

4-20-2020

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Recommended Citation

Anelise Powers, *Mediation in Education for Foster Care*, 20 Pepp. Disp. Resol. L.J. 101 (2020)
Available at: <https://digitalcommons.pepperdine.edu/drlj/vol20/iss1/5>

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MEDIATION IN EDUCATION FOR FOSTER CARE

Anelise Powers*

I. INTRODUCTION

Basic education is necessary to function in society as education provides a way for individuals to find work and provide for themselves and their families.¹ The more education one has generally correlates with increased financial security and freedom of choice in life.² According to the most recent data, there are well over 400,000 children in foster care.³ Education has the ability to “counteract the negative effects of abuse, neglect, separation, and lack of permanency” experienced by foster children.⁴ Education can improve the “physical, intellectual, social and emotional well-being of foster children in critical development stages of life and lend support to economic success in adulthood.”⁵ Therefore, access to education is an important part of helping these 400,000 foster children succeed in life. However, foster children face many barriers in their educational pursuits.⁶

In recent years, the law has given greater priority to the education of foster children, and foster children are often eligible for additional services.⁷ However, a common trend in foster care research is that foster children, though eligible for

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¹ Borge Brende, *Why Education is the Key to Development*, WORLD ECON. FORUM (Jul. 7, 2015), <https://www.weforum.org/agenda/2015/07/why-education-is-the-key-to-development/>.

² Robert Frank, *Key to Wealth? More Education, Study Says*, CNBC (May 5, 2015), <https://www.cnbc.com/2015/05/05/key-to-wealth-more-education-study-says.html>.

³ *Adoption and Foster Care Analysis and Reporting System Report 1*, CHILD. BUREAU (Oct. 20, 2017), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf> [hereinafter *Adoption and Foster Care*].

⁴ Nat’l Working Grp. on Foster Care & Educ., *Fostering Success in Educ.: Nat’l Factsheet on Outcomes of Children in Foster Care*, ABA CTR. ON CHILD. & THE LAW 2 (Apr. 2018), <http://www.fostercareandeducation.org/OurWork/NationalWorkingGroup.aspx> [hereinafter Nat’l Working Grp.].

⁵ *Id.* at 2.

⁶ *Id.* at 5.

⁷ *Id.* at 4.

services, do not always receive the services created to assist them.⁸ This paper will explore how improving mediation related to education and foster care can help maximize the impact of efforts to improve access to education among foster children. Section II of this paper will explore the current foster care education trends, and Section III will further explain why education for foster care matters. Section IV will explore the issues resolving conflict in foster care education, and Section V will explain why focusing on improving the mediation process for education can improve educational outcomes for foster children. Section VI will begin to explore some alternative solutions for more effective conflict resolution. Lastly, section VII will suggest how to approach these alternatives.

II. FOSTER CARE EDUCATION TRENDS

Unfortunately but unsurprisingly, there is a high correlation between being raised in foster care and lower educational attainment.⁹ According to the U.S. Department of Education, foster children have a higher risk of dropping out of school and are less likely to attend or graduate college than their peers.¹⁰ Lower college graduation rates among foster children is not entirely attributable to a lack of desire to pursue higher education by foster children.¹¹ Foster youth often express an interest to attend college, but numerous studies show lower enrollment rates and completion rates.¹²

Former foster children not only miss out on a college education when they are in school, they also tend to perform lower than their peers on math and reading standardized tests.¹³ Although foster care students are likely to be native English speakers, they perform similar to English as Second Language (“ESL”) students or students that are still learning English.¹⁴ The performance of foster children tracks comparatively to students with disabilities and lower than students from low-income households.¹⁵

There are many factors that contribute to these statistics showing lower educational achievement for foster children.¹⁶ One contributory factor is that foster

⁸ *Id.* at 7.

⁹ *Id.*

¹⁰ *Students in Foster Care*, U.S. DEP’T OF EDUC. (2007), <https://www2.ed.gov/about/inits/ed/foster-care/index.html>.

¹¹ See Nat’l Working Grp., *supra* note 4, at 7-8.

¹² *Id.*

¹³ *Id.* at 17 n. 26.

¹⁴ *Id.* at 17 n. 27.

¹⁵ *Id.* at 17 n. 27.

¹⁶ See Peter Pecora, *Maximizing Educational Achievement of Youth in Foster Care and Alumni: Factors Associated with Success*, 34 CHILD. & YOUTH SERV. REV. 1121, 1121 (2012), <http://fostercarechildren.pbworks.com/w/file/attach/63728498/Maximizing%20Educational%20Achievement%2>

children are more likely to be absent from school than other students.¹⁷ Foster children also more commonly face behavioral challenges in school.¹⁸ The National Survey of Child and Adolescent Well-Being explains, “recurrent physical abuse, emotional abuse, or chronic neglect can lead to difficulties in learning, behavior, and physical and mental health.”¹⁹ Foster children also tend to have more learning disabilities.²⁰ One study estimates that foster children are 2.5 to 3.5 times more likely to receive some form of special education.²¹ However, many schools often fail to recognize or diagnose foster children’s disabilities and provide access to special education services foster children may need.²² Therefore, the number of foster children in need of special education services is likely greater.²³ Some disabilities may go undiagnosed because foster children change schools frequently, their foster parents lack resources, or the school just writes the child off as being a troublemaker instead of investigating the root of behavioral issues.²⁴ “Children with disabilities also remain in foster care longer.”²⁵ Besides physical disabilities, many children may experience trauma that may cause developmental delays.²⁶

Although many foster children may qualify for special education services for physical or mental developmental disabilities,²⁷ schools often fail to provide adequate services to foster students and instead push out “problem” students from traditional public schools, even if the alternative school is not the best option for the

Of%20Youth%20in%20Foster%20Care%20and%20Alumni.pdf (identifying and explaining how at least four different factors contribute to low educational achievement in foster care).

