated classrooms. These experts usually work with all the children, and focus on children with special needs during "choice time" during which children choose from a variety of different activities.<sup>381</sup>

On the other hand, inclusion does have some weaknesses as a form of education, both for children with special needs and children without such needs.<sup>382</sup> Firstly, inclusion may be used to justify denying exceptional children services that they are entitled to under IDEA. Educators argue that inclusion is appropriate for some children, but may be used to deny an appropriate placement (FAPE) to children who need more specialized services.<sup>383</sup> Related to this argument is a critique of the assumption that separation is inherently stigmatizing, and that exceptional students cannot gain a positive self-identity from sharing their experiences and achievements with other exceptional children.<sup>384</sup> Consider, for example, the analogous situation where separate education for traditionally disadvantaged groups such as women and African-American boys is advocated because it is believed to instill pride in and knowledge about a

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378. See generally Glannon, *Race and Education*, *supra* note 121. Of course, inclusion alone will not solve this serious problem, which requires instead a re-evaluation of the supposedly "objective" means used to test and track children, as well as education to check biases among educators.

379. *Brown*, 347 U.S. at 494.

380. Supporting this point, one study found that special education students preferred to receive pull-out rather than in-class services in part because it is less embarrassing. The same students, however, preferred to receive help from their classroom teacher rather than a specialist to avoid being singled out for their skill deficits. Joseph R. Jenkins & Amy Heinen, *Students' Preferences for Service Delivery: Pull-Out, In-Class, or Integrated Models*, 55 *EXCEPTIONAL CHILDREN* 516, 518-22 (1989).

381. Author's visit to New Haggerty School in April, 1997.

382. Anne Proffitt Dupre, *Disability and the Public Schools: The Case Against "Inclusion,"* 72 *WASH. L. REV.* 775 (1997); Anne M. Hocutt, *Effectiveness of Special Education: Is Placement the Critical Factor?* in *THE FUTURE OF CHILDREN: SPECIAL EDUCATION*, *supra* note 77, at 79-102.

383. See generally Kauffman & Pullen, *supra* note 270.

384. *Id.* at 7; see also Dupre, *supra* note 382, at 818-21.



group identity that cannot be gained from a mainstream curriculum.<sup>385</sup> The failure of efforts at desegregation to succeed practically in achieving desegregation or in minimizing hostilities against racial minorities has resulted in a critical look at the supposed benefits of integration.<sup>386</sup>

Inclusion is also criticized as having detrimental effects on the overall school environment and education of students not eligible for special education.<sup>387</sup> This argument is particularly applied to students with emotional and behavioral disorders since they may be very disruptive in the classroom.<sup>388</sup> Moreover, critics of inclusion frequently cite the vast differential in public education spending per child on children with IEPs and those in regular education.<sup>389</sup> Courts have allowed consideration of the disruptive effects or monopolization of a teacher's time by a special education student to be considered in assessing a child's placement, but only following examination of whether appropriate support services in the regular classroom would ameliorate the problem.<sup>390</sup>

The debate over inclusion is complex and will likely continue into the near future. However, it also seems likely that, at least with regard to children in out-of-home care, the debate will resolve in favor of inclusion. Inclusion can be particularly valuable for exceptional children in out-of-home care because of their doubly marginalized status. The advantages that inclusion can bring in terms of increasing a child's social competence and improving his or her self-image are magnified for children in out-of-home care due to the frequent lack of consistent adult role models at home. Children in out-of-home care (analogously in some ways to children of color) are also more likely to be placed in special education and in the most restrictive settings within special education due to teacher bias.<sup>391</sup> Strong enforcement of the LRE environment is particularly necessary in these cases to counteract this bias. Finally, inclusion of children in foster care can benefit other students and teachers by exposing them to a diversity of families and groupings, thereby breaking down the rigid, traditional notion of family.

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385. See, e.g., Michael John Weber, *Immersed in an Educational Crisis: Alternative Programs for African-American Males*, 45 STAN. L. REV. 1099 (1993).

386. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

387. Dupre, *supra* note 382, at 842-57.

388. See *supra* Part I.C for a fuller discussion of the lack of inclusion of children with EBD.

389. Dupre, *supra* note 382, at 777-78 (citing one city's report of annual spending of \$25,000 annually per special education student versus \$5,611 annually per general education student)

390. See, e.g., *Greer v. Rome*, 950 F.2d at 697.

391. *Supra* discussion in Part I.C.

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### 2. *Parental Advocacy Basis for Access and Inclusion Rights in Special Education*

Another major road block to equality in education for exceptional children in out-of-home care is created by a combination of the factors already discussed – parental enforcement of IDEA and adherence to a traditional and limited conception of family. IDEA expressly aims to involve both parents and educators in improving educational opportunities for children with disabilities.<sup>392</sup> As noted previously, the special education system relies on the grant of procedural rights to parents of exceptional children for the enforcement of these children’s substantive rights to educational equality. One group of experts summarizes: “A fundamental premise of federal and state special education law is that each child’s parent will be an active participant throughout the special education decision-making process.”<sup>393</sup> Parental consent is required at multiple stages in the process, and a lack of parental consent can excuse an LEA’s failure to provide services to a child with a disability.<sup>394</sup> The latter is particularly disturbing considering the frequent lack of possible parental consent for children in out-of-home care. Further, parents continue to have rights under IDEA even when the disabled child has reached the age of majority, as long as he or she is still eligible for public schooling. Federal courts have found that an educational agency violated IDEA by not continuing to inform a parent of all special education proceedings and allowing her full participation.<sup>395</sup>

IDEA’s empowerment of parents on an individual basis is arguably a positive step toward broader equality and community involvement.<sup>396</sup> Yet this system is modeled on an intact middle class family wherein a child is cared for by one or more “legal” parents who are willing and able to use their procedural rights under IDEA to obtain better services for her. Parental power is thereby limited to the most informed parents with the most resources at their disposal.<sup>397</sup> This power structure is not coincidental since the primary move for reform and the creation of IDEA’s predecessor came from middle-class white parent groups.<sup>398</sup> Support for the notion that the final form of IDEA was heavily influenced by those who lobbied for it is provided by a comparison of

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392. 20 U.S.C.A. § 1400(d)(3) (West 2000).

393. WARBOYS ET AL., *supra* note 4, at 135.

394. *Davenport (IA) Community Sch. Dist.*, 20 IDELR 1398 (OCR 1993).

395. *See, e.g., Mrs. C. v. Wheaton*, 916 F.2d 69 (2d Cir. 1990).

396. Parents may still, however, be cast in the role of “outsiders or complainers” by the adversarial procedural processes. *See Minow, Bilingual & Special Education, supra* note 104, at 416-17.

397. Kotler, *supra* note 111, at 341. Parents are disadvantaged by the IEP process because of the inherent inequity in power in parent-professional relationships and the structure and attendance pattern at IEPs. *See Clune & Van Pelt, supra* note 265, at 34-36. This is particularly true of parents of color, parents who are poor, or parents who have lower levels of education.

398. Kotler, *supra* note 111, at 362.

IDEA with other statutory methods for enforcing educational rights. The parental rights framework of IDEA, and concomitant grassroots enforcement responsibility, is very different, for example, than the bilingual education framework implemented under Title V of the Civil Rights Act of 1964<sup>399</sup> Bilingual education is usually approached and resolved at a “classroom or school-wide” level as opposed to the more individualized approach of IDEA.<sup>400</sup> IDEA is not the only possible framework for implementing and enforcing educational rights, and thus may “constitute a major reallocation of power to parents in the assignment of educational resources and placements.”<sup>401</sup>

As previously outlined, the parental enforcement system of IDEA does not function when parents’ interests have been deemed divergent from those of their children, even harmful to them, as is the case with children in out-of-home care. The lack of parental advocacy has a particularly detrimental effect because other monitoring and compliance mechanisms by courts and government agencies are secondary and “after the fact” in reliance on parental advocacy.<sup>402</sup>

In summary, the frameworks of the child protection and special education systems, set within current equal protection doctrine, interact to deny children in out-of-home care adequate equality in terms of education. The child protection system is limited by a natural conception of the family which does not include foster families. Children do not have independent rights to safety, family, and special educational due process, and instead must rely on their legal parents to secure these protections for them. The gap in equal opportunity is particularly acute in special education because IDEA relies on parents to enforce the identification and appropriate placement of children with disabilities. The impact of these systemic contradictions on exceptional children in foster care is heightened by the rights-based equal protection model’s failure to consider the social construction of difference, intersectional identities, and substantive equality.

### III. TOWARD EMPOWERMENT AND EQUALITY FOR ALL CHILDREN IN SCHOOL AND AT HOME

Any solution to address the unique problems of exceptional children in out-of-home care requires action on a broad number of fronts. Social workers, teachers and school administrators, foster parents, and child advocates must all take steps to close the current gaps between the child welfare and special education systems, and ensure that all children are placed in the least restrictive

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399. 42 U.S.C.A. § 2000d (West 1994). My thanks to Professor Rachel Moran at Boalt Hall School of Law for pointing this out.

400. *Id.* at n.172.

401. Minow, *Bilingual and Special Education*, *supra* note 104, at 397-98.

402. Clune & Van Pelt, *supra* note 265, at 33.

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environment possible with access to all of the services that they need. This Part outlines actions that different persons in a child's life can take and proposes changes to the current legal rules governing the intersection between child welfare and special education to accomplish real equality.

