

# The Proper Guardians of Foster Children's Educational Interests

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*The United States Supreme Court has enumerated a constitutionally protected parental right to control the upbringing of one's child that includes the right to direct the child's education. The states, meanwhile, have differed in their interpretation and application of this principle when foster children's educational interests conflict with their biological parents' wishes. Specifically, although some states permit the judicial limitation of parental rights over children's education during foster care placement, others do not. This Article is among the first to consider the benefits and consequences of each approach in the context of parents' rights and children's best interests.*

## I. INTRODUCTION

In the United States, the relationship between parents and children is viewed as fundamental.<sup>1</sup> This is true not only in the literal sense but also in the constitutional sense that protects the relationship from governmental intrusion. In fact, this relationship is so respected that not only is it reluctantly terminated, but even when it is interrupted due to

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1. Odeana R. Neal, *Myths and Moms: Images of Women and Termination of Parental Rights*, 5 KAN. J.L. & PUB. POL'Y 61, 63 (1995). "According to doctrinal constitutional theory then, this relationship should not suffer state interference absent some compelling state interest." *Id.* at 67. Meanwhile, education and foster care, the other subjects of this Article, are not fundamental rights under the federal Constitution, although they do play essential roles in society. Angela M. Elsperger, *Florida's Battle With the Federal Government Over Immigration Policy Holds Children Hostage: They Are Not Our Children!*, 13 LAW & INEQ. 141, 162 (1994). Most states, however, protect education in their own constitutions. Lewis Pitts, Essay, *Fighting for Children's Rights: Lessons from the Civil Rights Movement*, 16 U. FLA. J. L. & PUB. POL'Y 337, 341 (2005).

the child's temporary entry into foster care, parents often retain their rights.<sup>2</sup>

One right in this parental bundle of rights is the constitutionally protected right to direct the education of one's child.<sup>3</sup> Although seemingly a subtle right, this right potentially has the greatest impact on foster children due to the importance of education in today's knowledge-based society and economy.<sup>4</sup> In fact, the value of an education cannot be overstated, particularly given that education has long been viewed as a key to success, especially for those from disadvantaged backgrounds.<sup>5</sup>

In any case, education in the United States is compulsory for children,<sup>6</sup> and few parents would veto their children's education during foster care. A significant problem arises, however, when a parent's educational decision for a child conflicts with the child's best interests.

Special education is particularly relevant to this discussion because more than half of all foster children receive special education services<sup>7</sup>—a rate roughly five times that of the greater school age

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2. See *infra* Part II.C (discussing the states' different approaches regarding parents' decision-making rights, specifically New York's and California's); see also Jill D. Moore, Comment, *Charting a Course between Scylla and Charybdis: Child Abuse Registries and Procedural Due Process*, 73 N.C. L. REV. 2063, 2093 n.176 (1995) (noting that parents retain parental rights in the form of a contract with the CPS agency, which has legal custody and provides substitute family care). This Article uses the term "foster care" to denote state custody of children who are placed voluntarily or involuntarily in out-of-home locations such as foster family homes, agency boarding homes, or group homes. For a general background on the foster care system, see, for example, Megan M. O'Laughlin, Note, *A Theory of Relativity: Kinship Foster Care May Be the Key To Stopping the Pendulum of Termination vs. Reunification*, 51 VAND. L. REV. 1427 (1998).

3. See, e.g., *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 534-35 (1925) (determining that parents had a constitutional right to choose a private education over a public education for their children); *infra* note 22 (discussing the protection of the liberty of parents and guardians to direct the education and upbringing of their children).

4. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.").

5. *Id.*; see also Judith M. Gerber & Sheryl Dicker, *Children Adrift: Addressing the Educational Needs of New York's Foster Children*, 69 ALB. L. REV. 1, 74 (2005) ("Adults who speak out about the rocky path they have traveled from foster care to successful adulthood often attribute their life success to their education and a caring teacher.").

6. Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools As Mediating Structures*, 48 OHIO ST. L.J. 663, 668 (1987). Hafen states, "Our tradition asserts that this compulsion is in the best interest of children, because education ultimately develops their capacity to enjoy the full and meaningful exercise of their adult liberties." *Id.*

7. See U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN, YOUTH & FAMILIES, NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING (NSCAW ONE YEAR IN FOSTER CARE WAVE I DATA ANALYSIS REPORT): EXECUTIVE SUMMARY (Nov. 2003) (noting that studies have shown that "the vast majority of children who have spent one year in out-of-home-care have substantial social and cognitive impairments"); Sheryl Dicker & Elysa Gordon,

population.<sup>8</sup> Nonetheless, there is concern that many foster children's special educational needs remain unaddressed.<sup>9</sup> Specifically, parents may be incapable of making appropriate educational decisions for their children because of mental health, substance abuse, or other life issues. Others may decline to enroll their children in special education while in foster care because of shame, confusion,<sup>10</sup> or their desire to assert control over their children even after the children have been removed from their care.

When the wishes of the parents conflict with the educational interests of their child in this way, especially if the child has been placed in foster care, resolution is needed. Although the federal courts are silent on parents' rights to direct their children's education while they are in foster care, Congress has addressed this issue through legislation, specifically, through the Individuals with Disabilities Education Act (IDEA).<sup>11</sup> The states have also individually addressed this issue. Some states, including California, provide their courts with mechanisms to limit parents' educational decision-making rights while the children

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*Safeguarding Foster Children's Rights to Health Services*, 20 CHILD LEGAL RTS. J. 45, 46 (2000) ("Studies nationwide reveal that half of all foster children have substantial delays in cognition, speech and behavioral development, and some studies have found even higher numbers of foster children in need of early intervention services." (citing N. Halfon et al., *Health Status of Children in Foster Care: The Experience of the Center for the Vulnerable Child*, 149 ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 386 (1995)); CHERYL SMITHGALL ET AL., UNIV. OF CHI. CHAPIN HALL CTR. FOR CHILDREN, EDUCATIONAL EXPERIENCES OF CHILDREN IN OUT-OF-HOME CARE 58-59 (2004) (finding that nearly half of all sixth to eighth grade students in out-of-home care who attend Chicago public schools are classified as disabled, and that these students are disproportionately likely to be classified as having an emotional or behavioral disability).

8. See Sheryl L. Buske, *Foster Children and Pediatric Clinical Trials: Access Without Protection Is Not Enough*, 14 VA. J. SOC. POL'Y & L. 253, 293 (2007) (noting 20% of foster children receive special education services); see also Gerber & Dicker, *supra* note 5, at 29 ("Foster children manifest disabilities at far higher rates than the general population. . . . Common disabilities include neurological and developmental delays, as well as behavioral and mental health problems.").

9. Gerber & Dicker, *supra* note 5, at 3. But see 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, 83 (2000) (noting foster children are at risk for both under- and over-identification with regard to special education).

10. See, e.g., Andrea F. Blau, *Available Dispute Resolution Processes Within the Reauthorized Individuals with Disabilities Education Improvement Act (IDEIA) of 2004: Where do Mediation Principles Fit In?*, 7 PEPP. DISP. RESOL. L.J. 65, 76 (2007) (noting parents' avoidance of special education disputes because they find the system too complex); Godsoe, *supra* note 9, at 105 (identifying a potential stigma for children with special education needs); *id.* at 109 (suggesting that some parents or caretakers may withhold information from school officials for fear of being blamed for the child's educational problems).

11. Individuals with Disabilities Education Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (codified as amended at 20 U.S.C. §§ 1400-1482 (2006 & Supp. 2008)).

remain in foster care.<sup>12</sup> Other states, including New York, have not created a mechanism to override parents' decisions about special education services,<sup>13</sup> even when their children are in foster care and their decisions run counter to the children's best interests.

At stake in these two divergent state approaches is the proper education of half a million children in foster care.<sup>14</sup> The very importance of this stake requires careful consideration of these various state approaches, without the benefit of much literature on the issue.<sup>15</sup> This Article, therefore, endeavors to determine the benefits and drawbacks of each approach in protecting foster children's educational interests given the legal and policy frameworks, and who should be the guardian of those interests. Focusing on parental rights in the special education context—where the tension between parents' wishes and the children's best interests may be great—this Article analyzes who could be appropriate guardians of foster children's educational interests.