¹⁷ Nat’l Working Grp., *supra* note 4, at 6.

¹⁸ Jennifer N. Rosen Valverde et al, *Integrating Educational Advocacy into Child Welfare Practice: Working Models*, 20 AM. U.J. GENDER SOC. POL’Y & L. 201, 202 (2011).

¹⁹ *Id.*

²⁰ *Id.*

²¹ Nat’l Working Grp., *supra* note 4, at 7.

²² See generally Karen Shulman et al., *Stopping School Pushout for: Girls with Disabilities*, NAT’L WOMEN’S L. CTR., Apr. 2017 at 1, 1.

²³ But see Theresa Sidebotham, *An Overview of Special Education Law—Part II*, 38 COLO. L. 59, 59 (Mar. 2009) (noting that foster care children are overidentified as having special needs and that special education is not helpful but possibly damaging for issues unrelated to disabilities).

²⁴ Andrew Hoffman, *Strategies to Promote School Success for Children in Foster Care*, CHWP MA-CLE 24-1, 3 (2012).

²⁵ Sidebotham, *supra* note 23.

²⁶ See *Developmental Delays in Adopted and Foster Children*, CHILD. HOSP. OF PHILA., <https://www.chop.edu/conditions-diseases/developmental-delays-adopted-and-foster-children> (last visited Oct. 2, 2019) (establishing that foster children and adopted children have less time being stimulated by caregivers so they have less opportunity to learn, and that separation and transition can impact learning and development skills); *Supporting Brain Development in Traumatized Children and Youth*, CHILD WELFARE INFO. GATEWAY (Sept. 2017), <https://www.childwelfare.gov/pubpdfs/braindevtrauma.pdf> (establishing that “the correlation between childhood abuse and neglect and altered brain functioning appears significant in brain imaging studies”) [hereinafter *Supporting Brain Development*].

²⁷ Sidebotham, *supra* note 23, at 26.

student.²⁸ According to Jackie Thu-Huong Wong, director of FosterEd: California, foster children are “identified as needing something extra and being pushed into an alternative setting that is segregated and has lower standards.”²⁹

III. WHY PROPER EDUCATION FOR FOSTER CARE STUDENTS MATTERS

Before child advocates can explain how we can improve these statistics, it must be established why improving education for foster care is important. First, the UN Convention of the Child answers this question by establishing that “the inherent dignity of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”³⁰ Protecting children as pivotal members of the human family is essential to protecting inalienable rights, essential to the peace, and freedom that make the world a place worth living in.³¹

The UN Convention on the Rights of the Child also highlights the value of encouraging personal responsibility by promoting that children should be prepared to integrate into society when they reach adulthood.³² As such, children should have a right to achieve this goal.³³ Foster children that age out of the system and even those that are adopted will need to develop a sense of individual responsibility in order to hold jobs and provide for themselves.³⁴ The mention of individual responsibility in the UN Convention on the Right of the Child suggests that advocates should work to help children develop practical skills and means to provide for themselves financially and contribute to their community.³⁵ Child welfare is an invaluable investment because it has a high return, invariably reducing the costs of healthcare, mental health services, child welfare services, and law enforcement and judicial system in

²⁸ See *Educational Equity for Foster and Probation Youth*, ALLIANCE FOR CHILD. RIGHTS, <https://kids-alliance.org/programs/education/educational-equity/> (last visited Oct. 2, 2019); *In Hollywood, Foster Care Teens Try to Defy Burden of Trauma, Cycle of Low Graduation Rates*, FOX NEWS NETWORK (June 6, 2015), <https://www.foxnews.com/us/in-hollywood-foster-care-teens-try-to-defy-burden-of-trauma-cycle-of-low-graduation-rates>[hereinafter *In Hollywood*]; *Improving Alternative Education in California*, LEGIS. ANALYST’S OFFICE: THE CAL. LEGISLATURE’S NONPARTISAN FISCAL & POL’Y ADVISOR (Feb. 2007), https://lao.ca.gov/2007/alternative_educ/alt_ed_020707.aspx (defining safety valve programs as districts that “use alternative programs as a place to send students the high school no longer wants”); see also *In New York City Schools, 40,000 Students Aren’t Getting Required Education Services, Report Finds*, ADVOCATES FOR CHILD. (Nov. 2018), <https://www.advocatesforchildren.org/node/1304>.

²⁹ *In Hollywood*, *supra* note 28.

³⁰ United Nations Convention on the Rights of the Child art. 49(1), Nov. 20, 1989, 1577 U.N.T.S. 3.

³¹ See generally *id.* at 1.

³² See *id.* at 1 (“Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community”).

