

# **Education Issues for Students in Foster Care**

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Texas Association of School Boards  
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## **Education Issues for Students in Foster Care**

### **TASB Legal Services**

#### **Current Challenges**

On any day in Texas, over 25,000 children are in the legal conservatorship of the state, and a majority of these children are school aged. Statistically, educational outcomes for these children lag significantly behind those of other students. Data from the Texas Department of Family and Protective Services (DFPS), and its child welfare arm Child Protective Services (CPS), and the Texas Education Agency (TEA) was highlighted at a 2010 conference of the Texas Supreme Court's Permanent Judicial Commission for Children, Youth and Families (Children's Commission).<sup>1</sup> According to the data, the dropout rate among the general population in Texas is 10.4%, while the rate among youth in foster care is 33.2%. The graduation rate of youth in foster care is only 36.1%. If a youth in foster care does graduate, he or she is more far more likely to graduate on the minimum high school graduation program—58.8% of the youth in foster care who graduate are on the minimum program, as compared to 17.5% of the general population. Moreover, children in foster care are more likely to be placed in alternative education programs and special education than the general student population.

Children placed in foster care experience numerous educational challenges, even beyond their personal histories of abuse or neglect. These challenges include high mobility, often before and while in foster care, leading to set backs in learning as well as loss of course credit; extended absences and enrollment delays during school transitions, often attributable to difficulty accessing and sharing appropriate records; and lack of adequate interventions, including special education services.

#### **Children's Commission Education Committee**

The Children's Commission, created in 2007 by the Texas Supreme Court to promote judicial leadership to improve the state's child protection system, has recognized the need to improve educational outcomes for children in foster care. The Commission decided it was in a unique position to coordinate a comprehensive effort of education and child protection leaders by establishing a high-level committee to look at educational needs and outcomes. Consequently, in May 2010, the Texas Supreme Court established an Education Committee of the Children's Commission to develop initiatives designed to improve court practices regarding educational outcomes of children and youth in the child protection system.

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<sup>1</sup> The 2010 Children's Commission report was based on 2008-09 Public Education Information Management System (PEIMS) data.

Specifically, the Education Committee was asked to identify and assess challenges to educational success of children and youth in the Texas foster care system; recommend judicial practices to help achieve better educational outcomes for children and youth in foster care; seek to improve collaboration, communication, and court practice through partnerships with the Department of Family and Protective Services (DFPS), the Texas education system, and stakeholders in the education and child-protection community; identify training needs regarding educational outcomes for the judiciary and for attorneys who represent DFPS, children, and parents in child protection cases; develop a collaborative model that will continue systemic improvement of educational outcomes; and make recommendations regarding the exchange and sharing of education-related data. These recommendations culminated with a final report published on March 31, 2012, *The Texas Blueprint: Transforming Education Outcomes for Children and Youth in Foster Care*.<sup>2</sup>

### **School Stability**

A child removed from his or her home and taken into the legal custody of DFPS is often placed in a temporary living arrangement, which may include a relative caregiver or foster home, that is not located near the school the child was attending at the time of the removal.

#### **Fostering Connections**

In October 2008, the federal Fostering Connections to Success and Increasing Adoptions Act of 2008 amended portions of the Social Security Act, in part to address the needs of children and youth in foster care. The law seeks to promote educational stability for foster children by requiring that child welfare agencies include a plan for ensuring the child's educational stability in every child's case plan.

In accordance with Fostering Connections, a state child welfare agency must:

- Ensure that the child's placement takes into account the appropriateness of the current educational setting and the proximity to the school in which the child is enrolled.<sup>3</sup>
- Coordinate with appropriate local educational agencies to ensure that the child remains in the school in which the child is enrolled at the time of placement, if remaining is in the child's best interest.<sup>4</sup>

In addition, Fostering Connections increased the types of federal funds available to cover the cost of transportation to a child's school, such as authorizing that transportation costs, including expenses related to transport to extracurricular activities, be allowable under foster care maintenance payments.<sup>5</sup>

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<sup>2</sup> Online at <http://texaschildrenscommission.gov/PDF/TheTexasBlueprint.pdf>

<sup>3</sup> 42 U.S.C. § 675(1)(G)(i).

<sup>4</sup> 42 U.S.C. § 675(1)(G)(ii).

<sup>5</sup> U.S. Dep't Health & Human Serv., Admin. on Children, Youth, and Families, CWPM § 8.1B Q27(2007), *available online at* [www.acf.hhs.gov/cwpm/programs/cb/laws\\_policies/laws/cwpm/policy\\_dsp.jsp?citID=36#1803](http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=36#1803).

## Homeless Status

In some instances, state law and the federal McKinney-Vento Homeless Assistance Act will require school districts to provide for school stability. A child who is awaiting foster care placement meets the Act's definition of *homeless*.<sup>6</sup> In Texas, this definition is understood to include any child in a shelter, as well as children who are "doubled up" with extended family or staying overnight in a DFPS office. A homeless child has a right to remain in his or her *school of origin*, which is the school in which the child was last enrolled or the school the child attended when last permanently housed, and transportation to the school of origin must be provided by the school district either for the duration of the child's homelessness or through the end of the academic year.<sup>7</sup> After the child is placed in a foster home, the child will no longer be homeless, unless he or she otherwise lacks a "fixed, regular, and adequate nighttime residence," as may occur if the child runs away from the foster care placement.<sup>8</sup>

## Placement Outside Current School's Attendance Zone

If a student is placed in foster care at a location outside of the student's previous attendance zone, but inside of the same school district, most schools allow the student to continue on in attendance at the original campus, at least through the end of the school year.<sup>9</sup> In fact, if the child is in grades 9-12, state law requires the school district to allow a student placed in foster care to finish high school at the school where the child was enrolled at the time of the placement.<sup>10</sup>

If, however, the foster home is located in a different school district, attendance options become more complicated. If the child is in grades 9-12, state law requires the school district to allow a student placed in foster care to finish high school at the school where the child was enrolled at the time of the placement without the payment of tuition.<sup>11</sup> To take advantage of this law, the foster parent or other appropriate individual would have to notify the school of origin of the child's status, and the foster parent would have to arrange for daily transportation back to the school.

Students in grades 8 and below, however, may not have a legal right to remain at their schools of origin if they no longer *reside* in the original district because they are placed at foster homes located in new school districts. Under Texas law, residency can be a relatively fluid concept. Usually for a student, residency is understood to be the place the child sleeps at night. There are, however, numerous court cases that consider a person's residency as the place where the person is living with "intent to remain," and temporary absences from that location do not alter the person's

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<sup>6</sup> 42 U.S.C. § 11432(g)(3)(A)(i).

<sup>7</sup> Tex. Educ. Code § 25.001(b)(5); 42 U.S.C. § 11432(g)(3)(A)(i), (1)(J)(iii).

<sup>8</sup> 42 U.S.C. §§ 11434a, 11302(a).

<sup>9</sup> See Tex. Educ. Code § 25.031 (authorizing local school districts to make campus assignments). See also TASB Policy Code FDB(LOCAL). Throughout, "TASB Policy Code" refers to local school district policies, which are organized statewide in accordance with letter codes developed by the Texas Association of School Boards Policy Service. For most Texas public school districts, these policies can be found online at the school district's Web site.

<sup>10</sup> Tex. Educ. Code § 25.001(g).

<sup>11</sup> Tex. Educ. Code § 25.001(g).

residency.<sup>12</sup> In some cases, where there is a demonstrable intent to return a child to a home located in the original school district, an argument for continued residency could be made on behalf of the child. For example, a child placed temporarily with a relative whose initial permanency plan calls for reunification with the child's parent may still be a resident of the home school district.