Part II of this Article therefore begins by considering constitutional law on parental rights, the federal IDEA, and the differing state approaches to addressing the educational needs of foster children, focusing on New York and California. Part III then analyzes the implications and consequences of these approaches, many of which favor California's method of protecting the educational interests of foster children. This Part concludes that if the education of foster children is to be prioritized, states should consider procedures that would allow them to limit or subrogate parents' rights over their children's education when appropriate.

## II. THE CURRENT LEGAL FRAMEWORK

Although sensitive to parental rights, the law permits the complete termination or surrender of all parental rights over the child under certain circumstances or, more readily, allows the temporary suspension

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12. See *infra* Part II.C.2 (discussing California's approach to the educational decision-making rights of parents, which limits the right after the child has entered foster care).

13. See *infra* Part II.C.1 (discussing New York's approach, which grants the parents educational decision-making rights even after the child has entered foster care).

14. Miriam Aroni Krinsky, *Perspective on Youth at Risk: A Case for Reform of the Child Welfare System*, 45 FAM. CT. REV. 541, 541–42 (2007) (noting that there are more than half a million children in the nation's foster care system at any given time). Importantly, “[w]hen children are placed in foster care, their schooling should be a central concern.” Gerber & Dicker, *supra* note 5, at 73.

15. See, e.g., Godsoe, *supra* note 9, at 84 n.8 (“The lack of consideration of this topic is clear in the lack of national statistics on this subject, and the apparent scant information or consideration in protocols of at least some education and child protection departments.”).

of the parental right to custody of the child by virtue of the child's placement into foster care.<sup>16</sup> While it is clear that parental rights over a child's education are terminated when there is a complete and permanent termination or surrender of parental rights,<sup>17</sup> it is far less clear who—the state, the parents, or another entity—should direct the child's education when there is a temporary suspension of parental rights to custody over the child.

New York and California, often considered bellwether states,<sup>18</sup> have each taken different approaches to this question, illustrating the two opposing positions from the range of possible approaches. While parents in New York generally retain educational decision-making authority over their children even after the children enter foster care and until there is a final termination or surrender of parental rights, California allows temporary limitation of this parental right in specific circumstances.<sup>19</sup> Before considering each approach in detail, however, it is first important to examine the federal legislative and constitutional backdrop against which these state approaches have been taken.

#### A. Parental Rights in the Constitution

Although family law typically remains in the domain of the states,<sup>20</sup> the United States Supreme Court has ensured that the parent-child

16. At the outset, it is important to note that foster parents' constitutional rights differ from biological parents' constitutional rights. *See, e.g.*, *Backlund v. Barnhart*, 778 F.2d 1386, 1389–90 (9th Cir. 1985) (“[F]oster parents do not enjoy the same constitutional protections that natural parents do.”).

17. For background on the legal significance of termination, see *infra* notes 36, 39, and accompanying text.

18. SUSAN MARKENS, *SURROGATE MOTHERHOOD AND THE POLITICS OF REPRODUCTION* 139 (2007) (“[New York and California are] often considered bellwether states since they frequently take the lead in formulating policies and laws in response to changing social needs.”); *see also* P. John Kozyris, *Corporate Wars and Choice of Law*, 1985 *DUKE L.J.* 1, 17 (1985) (labeling New York and California “bellwether states”).

19. *See infra* Part II.C (discussing the states' different approaches regarding parents' decision-making rights, specifically New York's and California's). *But see* Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 *ARIZ. L. REV.* 11, 47 (1994) (advising on the foster care system's effect on family bonds).

20. *See, e.g.*, *Moore v. Sims*, 442 U.S. 415, 435 (1979) (“Family relations are a traditional area of state concern.”). Nonetheless, Justice Antonin Scalia has expressed concern about the federalization of American family law:

I think it obvious . . . that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people.

*Troxel v. Granville*, 530 U.S. 57, 93 (2000) (Scalia, J., dissenting).

relationship is constitutionally protected, mostly through the Fourteenth Amendment.<sup>21</sup> This protection extends not only to the relationship between the government and parents in regard to a child's education but also to the termination of parental rights.

In the field of education, the United States Supreme Court has addressed the appropriate relationship between the government and the parents in two 1920s landmark decisions, which together establish that the Due Process Clause of the Fourteenth Amendment protects the rights of parents to direct the education of their children.<sup>22</sup> First, in *Meyer v. Nebraska*, the Court held that a statutory prohibition against teaching German in elementary school interfered with "the power of parents to control the education of their own."<sup>23</sup> In *Pierce v. Society of the Sisters*, meanwhile, the Court found an Oregon statute requiring all children to attend public elementary school to be an unreasonable interference with the liberty of parents and guardians to direct the upbringing of their children.<sup>24</sup> Therefore, included in the constitutionally protected bundle of parental rights is the particularly strong right to direct the education and upbringing of one's child.<sup>25</sup> These parental rights have altogether been described variously by the Court as "far more precious than property rights,"<sup>26</sup> "essential to the orderly pursuit of happiness by free men,"<sup>27</sup> and "more significant and

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21. See, e.g., *Pierce v. Soc'y of the Sisters*, 268 U.S. 510 (1925) (noting that the parents' right to choose private education over public education is a fundamental liberty interest protected by the Fourteenth Amendment); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (noting that the parents' right to hire a teacher to teach their child a foreign language is a fundamental liberty interest protected by the Fourteenth Amendment); see also *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (noting that the freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment). Such protection has also been called the "parental liberty interest," which permits parents to direct the upbringing of their children. See, e.g., Kandice K. Johnson, *Crime or Punishment: The Parental Corporal Punishment Defense—Reasonable and Necessary, or Excused Abuse?*, 1998 U. ILL. L. REV. 413, 425 (1998) (noting that the parent-child relationship creates a Fourteenth Amendment "liberty interest" that allows parents to direct the upbringing of their children).

22. William G. Ross, *The Contemporary Significance of Meyer and Pierce for Parental Rights Issues Involving Education*, 34 AKRON L. REV. 177, 177 (2000).

23. *Meyer*, 262 U.S. at 401.

24. *Pierce*, 268 U.S. at 534–35. One commentator offers an interpretation of *Meyer*, 262 U.S. at 390, and *Pierce*, *supra*, as cases that view the child as the property of parents. Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 997 (1992).

25. Godsoe, *supra* note 9, at 124.

26. *May v. Anderson*, 345 U.S. 528, 533 (1953).

27. *Meyer*, 262 U.S. at 399.

priceless than 'liberties which derive merely from shifting economic arrangements.'"<sup>28</sup>

Strong parental rights in the field of education permit and encourage parents to become passionate advocates for the education of their children, even when their children are in foster care. In general, the right to make educational decisions is only lost when a court terminates the entire bundle of parental rights. However, when married parents disagree about their custodial children's education, the courts generally abstain from interfering because the family unit is intact.<sup>29</sup> In divorced or single-parent families, meanwhile, one custodian may legally be designated to make educational decisions.<sup>30</sup> Finally, in cases where a child is placed into foster care—the primary group of children considered in this Article—the question becomes who has or should have the decision-making authority over a child's education.

Of course, parental rights are not limitless. Importantly, "[w]hile parents have a right to raise their children free from state intervention, children have a countervailing right to protection from abuse and neglect."<sup>31</sup> Therefore, the Supreme Court has allowed the state to act as *parens patriae*<sup>32</sup> and restrict certain parental rights and activities.

28. *Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 38 (1981) (Blackmun, J., dissenting) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

29. One married couple could not agree on the education of the child and brought the case to court, but the Alabama Supreme Court held that it had no jurisdiction in "the settlement of a difference of opinion between parents as to what is best for their minor child when the parents and child are all living together as a family group." *Kilgrew v. Kilgrew*, 107 So. 2d 885, 888–89 (Ala. 1958).

30. *See, e.g., Morgan v. Morgan*, 964 So. 2d 24, 30 (Ala. Ct. App. 2007) ("[The Alabama statute] provides that 'joint legal custody' confers upon the custodians equal rights and responsibilities for major decisions regarding the education of the child. [The statute] further provides, however, that '[t]he court may designate one parent to have sole power to make certain decisions while both parents retain equal rights and responsibilities for other decisions.' [It] states that when a trial court implements joint custody based on an agreement of the parties, 'the court shall require the parents to submit, as part of their agreement, provisions covering matters relevant to the care and custody of the child, including, but not limited to . . . [t]he care and education of the child.' In the event the parties cannot agree, 'the court shall set the plan.'" (citations omitted)).