### *A. Focus on Children's Needs, Listen to Their Voices, and Empower Them*

An initial step toward addressing the educational needs of exceptional children in out-of-home care is listening to and empowering them. To this end, advocates should be trained to listen to these children and to work with them, rather than just for them. Moreover, children should be given increased standing to assert their rights under IDEA, as well as be included to the maximum extent possible in their IEP development and implementation.

#### *1. Advocates Can Learn from Intersectional Children*

Uncovering and articulating the experiences of underrepresented persons is one step toward the achievement of greater equality through a transformation of our legal and social systems.<sup>403</sup> As Angela Harris puts it: "In order to energize legal theory, we need to subvert it with narratives and stories, accounts of the particular, the different, and the hitherto silenced."<sup>404</sup> The current special education system is premised on the abstract notion of parental enforcement and, thereby, excludes children in out-of-home care by failing to consider the actual plight of children without parental advocates. The startling high prevalence of educational risk among children in state custody requires more study to determine its scope and causation. Listening to the "voices" of children in out-of-home care regarding their educational needs is a pivotal first step.

A "child-centered approach" aims to incorporate children's experiences and needs into the law and "tame the adult 'rights talk'" in order to better recognize and meet children's interests.<sup>405</sup> An honest assessment of the realities of all children's lives rather than reliance on abstract principles is necessary to achieve a child-centered approach and the "paradigm shift"<sup>406</sup> that will be required for the special education and child welfare systems to adequately meet the needs of intersectional children. For educational providers, this means learning about the legal and social consequences of abuse, neglect and out-of-home placement, as well as the impact foster care or abuse and neglect can

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403. Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 BUFFALO L. REV. 1, 4 (1990).

404. Harris, *supra* note 256, at 615.

405. Holmes, *supra* note 284, at 1671-72 (discussing the child-centered analysis of Barbara Bennett Woodhouse and laying out his own child-centered adoption policy.)

406. This term is taken from Theresa Glennon's argument for a new approach by educators to children with S.E.D., an analysis analogous to the one attempted herein. See Theresa Glennon, *Disabling Ambiguities Confronting Barriers to the Education of Students with Emotional Disabilities*, 60 TENN. L. REV. 295, 320-21 (1993).

have on a child's behavior and performance in school.<sup>407</sup> Social workers and child protection workers, conversely, must be more aware of the educational challenges facing the children that they deal with who are in the child welfare system and infuse this knowledge into the process of choosing and monitoring children's home placements.

The child protection and special education systems must also empower children and youth in addition to focusing on and listening to them. Empowerment of exceptional children in out-of-home care, who often lack parental or other advocates who fully understand both their educational and home life needs, is the only way effectively to ensure children's equality.<sup>408</sup> To this end, children should have greater standing in procedures—legal, administrative, and otherwise—that are at least designed to act in their interests or which significantly impact their lives.<sup>409</sup> Currently, at least one state grants children and youth standing to request a special education due process hearing, but only if they are emancipated or are dependents of the court for whom no parent can be located and no appropriate surrogate parent can be appointed.<sup>410</sup> Although this covers the most vulnerable children, and is a very significant start, there are many children and youth in out-of-home care who would not fall within this definition but whose educational rights are not being adequately enforced by their parents, foster parents, or surrogate parents. All children and youth, to the extent possible given age and capacity, should be given the power to enforce their own educational rights.

## 2. *Children Should Be Included to the Maximum Extent Possible in IEP Development and Execution*

Children and youth should be included in IEP meetings whenever possible, taking into account age and disability.<sup>411</sup> The current special education system does not mandate inclusion of a child in the meetings determining his or her assessment, placement, and services. Instead, it requires the agency to "invite the student[s]" aged fourteen and older, and those younger "if appropriate," but does not include any procedural safeguards to ensure or facilitate the attendance of students, as it does with parents.<sup>412</sup> In practice, this system allows

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407. For further discussion of teacher training on this issue, see *infra* Part III.E.

408. See generally Katherine Hunt Federle, *Looking Ahead: An Empowerment Perspective on the Rights of Children*, 68 TEMP. L. REV. 1585 (1995).

409. Standing in legal and administrative proceedings might require the appointment of counsel, which children often already have, even in the absence of standing, in dependency cases. In many cases, a lawyer would not be necessary—other kinds of advocates would suffice. Because parents are already included in the IEPs to represent a child, there would be no extra burden to increase inclusion of the child herself. With or without an advocate, it would be more empowering than the current situation.

410. CAL. EDUC. CODE § 56501(a) (West 1989 and Supp. 2000).

411. I would argue for a very low threshold here, as very young children and persons with severe disabilities can often express their preferences if properly informed and encouraged to do so.

412. 34 C.F.R. § 300.345(b)(2) (1998).

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parents and educational personnel to choose whether a child will be included or not.<sup>413</sup> Children should be guaranteed a voice in these meetings so pivotal to their futures unless the LEA can demonstrate a compelling reason why this is not possible. Like a parent under the current law,<sup>414</sup> children would not be appointed counsel, but would have the right to bring an advocate.<sup>415</sup> A child's IEP team should then give weight to a child's preferences in implementing the program. Finally, individual teachers should ask children about their preferred method of service delivery, a step too often ignored which may have surprising results.<sup>416</sup>

### 3. *Children and Youth Can Be Empowered To Advocate and Work Together*

Empowerment can also include encouraging children to join together in advocating for common ends.<sup>417</sup> Just as children and youth are excluded from proceedings that determine their individual placements, they are usually not permitted or enabled to voice their interests or to advocate for their goals on a broader scale. One very successful counter-example is the California Youth Connection (CYC), an organization of current and former foster youth who advocate for state and federal legislation affecting children in out-of-home placement, educate the public and policy makers about the needs and realities of foster youth, and provide resources for foster children transitioning out of care into independent living as adults. Children and youth could be empowered in a similar manner to create similar advocacy networks to deal with special education issues. This would unify children with disabilities and educational needs and allow non-foster youth to better understand foster youth. Youth in foster care with educational needs could work with organizations such as CYC to link foster youth in general education to their peers in special education. Finding commonality with other youth and advocating on issues relevant to all can help resolve the intersectionality problem.

Children and youth can also advocate for themselves by enforcing laws

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413. 20 U.S.C.A. § 1414(d)(1)(B)(vii) (West 2000) (defining individualized education program (IEP) team to include "the child with a disability" only "whenever appropriate"). Unfortunately, during my clinical experience at Legal Services for Children in San Francisco, I had calls from several youth about parents and school officials who abused this gap in IDEA by excluding older children very competent to attend simply so they could make decisions regarding placement that the child would object to.

414. *Id.* § 1415(h)(1).

415. This would differ from child welfare court hearings where federal law mandates that children be appointed a guardian ad litem, although this is often not an attorney. See ANN M. HARALAMBIE, *THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES* 3 (1993).

416. See *supra* note 380 for discussion of the study by Joseph R. Jenkins & Amy Heinen on students' preferred methods for special education services.

417. This participation in civic activism lies at the heart of the ideal of American democracy. See ALEXANDER DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1988).

through private attorney general actions, if they are granted standing to do so. Recently proposed California state legislation would have given children currently or formerly living in out-of-home care standing to bring cases for the suspension or revocation of a foster or group home's license and/or a civil penalty because of abuse or neglect.<sup>418</sup> Similar jurisdiction-granting legislation could allow disabled children<sup>419</sup> to "police" the provision of special education services at a grassroots level.

Finally, advocacy not only builds coalitions and achieves constructive change, but it can also have a beneficial effect on individuals. The self-confidence and sense of belonging gained from advocacy can help exceptional children in out-of-home care overcome the stigma of difference that the world forces upon them.

### *B. Value and Empower All Families as Educational Advocates for Children*

Relationships with family members or other caregivers are perhaps even more significant for children than for adults, as 'home' is often the only world that children know. Moreover, adult household members are often the only people permitted to or capable of accessing services for children and youth. Thus, the limitation of legally recognized family interests and powers can be devastating to children whose only relationships are not protected or even acknowledged by the law. To treat each child equally, legal doctrine and statutory authority must be rid of its "cultural myopia"<sup>420</sup> and predicate rights on the substance of a relationship rather than its coherence with a formal standard.

Such a functional<sup>421</sup> definition of "family" would invest rights in adults who act as parents for a foster child, but who are not that child's biological or adoptive parents. Courts could follow the reasoning outlined in cases such as *Brown v. County of San Joaquin*<sup>422</sup> to look at the facts of individual cases and weigh a child's needs for permanency and length and intensity of his or her attachment to foster parents against the potential for family preservation and efforts at reunification made by biological parents. Time has shown that foster families are often more stable and loving homes for children and youth than "natural" biological and adoptive families. Thus, the distinction made in *Smith v. OFFER* between foster and natural families, and the focus on parental rights over children's interests in protection and attachment, are no longer valid. This

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418. A.B. 1809, 1997-98 Reg Sess. (Cal. 1998).

419. As with A.B. 1809, children may be represented by an adult, but the vesting of the right in the child ensures that there will be no potential conflict of interest such as those discussed throughout this Article.

420. *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977).