On the other hand, if the residence of a student in grades 8 and below in fact changes due to his or her foster care placement, the student will probably be able to remain in the school of origin until the end of the semester.<sup>13</sup> Whether the student may remain beyond the end of the semester will depend on whether the original school district has a local policy permitting annual transfers into the school district.<sup>14</sup> In other words, to stay in the school of origin, the student must transfer *back* to the school of origin.<sup>15</sup> Each school district decides whether to accept transfer students as a matter of local policy, and sometimes districts place certain restrictions on transfers related to good attendance and disciplinary records.<sup>16</sup> These policies may have an unintended disparate impact on the availability of transfers for this population. Moreover, even if a transfer is granted allowing the student to attend the school of origin, costs may be prohibitive as the school district is permitted to charge tuition and is not required to provide transportation for transfer students.<sup>17</sup>

### **Is Changing Schools in the Child's Best Interest?**

As part of the Fostering Connections amendments to the Social Security Act, child welfare agencies must include in every child's case plan a plan for ensuring the educational stability of the child while in foster care. If remaining in the school of origin is not *in the best interest of the child*, the child welfare agency and the local educational agency must: (1) ensure that they provide immediate and appropriate enrollment in a new school; and (2) ensure the child's educational records are provided to the new school.<sup>18</sup>

Guidance from the U.S. Administration of Children and Families directs states to require that an education stability plan be a written part of each child's case plan and be reviewed every six months. The child welfare agency may invite school personnel, agency attorneys, guardians ad litem, and youth to discussions about the education stability plan. The agency is encouraged to

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<sup>12</sup> Texas Education Agency *To the Administrator Addressed Letter Re: Attendance, Admission, Enrollment Records and Tuition*, Aug. 17, 2010, available online at <http://ritter.tea.state.tx.us/taa/legal081710-2.html>, at Proof of Residency, citing *Martinez v. Bynum*, 461 U.S. 321, 330-33 (1983), *Arredondo v. Brockette*, 648 F.2d 425 (5th Cir. 1981).

<sup>13</sup> See local school district policy at TASB Policy Code FDA(LOCAL).

<sup>14</sup> Note that a transfer will not be necessary if a child is still considered a resident of the original school district, which can happen, even if the child is living elsewhere in a foster home, if the child's parent continues to be a named joint managing, sole managing, or possessory conservator of the child and the parent continues to reside in the original school district. Similarly, a child is entitled to attend school in the district where his or her grandparent resides, if the grandparent is providing substantial afterschool care for the child. Tex. Educ. Code § 25.001(b).

<sup>15</sup> Tex. Educ. Code § 25.036.

<sup>16</sup> See local school district policy at TASB Policy Code FDA(LOCAL).

<sup>17</sup> Local school district policy may permit a student to seek a waiver of tuition. See TASB Policy Code FDA(LOCAL).

<sup>18</sup> 42 U.S.C. 675(1)(G)(ii) (emphasis added).

develop standard and deliberate processes for determining the child's best interest and properly documenting the steps taken to make the determination.<sup>19</sup>

In Texas, as part of a child's service plan, DFPS is supposed to look at proximity to school and the child's best interest in making a foster care placement. When placement changes take place, the case worker is directed to address placement issues by:

1. Documenting assurance that consideration was given to having the child remain in the school in which the child was enrolled just prior to placement;
2. Documenting assurance, if remaining in the same school is not in the child's best interest, that the child will be provided immediate and appropriate enrollment in a new school, with all of the educational records of the child provided to the school; and
3. Documenting assurance that the placement of the child takes into account the appropriateness of the current education setting and the ability to provide required special services.

The best interest determination must be made quickly. Fostering Connections requires assurances by the State agency and local education agencies to provide immediate and appropriate enrollment in a new school, with all of the education records of the child provided to the school.<sup>20</sup> Unless a child has a temporary physical or mental condition that prevents the child from attending school, DFPS must ensure a child returns to school not later than the third school day after the date of the order giving possession to DFPS.<sup>21</sup>

### **Considerations upon Withdrawal**

Because the best interest determination must be made quickly, school changes often occur abruptly, with little opportunity to withdraw formally from the previous district. However, as described below at *Education Records*, departing without withdrawing from the previous district may contribute to confusion and delay in transmitting records. For this reason, formal withdrawal is advisable. Under revised DFPS residential contract requirements, licensed caregivers, such as foster parents, are responsible for notifying the previous school of student's withdrawal. Local school district policy describes what is required for withdrawal, and the policy typically calls for a signed written request.<sup>22</sup>

Another concern is the fact that transitions rarely coincide neatly with the school calendar, leading to lost opportunities to gain course credit and sit for state-mandated and other essential examinations. If circumstances permit consideration of the school calendar in determining the timing of a child's change of schools, courts and child welfare agencies may want to consult:

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<sup>19</sup> U.S. Dep't Health & Human Serv., Admin. on Children, Youth, and Families, ACYF-CB-PI-10-11 (2010), available online at [www.acf.hhs.gov/programs/cb/laws\\_policies/policy/pi/2010/pi1011.htm](http://www.acf.hhs.gov/programs/cb/laws_policies/policy/pi/2010/pi1011.htm).

<sup>20</sup> 42 U.S.C. § 675(1)(G)(ii).

<sup>21</sup> Tex. Fam. Code § 264.115.

<sup>22</sup> TASB Policy Code FD(LOCAL).

- **District and campus calendars:** The local school district or campus calendars of the sending and receiving schools will typically be published online. School districts have a mandatory school start date and a mandatory minimum number of days of instruction.<sup>23</sup> Together these state mandates mean that public school districts in Texas tend to start and end at roughly the same time of year. Semester breaks and grading periods are not consistent around the state, however. Each school district, and often each campus, establishes a calendar with key dates, including the start and end of grading periods, school holidays, and teacher conference dates.
- **TEA assessment calendar:** State-mandated examinations, including State of Texas Assessments of Academic Readiness (STAAR) exams for grades 3-8 and end-of-course (EOC) exams for high school students, fall on dates established by TEA.<sup>24</sup> TEA’s calendar creates a window of opportunity for each required test; the window is typically a range of a few days, depending on the test. A student who is not enrolled or is not present at school during the window for test administration will not be able to test until make-up dates at a later time. If a student has not received complete instruction in a course by the end of the school year (e.g., has received only the first half or the second half), then the student would not take the STAAR EOC assessment until the student has completed the course.<sup>25</sup>
- **College admissions test schedules:** High school students who are college bound must also take national-level achievement tests, typically either the SAT or ACT. These students may also need to sit for examinations in Advanced Placement (AP) courses. The test schedules for these examinations are set by the College Board or ACT, as applicable.

## **Enrollment**

When a child is presented for enrollment in a new school, the child is entitled to immediate enrollment in the receiving school district. A child placed in foster care by an agency of the state or by a political subdivision shall be permitted to attend the public schools in the district in which the foster parents reside free of any charge to the foster parents or the agency.<sup>26</sup> Exceptions in the Texas Education Code that would permit a school district to decline admission to a “minor living separate and apart” from parents, based on poor disciplinary history for instance, do *not* apply to students residing in a school district with a “person having lawful control” under a court order.<sup>27</sup> Nevertheless, routine registration procedures may present unintended hurdles for students in foster care.

<sup>23</sup> Tex. Educ. Code § 25.0811 (prohibiting districts, absent an exception, from starting instruction before the fourth Monday in August); Tex. Educ. Code § 25.081 (requiring 180 days of instruction).

<sup>24</sup> Online at [www.tea.state.tx.us/index3.aspx?id=3635&menu\\_id=793](http://www.tea.state.tx.us/index3.aspx?id=3635&menu_id=793).