³³ *Id.*

³⁴ *Id.*

³⁵ See generally *id.*

the long run.³⁶ Aside from the financial sustainability of the individual and the community, being able to provide for one's self can give individuals greater confidence and feelings of self-worth.³⁷

Foster care education should also be a priority considering that foster children are more likely to have disabilities that must be recognized and properly treated. A recent study found:

Juveniles with disabilities are more likely to make poor decisions that lead to involvement in crime, are more likely to get caught, may have social skill deficits that result in harsher treatment in the justice system, and may have learning difficulties that make it more difficult for them to be rehabilitated. Disabilities should be considered and addressed not only because of statutory rights, but also because society benefits if a juvenile deals with underlying problems and becomes a productive citizen. For a juvenile with disabilities, justice and rehabilitation goals can be best served by pursuing solutions within the special education framework, as well as through the juvenile justice system. Even a juvenile who has dropped out of school is eligible for special education services under IDEA until he or she reaches 21 years of age.³⁸

Educational attainment is an important goal for foster children because it shapes both the extent to which they can be successful once they age out of the system and, most importantly, the ability to provide for themselves and their potential families.³⁹ Students who graduate from college make significantly more money than those who do not.⁴⁰ According to data from the Labor Department, which was also analyzed by the Economic Policy Institute In Washington, "Americans with four-year college degrees earned about 98% more an hour on average in 2013 than people without a degree."⁴¹ If the time spent in foster care prevents children from graduating from college, then they will not be as competitive in the job market as their peers. Society should care whether foster children who

³⁶ *Cost-Benefit Analysis*, CHILDWELFARE.GOV, <https://www.childwelfare.gov/topics/preventing/developing/economic/cost-benefit/> (last visited Sept. 26, 2019).

³⁷ Dawn Foster, *How Being Poor Can Lead to Negative Spiral of Fear and Self-loathing*, GUARDIAN (2015), <https://www.theguardian.com/society/2015/jun/30/poverty-negative-spiral-fear-self-loathing>.

³⁸ Sidebotham, *supra* note 23, at 59.

³⁹ See generally *id.*

⁴⁰ David Leonhardt, *Is College Worth It? Clearly, New Data Say*, N.Y. TIMES (May 27, 2014), <https://www.nytimes.com/2014/05/27/upshot/is-college-worth-it-clearly-new-data-say.html>.

⁴¹ *Id.*

have aged out of the system have job security because their earning contributions stimulate the local economy.⁴²

IV. RESOLVING EDUCATION CONFLICTS

Another issue possibly contributing to low educational attainment among foster children is that the methods of safeguarding foster children's education rights are not as effective as they could be. One way of solving educational conflict is through alternative dispute resolution.⁴³ Alternative dispute resolution includes problem-solving methods other than litigation.⁴⁴ However, the way that alternative dispute resolution has been practiced and enforced in education law is not reaching its full potential.

A. *Issues in Individuals with Disabilities Education Act (IDEA)*

Because many foster children have physical and learning disabilities, and may also be developmentally behind, it is important to consider the arbitration process for special education when assessing foster care education. Before IDEA, children with disabilities were not always allowed access to public education.⁴⁵ This began to change in the 1970s through important case law:

Two pivotal cases in the early 1970s first highlighted the large number of disabled children who were not permitted to enroll in the public school system: *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania* and *Mills v. Board of Education*. 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. To this end, the courts in *PARC* and *Mills* laid out procedural mechanisms for school districts to follow.⁴⁶

⁴² *The WTO Can . . . Stimulate Economic Growth and Employment*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif03_e/tif03_e.html (last visited Jan. 6, 2020) (explaining that employment stimulates the economy).

⁴³ Raquel Muniz, *You Are Now Entering The School Zone, Proceed With Caution: Educators, Arbitration, & Children's Rights*, 9 ARB. L. REV. 197 (2017).

⁴⁴ *Alternative Dispute Resolution*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/alternative_dispute_resolution (last updated June 8, 2017).

⁴⁵ Cynthia Godsoe, *Caught Between Two Systems: How Exceptional Children in Out-Of-Home Care Are Denied Equality in Education*, 19 YALE L. & POL'Y REV. 81, 91 (2000).

⁴⁶ *Id.* at 91-92.

Congress passed IDEA, a federal funding statute, in response to these cases.⁴⁷ IDEA's purpose is as follows:

[To] ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living . . . [and] to ensure that the rights of children with disabilities and the parents of such children are protected . . .⁴⁸

Both IDEA and the UN Convention on the Rights of the Child emphasize the importance of education as a tool for helping children achieve employment and independent living. IDEA is considered the most powerful guarantor of the educational rights of disable children.⁴⁹

To qualify for services under IDEA, a child must have one of the disabilities listed under IDEA, which encompasses not just physical and learning disabilities, but also emotional and neurological disabilities and developmental delays.⁵⁰ A child must also *need* the services to be protected by IDEA; having a disability is not enough.⁵¹ IDEA instructs school districts to identify or find what students may have disabilities, to request an evaluation, and for an evaluation to be given with consent from whoever has the legal authority to do so, usually the parents.⁵² If consent is not given, the district can request a due process hearing.⁵³ Parents may request that an independent party at the district's expense conduct the evaluation if they disagree with the outcome.⁵⁴ Then each child that has a disability will have an Individualized Education Program ("IEP") plan that should be reviewed annually.⁵⁵

One component of IDEA addresses due process issues.⁵⁶ IDEA requires state and local education agencies to offer mediation, upon request, as a way for resolving disputes regarding special needs education as an alternative to due process hearings.⁵⁷ Due process hearings are expensive for all parties involved and tend to favor parents or guardians with better resources.⁵⁸ Even parents or guardians that

⁴⁷ *Id.* at 92.