421. This distinguishes foster families from non-parental relatives who have not been caretakers (i.e. functional parents), or have been found to have no interests in their relationships with a child in cases such as *Mullins v. State of Oregon*, 57 F.3d 789, 331 (9th Cir. 1995).

422. 601 F. Supp. 653 (E. D. Cal. 1985), discussed *supra* notes 325, 327.

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is especially true in light of the Congressional intent to focus on child safety and permanency planning above family preservation evidenced in the Adoption and Safe Families Act of 1997.

The current definitions and valuation of different relationships needs to change for all children to have equal access to a safe and meaningful family. The legal framework must expand to encompass and recognize the complex family systems—composed of people related by blood, adoption, kin,<sup>423</sup> marriage, foster care, and more—which exist in our society today.<sup>424</sup> Laws governing family composition and support need to be flexible enough to support all families to care for children safely and to advocate for them effectively. Such a recognition of due process rights in family relationships beyond the model nuclear family would not represent an extension of constitutional rights beyond those supported by tradition and history, but rather an extension of the principles recognized in *Moore v. City of Cleveland* of the importance of familial relationships in our society's history.

Expanding legal protection of more relationships requires a relaxation of the all-or-nothing parental rights system and adoption of a continuum that recognizes the multifaceted network of relations between a child and a variety of adults.<sup>425</sup> The reality of families today—resulting from changing demographics in terms of divorce, remarriage, stepfamilies, caretaking of children by expanded kin networks and foster families, and the emerging myriad of possible relationships through new reproductive technologies—posit rights and duties in many different adults. Such a continuum, or hierarchy, of parental rights has been explicitly acknowledged in cases according foster families some liberty interests, and underlies emerging child protection and family law policies, such as subsidized guardianship and open adoption. Once our conception of family is expanded, all families can better be included and empowered to participate in the education of their children.

### 1. *Local Educational Agencies Should Ensure that Functional Parents Are Empowered To Advocate for All Exceptional Children*

State and local educational agencies have a responsibility under IDEA to appoint surrogate parents for exceptional children in out-of-home care.<sup>426</sup> Stricter monitoring and enforcement of this provision by children's advocates

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423. I use this in the Carol Stack sense of networks of extended relatives and non-relative community members. See Stack, *supra* note 287.

424. For related arguments regarding a change in the legal paradigms to accommodate different family types, see Holmes, *supra* note 284 (calling for a child-centered adoption policy that incorporates the child-friendly extended family system historically predominating in African and African-American communities), and Mandelbaum, *supra* note 288 (proposing new foster care funding schemes which incorporate the situation and needs of kinship caregivers).

425. See discussion *infra* Part II.B. But see Troxel v. Granville, 120 S. Ct. 2054 (2000).

426. 20 U.S.C.A. § 1415(b)(2) (West 2000). For further discussion of this issue, see also *supra* Part I.C.



ter monitoring and enforcement of this provision by children's advocates and government agencies, such as the Office of Civil Rights division of the Department of Education, is essential to the effective provision of special education services to all children. To this end, LEAs need to receive more accurate and timely information about a child's special education needs and parental involvement from child protection workers. If state law requires that a parent's educational rights be independently adjudged, as in California,<sup>427</sup> this should happen at the initial jurisdictional hearing of a child protection case, and the child protection agency should be required to either request the appointment of an educational surrogate or work directly with the parent to advocate for the child's education. The standard for courts to limit the educational rights of a parent must be fairly low and frequently monitored to ensure the enforcement of the rights of all children and parents, including functional parents, under IDEA.

Additionally, whenever possible LEAs should appoint surrogate parents who know the child and are already participating in his or her care.<sup>428</sup> Children and youth who have multiple placements or are in group homes should have consistent adults in their lives, such as a non-caregiving relative or a CASA, appointed as a surrogate parent. One very significant positive change in the final regulations accompanying the amended IDEA was the facilitation of foster parents acting as parents for children in special education.<sup>429</sup> The regulations do not recognize foster parents as "acting in the place of a parent," in which case parent status automatically attaches.<sup>430</sup> Instead, foster parents must meet certain criteria to act as the child's parent for IDEA purposes including that: (1) they are not prohibited from doing so by state law; (2) the natural parents' educational rights have been terminated under state law; (3) the foster parent has "an on-going, long-term parental relationship with the child;" (4) the foster parent is willing to make the required educational decisions; and (5) the foster parent has no conflict of interest with the child.<sup>431</sup> This case-by-case analysis applies only to foster parents and not to relative caregivers (who in some ways have less legal rights to the child) or guardians.<sup>432</sup> Prior to this regulation, 34 C.F.R. § 300.20(b),<sup>433</sup> long-term foster parents were occasion-

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427 CAL. GOV. CODE § 7579.5(a) (West 1995).

428. A state statute or judicial standard may also incorporate other factors into the appointment of an educational surrogate such as "cultural sensitivity." See CAL. GOV. CODE § 7579.5(e) (West 1995). But the functional parenting role should be the overriding consideration in order to best meet the needs of the child.

429. 34 C.F.R. § 300.20(b).

430. *Id.* § 300.20(a).

431. *Id.* § 300.20(b).

432. *Id.* § 300.20(a)(3).

433. See discussion of this new regulation, *supra* note 192.

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ally granted legal educational “parent” status for children in their care,<sup>434</sup> despite a limitation on state employees serving as educational advocates (discussed further below).<sup>435</sup> At that time, they also had to satisfy a case-by-case analysis, proving, as under the current regulation, that they had no conflicts of interest with the child, and also meeting additional requirements such as demonstrating that not too much of their income was derived from foster parenting.<sup>436</sup> Although the new regulation is a positive step, advocacy is needed to ensure that it is implemented, and the case-by-case analysis and state policies limiting foster parents who can serve as educational parents continue to deny many children in out-of-home care effective advocates.

Some states have adopted an alternative process that may provide more flexibility, but also does not go far enough to adequately meet the educational needs of children in out-of-home care. California, for instance, only allows parental status to be conferred upon caretakers when they have “legal custody” over a child.<sup>437</sup> This does not include foster parents since the state has legal custody over children in the child welfare system rather than the individual foster parent. However, instead of positing advocacy rights in persons “acting as a parent” as laid out in IDEA, California relies on the “surrogate parent” position.<sup>438</sup> Surrogate parents have all of the educational rights of actual parents. Although not required to recognize foster parents as “parents” educationally,<sup>439</sup> California law does give foster parents preference in the selection of an educational surrogate parent,<sup>440</sup> and many California school districts routinely ap-

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434. See, e.g., *Criswell v. Tennessee Dep’t of Educ.*, 558 EHLR 156 (M.D. Tenn. 1986) (finding permanent foster parents to be parents under IDEA and thus having authority to represent child in educational matters rather than a needlessly appointed surrogate parent); *In re Reynolds*, 211 EHLR 470 (1986 OSEP) (discussing the adoption of plan in Tennessee that would make all foster parents parenting for over six months “permanent” for educational parent purposes); see also Letter to Thompson, 23 IDELR 890 (OSEP 1995) (stating that there is not an absolute ban on foster parents serving as surrogate educational parents, rather determinations are to be made on a case-by-case basis).

435. Many people have pointed out that this distinction doesn’t make that much sense since foster parents are in a sense state employees since they are paid by the state, and thus would seem to be disqualified under the ban on “employees involved in the care or education of children” rule outlined *infra* Part II.B. However, foster parents are distinguished since the money they receive for caring for a child is a “reimbursement” and they are not treated as public employees. *WARBOYS ET AL.*, *supra* note 4, at 141, n.18.

436. The analysis took place under the former 34 C.F.R. §§ 300.514, 300.515 (1998). Letter to Thompson, 23 IDELR 890; see also Letter to Hargan, 16 EHLR 738 (OSEP 1990) (stating that the term “parent,” as defined in federal regulations, may include foster parent or other “person acting as a parent”); *In re Duncan*, 211 EHLR 400 (OSEP 1986) (allowing school district to refuse to recognize a foster parent as educational surrogate if he or she doesn’t meet the requirements of the old 34 C.F.R. § 300.514).

437. CAL. EDUC. CODE § 56028 (West Supp. 2000).

438. CAL. GOV’T CODE § 7579.5 (West 1995).

439. Letter to Baker, 20 IDELR 1169 (OSEP 1993) (stating that federal law does not require states to recognize a foster parent as a parent for educational purposes, but that such a recognition would be appropriate in certain circumstances if permitted under state law).

440. CAL. GOV’T CODE § 7579.5(c) (West 1995) (also giving preference to a child’s relatives and court appointed special advocate).

point foster parents and adult caretakers as surrogate parents.

Children and youth who have multiple placements or are in group homes should have other consistent adults in their lives appointed as a surrogate parent such as a non-caregiving relative or a CASA. LEAs and child protection agencies both have a responsibility to ascertain if a child needs a surrogate parent and, if so, to take steps so one can be appointed. LEAs also have a responsibility to properly inform all persons acting as parents or surrogate parents of their rights and responsibilities under IDEA. Finally, they must ensure that teachers and school administrators include these functional parents in the IEP process and enable them to effectively advocate for their exceptional children.