<sup>25</sup> TEA Questions & Answers on STAAR, updated March 8, 2012, online at [www.tea.state.tx.us/student.assessment/staar/](http://www.tea.state.tx.us/student.assessment/staar/).

<sup>26</sup> Tex. Educ. Code §§ 25.001(b)(3), .001(f).

<sup>27</sup> Texas Education Agency *To the Administrator Addressed Letter Re: Attendance, Admission, Enrollment Records and Tuition*, Aug. 17, 2010, available online at <http://ritter.tea.state.tx.us/taa/legal081710-2.html>.



## Who Can Enroll a Child?

The board of trustees of a school district or the board's designee may require evidence that a person is eligible to attend the public schools of the district when the person applies for admission. The board of trustees or its designee must establish minimum proof of residency acceptable to the district and may make reasonable inquiries to verify a person's eligibility for admission.<sup>28</sup> Generally, a child must be enrolled by the child's parent or by the child's guardian or other person with legal control of the child under a court order.<sup>29</sup> For admissions purposes, however, the board of trustees of a school district by policy may allow a person showing evidence of legal responsibility for a child other than an order of a court to substitute for a guardian or other person having lawful control of the child under an order of a court.<sup>30</sup>

In essence, this means that virtually anyone can enroll a child in school, as long as that person is prepared to show documentation that the child is eligible for enrollment in the district based on one or more grounds in Texas Education Code section 25.001, including: the child is homeless, the child has been placed in foster care in the district, the child and a parent or guardian both reside in the district, or a conservator of the child resides in the district. The district must record the name, address, and date of birth of anyone seeking to enroll a child.<sup>31</sup> The child must be enrolled immediately, but if the person presenting the child does not show legal authority over the child, the district may have an obligation to make a report to law enforcement.<sup>32</sup>

### Proof of Identity and Residency

An individual presenting a child for enrollment must show:

1. The child's birth certificate or other proof of identity;
2. The child's records from the school most recently attended; and
3. Immunization records.<sup>33</sup>

However, if the child is under 11 and enrolling at a new school, the school must request:

1. The name of each previous school attended by the child;
2. School records from each school identified in item 1, and, if the person enrolling the child provides copies of previous school records, request verification from the school of the child's name, address, date, and grades and dates attended; and

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<sup>28</sup> Tex. Educ. Code § 25.001(c).

<sup>29</sup> Tex. Educ. Code § 25.001(f).

<sup>30</sup> Tex. Educ. Code § 25.001(j). See TASB Policy Code FD(LOCAL).

<sup>31</sup> Tex. Educ. Code § 25.002(f).

<sup>32</sup> Tex. Educ. Code § 25.002(b)-(c); Tex. Code Crim. Proc. art. 63.019.

<sup>33</sup> Tex. Educ. Code § 25.002(a).

3. Not later than the 30th day after enrollment, or the 90th day if the child was not born in the United States, a *certified* copy of the child's birth certificate or other reliable proof of the child's identity and age and a signed statement explaining the person's inability to produce a copy of the child's birth certificate.<sup>34</sup>

In the case of a foster parent or CPS case worker presenting a child for enrollment, the caregiver will also want to present documentation giving the caregiver legal authority to care for the child. Typically, for Texas foster parents, DFPS Form 2085 will be the best documentation of such authority and will prevent an unnecessary report to law enforcement by the district.<sup>35</sup> The caregiver may also need to provide appropriate documentation of his or her residency in the school district. Examples of methods of verifying residency include requiring utility bill receipts, checking tax records, or verifying with responsible district personnel that the applicable residence is within the boundaries of the district.<sup>36</sup>

According to TEA's Student Attendance Accounting Handbook, any of the following documents are acceptable for proof of identification and age: birth certificate; driver's license; passport; school ID card, records, or report card; military ID; hospital birth record; adoption records; church baptismal record; or any other legal document that establishes identity.

All students presented for enrollment in a Texas public school district are to be immediately enrolled and may not be kept from attending school pending the receipt of academic records from the previous school.<sup>37</sup> If a child is in the custody of DFPS, the school district must accept the child for enrollment without the required documentation (specifically, the birth certificate or other identification, the previous school records, or the immunization records). DFPS must ensure that the required documentation is furnished to the school district not later than the 30th day after the date the child is enrolled.<sup>38</sup>

If the records are not received, TEA emphasizes that a failure to produce identifying records does not constitute grounds for refusing to admit a child, but rather triggers an obligation on the part of the school district to notify law enforcement to determine whether the child has been reported missing.<sup>39</sup>

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<sup>34</sup> Tex. Code Crim. Proc. art. 63.019.

<sup>35</sup> See Tex. Educ. Code § 25.002(f).

<sup>36</sup> Texas Education Agency 2010-11 Student Attendance Accounting Handbook (SAAH), Version 2, published Nov. 22, 2010, available online at [www.tea.state.tx.us/index2.aspx?id=7739&menu\\_id=645&menu\\_id2=789](http://www.tea.state.tx.us/index2.aspx?id=7739&menu_id=645&menu_id2=789).

<sup>37</sup> 19 Tex. Admin. Code § 74.26(a)(1).

<sup>38</sup> Tex. Educ. Code § 25.002(g).

<sup>39</sup> Texas Education Agency *To the Administrator Addressed Letter Re: Attendance, Admission, Enrollment Records and Tuition*, Aug. 17, 2010, available online at <http://ritter.tea.state.tx.us/taa/legal081710-2.html>.

## Proof of Immunization

Except when a parent or guardian seeks a waiver based on religious or health claims on behalf of the child or is an active member of the military, a child is required to be fully immunized against certain diseases before being admitted to school.<sup>40</sup> A child may be provisionally enrolled only if the child has begun the required immunizations and is proceeding as promptly as medically feasible.<sup>41</sup>

The Texas Education Code specifically provides that if DFPS has taken possession of a child, the caregiver has up to 30 days to provide immunization records.<sup>42</sup> However, the Texas Attorney General has ruled that the Texas Department of State Health Services (TDSHS), not TEA, has the primary rule-making authority for school admissions as they relate to immunizations.<sup>43</sup> In its rules, TDSHS acknowledges a grace period of 30 days for immunization records for homeless students, based on federal law.<sup>44</sup> The rules do not specifically recognize an exception for students in the possession of DFPS.

## Eligibility for Special Programs

Upon enrollment, the receiving school should be aware that a student in the care of DFPS is entitled to access to a number of special programs, including:

- **Pre-kindergarten:** Children in foster care, or children who have ever been in foster care in Texas as a result of an adversary hearing, are eligible for tuition-free enrollment in pre-kindergarten.<sup>45</sup>
- **Compensatory education:** Students in foster care are also automatically eligible for supplemental, compensatory instructional services with the state compensatory education program, including programs and services designed to supplement the regular education program for students identified as at risk of dropping out of school.<sup>46</sup> If the student is assigned to a campus operating a school-wide program under Title I of the Elementary and Secondary Education Act of 1965, the district may coordinate its state compensatory education funds and services with federal Title I funds and services.<sup>47</sup>

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<sup>40</sup> Tex. Admin. Code § 97.62. For more information, see the Texas Department of State Health Services' Web Site at [www.dshs.state.tx.us/immunize/school/default.shtm](http://www.dshs.state.tx.us/immunize/school/default.shtm).

<sup>41</sup> Tex. Educ. Code § 38.001(e).

<sup>42</sup> Tex. Educ. Code § 25.002(g).

<sup>43</sup> Op. Tex. Att'y Gen. No. GA-178 (2004).

<sup>44</sup> 25 Tex. Admin. Code § 97.66(b).

<sup>45</sup> Tex. Educ. Code §29.153.

<sup>46</sup> Tex. Educ. Code §29.081.