⁴⁸ Theresa Sidebotham, *An Overview of Special Education Law—Part I*, 38 COLO. L. 25, 25 (Jan. 2009).

⁴⁹ Godsoe, *supra* note 45, at 92.

⁵⁰ Sidebotham, *supra* note 48, at 26.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 28.

⁵⁶ *Id.*

⁵⁷ Jonathan A. Beyer, *A Modest Proposal: Mediating IDEA Disputes Without Splitting the Baby*, 28 J.L. & EDUC. 37, 37-38 (1999).

⁵⁸ *Id.* at 41.

achieved desired results viewed the due process hearing method as unfair.⁵⁹ Mediation requires parents and educators to agree to the process of mediation with a neutral mediator who facilitates the conversation and promotes a resolution of the problem.⁶⁰ Both parties must agree to any decisions made, and the mediator does not make any of the decisions.⁶¹ Participants can leave mediation at any time.⁶² Under IDEA, the goal of mediation is to find a solution that best addresses the educational needs of the child.⁶³ Lastly, mediation is useful because the participants decide the outcome together and so are more likely to respect the decision and follow through on it.⁶⁴

While giving advocates and parents the option to use mediation is an improvement, there are still practical issues with mediating and negotiating IDEA claims. IDEA has procedural safeguards but no strong substantive safeguards, which makes it hard to challenge a decision as long as the procedural steps have been taken.⁶⁵ It is also difficult to raise an issue with the school unless it has violated a procedural step.⁶⁶ Some complain that IDEA has vague definitions that hinder protection on the substantive issue rather than further procedural guarantees.⁶⁷ Although mediators must be chosen by the state educational agency and selected on a neutral basis,⁶⁸ many taking on the role of parental advocate complain that mediators tend to be biased towards schools over parents or guardians.⁶⁹ This is a concern because “the fairness of . . . mediation [] depends [on] the perceived neutrality of the mediator.”⁷⁰ This feeling is exacerbated by the fact that parents feel unsure of their child’s rights under the IDEA and also feel that the school may be taking advantage of their lack of knowledge.⁷¹

⁵⁹ *Id.* at 43.

⁶⁰ *IDEA Special Education Mediation: A Guide for Parents of Children & Youth* 1, 2, <https://files.eric.ed.gov/fulltext/ED555856.pdf> [hereinafter *IDEA Special Education Mediation*].

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* Although the U.S. Department of Education states that the goal is to reach the best solution for the child’s education, schools have motives to not provide as much support as would be best for the individual child because they are trying to provide for the financial health of the school—its children and staff as a whole. Therefore, schools may not always negotiate with the goal of finding the best solution for the child’s education. *See generally id.* at 3.

⁶⁴ *Id.*

⁶⁵ Beyer, *supra* note 57, at 38-39.

⁶⁶ *Id.* at 39.

⁶⁷ *Id.*

⁶⁸ *IDEA Special Education Mediation*, *supra* note 60, at 4.

⁶⁹ Stephen S. Worthington, *Special Education Arbitration: “Rightness” as a Matter of Law and Fact?*, 7 Y.B. ARB. & MEDIATION 271, 276 (2015).

⁷⁰ Beyer, *supra* note 57, at 47.

⁷¹ Godsoe, *supra* note 45, at 95.

Under IDEA, mediators do not always have a substantive understanding of special education.⁷² Although IDEA requires mediators to be “knowledgeable in laws and regulations relating to the provision of special education and related services,” there is no provision establishing the requisite level of expertise, so the requirement is not easily enforced.⁷³

IDEA does not require schools to recognize a child’s potential, which also affects the substantive outcomes of disabled children’s IEPs.⁷⁴ This is because “[t]he Supreme Court has made it clear that satisfaction of a child’s special right is met by minimum equality of access, rather than by facilitating equality of outcomes or educational potential. Thus, compliance with special education mandates is often focused on meeting procedural requirements as opposed to outcome goals.”⁷⁵

B. Issues Resolving Education Conflicts in Foster Care

The biggest reason for one of the largest disparities in education is that the number of children entering foster care has been increasing at a rapid rate, but the number of foster care providers has decreased.⁷⁶ Society has failed to rise to the occasion to take these children in.⁷⁷ As a result, many children “are often traumatized by the instability and frequent changes in placement associated with out of home care.”⁷⁸ This affects their success in education no matter the educational services offered;⁷⁹ however, there are still improvements the educational system can make to reduce the disparity between foster children and their peers.

Navigating the process of the already difficult special educational conflict is further exacerbated by a child being in foster care because “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.”⁸⁰ To even identify a child as needing special education services, a parent must consent to an evaluation of the child, but it can be difficult to contact the parents of foster children who reserve these rights.⁸¹ Other times, parents or those with legal authority over the foster child may not be willing to consent.⁸² Despite the fact that foster children are more likely

⁷² Beyer, *supra* note 57, at 56-57.

⁷³ *Id.* at 56.