In sum, IDEA should go even further than the new regulation discussed above and include foster parents as persons "acting in the place of a parent," thus allowing foster parents, like relative caregivers, to automatically serve as parents under IDEA.<sup>441</sup> This acknowledgment that many children remain in foster care for long periods of time and become very attached to their foster families even if they are never adopted or otherwise accorded rights to this relationship is essential to a full incorporation of children in out-of-home care into the special education system.

## 2. *Child Protection Agencies Should Consider A Child's Educational Needs in Selecting and Supporting Foster Families*

Many important criteria inform the selection of a foster family for a placement by child protection agencies, including location, availability, and placement of siblings. The shortage of foster parents<sup>442</sup> means that a great deal of the decision comes down to availability, especially in the case of emergency placements. Maintaining stability in school placement is often low priority, despite being required as a factor for consideration under both federal and state law,<sup>443</sup> and foster parents must be selected according to their ability to meet this need.<sup>444</sup> Many exceptional children qualify for specialized foster care, and should be placed with families better prepared to meet their needs.

State child protection agencies should explicitly consider a child's special educational needs in choosing a placement, consistent with federal law.<sup>445</sup> Although a child's safety, stability, and ties to siblings are extremely important, her educational needs are integrally tied to such stability and must be considered as well. Most importantly, child protection agencies must inform foster families of their responsibilities with regard to a child's education

441. 34 C.F.R. § 300.20(a).

442. A CHALLENGE TO THE NATION, *supra* note 16, at 24 (estimating that in 1993 the child protection system was losing about 30,000 good foster homes yearly).

443. Cohen, June 5, *supra* note 8, at 17; *see also* California Department of Social Services Manual of Policies and Procedures § 31-420.15 [hereinafter Cal. DSS Manual].

444. *See, e.g.*, Cal. DSS Manual § 31-420.17.

445. 42 U.S.C.A. § 675(1)(c) (West Supp. 2000) requires that each foster child's case plan include his or her health or education records "to the extent possible."

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families of their responsibilities with regard to a child's education and apprise them of the child's individual needs, as well as train them to advocate effectively to this end. Thus, social workers should ensure that they pass on the medical and educational information about children switching placements<sup>446</sup> and let foster parents know of their initial and ongoing role in the child's schooling. Agencies as a whole must train foster families as parental advocates for exceptional children and in turn advocate on their behalf with schools and LEAs.

### 3. *Schools Must Make All Families Partners in Their Children's Education*

Finally, regardless of a child's family structure or who her educational surrogate parent is, it has been clearly demonstrated that schools can best educate children when they include a child's family as much as possible in the process.<sup>447</sup> This is especially so as schools face greater challenges in terms of the diverse and urgent needs of students while their resources are being cut.<sup>448</sup> Schools must reach out to families, especially those disadvantaged by poverty, language, race, and other stigmatized categories, because they have traditionally been excluded by the bureaucracy and professional "insider" norms of schools.

Intersectional children, to an even greater extent than other students, have needs that are both educational and social, and thus families and teachers need to cooperate and address these needs together.<sup>449</sup> Unless these children receive some sense of continuity from the adult role-models at home and those at school, they will have difficulty bridging these two worlds.<sup>450</sup> This continuity is essential for children to have the most stable and productive learning experience, and enjoy healthy peer and teacher relationships. Moreover, if schools reach out to all parents, then those whose children are in special education will not be as singled out in a stigmatizing fashion.<sup>451</sup> Family involvement requires that teachers acknowledge parent outreach as an important part of their job, and

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446. One idea to this end is the medical and educational passport system for children in out-of-home care being implemented by several states, and discussed further *infra* Part III.C.1.

447. See generally A NEW GENERATION OF EVIDENCE: THE FAMILY IS CRITICAL TO STUDENT ACHIEVEMENT (Anne T. Henderson & Nancy Berla eds., 1997) [hereinafter NEW GENERATION OF EVIDENCE].

448. See generally URGENT MESSAGE: FAMILIES CRUCIAL TO SCHOOL REFORM (Anne C. Lewis & Anne T. Henderson eds., 1997) [hereinafter URGENT MESSAGE].

449. Parental involvement in schools to meet the social and academic needs of students is a key principle of the renowned Comer School Development Program. *Id.* at 45.

450. *Introduction*, in NEW GENERATION OF EVIDENCE, *supra* note 447, at 11 (citing the work of James Comer).

451. Minow, *Bilingual & Special Education*, *supra* note 104, at 206-25 (discussing Joel Handler's study of a special education program in Madison, Wisconsin that made special education part of a continuum of all educational services and included all parents first as school district members).

that they are trained to do so. This rarely happens and is a major barrier to family-school partnerships.<sup>452</sup> Adult caretakers need to be regularly informed about the performance and behavior of their children in order to best collaborate with teachers toward solutions. For instance, teachers can send home weekly notebooks recording children's progress and make a special effort to contact less involved guardians to invite them to school-wide fairs and other events.

A key step to better incorporating children in out-of-home care into schools is expanding the definition of 'parent.' For children in out-of-home care, a simple yet insensitive assignment such as asking students to draw their family tree "beginning with the parents" can be traumatic.<sup>453</sup> Further, teachers can best understand children's experiences and meet their needs by finding out who actually cares for a child and what adults are significant in his or her life, including older siblings and other relatives, foster parents, and social workers.<sup>454</sup> This is particularly important for exceptional children who otherwise risk going unidentified or, alternatively, risk being placed in inappropriate or overly restrictive settings. Teachers can enormously increase the opportunity for children without consistent caretakers to be in an appropriate and inclusive educational placement if they remain aware of their needs and strengths and take responsibility for referring them for special education assessments and monitoring the effectiveness of their IEPs.

After identifying each child's family, schools should include them in school programs and in planning the child's education. Schools around the country have found diverse ways to incorporate families, ranging from family centers offering social and educational services for children and adults<sup>455</sup> to involving "parents" of all kinds directly in the decision-making of the school. Other schools involve families in their curricula, both substantively by discussing diverse experiences, and by inviting them in as volunteers of all kinds. For instance the inclusionary kindergarten class at the New Haggerty School in Watertown, Massachusetts organizes a "special day" for each child wherein one unspecified adult friend or relative comes in to work with the class on an activity, ranging from kite-building to baking to reading. Reaching out to families for help and to celebrate and share in their children's successes gives parents of all kinds, including foster parents, a stake in the outcome, and added incentives to assist the child's progress, for instance in helping with homework.

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452. URGENT MESSAGE, *supra* note 448, at 16.

453. Telephone interview with Jim Mahsuz, Director of the Family Center in Somerville, Massachusetts (Apr., 1997).

454. This strategy is important for reaching out to other communities often excluded from schools, including African-American families. See JOCELYN A. GARLINGTON, HELPING DREAMS SURVIVE: THE STORY OF A PROJECT INVOLVING AFRICAN-AMERICAN FAMILIES IN THE EDUCATION OF THEIR CHILDREN 67-68 (1991).

455. This entails sensitivity to the privacy concerns of families. *Id.* at 58-63.

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By starting with an assessment of every family's strengths, rather than with a measurement of deviation from a standard "norm," teachers and administrators can work with children's guardians and caregivers for a more cohesive and efficient long-term educational plan for each child.

### *C. Take Steps To Identify Children in Out-of-Home Care and Stabilize Their Educational Placements*

Children in out-of-home care may be under-identified for special education due in part to their extreme mobility.<sup>456</sup> Transition from one residential situation to the next frequently means that children in out-of-home care do not remain in the same educational placement due to lost records, disputes between school districts over costs, et cetera. To address some of these needs, exceptional children in foster care must be accorded additional identification and placement security measures. Simultaneously, however, there must be a recognition that referrals to special education must continue to be based on individualized determinations and that these individual determinations must be conducted carefully in order to avoid the equally pernicious problem of over-identification of children based upon their situation or bias related to that situation.

#### *1. State and Local Educational Agencies Have a Heightened Responsibility To Fulfill the IDEA Child Find Mandate with Regard to Children in Out-of-Home-Care*

The lack of consistent care and advocacy for children in foster care means that states and LEAs should take additional steps to identify exceptional children among this group and to ensure that they are receiving the special education and related services that they are entitled to under IDEA.<sup>457</sup> A "child find" mechanism should be articulated that is specifically geared toward identification of children in out-of-home care and this mechanism should be designed to specifically account for the lack of strong parental advocacy and prevalence of unique educational risks that often characterize intersectional children. Such a mechanism could be justified as a necessary procedural protection for children who are dependents of the state under 20 U.S.C. § 1415(b)(2).

In addition to the more usual methods of identifying children, which include community education, census taking,<sup>458</sup> and medical and teacher refer-

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456. Children in out-of-home care are also likely to be over-identified due to their repeated involvement with service providers and bias against them on the part of some educators, as discussed *supra* Part I.C. This problem requires consistent parental advocacy to ensure that a child is in the LRE possible and can transition out of special education if ready. Reforms toward increasing the quantity and quality of educational advocates for children in out-of-home care are discussed *supra* at Part III.A..

457. 20 U.S.C.A. § 1412(a)(3)(A) (West 2000).