<sup>47</sup> See Tex. Educ. Code § 42.152 and Tex. Educ. Code Chapter 29, Subchapter C.

- **Free meals:** Children and youth in foster care are categorically eligible for free meals under the national school lunch and school breakfast programs.<sup>48</sup> Caregivers for children and youth in foster care do not have to complete a separate application for the federal programs; DFPS Form 2085 contains the authorization for immediate enrollment.
- **Texas Virtual School Network:** A student in foster care is eligible for enrollment, including full-time enrollment, in the Texas Virtual School Network.<sup>49</sup>
- **College tuition waiver:** Students who were in foster care until high school graduation or age 18, or who were adopted out of the foster care system after the age of 14, are eligible for a free tuition waiver for any state college in Texas. To access the tuition waiver, the student must take at least one college course prior to turning age 25.<sup>50</sup> School personnel can assist students in foster care by facilitating enrollment in at least one dual-credit or college course during their junior or senior year.

### **Temporary Presence in Another School District**

If a student currently enrolled in one Texas school district temporarily visits another school district for 10 days or fewer, the second district is not required to enroll and serve the student if it is known at the time the student arrives that the student will be staying for 10 days or fewer and both school districts agree that the student will continue enrollment in the previous school district for the duration of the student's stay. TEA specifies that this policy is not a basis for denying educational services if a parent, guardian, or student requests services, regardless of the number of days of enrollment.<sup>51</sup>

### **Education Records**

As described above, all students presented for enrollment in a Texas public school district are to be immediately enrolled, regardless of whether previous educational records are available, and DFPS has up to 30 days after a child's enrollment to furnish educational records.<sup>52</sup>

Nevertheless, child welfare advocates and school officials alike express dismay over often lengthy delays in receiving past educational records from a prior school district. Delays in the transmittal of records cause innumerable educational problems, including loss of credit, inappropriate student placements, loss of special education or other services, and more.

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<sup>48</sup> U.S. Dep't of Agric., Eligibility Manual for School Meals, at page 2, online at [www.fns.usda.gov/cnd/Guidance/EliMan.pdf](http://www.fns.usda.gov/cnd/Guidance/EliMan.pdf).

<sup>49</sup> Tex. Educ. Code § 30A.002.

<sup>50</sup> Tex. Educ. Code §§ 54.366-.367

<sup>51</sup> Tex. Educ. Agency, Student Attendance Accounting Handbook, Section 3.3.3.2 at page 53.

<sup>52</sup> 19 Tex. Admin. Code § 74.26(a)(1); Tex. Educ. Code § 25.002(g).

State law is quite clear: education records must be transmitted to a receiving school district within ten business days of a request.<sup>53</sup> School districts and public charter schools are required to participate in an electronic records exchange (TREx), created by TEA to facilitate prompt exchanges.<sup>54</sup>

According to Section 3.4.4 of TEA's Student Attendance Accounting Handbook (SAAH):

When a student moves from one Texas public school district or charter school to another, the student record must be transferred via the Texas Student Records Exchange (TREx) within 10 working days of receiving a request. The student record must include the following information at a minimum:

- Social security number or state-approved alternate ID last reported through PEIMS
- First, middle, and last name and generation code, if applicable
- Date of birth
- Gender
- Ethnicity and race
- Current grade level
- Immunization information
- Receipt of special education services and individual education plan, if applicable
- Academic year
- Course completion
- Final grade average
- Teachers of record
- Assessment instrument results
- District ID
- Campus ID
- Campus name
- Campus phone number

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<sup>53</sup> Tex. Educ. Code § 25.002(a-1).

<sup>54</sup> Tex. Educ. Code § 7.010.

For a high school student transferring from one Texas public school district or charter school to another, the following additional information is required to be sent via TREx for the student's high school transcript:

- Student's address, including city, state, and zip code
- District name
- Exit-level assessment and date the exit-level requirement was met
- Advanced measures completed for the distinguished graduation program, if applicable
- Texas Grant indicator code required by the end of the student's junior year
- Graduation program type required by the end of the student's junior year
- College Board campus code
- Certification of coursework completion date, if applicable
- Current and previous coursework, including:
  - Academic year
  - Session type
  - Campus awarding credit
  - Course category, name, number, abbreviation, semester, grades and credit
  - Course grade average and/or final grade average
  - Special explanation codes, if applicable
  - Pass/fail credit indicator codes, if applicable

In reality, these legal mandates are rarely met. The reasons for delay are not entirely clear, but the following may be contributing factors:

- **Failure to train or staff the function adequately:** The TREx system is relatively new, and training is spreading slowly across the state though TEA and the regional education service centers. Even after staff are adequately trained, the system is only as good as the data entered into it. TREx requires several transmittal steps, as well as manual entry of data that is not yet available in electronic form. If schools do not have enough administrative support to fulfill this function, the goals of the legislation and the TREx system will continue to be frustrated.
- **Undue caution due to FERPA:** The federal Family Educational Rights and Privacy Act (FERPA) protects the confidentiality of students' educational records. Absent consent from a parent or guardian, educational records can be released only in accordance with certain specified exceptions, including a court order.<sup>55</sup> Some child welfare advocates

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<sup>55</sup> 20 U.S.C. § 1232g; 34 C.F.R. § 99.3.

report that school staff are hesitant to release records to anyone but a parent. FERPA's confidentiality protections should not be an impediment to providing records for children in foster care, however. First, child welfare agencies may be able to seek and receive parental consent from a parent whose parental rights have not been terminated. If consent is not available, child welfare can rely on FERPA exceptions. Enrollment by a student in another school district constitutes authority for the original school district to release the education records of that student to the receiving school, regardless of whether parental authority has been received.<sup>56</sup> Moreover, the caregiver or other person authorized by the child's legal guardian (i.e., DFPS) should have access to educational records. FERPA regulations define a *parent* to include a natural parent, guardian, or an individual acting as a parent in the absence of a natural parent or guardian.<sup>57</sup> Finally, FERPA permits school districts to release records in compliance with a court order or subpoena.<sup>58</sup>

- **Hasty exits without formal withdrawal:** The list of records to be exchanged in TREx is to be sent to a receiving district upon a child's *withdrawal* from the previous district. If the previous district has not been notified of the child's withdrawal, that may contribute to a delay in transmitting records. Another complicating factor may be the fact that transitions rarely coincide neatly with semester breaks. As a result, the receiving district may be asking for current records before grades are available. In the TREx user's manual, TEA indicates that if a school receives a request, and the student attended the institution, but the most current semester's grades have not yet been posted, the request can be placed on hold.
- **Unpaid fees:** Under Texas Education Code section 31.104(d), if textbooks, including electronic textbooks and technological equipment, are not returned to a district in an acceptable condition and an appropriate payment is not made, the district may withhold the student's records. TEA, however, interprets the requirement to transfer records to a new school within 10 days of a request to apply regardless of whether a student has failed to return or pay for a textbook, including an electronic textbook.
- **Absence of child welfare records:** While ideally education records would transfer promptly between school districts, child welfare case workers with complete copies of education records can assist in getting necessary information to a new school quickly. In addition, some documents, like immunization or health records, may need to come directly from the child welfare agency. Title IV-E of the Social Security Act requires that the case plan of a child in foster care include health and education records, including information on health and education providers; school records; assurances that the child's placement in care takes into account proximity to the school of origin; immunization records; known medical issues and medication; and any other relevant health and education information.<sup>59</sup> Every child in foster care is supposed to have an Education Passport, to include current school records, all special education and ancillary services provided to the child, and copies

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<sup>56</sup> 20 U.S.C. § 1232g (b)(1)(B); 34 C.F.R. §§ 99.31(a)(2), 99.34.

<sup>57</sup> 34 C.F.R. § 99.3.