⁷⁴ See Godsoe, *supra* note 45, at 93.

⁷⁵ *Id.*

⁷⁶ *Id.* at 86.

⁷⁷ *Id.*

⁷⁸ *Id.* at 84.

⁷⁹ Caroline Miller, *How Trauma Affects Kids in School*, CHILD MIND INST., <https://childmind.org/article/how-trauma-affects-kids-school/>.

⁸⁰ Godsoe, *supra* note 45, at 85.

⁸¹ *Id.*

⁸² *Id.*

to have disabilities that may further hinder their learning on top of fosters' already tumultuous circumstances, fosters are less likely to be diagnosed.⁸³ But even when they are diagnosed, the foster child, who needs these services to survive, may not have parents or pricey education lawyers that other disabled children have and need in order to get the best special education services.⁸⁴ On the other hand, children may also be over-diagnosed or wrongly diagnosed and placed in an environment that is too restrictive academically.⁸⁵ This is more likely avoided by children that are not in foster care because they may have attentive parents and specialized advocates.

Even "foster care caseworkers and caregivers often fail to prioritize a child's educational needs."⁸⁶ But even when education is a priority, "[m]any of the parties responsible for the care of foster children have insufficient knowledge of the vast array of laws, regulations, and local procedures governing the provision of special education services to children and the procedures for accessing critically needed early intervention and special education services."⁸⁷ This lack of support again puts foster children at a disadvantage when educational issues arise because the education system relies on parents to assert children's rights to education, and caseworkers and caregivers are not currently prepared to fulfill this role.⁸⁸

As noted when considering the perception of bias against children in need of special education in arbitration, foster children face not only this bias but also tend to be vulnerable to bias against them for other demographic characteristics as well, as expressed below:

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, 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.⁸⁹

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Valverde, *supra* note 18, at 204.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Godsoe, *supra* note 45, at 91.

In sum, many foster children need some kind of education support services provided by IDEA, if not for genetic learning disabilities or physical disabilities, for mental and developmental disabilities.⁹⁰ However, even though IDEA extends to them a right to educational assistance, foster children face additional barriers to assistance due to their lack of neutral mediators, lack of parental advocates, caseworkers' and caregivers' failure to fulfill the role of parental advocate in education advocacy, IDEA's lack of substantive safeguards, lack of substantive knowledge of special education from mediators and legal advocates, and other racial, socioeconomic, and behavioral characteristics that may sway favor away from them in dispute resolution.⁹¹ Foster children face more barriers towards educational assistance even though they are the children that may need education the most in order to provide for themselves when they age out of the system.

V. WHY MEDIATION

As policies benefiting special needs education and foster care education continue to expand,⁹² it may be tempting to think that these issues may be resolved or that education law for foster care children is as good as it can be. The issue is not that foster care children do not have adequate rights to education. The issue is that despite the right to educational assistance and flexibility, foster children are still getting pushed into alternative schools and are not getting access to the assistance they are rightfully entitled to.⁹³ Because mediation is the process by which a student gets access to those rights, it is important to improve this process so that the substantive rights are attainable rather than just the procedural rights to be heard.

Improved mediation has the potential to address many of the issues that have been preventing foster children from accessing their rights as well. Mediators could be more informed on the substantive matters of special education rather than just special education law. Mediation could mandate participation from educational liaisons to advocate for foster children so that special education is not dependent on

⁹⁰ Sidebotham, *supra* note 23, at 60.

⁹¹ Godsoe, *supra* note 45, at 84 (“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”); see Valverde, *supra* note 18, at 204 (explaining that caseworkers do not prioritize education issues); Beyer, *supra* note 57, at 38, 56-57 (explaining that IDEA does not have substantive safeguards for special education outcomes and mediators do not always have substantive knowledge of special education); Worthington, *supra* note 69, at 276 (explaining that parents feel that mediators are biased towards schools); Godsoe, *supra* note 45, at 84 (explaining foster children often face racial and economic bias).

⁹² Nat’l Working Group, *supra* note 4, at 4.

⁹³ See *Educational Equity for Foster and Probation Youth*, *supra* note 28; *In Hollywood, foster care teens try to defy burden of trauma, cycle of low graduation rates*, *supra* note 28; *Improving Alternative Education in California*, *supra* note 28 (defining safety valve programs as districts that “use alternative programs as a place to send students the high school no longer wants”); see also *In New York City schools, 40,000 Students Aren’t Getting Required Education Services, Report Finds*, *supra* note 28.

parental advocates or their court appointed lawyer, who are often stretched thin by heavy caseloads covering a variety of matters.⁹⁴

VI. POSSIBLE ALTERNATIVE SOLUTIONS

A. *More Neutral Mediators*

Procuring more neutral mediators is a solution that would benefit not just foster children but all children negotiating special education claims. There are several suggestions for finding more neutral mediators. One option suggested is to have mediation or arbitration conducted by nonprofits or more isolated parties.⁹⁵ Some states allow parents and schools to choose the mediator together.⁹⁶ To further the neutrality of mediators, the Secretary of Education also clarified that the impartiality requirement of the mediator means that employees of any local or State education agency that directly provides services to the child cannot be mediators.⁹⁷ Although selection by state educational agencies may be neutral, allowing more schools and parents to choose their own mediator together may further the neutral perception of the mediator, upon which successful mediation rests.