31. Susan Vivian Mangold, *Extending Non-Exclusive Parenting and the Right to Protection for Older Foster Children: Creating Third Options in Permanency Planning*, 48 BUFF. L. REV. 835, 835 (2000).

32. *See* BLACK'S LAW DICTIONARY 1114 (6th ed. 1990) ("[*Parens patriae*] refers traditionally to role of the state as sovereign and guardian of persons under legal disability, such as juveniles or the insane . . . and in child custody determinations, when acting on behalf of the state to protect the interests of the child. It is the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents."). For the distinction between *parens patriae* and *loco parentis* in the foster care system, see Jennifer Sapp, Note, *Aging Out of Foster Care: Enforcing the Independent Living Program*

Specifically, “neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth’s well being, the state as *parens patriae* may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor and in many other ways.”<sup>33</sup> The *parens patriae* concept is therefore used to justify state intervention, including foster care, in family matters to protect minors.<sup>34</sup>

It is possible, although difficult, for a person to lose all parental rights—not just those relating to education. Most often, parental rights are terminated because of parental abandonment, severe abuse, or permanent neglect.<sup>35</sup> In every case, however, courts justifiably treat the termination of parental rights very seriously, often doing so only when no alternative is available<sup>36</sup> and pursuant to constitutional and statutory requirements.<sup>37</sup>

In termination of parental rights proceedings, the primary constitutional concern is the due process rights of parents who are at risk of losing their parental rights. Therefore, child abuse or neglect adjudications and hearings, which place the child in the court’s

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*Through Contract Liability*, 29 CARDOZO L. REV. 2861, 2879 nn.108–09 (2008). Specifically, *parens patriae* was “used to describe the power of the state to act in *loco parentis* for the purpose of protecting the property interests and the person of the child.” *In re Gault et al.*, 387 U.S. 1, 16 (1967). Both doctrines are intended to protect children: “Within the framework of *parens patriae* (the protector of subjects unable to protect themselves) and *loco parentis* (the power to stand in the place of the parents), the state has the authority to act in the best interest of and for the protection of children.” Honore M. Hughes & Michele Marshall, *Advocacy for Children of Battered Women*, in ENDING THE CYCLE OF VIOLENCE: COMMUNITY RESPONSES TO CHILDREN OF BATTERED WOMEN 121, 171 (Einat Peled et al. eds., 1995).

33. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); see also J. Bart McMahon, Note, *An Examination of the Non-Custodial Parent’s Right to Influence and Direct the Child’s Education: What Happens When the Custodial Parent Wants to Home Educate the Child*, 33 U. LOUISVILLE J. FAM. L. 723, 732–35 (1995) (discussing the compelling state interest in establishing minimal educational requirements).

34. “In foster care, the *state as parens patriae* is acting as a parent for a child whose family ties have been—temporarily, it is hoped—disrupted.” Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 507 n.192 (1983).

35. See Neal, *supra* note 1, at 66 (“Termination of parental rights is usually based on parental abandonment, neglect, or mistreatment.”).

36. See, e.g., *N.H. v. J.H.*, 571 So. 2d 1130, 1133 (Ala. Ct. App. 1990) (“[T]he court must consider and reject all other viable alternatives to termination of parental rights so that it can conclude that termination is the child’s best interest.”); *In re L.V.*, 482 N.W.2d 250, 253 (Neb. 1992) (noting termination of parental rights may only occur in the “absence of any reasonable alternative and as the last resort” (quoting *In re T.C.*, 409 N.W.2d 607, 609 (Neb. 1987))).

37. See, e.g., *Dep’t of Human Servs. v. Compton (In re H.R.C.)*, 781 N.W.2d 105, 113 (Mich. Ct. App. 2009) (determining, as a violation of parents’ due process, that a trial court may not conduct unrecorded *in camera* interviews of the minor children when considering whether termination is in their best interests).

jurisdiction, almost always, if not always, precede termination hearings.<sup>38</sup> Furthermore, the Supreme Court has held that in a termination of parental rights proceeding, “[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.”<sup>39</sup>

Therefore, parental rights are constitutionally protected, including those related to the determination of educational decisions for children. However, these protections occasionally undermine the important public policy goal of ensuring that children receive their educational requirements. The federal Individuals with Disabilities Education Act addresses parents’ special education decision-making rights and their children’s educational needs, and is considered next.<sup>40</sup>

### *B. The Federal Individuals with Disabilities Education Act*

Recognizing the importance of special education for all children, Congress passed the Education for All Handicapped Children Act in 1975.<sup>41</sup> This law is currently enacted as the Individuals with Disabilities Education Act (IDEA).<sup>42</sup> The IDEA provides states funding “to improve early intervention, special education, and related services provided to infants, toddlers, children, and youths with disabilities.”<sup>43</sup> The purpose of the law includes ensuring that each child

38. See Neal, *supra* note 1, at 66 (explaining that a hearing, held to determine that a child has been abandoned, abused, or neglected, and placement of the child under the jurisdiction of a court generally precedes a termination hearing).

39. Santosky v. Kramer, 455 U.S. 745, 747–48 (1982). Neal explains:

[Termination] means that the parent no longer has a right to participate in the life of the child in any way unless the person or agency to whom custody of the child has been granted gives permission for the child to see the parent or have the parent be a part of the child’s life.

Neal, *supra* note 1, at 66–67. In other words, “the parent becomes ‘a legal stranger to the child.’” *Lowe v. Richmond Dep’t of Pub. Welfare*, 343 S.E.2d 70, 72 (Va. 1986) (quoting *Shank v. Dep’t of Soc. Servs.*, 230 S.E.2d 454, 457 (Va. 1976)).

40. See *infra* Part II.B (discussing the impact of the Individuals with Disabilities Education Act on special education with respect to the children and parents).

41. See U.S. DEP’T OF EDUC., SPECIAL EDUC. & REHABILITATIVE SERVS., A 25 YEAR HISTORY OF THE IDEA, <http://www2.ed.gov/policy/speced/leg/idea/history.html> (last modified July 19, 2007) (noting that Congress recognized that more than one million children with disabilities were entirely excluded from the educational system, and that more than half of all children with disabilities had only limited access and were therefore denied an appropriate education).

42. See *id.* (noting that the Education for All Handicapped Children Act was amended and renamed the Individuals with Disabilities Act (IDEA) in 1990).

43. Jennifer A. Knox, Comment, *The IDEA Amendments of 1997 and the Private Schools Provision: Seeking Improved Special Education, But Serving Only A Select Few*, 49 CATH. U. L.

with special needs receives a free appropriate public education specifically designed to meet those individual needs, while ensuring that the rights of such children and their parents are protected.<sup>44</sup>

Congress also recognized the importance of providing parents with meaningful opportunities to participate in their children's education.<sup>45</sup> While the IDEA requires state or local educational agencies to identify and seek to evaluate all school-age children with suspected disabilities to determine their eligibility for special educational support,<sup>46</sup> the law also requires parental consent before such evaluations may take place.

Specifically, the IDEA requires state or local educational agencies to obtain parental consent at two points: before a child's initial evaluation to determine eligibility for special education,<sup>47</sup> and again before the child is provided special education services.<sup>48</sup> Consent for an initial evaluation does not constitute consent for the provision of special education services.<sup>49</sup> Thus, parents may consent to the initial evaluation of their children and later refuse consent to their children's receipt of special education services. Alternatively, parents may consent to the evaluation and special education services, or refuse consent altogether. In addition, parents may withdraw consent for special education

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REV. 201, 204 (1999); *see also* Brandy Miller, Note, *Falling Between the Cracks: Why Foster Children Are Not Receiving Appropriate Special Education Services*, 5 WHITTIER J. CHILD & FAM. ADVOC. 547, 550 (2006) (explaining that the IDEA provides federal funding for all public school children with emotional and learning disabilities as well as physical disabilities, including visual, speech, and hearing impairments).

44. 20 U.S.C.S. § 1400(d)(1)(A)–(B) (LexisNexis 2005). Notably, states are not mandated to ensure the educational success of special needs children; rather, states must provide procedural mechanisms whereby such students may access free appropriate public education. *See* Godsoe, *supra* note 9, at 93 (“Schools are not . . . responsible for maximizing the educational outcomes of exceptional children. The Supreme Court has made it clear that satisfaction of a child's special education right is met by minimum equality of access, rather than by facilitating equality of outcomes or educational potential. Thus, compliance with special education mandates is often focused on meeting procedural requirements as opposed to outcome goals.” (footnote omitted)).