<sup>58</sup> 20 U.S.C. § 1232g(b)(1)(J).

<sup>59</sup> 42 U.S.C. § 675.

of the birth certificate, social security card and personal identification.<sup>60</sup> For secondary school students, the passport should include the current cumulative transcript. Unfortunately, however, these compilations of records are rarely complete, which is not surprising given the haste with which children are often removed from their homes.

In 2009, the Texas Legislature directed TEA and DFPS to enter into a memorandum of understanding regarding the exchange of educational records.<sup>61</sup> In the memorandum, DFPS agrees to compile data for TEA about overall timeliness of record transmission and also inform the TREx help desk whenever records are not received within ten days of a request.

### **Loss of Course Credit**

The Texas Administrative Code offers general guidance to school districts about how to award credit to transfer students for the courses they took in previous school districts. The Code requires that credit earned toward state graduation requirements by a student in an accredited school district be transferable and be accepted by any other school district in the state. However, credit earned in local-credit courses may be transferred only with the consent of the receiving school district.<sup>62</sup> Consequently, credits previously earned for required courses must be recognized, but credits for electives may or may not be recognized.<sup>63</sup>

Generally speaking, school district practice is to recognize course credits previously earned for electives, regardless of whether the same elective would be offered in the receiving district.<sup>64</sup> Frequently, however, receiving school districts will not recognize the grades awarded in electives or other courses that would not be available in the new school district for purposes of calculating a student's grade point average.<sup>65</sup>

### **Mid-semester Moves**

A more difficult issue arises when a student transfers in the middle of a semester. The Texas Administrative Code provides that, in accordance with local district policy, students who are able to successfully complete only one semester of a two-semester course can be awarded credit proportionately.<sup>66</sup> There is no option, however, to recognize other fractions of credit under state law.

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<sup>60</sup> Tex. Fam. Code § 266.008.

<sup>61</sup> Tex. Educ. Code § 25.007.

<sup>62</sup> 19 Tex. Admin. Code § 74.26.

<sup>63</sup> For a list of required courses, see 19 Tex. Admin. Code chapter 74, subchapter F, or TASB Policy Code EHAC(LEGAL).

<sup>64</sup> See TASB Policy Code FD(LOCAL), requiring confirmation of student achievement before recognizing transfer credit for courses taken at non-accredited schools, but not requiring similar confirmation before recognizing transfer credits from accredited schools.

<sup>65</sup> See TASB Policy Code EIC(LOCAL).

<sup>66</sup> 19 Tex. Admin. Code § 74.26(d).



If a student moves in the middle of a semester, the receiving district will presumably place the student in equivalent classes to complete the semester and award credit based on an affirmation that the student's overall learning has satisfied state requirements for the course. For classes in the required curriculum, this placement should be straightforward—but how do school districts respond when a student moves mid-semester and arrives at a district that does not offer the same elective classes?

For example, imagine a high school student is enrolled in Algebra II, English III, World History, Biology, Art, German II, and a career and technology course in cosmetology. The student moves in the middle of a semester. The receiving district is going to be able to place the student in math, English, history, science, and art. If the student is able to stay on track despite the move and complete those courses, the student will earn 5 credits. But what if the new school is teaching the required curriculum in a different order from the previous district, and the student ends up revisiting some material, but missing other topics? And what if the new school simply does not offer German as a foreign language or cosmetology?

Reading between the lines of the grim graduation statistics for youth in foster care, it seems that often those credits are simply lost. Under TASB Policy Code FD(LOCAL), districts typically place new transfer students initially at the same grade level as the previous school district, then use a variety of methods, including teacher observation and possibly testing, to validate the placement. Confirming previous coursework is important not only in electives, but also in required courses, to avoid or compensate for gaps or duplication in instruction.

Admittedly, if a receiving district is going to compensate for gaps in instruction due to a child's relocation, this may require the dedication of additional resources, including tutoring or other instructional services. The MOU adopted under Texas Education Code section 25.007 required TEA to promote practices that would facilitate access by students in foster care to credit transfer services, summer programs, and after-school tutoring programs at nominal or no cost. A child in the care or custody of DFPS or who resides in a foster group home is considered "at risk" of dropping out of school and is eligible to receive compensatory education services.<sup>67</sup>

In addition, finding ways for a student to complete and receive credit for electives after a mid-semester transfer is challenging, but not impossible. In the same MOU, the Texas Legislature required TEA to address procedures for awarding credit for course work, including electives, completed by a student in substitute care while enrolled at another school.<sup>68</sup> To this end, TEA has emphasized the importance of credit recovery using the Texas Virtual School Network, distance learning, and online courses; and the provision of other instructional support and technical support to enable children in foster care to successfully transition between school districts.

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<sup>67</sup> Tex. Educ. Code § 29.081(d)-(d-1); TASB Policy Code EHBC(LEGAL).

<sup>68</sup> Tex. Educ. Code § 25.007(b).

Returning to the example of the high school student transferring mid-semester, in addition to providing instructional support in required classes, the district should also explore options for the student to realize credit for German II and the cosmetology course. Credit for German II may be attainable through the Virtual School Network or other online course, by dual enrollment with a community college, or through independent study followed by credit by examination.<sup>69</sup> Cosmetology may be a more difficult match, but options may be available at a community college. If not, depending on how much time is left in the semester, the student may be able to select a new course and, with instructional support, catch up with the rest of the class.

### **Local Graduation Requirements**

Another difficulty is the fact that different districts may have unique graduation requirements. For instance, some require one or two additional credits, or some may require a class that in other districts is an elective.<sup>70</sup> These local differences are adopted as an expression of local priorities, often to raise local standards; but these well-intended policies present a hurdle for highly mobile populations, including children in foster care. Districts with special graduation requirements could consider helping transfer students adjust by waiving local requirements.

Another useful tool for keeping recent transfer students on track for graduation is the Personal Graduation Plan (PGP), which is a written plan that identifies educational goals for a student and describes a course of study to help the student achieve those goals, including the use of innovative instructional options like flexible scheduling, online course, and other interventions. Schools are required to implement PGPs for students who have failed a mandatory state assessment test or who are unlikely to graduate within five years of enrolling in ninth grade, but schools are encouraged to develop PGPs for all high school students.<sup>71</sup>

### **Special Education**

Statistically, children in foster care are far more likely than other students to be identified as needing special education services. The 2010 Children's Commission report indicated that in Texas, 28.9% of the children in foster care were being served in special education, while only 9.6% of the general student population was in special education.

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<sup>69</sup> See TASB Policy Codes EHDB (Credit by Exam with Prior Instruction); EHDD (College Course Work/Dual Credit); and EHDE (Distance Learning).

<sup>70</sup> See TASB Policy Code EIF(LOCAL).

<sup>71</sup> See Tex. Educ. Code § 28.0212.