458. THOMAS & RUSSO, *supra* note 91, at 40.

rals, educational agencies should initiate systematic referral methods among child protection workers, foster families, group homes, CASAs, and other adults working with children in out-of-home care. All referrals should then be noted in a child's educational and medical passport and the educational agency governing the first referral would be responsible for periodically checking to ensure the child is continuing to receive services, or, alternatively, that the child has not been inappropriately placed in a restrictive environment, depending on if he or she was found to have special education needs. Because children in out-of-home care are subject to many environmental and situational stresses which could lead to a need for special education at one point and not at another, educators and social workers must be sure to allow children and youth mobility out of special education when appropriate, again without waiting for parental advocacy. This may require periodic academic assessments for children in out-of-home care so that no one test is responsible for labeling students.<sup>459</sup> More than one assessment method should be used and assessments should be conducted so as not to incorporate bias against children in out-of-home care. Such an assessment structure could easily be modeled on the recent inclusion of such requirements in IDEA with regard to children of color and children whose first language is not English.<sup>460</sup>

Preventive screening, tutoring, or counseling of all children in out-of-home care could also be justified under IDEA,<sup>461</sup> and the benefits of tracking and monitoring under a program "designed to serve the unique educational needs of children in foster care,"<sup>462</sup> including general education, special education and independent living skills development outweigh the detriments of stigma.<sup>463</sup> School personnel should already know which children are state dependents, for residency and emergency notification purposes, and thus can use this knowledge for positive preemptive screening and support. However, it must be emphasized that school personnel would violate the IDEA requirement for an individualized determination of eligibility if they referred children for special

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459. Cohen, June 12, *supra* note 179, at 10 (citing recommendation of Professor Trudy Festinger, author of NO ONE EVER ASKED US: A POSTSCRIPT TO FOSTER CARE).

460. 20 U.S.C.A. §§ 1414(b)(2)-(3) (West 2000).

461. 20 U.S.C.A. § 1415(b)(2) (West 2000). In a related argument, Kevin Ryan outlines justification for runaway prevention screening and counseling of foster youth based on a constitutional substantive due process right to adequate care in state custody. *See generally* Ryan, *supra* note 64. Such an argument might be applicable in the special education context as well, but as IDEA already provides clear statutory rights to procedural and other protections, it is unnecessary to take on the difficulties of a potentially unrecognized substantive due process claim.

462. Brochure, Foster Youth Services (on file with author). Such a program exists in several counties in California, called Foster Youth Services (F.Y.S.).

463. The alternative transitional school created and monitored under the *Katie I.* Consent Decree contains just such a provision to "orient" all foster care children in shelter care attending the school whether they are eligible for special education or not to "[identify] and [assess] each child's educational needs," "[make] placements consistent with [these] needs, and "[implement] an educational program for each child." *Katie I.* Consent Decree, *supra* note 141, at 19.

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education solely for being a dependent of the state.<sup>464</sup>

### 2. *Exceptional Children in Out-of-Home Care Could Be Guaranteed Educational Placement Stability Via a Stay-Put Provision*

Children in out-of-home care receiving special education services require some guarantee of educational continuity despite their vulnerability to home placement, and subsequent educational placement, change.<sup>465</sup> To this end, IDEA and state laws should incorporate a “stay-put” provision for children in out-of-home care. The existing stay-put provision in disciplinary matters can provide guidance to this end, as can the residency rules for homeless children outlined in the federal Stewart B. McKinney Homeless Assistance Act (hereinafter the McKinney Act).<sup>466</sup> IDEA currently prohibits schools from changing a child’s placement for more than a very limited time during disciplinary or IEP appeal procedures because this would constitute a change in placement without a full IEP and all of the procedural protections guaranteed therein.<sup>467</sup> The McKinney Act requires LEAs to either allow homeless children to continue their education in their original school district for the remainder of the school year or enroll them in the school district where they actually live, depending upon the child or youth’s best interests.<sup>468</sup>

A stay-put provision designed for exceptional children in out-of-home care should allow them to remain in their original educational placement pending a new IEP and due process, like the current IDEA disciplinary stay-put measure, unless the child herself wishes to change placement. The statute should specify that the original school district would be responsible for costs until the child is moved, including related services such as transportation. There could be an exception for unfeasibility, such as the placement of the child very far away geographically.<sup>469</sup> Even in an exceptional case, however, the original school would still be required to expedite records transfers and cover the IEP cost at the new placement.

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464. See the allegation to this regard in the *Katie I. Consent Decree*, *id.* at 7.

465. The unique vulnerability of children in out-of-home care to sudden and repeated home placement change, coupled with their low levels of parental advocacy and high levels of educational risk, are strong arguments for creating a special provision focused toward their stability alone. Although exceptional children may move with their parents or among relatives, the situation is not as common nor as systemic and thus can be adequately handled under the current IDEA.

466. 42 U.S.C.A. § 11432 (West 1995).

467. 20 U.S.C.A. §§ 1415(j)-(k) (West 2000). The most recent amendments allow schools to move exceptional children to an “appropriate interim placement” if they are disciplined for weapons and drugs offenses, but this exception is not really applicable to the situation of children in out-of-home care. *Id.* § (k)(1)(A)(ii).

468. 42 U.S.C.A. § 11432(g)(3)(A) (West 1995).

469. The *Katie I. Consent Decree* contains a stay-put provision for children in shelter foster care with multiple exceptions including transportation time between residential placement and school exceeding an hour each way and best service of the child’s educational needs. *Katie I. Consent Decree*, *supra* note 141, at 9.



3. *Educators and Child Protection Workers Must Facilitate Transitions for Exceptional Children in Out-of-Home Care*

A stay-put provision such as that outlined above could greatly reduce the detrimental effects of mobility on exceptional children in foster care. Additionally, or in the absence of such a measure, child protection workers, teachers, and school administrators can greatly reduce the gaps in service provision and emotional trauma that often accompany these children's frequent moves. Facilitating record transfers is pivotal to avoid the loss of vital educational information.<sup>470</sup> Both child protection workers and educators play a key role in ensuring that this happens efficiently. Child protection workers are responsible for providing detailed medical and education records to foster families and group home counselors.<sup>471</sup> The child protection workers must also inform schools as to a child's surrogate parent or lack thereof, and work with the LEA toward obtaining a surrogate appointment if the child needs it. They should then work with a child's care provider or surrogate parent to ensure that they know how to and actually do access the educational records from the last school placement. The foster family and social worker must insist upon the local school's acceptance of the child regardless of space availability, placement in a special education setting most similar to the last one, an IEP within 30 days, and the provision of a related service such as transportation should this be necessary.<sup>472</sup>

LEAs and schools are responsible for honoring residency rules in allowing all children to enroll.<sup>473</sup> They also must request records quickly for new students, and in turn expedite record transfers themselves. In this regard, we can again be informed by the McKinney Act, which mandates that schools maintain the records of homeless children "so that the records are available, in a timely manner, when a child or youth enters a new school district."<sup>474</sup> An LEA has also expedited educational record transfers for children in out-of-home care as part of a consent decree, and reviewed their procedures for record transfers up to monthly to ensure that they were not delaying children's appropriate placement in school.<sup>475</sup> Such a requirement should be read into IDEA as an essential part of the ongoing provision of services and system of procedural safeguards underlying both the act in general as well as more specific provi-

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470. For exceptional children, these include IEPs, transcripts, previous referrals for a special education evaluation, and immunization records.

471. See, e.g., CAL. WELF. & INSTIT. CODE § 16010.

472. Foster Youth Services, *School Placement of Foster Children: Process and Procedures* (Apr. 21, 1998) (on file with author).

473. See the more detailed discussion of these requirements *supra* Part II.C.

474. 42 U.S.C.A. § 11432(g)(5)(A) (West 1995).

475. *Katie I. Consent Decree*, *supra* note 141, at 5-6.

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sions, such as the “child find” and “stay put” requirements.<sup>476</sup>

Above the bare minimum of ensuring that records are timely transferred, school personnel can further ease the emotional disruption of moves by creating an atmosphere that welcomes children, for instance by pairing new children with peers, helping them enroll in lunchtime and after school activities, and developing “rituals” for teachers and administrators to utilize to ease the transition for students and their parents.<sup>477</sup> Simple steps by individual educators can go a very long way—staff at two schools in Massachusetts personally drove foster children who had moved to and from school for months to enable the children to stay in the same school with their siblings.<sup>478</sup>

### *D. Children in Out-of-Home Care Have a Right to Interagency Coordination, Appropriate Placements, and Related Services Under IDEA*

In addition to guaranteeing every exceptional child an appropriate placement in the least restrictive environment, IDEA requires states and LEAs to take other steps to best educate all exceptional children. The provisions mandating interagency coordination and the provision of related services are particularly relevant to the equal provision of special education to children in out-of-home care.

#### *1. Children in Out-of-Home Care Are Entitled to Interagency Coordination*

IDEA mandates interagency coordination in the provision of special education and related services<sup>479</sup> and further recognizes the importance of interagency coordination by allowing states to use excess funds to establish and expand interagency services.<sup>480</sup> Both educators and child protection workers stress the need for greater interagency cooperation in the case of children at the intersection of the special education and child welfare systems. A holistic approach to each child could result in the identification of all of his or her needs, thereby preventing children from falling through the cracks and streamlining services. Coordination allows professionals from different spheres to best access funding for a child’s needs while at least attempting to minimize the restrictiveness of educational and residential placements. It further enables all adults involved in the long term care of a child to coordinate a long term plan

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476. Proper upkeep of a child’s records is also essential to fulfilling the IDEA requirement that parents or educational surrogate have a right to inspect a child’s records. See 20 U.S.C.A. § 1415(b)(1) (West 2000).