45. *See generally* 20 U.S.C.S. § 1400(c)(5)(B). The education of children with disabilities can be improved by “strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children . . .” *Id.*

46. *Id.* § 1412(a)(3).

47. *Id.* § 1414(a)(1)(D)(i)(I) (“The [state or local] agency proposing to conduct an initial evaluation to determine if the child qualifies as a child with a disability . . . shall obtain informed consent from the parent of such child before conducting the evaluation.”).

48. *Id.* § 1414(a)(1)(D)(i)(II) (“The [state or local] agency that is responsible for making a free appropriate public education available to a child with a disability under this subchapter shall seek to obtain informed consent from the parent of such child before providing special education and related services to the child.”).

49. *Id.* § 1414(a)(1)(D)(i)(I); 34 C.F.R. § 300.300(a)(ii) (2008).

services at any time and may place their children back in the general education setting.<sup>50</sup>

For a subset of foster children whose parents' rights have been terminated or whose parents' identities or whereabouts are unknown,<sup>51</sup> the IDEA provides alternate consent procedures.<sup>52</sup> While state or local educational agencies are still required to make "reasonable efforts" to obtain parental consent, the failure to obtain such consent is not an absolute bar to special education eligibility testing or services for this specific subset of foster children.<sup>53</sup>

Rather, someone other than the birth parent may serve as a special education decision maker for foster children when the parents' rights have been terminated or their identities or whereabouts are unknown, provided that he or she comes within the IDEA's broad definition of "parent."<sup>54</sup> If more than one person in the child's life meets the IDEA definition of "parent," the child's birth or adoptive parent is given precedence, and is presumed to have legal authority to make educational decisions for the child, unless that person no longer has that legal authority.<sup>55</sup> If a foster child<sup>56</sup> has no IDEA parent<sup>57</sup> or the parents' whereabouts are unknown, a surrogate parent may serve as the child's

50. See 34 C.F.R. § 300.300(b)(4)(i) (providing that the state or local educational agency may not continue to provide special education services to the child "[i]f, at any time subsequent to the initial provision of special education . . . services, the parent of a child revokes consent in writing for the continued provision of special education . . . services").

51. 20 U.S.C.A. § 1414(a)(1)(D)(iii)(II)(aa)–(bb) (West 2005).

52. These alternate consent procedures may also apply in states that include foster children in the statutory class "ward[s] of the state." *Id.* § 1401(36) ("The term 'ward of the State' means a child who, as determined by the State where the child resides, is a foster child, is a ward of the State, or is in the custody of a public child welfare agency.").

53. See *id.* § 1414(a)(1)(D)(iii)(I) (stating that "reasonable efforts" must be made to obtain informed consent from the parent of a foster child). The statute, however, does not clarify what constitutes "reasonable efforts." *Id.*

54. The IDEA definition of "parent" includes "natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent)," "guardian (but not the State if the child is a ward of the State)," a relative "acting in the place of a natural or adoptive parent," and a "surrogate parent." *Id.* § 1401(23)(A)–(D). Notably, Congress has deferred to the states to determine whether foster parents should have the authority to make special education decisions for foster children in their care. *Id.* § 1401(23)(A).

55. See *id.* § 1414(a)(1)(D)(iii)(I–II) (establishing that informed consent must be obtained from the parent of a child unless the parent's whereabouts are unknown or the State has terminated the parent's right to give informed consent).

56. See *supra* note 52 and accompanying text (explaining that the IDEA alternate consent procedures may also apply in states that include foster children in the statutory class "ward[s] of the state").

57. This includes children whose parents' rights over them have been terminated. See *supra* notes 54–55 and accompanying text (providing the IDEA definition of "parent").

special education decision maker.<sup>58</sup> States or local educational authorities have the duty to ensure that surrogate parents are assigned to such children.<sup>59</sup> Alternatively, a family court or juvenile judge may appoint a surrogate parent to the foster child.<sup>60</sup>

In summary, parental consent is necessary for special education evaluations and services, even for foster children whose parents' rights have been terminated or whose parents' identities or whereabouts are unknown. However, because the IDEA definition of "parent" is so broad, other individuals in the child's life, including relatives, foster parents, or surrogate parents, may serve as special education decision makers for this subset of foster children whose parents' rights have been terminated or whose parents' whereabouts are unknown.

On the other hand, for foster children whose parents still have rights over them and whose parents' identities and whereabouts are known, parental consent is generally required for special education evaluations and services. The IDEA gives just three opportunities to override such parents' special education decisions: (1) states may use IDEA's due process mechanisms to override a parent's refusal to consent to an initial evaluation; (2) in cases where a child is a ward of the state and is not residing with the parent, state law may allow a judge to subrogate the parent's right to make educational decisions for a child and appoint someone else to consent for an initial evaluation; and (3) in accordance with state law, a judge may issue a judicial decree or order selecting an educational decision maker from among multiple parties who meet the definition of parent under the IDEA. Each of these options is discussed below.

First, school districts may, to the extent permitted by state law, use the IDEA's due process procedures to override a parent's refusal to consent to special education evaluations, but not services. Specifically, if parents refuse to provide consent for their children's initial

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58. See 20 U.S.C.A. § 1401(23)(D) (defining "parent" to include an individual assigned to be a surrogate parent); 34 C.F.R. § 300.519(a)–(b) (2008) (stating that a public agency has a duty to assign a surrogate parent to protect the rights of a child if no parent can be identified or found, the child is a ward of the State, or the child is an unaccompanied homeless youth).

59. See 34 C.F.R. § 300.519(b) ("The duties of [state or local educational agencies] . . . include the assignment of an individual to act as a surrogate for the parents . . . ."); *id.* § 300.519(a)(1)–(2) (requiring state or local educational agencies to ensure that the children who have no IDEA parent or whose parents' whereabouts are unknown have special education decision makers who can act on their behalf). Under the IDEA, state or local educational authority employees, or anyone with a "personal or professional interest that conflicts with the interest of the child," may not serve as surrogate parents. *Id.* § 300.519(d)(2)(ii).

60. See *id.* § 300.519(c) ("In the case of a child who is a ward of the State, the surrogate parent alternatively may be appointed by the judge overseeing the child's case . . . .").

evaluation, state or local educational agencies may utilize state and federal procedural safeguards to seek an order overriding parents' objections and allowing the evaluation to go forward, but only to the extent that state law permits such action.<sup>61</sup> In contrast, if, after reviewing the evaluations, parents refuse to consent to services, the school district may not use the IDEA's due process procedures to circumvent the parents' decision.<sup>62</sup> A parent's refusal or failure to consent to a child's receipt of special education services is final.<sup>63</sup>

Second, IDEA specifies that parental consent is not required for an initial evaluation in certain limited circumstances. If a child is a ward of the state and is not residing with the parent, IDEA allows school districts to proceed with an initial evaluation of the child without parental consent if: (1) the rights of the parent to make educational decisions have been subrogated by a judge in accordance with state law; and (2) consent for an initial evaluation has been given by an individual appointed by the judge to represent the child.<sup>64</sup> This option is only available if state law allows for "subrogation" of a parent's right to make educational decisions.<sup>65</sup> It also applies only to initial evaluations. Thus, this IDEA provision cannot be used to override a parent's refusal to consent for a re-evaluation or for provision of services.

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61. See 20 U.S.C.A. § 1414(a)(1)(D)(ii)(I) ("If the parent of such child does not provide consent for an initial evaluation . . . the local educational agency may pursue the initial evaluation of the child by utilizing the procedures described in section 1415 of this title, *except to the extent inconsistent with State law* relating to such parental consent.") (emphasis added); see also 34 C.F.R. § 300.300(a)(3)(i) ("If the parent . . . does not provide consent for initial evaluation . . . or the parent fails to respond to a request to provide consent, the public agency may, but is not required to, pursue the initial evaluation of the child by utilizing the [prescribed federal] procedural safeguards . . . except to the extent inconsistent with State law relating to such parental consent.").

In situations where school districts have obtained an order overriding parental objections to initial evaluations, court-appointed child representatives may provide consent for the child's initial evaluation. 20 U.S.C.A. § 1414(a)(1)(D)(iii)(II)(cc). The state may not serve as a "parent" for consent purposes for children who are in foster care. See *id.* § 1401(23)(B) (defining "parent" to exclude the State if the child is a ward of the State).