The federal Individuals with Disabilities Education Act (IDEA) requires school districts to offer all children with disabilities a free, appropriate public education in the least restrictive environment possible.<sup>72</sup> A child qualifies for special education if the child has one or more disabilities, such as a learning disability, emotional disturbance, physical disability, or autism, and the disability adversely affects the child's educational performance.<sup>73</sup>

### **IDEA Decision Making**

IDEA specifically includes “wards of the State” and “highly mobile children” as populations for whom school districts have a child find duty, meaning a duty to identify, locate, evaluate, and serve children who are eligible for special education services.<sup>74</sup> IDEA does not require parental consent for an initial evaluation for a ward of the State if, despite reasonable efforts, the school cannot locate the parents or parental rights have been terminated or abrogated by a court order.<sup>75</sup> This regulation allows an initial evaluation to begin even before a surrogate parent is appointed, which may take up to 30 days.<sup>76</sup>

IDEA affords parents and those standing in parental relation a number of procedural protections, including the right to seek a special education evaluation, and if the child qualifies, the right to serve on a committee (known in Texas as an Admission, Review, and Dismissal or “ARD” committee) and participate in the formulation of an individualized education program (IEP), which determines goals and objectives, necessary accommodations or modifications, and related services for the child.<sup>77</sup>

IDEA includes the following in the definition of *parent*:

- A natural, adoptive, or foster parent;
- A guardian, but not the State if the child is a ward of the State;
- An individual acting in the place of a natural or adoptive parent, including a relative with whom the child lives or another person legally responsible for the child; or
- An individual assigned to act as a surrogate parent for the child.<sup>78</sup>

Generally speaking, the IDEA as reauthorized in 2004 shows a preference for final decision making authority to be invested in someone standing in parental relation to the child; a stranger to the child should be appointed as a surrogate only if no qualified adult with a relationship to the

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<sup>72</sup> Another federal law, Section 504 of the Rehabilitation Act, prevents discrimination against students with disabilities that impair a major life activity. Because this law protects all students with disabilities, including those with impairments that do not limit educational progress, this law protects students that may not qualify for IDEA. Students identified as having a disability, but who are not eligible for special education, will have a 504 plan that specifies the modifications appropriate to assist the child in participating fully in the education program.

<sup>73</sup> 20 U.S.C. § 1400, et seq.

<sup>74</sup> 20 U.S.C. § 1412(a)(3)(A).

<sup>75</sup> 34 C.F.R. § 300.300(a)(2).

<sup>76</sup> 20 U.S.C. § 1415(b)(1)(B).

<sup>77</sup> 20 U.S.C. § 1412.

<sup>78</sup> 20 U.S.C. § 1401(23); 34 C.F.R. § 300.30.

child is available. In fact, IDEA defines “ward of the State” as a child in foster care or in the custody of a child welfare agency, but the term specifically *excludes* a foster child with a foster parent who meets the definition of “parent.”<sup>79</sup> Moreover, IDEA gives the power to designate a person with IDEA decision making authority not only to school officials, but to judges, who are likely to know a child better than a receiving school district.<sup>80</sup>

Consequently, IDEA would give more freedom to treat at least some foster parents as parents without the need to appoint a surrogate, but Texas law remains more cautious. Texas law instructs school districts to give preference to foster parents when assigning surrogate parents. In addition, state law indicates that foster parents may act as parents, as authorized by IDEA, but only if DFPS has been appointed the child’s temporary or permanent conservator, the child has been placed with the foster parent for at least 60 days, the foster parent does not have a conflict of interest as reflected in 19 Texas Administrative Code section 89.1047, and the foster parent agrees to participate in decisions on behalf of the child and take a required training course.<sup>81</sup>

In TEA’s rules, surrogate and foster parents are subject to virtually the same requirements, including a rule that requires school districts to offer individuals serving as surrogate or foster parents, not later than 90 days after their appointment, a course about various aspects of the special education program. If the individual completes the training within 90 days, the individual shall not be required by the school district to complete additional training in order to continue serving as a surrogate parent for other students with disabilities. School districts may provide ongoing or additional training to foster parents or surrogate parents; however, a district cannot deny an individual who has received the training from serving as the parent on the grounds that the individual has not been trained.<sup>82</sup>

Note that the following individuals are not eligible to serve in the capacity of a surrogate parent:

- A TEA or school district employee
- Any agency involved in care or education of the child, such as DFPS, the Texas Juvenile Justice Commission, or a Residential Treatment Center
- A person with a personal or professional interest that conflict with the interests of the student.<sup>83</sup>

### **Special Education Transitions**

The procedures required for special education evaluations and placements—complex in the best of circumstances—are complicated further by the mobility of students in the foster care system. For a student making a school transition during the special education evaluation process, the

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<sup>79</sup> 20 U.S.C. § 1401(23), (36).

<sup>80</sup> 20 U.S.C. § 1415(b)(2)(A)(i); 34 C.F.R. § 300.30(b).

<sup>81</sup> Tex. Educ. Code § 29.015.

<sup>82</sup> 19 Tex. Admin. Code § 89.1047.

<sup>83</sup> 34 C.F.R. § 300.519(d)(2).

sending and receiving school districts must coordinate to ensure prompt completion of the evaluation.<sup>84</sup> Under IDEA, an initial evaluation must be completed within 60 days. IDEA contains an exception if the child enrolls in a new school during the 60-day timeframe, but the evaluation must be completed “promptly,”<sup>85</sup> and the school district and parent must agree to a new deadline for completing the evaluation.<sup>85</sup>

Under Texas law, when a student enrolls in a new school, TEA requires the receiving school district to accept a special education referral made by the student’s previous district.<sup>86</sup> If the student was in the process of being evaluated for special education eligibility in the student’s previous school district, the new school district must coordinate with the student’s previous school district as necessary and as expeditiously as possible to ensure a prompt completion of the evaluation. The evaluation must be completed not later than the 60th calendar day following the date on which the new school district receives written consent for the evaluation as required by Texas Education Code section 29.004.<sup>87</sup>

If a child in special education in a Texas school district moves after an IEP has been established, the receiving district must provide appropriate special education services, including services comparable to those described in the previous IEP, until the new district can call an ARD committee meeting to revisit the IEP. The receiving district may choose to perform a new evaluation before establishing an IEP, but must provide comparable services during that time.<sup>88</sup> When a student transfers within the state and the parents verify that the student was receiving special education services in the previous school district or the previous school district verifies in writing or by telephone that the student was receiving special education services, the school district must meet the requirements of Section 300.323 (above) within 30 school days from the date the student is verified as being eligible for special education services.<sup>89</sup>

Essential to providing *comparable services* is knowing what services were being provided at the previous school district. The need for prompt transmittal of educational records is heightened in the special education context. Special education law and rules say that special education records must be forwarded from the previous district within 30 days, but Texas law requires an even faster exchange, within ten working days, for all school records.<sup>90</sup>

## **Behavioral Problems and School Discipline**

In some instances, the best interest determination about where a child in foster care should attend school will favor enrolling the child in a new school to allow a fresh start after a difficult behavioral history at the previous school district. A child in foster care enrolling in a new school district where the foster parent resides will be entitled to immediate enrollment regardless of the

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<sup>84</sup> 20 U.S.C. § 1414(b)(3)(D).

<sup>85</sup> Tex. Educ. Code § 29.004; 34 C.F.R. § 300.301(d)(2), (e).

<sup>86</sup> Tex. Educ. Code § 25.007(b)(8).

<sup>87</sup> 19 Tex. Admin. Code § 89.1050(f)(1).

<sup>88</sup> 34 C.F.R. § 300.323(e).

<sup>89</sup> 19 Tex. Admin. Code § 89.1050(f)(2).

<sup>90</sup> Tex. Educ. Code § 25.002(a-1).

student's previous transgressions. Exceptions in the Texas Education Code that would permit a school district to decline admission to a "minor living separate and apart" from parents, based on poor disciplinary history for instance, do *not* apply to students residing in a school district with a person having lawful control under a court order.<sup>91</sup>

### **Fresh Start at a New School**

For the most part, newly enrolling students will begin with a clean slate. However, there are provisions in state law that allow a student's previous disciplinary history to follow the student from district to district.

If the student is leaving a previous district while subject to serious discipline—namely, a removal to a disciplinary alternative education program (DAEP) or expulsion—the receiving district may continue the disciplinary placement made by the previous district.<sup>92</sup>

In addition, disciplinary placements for future misbehavior—including suspensions, DAEP placements, and expulsions—must be made in accordance with each local school district's Student Code of Conduct (SCOC). By law, each SCOC must specify that in making these placements, administrators will give consideration to a number of factors, including self-defense, intent or lack of intent at the time of the conduct, and the student's disciplinary history.<sup>93</sup> Consequently, decisions about future disciplinary consequences must be made with an eye toward the student's past.