B. *More Substantive Knowledge Requirement of Mediators*

Mediators should have expertise in substantive areas of special education for the best results. Substantive expertise of IDEA should include an understanding of not just the procedural aspects of IDEA conflict but also “cultural and technical practices associated with educating children with disabilities . . . because of the complex and specialized understanding necessary to determine the appropriate needs of the child.”⁹⁸ It is important that advocates of a foster child’s education have a full substantive understanding of IDEA, or they may overlook the breadth of the child’s rights under IDEA. For example, IDEA includes services that are non-academic; all children:

[H]ave a right to an appropriate placement under IDEA, including related services. This may include learning social and basic life

⁹⁴ Kellie Kennedy, *Advocates: States Should Give Kids Court Appointed Lawyers*, ST. AUGUSTINE (2012), <https://www.staugustine.com/news/2012-03-11/advocates-states-should-give-foster-kids-lawyers>; see also Phil McCausland, *Public Defenders Nationwide Say They’re Overworked and Underfunded*, NBC NEWS (Dec. 11, 2017), <https://www.nbcnews.com/news/us-news/public-defenders-nationwide-say-they-re-overworked-underfunded-n828111>.

⁹⁵ Muniz, *supra* note 43.

⁹⁶ *IDEA Special Education Mediation*, *supra* note 60, at 2.

⁹⁷ Beyer, *supra* note 57, at 47-48.

⁹⁸ *Id.* at 56-57.

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. In this fashion, special education can be seen as a system, which considers the holistic care and well-being of children.⁹⁹

Having mediators with some substantive knowledge about child development could help mediators better guide the mediation. It could also help mediators appear more neutral.¹⁰⁰ A mediator with more substantive knowledge of child development may be less likely to be dismissive towards needs requested by parents that may seem arbitrary without knowing the significance of the request. The mediator would be able to help mediate better by knowing what services were significant and what are not as helpful.¹⁰¹ This way they can be aware of what is happening in the conversation and be able to react appropriately. This proposal may be implemented by requiring mediator-training courses on special education. This effort may also be promoted by encouraging state educational agencies, parents or schools who select their own mediators to elect those with substantive knowledge of special education. Mediators will be encouraged to specialize in order to be competitive.

C. *Factoring Education into Placement Mediation*

When considering matters of placement and education, the two issues are usually dealt with independently.¹⁰² One potentially powerful alternative would be for education to play a bigger role in placement mediation and for foster parents to play a bigger role in education mediation.¹⁰³ This means that mediation of both issues of education and placement should substantively factor education and placement matters in all mediation regarding the welfare of the child.

⁹⁹ Godsoe, *supra* note 45, at 155.

¹⁰⁰ See generally Worthington, *supra* note 69, at 276 (stating that the mediator appears more closely tied with the school).

¹⁰¹ See generally Godsoe, *supra* note 45, at 155.

¹⁰² Judith M. Gerber, *Children Adrift: Addressing the Educational Needs of New York's Foster Children*, 69 ALB. L. REV. 1, 31 (2005).

¹⁰³ Gerber, *supra* note 97, at 31.

Because school continuity is intimately tied to a child's well-being, it should be a factor in all foster care determinations, as well as a consideration in permanency planning. DSS and child welfare agencies need to adopt a routine protocol that incorporates school continuity into all foster care placement decisions. From the outset, DSS should gather information on the child's current school placement and assess the impact of a school transfer on the child. To work effectively with the schools, child welfare professionals should be acquainted with local school district personnel, policies and practices, and communicate with school officials whenever a child may be moving to another foster care setting. For example, some districts have "open enrollment" or "school choice" policies that may permit a child to remain in the same school despite a change in residence. Other districts, like New York City, may have express policies that permit children in foster care to remain in a school despite a mid-year transfer. Other school districts, upon request, may agree to accommodate a child's need for school stability under a formal or informal "hardship" policy. Some school administrators may even honor requests to permit a child in foster care—particularly one whose placement is short term—to continue attending schools across district borders.¹⁰⁴

Foster parents can also contribute more to educational issues because they take on the regular daily parental responsibilities including schooling, and therefore must know about the child's educational needs such as homework.¹⁰⁵ Also, since foster parents may have insights into the day-to-day development and educational needs of the child, it is important to consider their feedback as well.¹⁰⁶ Although education may seem arbitrary when placement itself is already difficult to establish without added factors such as education, a positive and fruitful learning environment considers the long-term well-being of the child if placement fails to be permanent.¹⁰⁷ Therefore, it may benefit the educational goals and the permanency to consider these issues together. This may be a helpful alternative and fortunately, there is some move in this direction as education and placement mediation are beginning to merge.¹⁰⁸

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 38.

¹⁰⁷ *See generally id.*

¹⁰⁸ Nat'l Working Group, *supra* note 4, at 5.