62. See 20 U.S.C.A. § 1414(a)(1)(D)(ii)(II) ("If the parent of such child refuses to consent to services . . . the local educational agency *shall not provide* special education and related services by utilizing the procedures described in section 1415 of this title." (emphasis added)).

63. The parent's failure to consent to special education services absolves the state of its requirement to make available a free appropriate public education to children with disabilities. See *id.* § 1414(a)(1)(D)(ii)(III) ("If the parent . . . refuses to consent to the receipt of special education and related services, or the parent fails to respond to a request to provide such consent . . . the local educational agency shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child . . .").

64. *Id.* § 1414(a)(1)(D)(iii)(II).

65. *Id.*

Third, to the extent permitted by state law, judges may select an educational decision maker from among the multitude of individuals who may fit the broad definition of “parent” under the IDEA. Normally, when more than one person meets the definition of “parent” under the IDEA, the birth or adoptive parent is given precedence and is presumed to be the parent. A judicial decree or order can override that presumption, even when the parents’ identities and whereabouts are known and their consent would otherwise be necessary.<sup>66</sup> For example, if a child had both a parent and a foster parent, a judge could, if consistent with state law, issue an order appointing the foster parent as the child’s educational decision maker. The person appointed by the judge would have full authority to exercise all parental rights under the IDEA, including the right to consent to both evaluations and services. However, before a judge issues such an order or decree, the IDEA requires that there be a legal finding that the biological parent is not a suitable special education decision maker for the child.<sup>67</sup> Thus, in some states, judges may limit a parent’s right to make special education decisions for the children, but only after the parent has been afforded due process under the law.

In sum, the principles embodied in the IDEA seek to improve the education of children with disabilities. These principles, though, do not exist in a vacuum, but must instead be applied within the states’ legal frameworks, which are considered next.

### *C. State Approaches to Protecting Children’s Educational Interests*

In regard to foster children and the special educational decision-making rights of parents whose whereabouts are known and whose parental rights have not been terminated, California and New York serve as illustrative examples of two opposing approaches. The differences in their approaches, and those among the various states, result from the recognition that although parental rights are constitutionally protected, foster children often find themselves in foster care due to their parents’ neglect or abuse. Occasionally, the reasons

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66. See 34 C.F.R. § 300.30(b)(2) (“If a judicial decree or order identifies a specific person or persons . . . to act as the ‘parent’ of a child or to make educational decisions on behalf of a child, then such person or persons shall be determined to be the ‘parent’ for purposes of this section.”).

67. See Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540, 46,566 (Aug. 14, 2006) (to be codified at 34 C.F.R. pts. 300–01) (stating that biological parents are afforded due process of law in that “judicial orders or decrees would [not] apply *unless* there has already been a determination, through *appropriate legal processes*, that the biological parent should not make educational decisions for the child or that another person has been ordered to serve as the parent” (emphases added)).

for the children's foster care placement may cast doubt on their parents' ability to make proper educational decisions for the children.<sup>68</sup> The states accommodate this reality in different ways, as illustrated by the contrasting approaches of New York and California.

### 1. New York's Approach

Parents in New York enjoy strong protection of their right to direct the education of their children, even after the children are removed from their care and placed in foster care. Specifically, unless the parent<sup>69</sup> cannot be located, his or her identity is unknown, or parental rights have been terminated, parents in New York retain the right to make special education decisions for their children even after the children's placement into foster care.<sup>70</sup> Thus, a parent whose identity and whereabouts are known and whose parental rights remain intact may refuse consent for the child's special education evaluations and services.

Consistent with the framework provided in the IDEA,<sup>71</sup> consent for a foster child's evaluation and services in New York may be obtained from an individual other than the birth parent in certain circumstances. In particular, consent from such individuals is acceptable when birth parents cannot be located, their identity is unknown, or parental rights have been terminated.<sup>72</sup>

In situations where the parents' identities and whereabouts are known and their parental rights to the child have not been terminated, the New

68. *See supra* Part I (discussing that parents may be incapable of making appropriate educational decisions for their children because of mental health, substance abuse, or other life issues).

69. New York's definition of "parent" includes a "birth or adoptive parent," a "legally appointed guardian," relatives "acting in the place of a birth or adoptive parent," and a surrogate parent. 8 N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(ii)(1)(2010).

70. *See id.* § 200.5(b)(6) ("If the [child] is a ward of the State and is not residing with the [child]'s parent, the school district shall make reasonable efforts to obtain the informed consent from the parent.").

71. *See supra* notes 52–59 and accompanying text (explaining how, under certain circumstances, the IDEA allows a "natural, adoptive, or foster parent," "guardian," a relative "acting in the place of a natural or adoptive parent," and/or a "surrogate parent" to provide consent).

72. *See supra* note 69 (providing New York's definition of "parent"). Under New York State regulations, the term "parent" "does not include the State if the student is a ward of the State." Tit. 8, § 200.1(ii)(1). Children in foster care are wards of the State. *See id.* § 200.1(kkk)(1)–(3) (defining "ward of the State" as a child under the age of twenty-one who has been placed or remanded, freed for adoption, who is in custody of the Commissioner of Social Services or the Office of Children and Family Services, or who is a destitute child).

York state regulations are consistent with the IDEA in that they provide the same three exceptions to the consent rules.<sup>73</sup>

In practice, however, these three exceptions are rarely—if ever—invoked in New York. First, the procedures that allow a school district to file a due process hearing request in order to override a parent’s refusal to consent to initial evaluations are permissive, not mandatory.<sup>74</sup> School districts rarely exercise this option, perhaps because of the expense involved in pursuing a hearing and conducting the evaluations. Second, New York state law is silent as to whether a judge may “subrogate” a parent’s right to make educational decisions, or issue a judicial decree or order appointing someone else to make educational decisions for a foster child. Generally, proceedings involving abused and neglected children are governed by the New York State Family Court Act,<sup>75</sup> which does not contain a specific provision authorizing judges to limit a parent’s right to make special educational decisions for children in foster care.<sup>76</sup> Judges in New York lack clear statutory

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73. New York’s adoption of the IDEA’s three consent exceptions are described below:

(1) A judge in New York may permit the school district to override a parent’s objection to the child’s evaluation for special educational eligibility, in accordance with due process. *See* Tit. 8, §§ 200.5(b)(3), 200.5(h)–(k) (enumerating the due process procedures school districts may follow, which may include an impartial due process hearing).

(2) If the child is a ward of the state, such as a foster child, and is not residing with the parent, the school district may proceed with an initial evaluation of the child without parental consent if a judge has subrogated the parent’s rights to make educational decisions for the child and a court-appointed individual has provided the requisite consent. *Id.* § 200.5(b)(6)(iii).

(3) A judge in New York may appoint someone other than the birth or adoptive parent to act as a parent for special education decision-making purposes. *See id.* § 200.1(ii)(4) (“If a judicial decree or order identifies a specific person or persons to act as the parent or make educational decisions on behalf of the student, then such person or persons shall be determined to be the parent for [special education decision-making] purposes . . .”).

74. *See id.* § 200.5(b)(3) (“If the parents of a student with a disability refuse to give consent for an initial evaluation . . . the school district *may*, but is not required to, continue to pursue those evaluations by using the due process procedures described . . .”) (emphasis added).

75. *See* N.Y. FAM. CT. ACT § 1011 (McKinney 2010) (stating that the Act “is designed to establish procedures to help protect children from injury or mistreatment and to help safeguard their . . . well-being”).

76. Similarly, there is no specific statutory authority in New York permitting a judge to subrogate a parent’s rights to direct the medical or dental care of the child while the child is in foster care. While New York authorizes the local commissioner charged with the care of foster children to provide “effective consent for medical, dental, health and hospital services for any child” who is in foster care, *see* N.Y. SOC. SERV. LAW § 383-b (McKinney 2010), the statute offers no guidance on what procedural safeguards, if any, apply when parents object to medical or dental procedures for their children while the children are in foster care, *see id.* (stating that the local commissioner of social services or the local commissioner of health may give effective consent for medical, dental, health, and hospital services for abused or neglected children).

At least one court in New York has intimated that courts may override a parent’s objection, albeit only after a fact-specific inquiry that considers, *inter alia*, the merits of the parent’s

authority to issue orders limiting parental rights to make special educational decisions for children until there has been a full termination of parental rights. Thus, while New York education regulations anticipate situations where it may be appropriate to temporarily restrict the special education decision-making authority of parents whose children are in foster care, New York's Family Court Act does not give judges specific statutory authority to issue such orders. Consequently, when a child is in foster care in New York, the parents' whereabouts are known, and the parents' rights have not been terminated, the parents' refusal to consent to the provision of special education evaluations or services for their child is final. Thus, the three mechanisms that the IDEA provides for overriding parental consent are essentially inoperative in New York.