### **Corporal Punishment**

In light of the physical abuse or other trauma children in foster care may have endured, DFPS, acting in its role as a child's guardian, may make a written request to a child's school that corporal punishment not be used as a disciplinary method for that child. If school district policy provides that corporal punishment is permitted as a method of student discipline, the district may use corporal punishment to discipline a student *unless* the student's parent or guardian or other person having lawful control over the student has previously provided a written, signed statement prohibiting the use of corporal punishment as a method of student discipline. The signed statement must be provided annually to the school district.<sup>94</sup>

### **Discipline and Special Education**

Both state and federal law require that a student's disability be taken into consideration before the student is punished for misbehavior. If the misbehavior is a manifestation of the student's disability, the behavior is to be managed (i.e., alleviated or avoided) but not punished. These

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<sup>91</sup> Texas Education Agency *To the Administrator Addressed Letter Re: Attendance, Admission, Enrollment Records and Tuition*, Aug. 17, 2010, available online at <http://ritter.tea.state.tx.us/taa/legal081710-2.html>.

<sup>92</sup> Tex. Educ. Code §§ 37.008(j) (DAEP); .010(g) (expulsion).

<sup>93</sup> Tex. Educ. Code § 37.001(a).

<sup>94</sup> Tex. Educ. Code § 37.0011.

protections extend not only to students who are already qualified for special education, but also to students who are still in the process of qualifying for services.

For students in special education or who are protected from discrimination by Section 504, federal law imposes procedural protections to ensure that children are not punished for actions that result from their disabilities. Specifically, a student in special education cannot be disciplined by a removal from his or her educational setting for ten days or more without assembling the ARD committee to conduct a manifestation determination.<sup>95</sup> To the extent behaviors are a manifestation of a child's disability, the district will have an obligation to assess the behavior through a functional behavioral assessment (FBA) and develop a behavior intervention plan (BIP) designed to help the student avoid the circumstances that could lead to misbehavior.<sup>96</sup>

### **Eligibility for School Activities**

In 2009, the Texas Legislature required TEA to enter an MOU with DFPS to address numerous issues related to school transitions for students in foster care.<sup>97</sup> In adopting the MOU, TEA was instructed to promote practices that would facilitate access by students in foster care to extracurricular programs and summer programs, among other services.

### **UIL Residency Requirements**

Texas law provides that a durational residence requirement may not be used to prohibit a child in foster care from participating fully in any activity sponsored by a school district.<sup>98</sup> Such durational requirements are rarely imposed at the local school district level.<sup>99</sup> The University Interscholastic League (UIL), however, imposes layers of durational residential requirements in its Constitution and Contest Rules, depending on the activity in which a student wishes to participate.<sup>100</sup> Specifically,

- **All varsity contests:** In Section 400, on eligibility for all contests, the UIL rules state, among other qualifications, that an individual is eligible to participate in a varsity contest as a representative of a participant school if that individual has been in regular attendance at the participant school since the sixth class day of the present school year or has been in enrolled and in regular attendance for 15 or more calendar days before the contest or competition (student becomes eligible on the fifteenth day).

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<sup>95</sup> 20 U.S.C. § 1415(k)(1)(E).

<sup>96</sup> 20 U.S.C. § 1415(k)(1)(D)-(F).

<sup>97</sup> Tex. Educ. Code § 25.007.

<sup>98</sup> Tex. Educ. Code § 25.001(f).

<sup>99</sup> The only durational residence requirement commonly occurring in local school district policy is a requirement that a student have been enrolled for a certain number of years or semesters in order to receive a local graduation honor, such as the title of valedictorian. See TASB Policy Code EIC(LOCAL).

<sup>100</sup> University Interscholastic League, Constitution & Contest Rules (2010-11), *available online at* [www.uil-texas.org/policy/constitution](http://www.uil-texas.org/policy/constitution).

- **All varsity athletics:** In Section 440, on eligibility for athletics, the UIL rules state, among other qualifications, that an individual is eligible to participate in a varsity athletic contest as a representative of a participant school if that individual is a resident of the member school district and a resident of the attendance zone in which the participant school being attended is situated, or has been continuously enrolled in and regularly attending the school for at least the previous calendar year if his or her parents do not reside within the school district's attendance zone.

Soon after the statutory language now codified in Section 25.001(f) was enacted, the UIL asked the attorney general to interpret the application of the statute to its rules. The attorney general answered that no durational residential requirement in the UIL rules could be applied to a child placed by DFPS or a court into a foster home located in a receiving school district. This is true regardless of whether this is the child's first time to be placed in a foster home or whether the child has been moved to a new foster home; if the placement is by DFPS or a court, no durational requirement can be imposed. If, however, the child is not changing foster homes, but rather the foster family is choosing to relocate to a new school district, durational requirements will apply to the child as they would any other student.<sup>101</sup>

The UIL responded by updating its rules to reflect the attorney general's opinion. In Section 442, regarding residence in the attendance zone, the UIL rules state that the residence of a student assigned by appropriate authority to a foster home or a home licensed by the state as a child care boarding facility, or placed in a home by the Texas Youth Commission, is presumed to be at the home. If a student's parent moves the student to a foster home in another school district, the student is not eligible, but may apply for a waiver.<sup>102</sup>

### **Tryout Schedules**

Although school practices regarding extracurricular activities do not impose a durational residential requirement and are not intentionally discriminatory, they do limit participation by highly mobile populations. Many team sports hold tryouts well in advance of the season, including spring tryouts for fall sports. Because many activities use the summer to prepare for the following school year, the practice of holding spring tryouts for fall sports is unlikely to change. Nevertheless, some districts allow fall tryouts or "walk-ons" as ways to accommodate highly mobile student populations. These options are more likely to be available in school districts with significant populations of mobile students, including military dependents.

### **Decision Making for and Access to the Child at School**

When a child enters the child welfare system, a number of individuals begin to share responsibility for advocating on behalf of the child. Discerning who among these individuals has final decision making authority will vary depending on the child's case and the nature of the

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<sup>101</sup> Op. Tex. Att'y Gen. No. MW-43 (1979).

<sup>102</sup> University Interscholastic League, Constitution & Contest Rules (2010-11), *available online at* [www.uil texas.org/policy/constitution](http://www.uil texas.org/policy/constitution).



educational decision. Naturally this is baffling to school staff who need to know on a practical level to whom routine school correspondence should be directed and who has the power to sign off on decisions as minor as permission to attend a field trip or as monumental as consent for special education services.