D. Educational Liaisons for Foster Children

One method to address the issue of lack of substantive knowledge in mediation could be to involve and appoint educational liaisons for foster children in general. Having a specialized advocate may be even more important than having a specialized mediator because ultimately, the mediator does not make the decisions.¹⁰⁹ It may be beneficial for foster children to have an advocate that is specialized in education to make up for the fact that they do not have a parent advocating for them.¹¹⁰ A foster child's court appointed lawyer may not be prepared to fill the shoes of a parental advocate due to being stretched thin in the material they need to cover in their role, and stretched thin by heavy caseloads.¹¹¹ Educational liaisons may also be familiar with the education mediation process.¹¹²

Some of the substantive issues specialized educational liaisons could be whether or not foster children get pushed into alternative schools. Educational liaisons could be more aware of the downfalls and benefits to alternative schools and may be more familiar and alert to schools' tendencies to push out children that require extra attention and resources.¹¹³ Educational liaisons may be more alert to what constitutes as a disability and may know when to assert rights to assistance.¹¹⁴ Having an educational liaison may also help the quality of the advocacy as experience lends to knowing what arguments work and which do not.¹¹⁵

Even if they do not have a disability, they may still have emotional or neurological disabilities and may be behind developmentally and therefore would qualify under IDEA.¹¹⁶ Therefore, an educational liaison is a relevant aspect of the education of foster care children as it applies to many of the children in the system. Because so many children in foster care do qualify for IDEA, having an educational liaison appointed automatically can make the process more efficient and it is essential when children are bouncing around from one school to another to get them plugged into a school routine.¹¹⁷ Even if foster children do not qualify for IDEA an educational liaison could still be useful for any other educational issues that may arise such as behavioral issues.¹¹⁸

¹⁰⁹ *IDEA Special Education Mediation*, *supra* note 60, at 2.

¹¹⁰ Godsoe, *supra* note 45, at 85.

¹¹¹ Kennedy, *supra* note 94.

¹¹² Andrea Zetlin, Lois Weinberg & Christina Kimm, *Improving Outcomes for Children in Foster Care: Intervention by an Education Liaison*, 9 J. OF EDUC. FOR STUDENTS PLACED AT RISK 421, 423–24 (2004).

¹¹³ *Id.* at 425.

¹¹⁴ *Id.* at 428.

¹¹⁵ *Id.*

¹¹⁶ *IDEA Special Education Mediation*, *supra* note 60, at 5.

¹¹⁷ Valverde, *supra* note 18, at 207-08 (showing a program of appointed educational liaison or advocates that are recruited specially for abuse and neglect cases and are funded by private organizations and donations).

¹¹⁸ *Id.* at 207 (showing that some educational liaisons also help with school discipline issues).

In 1998, the nation's largest county child welfare agency embarked on an Education Initiative to ensure that agency workers focused on the educational needs and schooling of foster children on their caseloads. A key component of the initiative was the provision of an Education Specialist (ES), a liaison from the local education agency who was co-located in the child welfare agency (CWA) office. The ES worked alongside CWA workers, and as workers identified school problems for individual cases, the ES sought to secure appropriate and effective educational programs and services from the child's school district. The ES, a certified special education teacher, was selected for the position because of her knowledge of the rules and regulations of California schools and of the educational resources and services available in the schools and community. The ES received training on a variety of relevant education and legal issues from a nonprofit advocacy law firm that also provided weekly technical assistance with individual cases on which she was working. The ES also had daily access to the law office staff by telephone to consult about a case. Consequently, if, during the course of the day, the ES was unclear about the next steps to take on a case, she had the option of getting immediate information from the law office staff.¹¹⁹

IDEA does require states to appoint a surrogate educational parent but “the lack of effective identification and monitoring of the special education needs of children in out-of-home care” demonstrates that these processes are not being followed effectively.¹²⁰

The pushback on this alternative may be that education liaisons are too expensive or that you could make an argument for appointing specialized advocates for all the other aspects of foster care advocacy until children are being juggled around with a bunch of different lawyers that don't really get to know the child.

E. When Mediation Fails—Bring in Education Lawyers

In the case that mediation still fails, caseworkers should be prepared to use lawyers that specialize in education. For example:

¹¹⁹ Zetlin, *supra* note 112, at 423-24.

¹²⁰ Godsoe, *supra* note 45, at 107-08.

To address the high number of abused and neglected children struggling with educational deficits and disabilities, Legal Aid established the Kathryn A. McDonald Education Advocacy Project (EAP) in 2001. EAP is housed within Legal Aid's Juvenile Rights Practice and provides early intervention and special education advocacy to children with disabilities who are involved in the child welfare system. EAP also offers information and advice on general education issues affecting the child welfare population. Legal Aid is appointed by the family court to represent the child in abuse and neglect cases; therefore, EAP represents the child with respect to his or her educational issues.¹²¹

However, schools should do their best to offer whatever resources it believes are reasonable because if mediation fails and a suit is filed and found successful on the part of the foster child, there may be precedent established that costs the school more money in the long run.¹²²

VII. RECOMMENDATION

In regard to the neutrality of mediators, the U.S. Department of Education made some practical assurances of impartiality.¹²³ Though it may be possible and desirable to have more neutral mediators, the *perception* of neutrality is the greater issue and simple to fix.¹²⁴ Even if mediators are neutral, parents' lack of involvement in neutral selection is the problem.¹²⁵ The inability to engage in the selection creates an impression that the mediator is more closely tied to the school, preventing the mediation from reaching its full potential.¹²⁶ Allowing parents and the school to pick a mediator together would best solve this issue assuming efficiency is maintained. Expecting more substantive knowledge from mediators would also combat the perception of bias and hiring mediators from non-profits should be considered in the selection process by parents and schools because those mediators are further removed and less likely to be employed by an educational institution.