## 2. California's Approach

California's approach is an important one to consider for several reasons. First, it offers a contrast to New York's approach on this issue. Furthermore, it applies to a substantial number of children—20% of the country's foster care children are residing in that state alone.<sup>77</sup>

California takes a broad approach to addressing the educational needs of all foster children, and not just those with special needs. For example, California state law authorizes juvenile dependency courts to "limit a parent's or guardian's educational rights regardless of whether the child is, or may be eligible for, special education and related services,"<sup>78</sup> as long as such a limitation is in the child's best interests.<sup>79</sup> Furthermore, courts may limit a parent's right to direct the child's

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objection and the state's *parens patriae* interest in overriding the parent's objection. See *In re Martin F. & Desiree L.*, 820 N.Y.S.2d 759, 773 (Fam. Ct. 2006). In *Martin F.*, a local commissioner provided consent for the administration of anti-psychotic medication for a three-year-old child in foster care over the objection of the child's mother. *Id.* at 760. The local commissioner posited New York Social Services Law § 383-b authorized the agency to provide such consent. See *id.* at 762. The Monroe County Family Court held that the statute cited "was not intended to authorize the non-emergency use of psycho-tropic drugs on children over parental objection," *id.* at 773, and that the mother and child's constitutional due process rights were violated when the local commissioner overrode the mother's objection without a court order, *id.* at 771–73.

77. Melinda Atkinson, Note, *Aging Out of Foster Care: Towards a Universal Safety Net for Former Foster Care Youth*, 43 HARV. C.R.-C.L. L. REV. 183, 201 (2008).

78. CAL. CT. R. 5.650(a) (2008).

79. See *In re Samuel G.*, 94 Cal. Rptr. 2d 237, 242 (Ct. App. 2009). The court explained that the "fundamental premise of [child] dependency law is to serve the best interests of the dependent child," *id.*, and that "[a]ll educational decisions must be based on the best interests of the child," *id.* at 243 (citations omitted). For an explanation of the "best interests" standard, see *infra* notes 97–98 and accompanying text.

education at any time while the child is in foster care.<sup>80</sup> Courts may limit a parent's right to make educational decisions for the child at any point once the child enters foster care, provided that doing so would be in the child's best interests. These provisions allow California to take advantage of the exceptions to parental consent that are contained within the IDEA. Unlike New York, judges in California are therefore able to issue orders subrogating a parent's right to make educational decisions or appointing another person to act in the parent's place. This is true even of parents whose identities and whereabouts are known, and whose parental rights to the child have not been terminated.

Statutory and procedural safeguards, however, limit the authority of the California courts to curtail or subrogate the parents' right to make educational decisions for their children, even when they are placed in foster care. Specifically, before a court can limit such parental rights, it must make three separate findings: (1) that the state or local educational authority has attempted to find and engage the parent in educational decision making;<sup>81</sup> (2) the parent is "unavailable, unable, or unwilling to exercise educational rights for the child";<sup>82</sup> and (3) that "[t]he child's educational needs cannot be met without the temporary appointment of a responsible adult."<sup>83</sup> In addition, a court-ordered limitation on a parent's right to direct his or her child's education must be clear and specific<sup>84</sup> and "may not exceed those [means] necessary to protect the child."<sup>85</sup> Thus, orders limiting a parent's educational decision-making rights may be temporary.<sup>86</sup> Parents may also appeal from court orders limiting their educational decision-making rights over their children,<sup>87</sup>

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80. See CAL. WELF. & INST. CODE § 319(g)(1) (2008) ("At the initial hearing upon the petition filed . . . or anytime thereafter up until the time the minor is adjudged a dependent child of the court or a finding is made dismissing the petition, the court may temporarily limit the right of the parent or guardian to make educational decisions for the child and temporarily appoint a responsible adult to make educational decisions for the child . . .").

81. *Id.* § 319(g)(1)(B) ("The county [must have] made diligent efforts to locate and secure the participation of the parent or guardian in educational decision making.").

82. *Id.* § 319(g)(1)(A).

83. *Id.* § 319(g)(1)(C).

84. *Id.* § 361(a) ("[T]he court may limit the control to be exercised over the dependent child by any parent or guardian and shall by its order clearly and specifically set forth all those limitations.").

85. *Id.*

86. See *id.* § 361(a)(2) (establishing that the right to make educational decisions for a child may be "fully restored" to a parent or guardian provided the limitation is no longer necessary to protect the child).

87. See, e.g., *In re R.W.*, 91 Cal. Rptr. 3d 785, 791 (Ct. App. 2009). Affirming the lower court's order limiting the mother's educational decision-making rights and issuing a consent order in her stead, the court explained that there was ample evidence of the mother's history of poor "judgment in making decisions affecting R.W.," *id.* at 791–92, and that the "window of

with appellate courts applying the abuse of discretion standard of review.<sup>88</sup>

At the same time it limits a parent's educational rights, the court must also "appoint a responsible adult to make educational decisions for the child" as long as the court-ordered parental decision-making limitations are in place.<sup>89</sup> Also known as an educational representative,<sup>90</sup> this responsible adult, who is court-authorized to make educational decisions for the child,<sup>91</sup> may be the child's relative, foster parent, family friend, mentor, or a Court Appointed Special Advocate (CASA) volunteer.<sup>92</sup> If the court is unable to appoint an educational representative, and the child is in or may be eligible for special education services, the court must refer the child to a local educational agency for appointment of a surrogate parent.<sup>93</sup>

Therefore, California requires that each child in foster care has a readily identifiable educational decision maker who can act on his or her behalf. In addition, courts must have in their records forms clearly indicating who, if someone other than a birth parent, currently holds educational decision-making rights for the foster child.<sup>94</sup>

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opportunity for meaningful therapeutic [educational and mental health] intervention [was] closing" for this troubled 16-year-old child who had been in foster care for seven years, *id.* at 791. The court further explained, "Mother's opposition to the recommendation to place R.W. at a [residential treatment center in Wyoming, away from her home in California] was not in R.W.'s best interest." *Id.* at 792.

88. *See, e.g., id.* at 791 ("We review the juvenile court's order limiting parents' educational rights under an abuse of discretion standard . . . bearing in mind '[t]he focus of dependency proceedings is on the child, not the parent.'" (quoting *In re Hadley B.*, 56 Cal. Rptr. 3d. 234, 237 (Ct. App. 2007))).

89. *See* CAL. WELF. & INST. CODE § 361(a) (describing limitations on parental decision-making rights related to a child's education).

90. *See* CAL. CT. R. 5.650(b) (2008) (stating that upon limiting the right of a parent to make educational decisions for a child, the court may appoint an educational representative for the child).

91. For a list of responsibilities attached to the educational representative role, see *id.* at 5.650(f). Examples of such responsibilities include special education decision making, *id.* at 5.650(f)(1), representing the child in school disciplinary matters, *id.* at 5.650(f)(1)(E), and "[b]eing culturally sensitive to the child," *id.* at 5.650(f)(2)(B).

92. *Id.* at 5.650(c). In the special education context, these educational representatives may be viewed as IDEA "parents" for special education decision-making purposes, with perhaps the exception of a CASA volunteer. See *supra* notes 54–55 and accompanying text for information on who may serve as IDEA "parents" and the rights of such individuals.

93. CAL. CT. R. 5.650(b)(3)(A); see also CAL. GOV'T CODE § 7579.5 (2010) (describing, *inter alia*, the local educational agency's responsibilities in finding surrogate parents, the rights and responsibilities of surrogate parents, and their qualifications).

94. *See* CAL. CT. R. 5.650(b), (d)(3)(a), and (d)(4) (describing the requirements in documenting who will represent the child as the child's surrogate parent).

In sum, where the parents' whereabouts are known and they are still the children's legal parents, New York and California have taken divergent approaches to parents' rights on the education of their children in foster care, particularly in the area of special education. This could be partially explained by differing political cultures and legislative environments. These two illustrative approaches, however, reveal the consequences and implications of each, as well as the benefits of one of the functions of American federalism—experimentation.<sup>95</sup> To fully reap these benefits, though, the lessons from these experiments should be implemented more broadly following an analysis of their problems and implications.