- **Natural or adoptive parent:** The fact that a child is taken into DFPS custody impairs, but does not formally terminate, parental rights. Accordingly, a child's natural or adoptive parent may still have access to school records and have opportunities to influence, if not control, educational decisions.
- **Child welfare case worker:** A court order placing a child in DFPS custody may name DFPS as the final decision maker for the child's education decisions. Unless otherwise provided in court order, the general rights and duties of a nonparent appointed as managing conservator of a child include the right to designate the primary residence of the child and to make decisions regarding the child's education.<sup>103</sup> Consequently, DFPS, acting through the child welfare case worker, has authority over major decisions, like the best interest decision of where the child should enroll in school.
- **Foster parent:** Nevertheless, it is the child's foster parent who is present at school, interacting with school staff. All involved may find it much easier for the foster parent to receive routine school correspondence, review and sign grade reports and permission slips, and otherwise stand in parental relation to the child in all but the most fundamental educational decisions.
- **Attorneys and guardians ad litem:** The appointment of an attorney ad litem (AAL) is mandatory in DFPS cases when the agency files a suit affecting the parent-child relationship requesting termination of parental rights or its appointment as conservator of the child. The AAL is appointed to represent the legal interests of the child, so to the extent possible, the representation is directed by the child.<sup>104</sup> Similarly, a guardian ad litem (GAL) is required in DFPS suits affecting the parent-child relationship. Rather than being directed by the child, however, the GAL represents the child's *best interests*. A GAL may be a CASA or volunteer advocate; an adult having competence, training, and expertise determined by court to be sufficient to represent best interests; or an attorney appointed in the dual role of GAL and AAL.<sup>105</sup> In terms of the child's education, the AAL and GAL will not be final decision makers, but can act as advocates for the child, especially if the child needs representation in a disciplinary or other hearing.
- **Special education surrogate parent:** As discussed more fully above, in some cases, another qualified individual with special training will serve as a child's surrogate parent for purposes of special education decisions. Others with "knowledge or special expertise regarding the child" may be invited to participate in an ARD committee.<sup>106</sup> This may

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<sup>103</sup> Tex. Fam. Code § 153.371 (10).

<sup>104</sup> Tex. Fam. Code §§ 107.003-.004, .012.

<sup>105</sup> Tex. Fam. Code §§ 107.011, .0125.

<sup>106</sup> 34 C.F.R. § 300.321(a)(6).

include the parent, foster parent, homeless liaison, AAL/GAL, or even the judge, where appropriate.<sup>107</sup> Once a surrogate parent is appointed, however, only that individual can consent to services or file for due process.

### **Access during the School Day**

Like all school-aged children, children in foster care are subject to compulsory attendance.<sup>108</sup> State law makes an exception to compulsory attendance when a student must attend a required court appearance. A student excused on this basis may not be penalized for the absence and shall be counted as being in attendance if the student satisfactorily completes missed school work within a reasonable amount of time.<sup>109</sup>

Other interruptions during the school day may be met with a certain degree of resistance from school officials, however. Generally speaking, school officials expect students to be in class during instructional time, and school officials express frustration with interruptions from outside sources when others use the school as a convenient location to find and access a child. Child advocates can reduce this friction by being sensitive to the school's schedule. If possible, arrange meetings during non-instructional time. If a meeting is likely to upset the child, choose a time that will not end with the child being sent immediately into an instructional setting.

Finally, unless the conflict is unavoidable, child advocates should avoid establish standing appointments that occur at the same time during the school week on an ongoing basis. If, for example, a child must leave every Tuesday at 10 am for a therapy appointment, the child is likely missing instruction in the same class for each appointment. Depending on whether the campus uses block or regular period scheduling, the child may be missing 20 percent of the instruction in that course. State law requires that, after enrolling, a student must attend class at least 90 percent of the time a class is offered in order to receive credit for the course. A student who is in attendance for at least 75 percent but less than 90 percent of the days a class is offered may be given credit if the student completes a plan approved by the school's principal that provides for the student to meet the instructional requirements of the class. However, a student under the jurisdiction of a court in a criminal or juvenile justice proceeding may not receive credit without the consent of the judge presiding over the student's case. An attendance committee may grant an exception in "exceptional circumstances" and award credit to a student who failed to attend 90 percent of course, based on local school district policy.<sup>110</sup>

### **Campus Visitor Procedures**

In addition to choosing appropriate times to visit students, child advocates should be prepared upon arrival to identify themselves, explain their relationship to the child, and explain in general terms the reason for their visit. These inquiries from school officials are not intended to pry into

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<sup>107</sup> H.R. Rep. No. 108-779, pt. 151, pg. 35.

<sup>108</sup> Tex. Educ. Code § 25.085.

<sup>109</sup> Tex. Educ. Code § 25.087(b)(1)(B), (d).

<sup>110</sup> Tex. Educ. Code § 25.092.

a student's personal business, but rather to protect student safety and gain a general understanding of the legal authority for a visit. These explanations will be particularly important if an advocate wishes to meet privately with a student.

By law, school officials may not interfere with an *investigation* of a report of child abuse or neglect conducted by DFPS on school premises, and the interview may be conducted privately, as deemed appropriate by the CPS investigator.<sup>111</sup> However, when "other lawful authorities" want to interview a student at school for any other purpose, local school district policy will typically require the principal or his or her designee to verify and record the identity of the visitor and request an explanation of the need to interview the student at school. By policy, the principal will ordinarily make reasonable efforts to notify the student's parents or other person having lawful control of the student, unless the interviewer raises a valid objection to the notification. In addition, by policy, the principal or a designee will ordinarily be present during the interview, unless the interviewer raises a valid objection.<sup>112</sup>

In addition, as a visitor on school campus, a child welfare advocate will be subject to regular campus check-in procedures required of all visitors. Texas law allows a school district to require a campus visitor to show a driver's license or other photo identification, establish an electronic database of campus visitor information, and verify whether a campus visitor is a sex offender using a computerized central database maintained by DPS or another source acceptable to the district.<sup>113</sup>

### **Privacy versus Outreach**

Both children and child welfare advocates are often hesitant to tell school personnel about a child's personal family situation. Unfortunately, many children in foster care report that they have experienced embarrassment when their personal circumstances were revealed unnecessarily (for example, a teacher telling the class that a student "has to go to the office to meet with her case worker") or when family circumstances form the basis of school activities (for example, a teacher asking children to create a family tree for a class project). Often these incidents are not the result of intentional discrimination, but rather of a lack of knowledge and sensitivity regarding a child's circumstances. The amount of information educators need to know about a child's history and circumstances will vary from case to case. Educators can encourage trust by developing guidelines about how to protect sensitive family information in the school setting, providing adequate professional development to appropriate school staff, and being in constructive dialogue with local child welfare representatives.

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<sup>111</sup> Tex. Fam. Code § 261.303; 40 Tex. Admin. Code § 700.409(a).

<sup>112</sup> See TASB Policy Code GRA(LOCAL).

<sup>113</sup> Tex. Educ. Code § 38.022.

In 2011, the Texas Legislature added a requirement that local school districts identify a liaison for students in foster care.<sup>114</sup> Having an individual in a school district with special knowledge and sensitivity to the needs of students in foster care may alleviate many of educational barriers for these children. As with a homeless liaison, this individual could be a resource for students, child welfare advocates, and foster parents who wish to confide specific information to an appropriate official in the school district without disclosing the information directly to classroom teachers. A liaison could help sensitize school administrators, teachers, and other staff to the emotional and academic challenges of placement in foster care. Ideally, liaisons could clear a path for students in foster care to access credit recovery and other instructional support and to be sure students are permitted to make up work they miss due to court hearings and case meetings and are not penalized for these absences.

## **Conclusion**

Children and youth in foster care face significant barriers to successful educational outcomes. School officials do not have the power to mend the broken circumstances in these students' home lives, but they can take steps to make the educational environment more responsive to the needs of this population. So often, common policies and procedures that function adequately for other children have unintended consequences for these students. Interdisciplinary dialogue, of the sort established by the Texas Children's Commission Education Committee, is an essential starting place for increasing awareness, alleviating barriers, and ultimately improving educational outcomes for children in foster care.

For more information on this and other school law topics, visit TASB School Law eSource online at [schoolawesource.tasb.org](http://schoolawesource.tasb.org).

*This document is provided for educational purposes only and contains information to facilitate a general understanding of the law. It is neither an exhaustive treatment of the law on this subject nor is it intended to substitute for the advice of an attorney. It is important for the recipient to consult with the district's own attorney in order to apply these legal principles to specific fact situations.*

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<sup>114</sup> H.B. 826, 82nd Sess. (Tex. 2011).