477. WEISSBOURD, *supra* note 205, at 110.

478. The Mary Lyons School in Brighton, MA and the Tobin School in Roxbury, MA, both visited by the author in March 1997.

479. 20 U.S.C.A. § 1412(a)(12) (West 2000).

480. 20 U.S.C.A. § 1411(f)(4)(A)(iv) (West 2000).

for her, rather than responding to crises in one sphere without considering the impact on another.<sup>481</sup> Interagency cooperation, particularly in terms of funding, can be a complex undertaking requiring considerable efforts on the part of school and child protection administrators. Collaboration must take place at all levels - from individual teacher or principal and social worker to county-wide. However, there are a number of programs that provide a model for interagency cooperation. One inclusion pilot school in Massachusetts, for instance, focuses on structuring innovative arrangements that are cost-effective for both the child welfare and education departments, such as placing children in private residential care in a mainstream classroom with added supports.<sup>482</sup> The school staff see themselves as advocates for children in foster care with both the child protection and educational agencies. By "lobbying" for these children, educators can avoid special education referrals that are really designed to obtain needed services outside of education—an unfortunately all-too-common situation.<sup>483</sup>

Coordination between child protection and educational agencies on a larger scale also demonstrates the potential for interagency cooperation and reform. A Massachusetts project paired ten elementary schools with ten child protection offices to consult about at-risk children. The category of at-risk children is defined as any child with EBD and particularly focuses on foster children.<sup>484</sup> Social workers train teachers and vice versa. The two groups coordinate children's protection and educational plans, and develop programs to better integrate foster parents into the school system. An initial assessment of the program by the child protection administrator responsible for its coordination revealed that it had resulted in greatly improved communication between agencies and a related enhancement of service provision to children.<sup>485</sup>

A collaboration between child protection, educational, and other agencies

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481. Such a plan ideally involves other actors besides educators and child protection workers, such as police officers and health-care providers, in order to better prevent child abuse and neglect and the concomitant removal to foster care, and to help children recover from its effects. A creative program linking the child protection agency and schools via computer was recently developed in New York City. It is hoped that giving the agency access to school absence and other records will increase the reporting and intervention of child abuse. See Dale Russakoff, *The Protector*, THE NEW YORKER, April 21, 1997, at 69.

482. Interview with Dr. Mary Nash, Principal, Mary Lyon School in Brighton, MA (Mar., 1997). Dr. Nash calls the effective coordination of services to children "a fiscal game." Such arrangements can be abused to shift funding from one agency to another, as some critics accused the Massachusetts Department of Social Services of doing when it launched a Commonworks program which would shift half of its residential school population into public schools, allegedly to get special education funding for these children. See Kate Zernike, *Bad Behavior. Special Treatment: Special Ed, A System Disabled*, THE BOSTON GLOBE, Mar. 31, 1997, at A1 & A8.

483. Interview with Dr. Mary Nash, *supra* note 482.

484. Telephone interview with Susan Stalk, Administrator, Massachusetts Department of Social Services (Apr. 1997). Ms. Stalk is the administrator responsible for coordination with Boston Public Schools. The Massachusetts D.S.S. and Boston Public Schools are fund-sharing through an interagency service agreement, and this pilot project received additional funds from the Kellogg Foundations' Massachusetts Families for Kids.

485. *Id.*

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in California is specifically addressing the lack of special education referral and service provision for children in out-of-home care.<sup>486</sup> The cooperative project was initiated by Foster Youth Services (F.Y.S.), an agency in several California school districts which was “designed to serve the unique educational needs of children in foster care,”<sup>487</sup> including general education, special education and independent living skills development. Recently vetoed state legislation would have increased Foster Youth Services funding, allowing it to expand potentially to all California counties.<sup>488</sup> F.Y.S. is currently jointly funded by school districts and by county child protection agencies. A diverse range of service providers and advocates, including child protection workers, a probation officer, special education administrators, and children’s legal advocates, are meeting in part to identify protocols for the identification and placement of exceptional foster children. By opening lines of communication among various service providers, as well as clearly outlining each party’s responsibilities toward a particular child, the F.Y.S. project has already taken important steps toward better serving the needs of these intersectional children, and can serve as a model for other interagency efforts.

### 2. *Children in Out-of-Home Care Merit Appropriate Placements and Adequate Related Services to Special Education Under IDEA*

All exceptional children have a right to an appropriate placement under IDEA, including related services.<sup>489</sup> This may include learning social and basic life skills, or being provided with non-academic services such as social work case management and psychological counseling or transportation. These entitlements under IDEA are particularly vital for children in out-of-home care who often have many non-academic barriers to successful achievement in school. Children’s advocates can use the IDEA mandate not only to fulfill a child’s educational needs, but also to access services to assist in the child’s health and well-being at home—which are connected to his or her school performance.<sup>490</sup> In this fashion, special education can be seen as a system which considers the holistic care and well-being of children.

An appropriate placement and related services for children in out-of-home care may arguably encompass a wide range of services including a curriculum incorporating the unique needs of children who have been abused or neglected and in multiple placements, staff development regarding the needs and situa-

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486. I participated in some of the meetings of the Contra Costa County Foster Youth Services to identify the problems and work out some of the protocols.

487. Brochure, Foster Youth Services brochure (on file with author).

488. California AB 2012 (2000).

489. See discussion of the FAPE and related services requirements *supra* Part I.B.

490. Similarly, children’s advocates have used IDEA to access better services for children in delinquency institutions. See Glennon & Schwartz, *supra* note 264, at 1565 n.57 (discussing *Nick O. v. Terhune*, No. 89-0755 (E.D. Cal. 1990) (stipulation and order filed)).

tions of foster children, counseling and transportation for all children in out-of-home care, procedures to stabilize children's educational placements such as those outlined above, and special advocacy agencies such as Foster Youth Services to liaise between the child protection and special education systems.<sup>491</sup>

A cohesive approach to meeting all of a child's needs through an FAPE and related services could take the form of school-based wraparound services, a mode of service delivery discussed at greater length below.

*E. Provide Special Education and Related Services Preventively and Widely Through Grassroots Involvement*

Even more than other children who are eligible for special education, children in out-of-home care need to be provided with a full range of preventive services in a comprehensive fashion. To this end, the preschool- and school-aged special education programs can be greatly informed by the IDEA program for infants and toddlers, Early Intervention, which is preventive and geared toward the needs and strengths of the whole family, rather than looking at a child in isolation from her caretakers and community. Other steps toward better serving exceptional children in out-of-home care include the implementation of preventive and "whole-school" approaches in order to prevent the need for children to be labeled before they can receive services, and further collaboration between child welfare, educational and other social service agencies, and workers at a grassroots level.

*1. Early Intervention Can Serve as a Model Program Addressing Children's Special Home and School Needs*

The Early Intervention (E.I.) program, contained in Part C of the 1997 Amendments to the Individuals with Disabilities Education Act, is designed to support infants and toddlers who are developmentally delayed<sup>492</sup> or are at risk of becoming so.<sup>493</sup> Part C thus differs significantly in both its mission and its structure from the rest of IDEA and from child protective legislation. The Early Intervention program is explicitly preventive—funding services not only to children with developmental delays, but also to children *at risk* of becoming developmentally delayed.<sup>494</sup> To this end, it has both a more flexible definition of eligibility and a wider application than the other legislative schemes outlined earlier in which a child is only eligible if he or she is *already* disabled, or has been abused, neglected or abandoned.

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491. All of these services are present in some form in the *Katie I.* Consent Decree.

492. As defined by the state per 20 U.S.C.A. §§ 1432(3), 1435(a)(1) (West 2000).

493. The E.I. entitlement interacts with other federal programs providing services for at-risk or disabled pre-schoolers such as Head Start. See WARBOYS ET AL., *supra* note 4, at 5.

494. 20 U.S.C.A. § 1431(b)(4) (West 2000).

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The E.I. system lies at the juncture of special education and child welfare in that it addresses delays or risks in infants and toddlers that affect their home life, and may result from their home life, but that will also affect future educational success and inclusion. Part C explicitly takes as one of its purposes the prevention of a need for future special education services, and implicitly aims to prevent out-of-home placement of children by better supporting their families before any abuse or neglect occurs, particularly where families are already stressed by poverty, isolation, or racism.<sup>495</sup> Many children need early intervention services for developmental delays resulting from abuse and neglect.<sup>496</sup> Thus, the E.I. program does not narrowly focus only on a child's family or school situation—as do special education and child welfare legislation—but rather takes a holistic approach to a child's development within his or her family. Such services can greatly improve a child's chances of securing a safe and nurturing home placement, either with his parents or out of the home.