### III. PROBLEMS AND IMPLICATIONS

Problems and implications arise in both the New York and the California approaches, although one approach might favor parental rights over children's educational interests. Given the importance of education, this proposition should be carefully considered through the evaluation of foster children's best interests and the fitness of those available to guard their interests—primarily the parents and the state.

#### A. Foster Children's Educational Interests

Among the most significant aspects of a child's upbringing is education. Yet, the current foster care system does not meet the inherently important educational needs of children. To redress this problem, it is important to determine a child's best interests in regard to education and to protect these interests.<sup>96</sup>

The "best interests of the child" standard has been used as the guiding standard in legal cases involving many children's issues.<sup>97</sup> It requires that paramount consideration be given to the interests of children.<sup>98</sup>

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95. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) ("One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting))).

96. See *infra* notes 97–98 (discussing the "best interests of the child" standard).

97. Very often, courts in both England and the United States rely on the best interests standard in deciding child-related cases. For background on the American best interests standard, see John C. Lore III, *Protecting Abused, Neglected, and Abandoned Children: A Proposal for Provisional Out-of-State Kinship Placements Pursuant to the Interstate Compact on the Placement of Children*, 40 U. MICH. J.L. REFORM 57, 64 n.23 (2006). For background on this principle in England, see Kerry O'Halloran, *THE WELFARE OF THE CHILD* 9–35 (Ashgate 1999).

98. See, e.g., Barbara McLaughlin, Note, *Transracial Adoption in New York State*, 60 ALB. L. REV. 501, 517 (1996) ("[C]ourts have interpreted this 'best interests of the child' standard as

Although the inherent flexibility of the standard has led both sides on any issue to rely on it equally, ultimately the court determines the child's best interests.

When a child's interests conflict with parental rights, the dilemma requires a delicate balancing act.<sup>99</sup> This conflict, however, does not necessarily have to arise in the arena of foster children's education—it is not entirely clear that a constitutional principle guarantees the parental right of education of a child placed in foster care, yielding the two differing approaches in New York and California.<sup>100</sup> Without the countervailing weight of parental rights in the arena of a foster child's education, however, the child's best interests may arguably be considered the determining factor when granting the authority to make decisions regarding the foster child's education.

The proper education of foster children is in their interests not only because education is itself important,<sup>101</sup> but also because the duration of foster care may encompass several years of the child's life.<sup>102</sup> Although the goal of foster care is often reunification with the parent,<sup>103</sup> some foster children are never returned to the custody of their parents.<sup>104</sup> If

placing the interests of the child paramount over any other factor . . .”).

99. See Margaret Ryznar, Note, *Adult Rights as the Achilles' Heel of the Best Interests Standard: Lessons in Family Law from Across the Pond*, 82 NOTRE DAME L. REV. 1649, 1651–59 (2007) (discussing further the potential conflicts between parental rights and children's best interests); see also Barbara Bennett Woodhouse, “*Out of Children's Needs, Children's Rights*”: *The Child's Voice in Defining the Family*, 8 BYU J. PUB. L. 321, 327 (1994) (discussing the tension between parental rights and children's best interests).

100. See *supra* Part II.C (discussing the opposing approaches of New York and California in regard to foster children and the educational decision-making authority of parents whose parental rights have not been terminated).

101. See *supra* notes 4–5 and accompanying text (asserting the importance of education, especially for those children of disadvantaged backgrounds); *infra* note 113 (noting that education contributes to a child's sense of stability); see also, e.g., Gerber & Dicker, *supra* note 5, at 28 (“[A]ppropriate school programming may keep a child out of foster care or prevent placement in a more restrictive foster care setting.”).

102. Krinsky, *supra* note 14, at 542 (“[A]most half of foster children spend at least 2 years in the child welfare system, and nearly 20 percent wait 5 or more years for a safe, permanent family.”). But see Betsy Krebs & Paul Pitcoff, *Reversing the Failure of the Foster Care System*, 27 HARV. WOMEN'S L.J. 357, 358 (2004) (noting that the current multi-billion-dollar foster care system was never intended to raise children, but was instead intended to temporarily protect infants and small children at risk of abuse or neglect).

103. Reunification essentially means returning a foster child to the biological parent(s) or previous principal caretaker(s). See UNIV. OF CHI. CHAPIN HALL CTR. FOR CHILDREN, PERMANENCY AND REUNIFICATION TRENDS IN 25 STATES, <http://aspe.hhs.gov/hsp/fostercare-reunif01/chapter3.htm> (last visited Sept. 7, 2010). State administrators report that reunification is the primary goal for families in the child welfare system. *Id.*

104. Each year, approximately 19,000 youths age out of the foster care system. Krinsky, *supra* note 14, at 542. “Youths who ‘age out’ turn eighteen outside of the custody of their parents and without an alternative permanent placement. In such instances, these youths obtain majority

the period of foster care is especially prolonged in this way, it is important that the foster children have competent guardians of their educational interests, whether it is their birth parents or someone else. On the other hand, when a foster placement is of a more limited duration, the child still benefits by receiving the proper education while in state care.

The current foster care system is not ideal,<sup>105</sup> and an area of great concern is the educational deficits created by the child's placement into the system. As observers note, "[T]hese vulnerable children—who enter foster care already at risk for poor educational outcomes—do not receive the education they need and deserve."<sup>106</sup> Complicating the situation further, many foster care placements are made without regard to the child's educational history and needs.<sup>107</sup>

The lack of proper education for foster children may explain the findings of a University of Wisconsin study that 37% of former foster youth had not yet completed high school by twelve to eighteen months after discharge, while only 9% enrolled in college.<sup>108</sup> Furthermore, "one-quarter to one-third of [foster] youth reported a perceived lack of preparedness in several skill areas," such as managing money, living on

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status via their age, not emancipation." Elisa Poncz, *Rethinking Child Advocacy After Roper v. Simmons: "Kids Are Just Different" and "Kids are Like Adults" Advocacy Strategies*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 273, 320–21 (2008). These youths generally do not fare well in society. See, e.g., *id.* at 321 (noting that very few youths finish school, and many end up pregnant, in jail, or dead). The other methods of leaving foster care include either reunification with the biological family or adoption. Mangold, *supra* note 31, at 837.

105. See, e.g., Kelsi Brown Corkran, *Principal-Agent Obstacles to Foster Care Contracting*, 2 J.L. ECON. & POL'Y 29, 29 (2006) ("By all accounts, America's foster care system is a mess."); Cheryl Hanna, *Bad Girls and Good Sports: Some Reflections on Violent Female Juvenile Delinquents, Title IX & The Promise of Girl Power*, 27 HASTINGS CONST. L.Q. 667, 686 (2000) ("One counselor suggested to me that many of the girls who have been in foster care have had very bad experiences with their foster mothers."); Clare Huntington, *Mutual Dependency in Child Welfare*, 82 NOTRE DAME L. REV. 1485, 1489 (2007) ("The child welfare system is in serious disrepair."); Jill Sheldon, Note, *50,000 Children are Waiting: Permanency, Planning and Termination of Parental Rights under the Adoption Assistance and Child Welfare Act of 1980*, 17 B.C. THIRD WORLD L.J. 73, 74 n.7 (1999) ("Foster care, originally intended to be a temporary solution, has become a financial burden on the states and federal government, as well as an emotional nightmare for children continuing to drift from one temporary home to another.").

106. Gerber & Dicker, *supra* note 5, at 1.

107. *Id.* at 2.

108. Karen Gievers, *Listening to Silenced Voices: Examining Potential Liability of State and Private Agencies for Child Support Enforcement Violations*, 25 NOVA L. REV. 693, 715 (2001).

one's own, and parenting.<sup>109</sup> Only half of post-foster care youth were employed twelve to eighteen months after leaving foster care.<sup>110</sup>

The educational deficits for foster children, however, could be alleviated by a better approach to these issues. It is undeniable, of course, that a youth's placement in foster care is traumatic.<sup>111</sup> The attendant instability and uncertainty will no doubt impact a child's ability to focus academically.<sup>112</sup> However, the problems inherent in foster care placement may be eased if foster children's interests, including their educational interests, are carefully guarded in every step of the foster process.<sup>113</sup> Before these interests can be implemented, however, they must first be determined.