On the other hand, requiring mediators to have more substantive knowledge of special education may certainly have its benefits and may avoid some of the

¹²¹ Valverde, *supra* note 18, at 207.

¹²² See Beyer, *supra* note 57, at 42–43.

¹²³ *IDEA Special Education Mediation*, *supra* note 60, at 4.

¹²⁴ See Beyer, *supra* note 57, at 48 (explaining that the success of mediation depends on the perceived neutrality of the mediator); Worthington, *supra* note 69, at 276 (explaining that parents feel that mediators are biased towards schools).

¹²⁵ Beyer, *supra* note 57, at 47–48; Worthington, *supra* note 69, at 275–76.

¹²⁶ Worthington, *supra* note 69, at 276.

discrepancies in foster children gaining access to their educational rights; however, more informed mediators likely will not be as productive as investing in educational liaisons. Practically, it would be hard to measure and enforce a certain level of substantive knowledge from mediators. Offering training to mediators and encouraging those selecting mediators to look for substantive knowledge in those that they hire may encourage mediators to display more substantive knowledge may be beneficial but should be low on the priority list.

Mediating education and placement together may complicate the placement process but may ultimately help the placement itself in the long run.¹²⁷ Therefore, would be worth at least considering them together. Even if placement meant changing schools, establishing a detailed education plan in conjunction with a decision to change placements would prevent delaying the attainment of educational assistance that happens between moves, and therefore, would prevent children from falling unnecessarily behind by keeping consistency.

The most worthwhile measure for the child welfare system to prioritize would be to implement education liaisons for foster care children as soon as they enter the foster care system.¹²⁸ The role of an education liaison may look different depending on the context, but having an educational specialist automatically appointed in education mediation and advocacy would be a major improvement from reliance on court appointed advocates to safeguard educational rights. Although some may argue that bringing in people who specialize in education may lead to automatically appointing specialists for a multitude of issues, this argument overlooks the state of education for foster children and the unique stake education plays in their lives.

Education is unique and distinct from the other issues court appointed lawyers deal with such as criminal law, guardianship, and placement.¹²⁹ When criminal, guardianship and placement type issues come up, they require immediate attention whereas education may not feel as urgent but has significant long-term consequences.¹³⁰ Court appointed lawyers are well suited, by virtue of their legal degrees, to understand criminal law without any additional substantive knowledge. Guardianship and placement require most of a court appointed lawyer's time, so they are more likely to have substantive knowledge of that court process.¹³¹ There are already child advocate specialists that observe placements and report back to court about whether or not the children are healthy.¹³² However, we do not have as much

¹²⁷ Gerber, *supra* note 102, at 31.

¹²⁸ As far as funding and managing educational liaisons, this could be the role of child welfare or potentially, something delegated to schools on either a state or federal level.

¹²⁹ See Zetlin, *supra* note 112, at 123–24.

¹³⁰ Gerber, *supra* note 102, at 3–4.

¹³¹ Kennedy, *supra* note 94.

¹³² See *Responsibilities of Child Advocate Attorney*, <http://www.attorneys.com/child-custody/responsibilities-of-a-child-advocate-attorney> (not mentioning education advocacy as one of the main responsibilities); Children's

effort going into safeguarding the value of foster children's education, and an educational liaison would help with this.¹³³

If mediation fails, it is important that child welfare lawyers are prepared to bring in education lawyers whenever possible to establish precedent in favor of educational assistance. Also, schools will be motivated to mediate fairly in the future in order to avoid evenhanded legal battles.

VII. CONCLUSION

In sum, foster children are performing at some of the lowest levels of education.¹³⁴ There is potential for improvement and the need for improvement in the education of foster children is essential to their livelihood.¹³⁵ Recent child welfare and education policies have provided rights to useful resources that may aid children that have learning disabilities,¹³⁶ but many qualifying foster children are not getting the services they are entitled to. Fortunately, improved mediation has the potential to improve access to necessary education services.

The focus should be on appointing educational liaisons to foster children to assist in education mediation. Educational liaisons can help safeguard substantive rights discussed in mediation rather than just procedural rights by bring their own substantive knowledge of special education. Educational liaisons should be appointed immediately to new cases through a public entity so that foster children do not have to waste time finding someone when issues arise. This way, schoolwork is not put off and a child can adapt to a stable education routine. Other practices that may improve the substantive results of education mediation for foster care would include allowing advocates and schools to choose their mediators together to lessen the perception of bias, and to consider placement and education options together in mediation. Considering placement and education together will also help children find a routine and have some consistency so that they do not continue to fall unnecessarily behind in school.

Bureau, *Understanding Child Welfare and the Courts*, CHILD WELFARE INFORMATION GATEWAY 3 (October 2016), <https://www.childwelfare.gov/pubpdfs/cwandcourts.pdf> (explaining the permanency process and not mentioning education aspects).

¹³³ *Responsibilities of Child Advocate Attorney*, *supra* note 132; Children's Bureau, *supra* note 132.

¹³⁴ Nat'l Working Grp., *supra* note 4, at 2.

¹³⁵ *See generally* Nat'l Working Grp., *supra* note 4, at 2.

¹³⁶ *See generally* IDEA Special Education Mediation, *supra* note 60, at 5.