Infants and toddlers may qualify for E.I. if they are aged from birth through age two and fall into one of the following three broad categories: (1) currently experiences a developmental delay in cognitive, physical, communication, social or emotional, or adaptive development; (2) has a physical or mental condition with a high probability of resulting in developmental delay; or, at a state's discretion, (3) is at-risk of having substantial developmental delay if not provided with E.I. services.<sup>497</sup> States have the option whether to provide services to the latter category of at-risk infants and toddlers, whereas they must provide services to the first two categories of children if they accept funding under Part C.<sup>498</sup> As of 1996, all fifty states had chosen to receive federal support for Early Intervention, and up to forty-one were in full compliance with then-Part H.<sup>499</sup>

The preventive purposes underlying E.I., and its widespread mandate, result in more flexible and less stigmatizing definitions than those that govern the larger special education system. The rationale underlying the use of the term developmentally delayed makes very clear Congress' desire to avoid labeling in the E.I. context as much as possible: the term was chosen "in order to prevent locking the child into an eligibility category that may be inappropriate or

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495. The findings underlying Part C illustrate this dual purpose: "The Congress finds that there is an urgent and substantial need . . . (2) to reduce the educational costs to our society, including our nation's schools, by minimizing the need for special education and related services after infants and toddlers with disabilities reach school age; (3) to minimize the likelihood of institutionalization of individuals with disabilities and maximize the potential for their independent living in society; (4) to enhance the capacity of families to meet the special needs of their infants and toddlers with disabilities . . . (5) to enhance the capacity of state and local agencies and service providers to identify, evaluate, and meet the needs of historically underrepresented populations, particularly minority, low-income, inner-city and rural populations." 20 U.S.C.A. § 1431(a) (West 2000).

496. WARBOYS ET AL., *supra* note 4, at 82.

497. 20 U.S.C.A. §§ 1432(5), 1435 (West 2000).

498. *Id.* §§ 1432(5)(B), 1435.

499. THE FUTURE OF CHILDREN: SPECIAL EDUCATION, *supra* note 77, at 37.

incorrect.”<sup>500</sup> Inclusion is a very important part of E.I., as with special education and child welfare,<sup>501</sup> and states are mandated to provide services “to the maximum extent appropriate . . . in natural environments, including the home, and community settings in which children without disabilities participate.”<sup>502</sup>

The holistic approach of E.I. is reflected in the “comprehensive, coordinated, multidisciplinary, interagency”<sup>503</sup> network of services it provides for infants and toddlers. Services revolve around the family rather than the individual child, and parental rights are emphasized as under Part B of IDEA.<sup>504</sup> Thus, the “individualized family service plan” forms the core of E.I., and focuses on the strengths and needs of both the infant or toddler and his or her family.<sup>505</sup> Services are not divided into educational or “related” home-based services, but rather encompass a wide variety of needs in both realms, such as family training, counseling and home visits, speech therapy, transportation, occupational therapy, and social work services.<sup>506</sup> E.I. services have been proven to be very effective at facilitating the development of children with certain disabilities and, thereby, reducing the need for later restrictive special education placements.<sup>507</sup>

Although E.I. has different capacities and limitations because it is designed for very young children, the special education and foster care systems can be informed by some of its principles. First, the preventive approach of E.I. could be adapted to the special education and child welfare systems and used to prevent restrictive special education and out-of-home care placements *before* they become necessary. The education system could provide extra services to children at-risk of a more restrictive referral, or to all children, ideas that find some support in IDEA and are outlined further below in Part III.E. The child welfare system could, and is beginning to, assist families and children before abuse and neglect mandate removal through home visiting and other preventive programs.<sup>508</sup>

Additionally, the systems serving children in home and at school can be informed by the holistic approach of E.I.. The home and school situations of children and youth are inextricably intertwined, requiring solutions that take

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500. 62 Fed. Reg. 55026-01 at 55031.

501. *See* Part II *infra*.

502. 20 U.S.C.A. § 1432(4)(G) (West 2000).

503. 20 U.S.C.A. § 1431(b)(1) (West 2000).

504. For instance, written parental consent is required prior to an initial evaluation and assessment of a child and the initiation of E.I. services, although a lack of consent may sometimes be overridden by a due process hearing. 34 C.F.R. § 303.404(a); 34 C.F.R. § 303.404, n.2.

505. 20 U.S.C.A. §§ 1436(a)(1)-(2) (West 2000).

506. *Id.* § 1432(4).

507. WARBOYS ET AL., *supra* note 4, at 80.

508. C.D.F. YEARBOOK 1997, *supra* note 18, at 57-59; *see also* Indira A. Lakshmanan, *Hawaii Abuse Prevention May Catch on in Mass.*, BOSTON GLOBE, Apr. 20, 1996, at 1 (discussing highly successful home visiting program used to reduce child abuse and neglect in Hawaii).

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both into account. In beginning from a multidisciplinary, coordinated focus on children's family and future educational development, the E.I. model demonstrates potential common ground and practical collaborations between the child welfare and special education systems serving older children.

### 2. *Educators Are Empowered To Implement More Pre-Labeling and Whole-School Approaches by the IDEA Amendments of 1997*

As long as the entire burden of difference is made to reside in one child,<sup>509</sup> educators and child protection workers will continue to face the impossible choice between the stigma that may accompany labeling and enabling a child to access needed services as they contemplate identifying and referring children for special education. Moreover, the due process protections laid out in IDEA are not sufficient to achieve better substantive outcomes for all exceptional children.<sup>510</sup> Instead, the role and structure of schools need to be expanded to include the diversity of children being educated today, and the variety of academic and non-academic skills essential to future employment and citizenship. The IDEA Amendments of 1997 propose just such a "whole-school" approach and "pre-referral intervention to reduce the need to label children as disabled in order to address their learning needs."<sup>511</sup> A universal and preventive approach to special education may be particularly beneficial to exceptional children in out-of-home care since they are doubly stigmatized and at-risk for more restrictive placement.

The funding provisions of the amended IDEA also empower schools and LEAs to develop more broad-based approaches to special education. The IDEA Amendments of 1997 substantially change the special education funding provisions by basing them in part on the relative populations of children and youth aged 3 through 21 living in poverty.<sup>512</sup> These provisions alleviate somewhat the need to identify individual children as disabled in order to obtain funds, thus allowing states to use some IDEA funding for general preventive and remedial services for all children, and reducing incentives for restrictive placements.<sup>513</sup> The funding provisions also provide more flexibility to state and local educational agencies in formulating and shaping programs. Preventive services can be more cost-effective by prohibiting the need for more ex-

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509. *Supra* Part II.A. (discussing Martha Minow's elaboration of "the dilemma of difference").

510. Macchiarola et al., *supra* note 179, at 604. See also Minow, *Bilingual and Special Education*, *supra* note 104, at 416 (stating that the "substantive dimensions [of IDEA] are overshadowed by the rigor of its procedural protections").

511. 20 U.S.C.A. § 1400(c)(5)(F) (West 2000).

512. *Id.* § 1411(e)(3)(A)(i)(II)-(III). The full scope and impact of these changes in the IDEA funding are beyond the scope of this Article.

513. The IDEA Amendments appear to address some of the critiques of the categorical per-child funding structure addressed in The Packard Foundation's 1996 study of special education. See *THE FUTURE OF CHILDREN: SPECIAL EDUCATION*, *supra* note 77, at 12-15.



pensive (and restrictive) services and placements in the future, a purpose explicitly recognized in the Early Intervention Part of IDEA.<sup>514</sup> These changes may have particular significance for children in out-of-home care who risk being referred to more restrictive school environments than they may need because special education is the easiest way to access funding during the current drastic shortages of child protection and welfare funds.<sup>515</sup>

LEAs can look to school districts already performing preventive interventions before special education referral and to the Early Intervention program as models. San Francisco Unified School District, for instance, implements "student study teams" to assess students who are not performing well in school and to attempt to formulate and implement supports for students that are less restrictive than special education, such as tutoring or mentoring.<sup>516</sup> Massachusetts Department of Education regulations require school personnel to make and document extensive efforts to adjust or modify a child's regular education program before referring him or her to special education.<sup>517</sup> This may include working with the school social worker, changing the child's schedule or switching her teacher. LEAs can follow this approach in providing preventive services to at-risk students before they are assessed as disabled, perhaps preventing such a diagnosis. Like the possible inclusion of at-risk infants and toddlers under the Early Intervention program, prevention services to students can lower the need for referral and more expensive services later. Some students will still require special education identification and services, but others can be helped to succeed under IDEA and other educational funding statutes<sup>518</sup> without bearing the burden of the unnecessary stigma and segregation that can result from referral. Preventive educational services can also lower the need for removal of children from the home, if abuse or neglect is related to parental inability to cope with a child's disability.<sup>519</sup>

Great care must be taken in identifying students as at-risk to use as objective a set of criteria as possible and avoid broad generalizations. Although chil-

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514. 20 U.S.C.A. § 1431(a)(2) (West 2000) (finding that there is a need "to reduce the educational costs to our society, including our Nation's schools, by minimizing the need for special education and related services after infants and toddlers with disabilities reach school age").

515. However, a move toward more census-based funding like that outlined above does create the risk that educational agencies will identify and provide fewer special education services. See *THE FUTURE OF CHILDREN: SPECIAL EDUCATION*, *supra* note 77, at 14.

516. This policy in part grew out of the goal of reducing the overrepresentation of students of color in special education. Abigail Trilling, Legal Services for Children staff attorney, training for L.S.C. Interns (April 1998).

517. MASS. REGS. CODE tit. 766, § 314.

518. For instance, Title I of the Elementary and Secondary Education Act provides funding to schools to improve the educational success of low-income students currently not achieving in school. Title I funds may be used either for "schoolwide programs" or "targeted assistance programs" geared to those students most in need. 20 U.S.C.A. §§ 6314-15 (West 2000).

519. Cohen, June 12, *supra* note 179, at 10.

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dren can easily and maybe sometimes should be<sup>520</sup> categorized together by their child protective status, “treating the categor[y] as though [it] existed and as though [it] defined a person’s identity and worth is another matter.”<sup>521</sup> Not all children in out-of-home care, for instance are educationally at-risk, but many will be because of excessive mobility, lack of advocates and the other factors outlined above in Part I.C. Only when these factors appear, and a child demonstrates behavioral<sup>522</sup> or academic needs do the benefits of individual intervention outweigh its potential stigma. Otherwise, educators and child protection workers can and arguably should monitor students in high-risk categories without singling them out for special treatment.

Pre-referral interventions and the provision of preventive support services are closely related to inclusion. In practice, preventive interventions have two major components: classroom interventions by teachers and related service provision by schools and other agencies. For instance, certain modified instructional methods can be used very successfully to include some children with emotional and behavioral disorders in the mainstream classroom without a special education referral, such as direct instruction or peer tutoring.<sup>523</sup> Students may need to acquire social skills for inclusion, either because they have EBD<sup>524</sup> or because they have never learned how to behave from adult role models. For instance, learning to negotiate and to express feelings appropriately may be particularly important for foster children who are often from family settings wherein such conflict resolution skills were never taught or used. This kind of learning through appropriate social interaction with peers and teachers cannot happen as effectively if children are segregated into special education. In one study, a group of teachers’ use of interventions including behavior modification and cooperative learning exercises before referring foster children to special education was one factor in the sixty-three to one-hundred percent drops in referral rates.<sup>525</sup>

### 3. *Child Protection and Education Agencies Should Collaborate on School-Linked Services*

The complex and interconnected needs of intersectional children cannot be adequately addressed under the existing rigid and separate service provision systems. This is particularly true when one of the service systems, such as

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520. Foster Youth Services, for instance, tracks the educational needs and performance of all children in out-of-home care in their jurisdiction due to the high risk of restrictive placements, failure and school drop-out among this group.

521. Minow, *Bilingual and Special Education*, *supra* note 104, at 204.

522. This should include “quiet” behavior problems, such as depression and low self-esteem, as well as the louder and more frequently noticed ones such as Attention Deficit Hyperactivity Disorder.

523. Manganore, *supra* note 168.

524. Cartledge & Johnson, *supra* note 171, at 52.

525. Cormier, *supra* note 7, at 61.

child protection, is crisis-oriented rather than preventive and long-term. A holistic approach to service provision removes some of the dilemmas of labeling by allowing advocates to access multiple services for children at once and in coordination rather than piece meal. Schools are a good site for the coordination of services to children and families due to their history as community institutions and their mission of universal service of all children.<sup>526</sup> Linking non-academic services to schooling may also improve academic performance, thereby demonstrating the correlation between the two.<sup>527</sup> School-linked services may be justified for children in special education under the inter-agency coordination, related services or the pre-referral and "whole-school" provisions<sup>528</sup> of IDEA. Entire schools devoted to the education and special needs of children in out-of-home care may be created at child protection shelters or other agencies, with special steps made to include children not in foster care in some classes and on exchanges.<sup>529</sup>

The coordination and provision of services to children within schools, even within regular classrooms, can greatly increase the potential for inclusion of all children, thereby minimizing the need for stigmatizing special education referrals. One project which brought "wraparound services" to schools decreased referrals by up to eighty-six percent and substantially decreased the restrictiveness of placements for students at-risk for more restrictive placements both out of the regular classroom and out of the public school altogether.<sup>530</sup> The Tobin School in Roxbury, Massachusetts offers an extensive Family Support Program which coordinates community resources such as health education and family preservation through an on-school site to maximize the inclusion of children with different social and health needs. The Mary Lyon school in Brighton, Massachusetts provides wraparound before and after school programs to all its students as well as teams of educators, counselors and other professionals who work together to develop plans for each child. Foster Youth Services in Contra Costa County, California has offices in numerous school districts which coordinate educational placements and support services such as tutoring for children and youth in out-of-home care. They also track children who have moved among districts, serving as a source of "institutional memory" to bridge chil-

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526. CENTER FOR THE FUTURE OF CHILDREN, THE DAVID AND LUCILE PACKARD FOUND., 2 THE FUTURE OF CHILDREN: SCHOOL LINKED SERVICES 8-9 ed. (Spring 1992).

527. *Id.* at 8.

528. 20 U.S.C.A. § 1400(c)(5)(F) (West 2000).

529. For one example, see the Alternative Transitional School created under the *Katie I.* Consent Decree to meet the special needs of children in out-of-home care including emotional and physical trauma, excessive mobility, preventive screening and services and a twelve-month school year. *Katie I.* Consent Decree, *supra* note 141, at Appendix A.

530. The number of children in the most restrictive level five dropped from seven to one in one year and children in regular classrooms receiving wraparound services increased from five to seventeen. Lucille Eber et al., *School-Based Applications of the Wraparound Process: Early Results on Service Provision and Student Outcomes*, 5 J. OF CHILD AND FAM. STUD. 93 (1996).

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dren's different home and school placements. School-linked or wraparound services are particularly important for children in out-of-home care who are under the jurisdiction of multiple agencies due to their status, and who often require multiple services. The coordination of services at school can alleviate their frequent instability at home and enable service providers to track and monitor children's needs and progress.

### 4. *Grassroots Change Is Needed from Teachers, Social Workers and All Children's Advocates*

Educators can do a great deal to provide stability and a community at school for children in out-of-home care. One of the greatest risk factors characterizing children in this group is their frequent lack of stability in relationships, particularly with adults. Teachers and school administrators can create a stable, sometimes "surrogate family" environment for their students who are in foster care. This might mean pairing a student with an adult for regular "special time," facilitating sibling visitation, or lobbying to have a child stay in the school, even though he or she has moved out of district. Success in creating a warm and nurturing environment for children requires attention to details, such as the creation of a "Magic Lunchbox," filled by a different teacher each day, for a child in a psychiatric hospital who has no guardian to make him lunch,<sup>531</sup> or inclusion of children in out-of-home care on field trips even if they cannot pay the ten dollar fee.<sup>532</sup> Encouraging positive peer interactions is also a very effective means of helping to integrate different children into the school community. Peer tutoring not only helps students academically, but also allows them to learn about and cooperate with children different from themselves.<sup>533</sup>

Increased attention to the needs of exceptional children in out-of-home care requires increased knowledge about the reality of their situations rather than a reliance on stereotypes or preconceptions about either disabled or foster children. IDEA requirements regarding personnel development, support, and training regarding special education and inclusion may be used to require teacher training regarding the needs of children in out-of-home care.<sup>534</sup> Increased awareness of the situations and needs of children in foster care can dramatically improve teachers' ability to effectively include these children in general education programs. Training teachers about foster care at one school substantially reduced special education referrals of children in out-of-home care.<sup>535</sup> The training consisted of an intensive eight month program on topics

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531. This example comes from the Mary Lyons School in Brighton, MA.

532. Cohen, June 12, *supra* note 179, at 9.

533. Cartledge & Johnson, *supra* note 171, at 55.

534. 34 C.F.R. § 300.555 (1999). Educational staff training regarding the needs and foster children was part of the *Katie I.* Consent Decree. *Katie I.* Consent Decree, *supra* note 141, at 11.

535. Cormier, *supra* note 7, at 61.

ranging from children's psychosocial and cognitive development, to the personal stories of some foster children, to coping strategies for the classroom, and also required teachers to use three interventions before referring children. A program need not be so extensive to yield benefits; a one-time session can begin the process of change by enabling teachers to better understand, and thus better teach, foster children. Such training can take many forms, such as in-service workshops, school visits, and regular feedback sessions with professional peers. An ideal training would allow children currently and formerly in foster care to speak to educators, as they are the best chroniclers of their own experiences and advocates for their own needs.<sup>536</sup> Such training is often requested by teachers themselves "to address the personal and professional attitudes" and fears that they "[believe] to be the greatest initial barriers to integration."<sup>537</sup>

#### CONCLUSION

The child protection and special education systems interact to deny equality to children at their intersection. Their conflicting discourses and practices serve to further marginalize children already doubly burdened by disability or educational risk and placement in out-of-home care. Set in a framework of equality that relies on stigmatizing categorization in order to qualify for services and ignores outcome, these interacting systems require change on all levels—from acts by individual teachers and social workers to stabilize children's placements, to an expansion of the definition of family and an increase in preventive educational services. The roots for change lie within the existing statutory and legal frameworks, but will only occur with shifts in outlook and practice among those working and caring for children. The Individuals with Disabilities Education Act promises "full equality of opportunity" to all exceptional children.<sup>538</sup> We must expand its protections and monitor its implementation to encompass the needs and situation of children in out-of-home care to make this promise a reality for intersectional children.

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536. A program such as California Youth Connection could perform such a function.

537. Cartledge & Johnson, *supra* note 171, at 53-54.

538. 20 U.S.C.A. § 1400(c)(2)(B) (West 2000).