Most importantly, the educational interests of foster children entail receiving special education if and when needed.<sup>114</sup> To deny foster children these special services may be harmful.<sup>115</sup> Therefore, foster children's educational interests require careful attention to their

109. *Id.* (citing Mark E. Courtney & Irving Piliavin, Inst. for Research on Poverty, Univ. of Wis.-Madison, *Foster Youth Transitions to Adulthood: Outcomes 12 to 18 Months After Leaving Out-of-Home Care* (July 1998 (rev. Aug. 2008))).

110. *Id.*

111. *See, e.g.*, Atkinson, *supra* note 77, at 183 ("By definition, foster care youths have experienced trauma."); Krinsky, *supra* note 14, at 541 ("Over time, these youngsters find themselves separated not simply from their biological parents, but also from siblings and every other anchor in their young lives. And in many cases, more is done to traumatize than to heal these children."); Catherine J. Ross, *A Place at the Table: Creating Presence and Voice for Teenagers in Dependency Proceedings*, 6 NEV. L.J. 1362, 1368 (2006) (noting that foster care placement in itself can have a traumatic effect).

112. Gerber & Dicker, *supra* note 5, at 9–10.

113. *See also* Godsoe, *supra* note 9, at 146 ("Although a child's safety, stability, and ties to siblings are extremely important, her educational needs are integrally tied to such stability and must be considered as well.").

114. "Foster children often have mental and physical health problems that require medical treatment, and many need special education services." Corkran, *supra* note 105, at 32. As Gerber and Dicker discuss,

Children enter foster care with a broad variety of gifts and needs and, like other children, benefit from the full array of school services, ranging from programs for the academically gifted to those for the severely challenged. Appropriate school services not only enhance the education of foster children, but may also affect child welfare and judicial decisions regarding foster care placement.

*Supra* note 5, at 28. Godsoe adds,

Children in out-of-home care are particularly likely to have certain disabilities qualifying for special education including mental retardation—eighteen percent versus the one to two percent rate among all children—and severe emotional disability—thirteen to sixty-six percent versus the incidence rate of two to five percent among all children.

*Supra* note 9, at 99–100.

115. *See, e.g.*, Godsoe, *supra* note 9, at 100 (discussing the harms of under-identifying foster children in need of special education services).

educational needs and entitlements under federal law, which may include special needs education—as is often the case among foster youth.<sup>116</sup> Foster children’s educational interests also require flexibility in addressing the special circumstances of their position.

In sum, flexibility and attention to special needs are in the educational interests of children. These, of course, must be balanced with the best interests of children in having their family connections maintained in most cases. The question is, however, who are the best guardians to ensure this type of protection of foster children’s educational interests.

### *B. The Proper Guardians of Foster Children’s Educational Interests*

The proper guardians of foster children’s educational interests are those who can protect such interests. Such a determination hinges, in great part, on the fitness of the parties available to make the decisions, which primarily consist of the parents, as well as the state, and through it, the foster parents.<sup>117</sup> Each will be considered in turn.

Parents’ fundamental stake in their children’s education is essential. Not only does it protect the parental desire to rear children without governmental intervention, but it also advances society’s interest in parents’ acceptance of responsibility for their children’s education, given the undeniably high financial and nonfinancial resources required to raise and educate a child.<sup>118</sup> Parental rights are therefore best classified as obligations coupled with privileges.<sup>119</sup> “The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”<sup>120</sup>

In a world of fit parents, there would be no quibble with these principles. As Justice O’Connor underscored, there is, in fact, an

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116. See, e.g., *supra* notes 7, 114, and accompanying text (noting that nearly half a million children are in foster care, more than half of which receive special education services).

117. “[A] foster family . . . has its source in state law and contractual arrangements.” *Smith v. Org. of Foster Families for Equal. Reform*, 431 U.S. 816, 845 (1977); see also *id.* (noting the state’s presence in the entirety of the foster care relationship); *id.* at 846 (noting a tension between the rights of biological and foster parents that is “virtually unavoidable”). But see *Godsoe, supra* note 9, at 139–43 (asserting that children can often be their own advocates).

118. The average expenditures per child in a middle-income, husband-wife American family was \$221,190 in 2008, versus \$183,509 (in 2008 dollars) in 1960. U.S. DEP’T OF AGRIC., PUB. NO. 1528, EXPENDITURES ON CHILDREN BY FAMILIES, 2008, at 23 (2008), available at <http://www.cnpp.usda.gov/Publications/CRC/crc2008.pdf>.

119. See, e.g., *In re Lisa H.*, 589 A.2d 1004, 1006 (N.H. 1991) (“[A] parent’s authority is not only a natural and essential right which is prior to the State itself, it is an obligation.”).

120. *Pierce v. Soc’y of the Sisters*, 268 U.S. 510, 535 (1925).

uncontroversial presumption that fit parents generally act in their children's best interests.<sup>121</sup> The problem, however, is that not all parents are equally fit. Even those who are unfit are unequally so.

Of course, it is difficult to find the proper balance between permitting overly frequent governmental intervention in unfit families and failing to intervene when intervention is needed.<sup>122</sup> However, it is possible to vary the level of governmental intervention by adjusting the procedures mandated in government intervention in family, such as raising or lowering the burden of proof for intervention, requiring or not requiring lawyers to participate, extending or restricting the relevant proceedings, and narrowing or broadening the definition of child abuse.<sup>123</sup>

Furthermore, to permit the preservation of a child's family whenever possible, it is necessary to divide child welfare intervention into two stages: the first being foster care, which amounts to a temporary intervention, and the second being the permanent termination of parental rights.<sup>124</sup> This two-stage intervention stems from the recognition that it is not ideal to permanently terminate familial ties and parental rights to a child when the family's troubles are temporary or capable of resolution.<sup>125</sup>

By definition, parental rights are entirely terminated at the second stage.<sup>126</sup> While they are not at the first stage—when the child is placed in foster care often with the goal of reunification with the parents—even this justifiable government intervention suggests the unfitness of the parents at that particular time.<sup>127</sup> In fact, foster placement, in some

121. See *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (plurality opinion) (highlighting that the State will not question a fit parent's ability to make decisions in the best interest of the parent's child).

122. See, e.g., Krebs & Pitcoff, *supra* note 102, at 357 (discussing the concern that, on the one hand, children are too easily taken from their parents, and on the other hand, vulnerable children are not adequately protected from abusive family members).

123. See CARL E. SCHNEIDER & MARGARET F. BRINIG, AN INVITATION TO FAMILY LAW 1051–1118 (1996) (discussing the intersection of pluralism and family law in the context of conflicts between parental authority to control a child's education and the state's authority to ensure that children achieve some minimal level of education, as well as the intersection in the context of custody or adoption disputes regarding religion, race, and ethnicity).

124. For an example of the circumstances resulting in a child's placement within the jurisdiction of the juvenile court, which may then adjudge that person to be a dependent child of the court, see CAL. WELF. & INST. CODE § 300 (West 2006).

125. But see Naomi R. Cahn, *Welfare Reform and the Juvenile Courts: Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189, 1222 (1999) (arguing for additional child welfare options such as open adoption or longer term foster care placement).

126. See *supra* notes 37, 39, and accompanying text (noting that courts take the termination of parental rights very seriously and do so pursuant to constitutional and statutory requirements).

127. See, e.g., Cristina Chi-Young Chou, *Renewing the Good Intentions of Foster Care*:

cases, may undermine the idea that these parents effectively act according to their child's best interests. As one commentator suggests, although some foster care placements are voluntary,<sup>128</sup> many may be the result of ongoing neglect or abuse of the children by their parents, who often had limited education themselves.<sup>129</sup>

Nonetheless, "the law continues to presume a merger of parental and children's interests when determining parental fitness, even after a child is removed from the home."<sup>130</sup> Furthermore, special education, and much of the educational system, continues to hinge on parental advocacy for the child, even when such advocacy is unavailable. For example, the special education statutory framework on assessment and service provision often initially requires parental consent.<sup>131</sup> The IDEA

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*Enforcement of the Adoption Assistance and Child Welfare Act of 1980 and the Substantive Due Process Right to Safety*, 46 VAND. L. REV. 683, 683 (1993) ("Children enter foster care when their own parents fail them."); Godsoe, *supra* note 9, at 125 ("[P]arental incapacity to care for them is a prerequisite to their placement [in foster care]."). *But see* Marsha B. Freeman, *Lions Among Us: How Our Child Protective Agencies Harm the Children and Destroy the Families They Aim to Help*, 8 J.L. & FAM. STUD. 39, 47 (2006) (noting that many parents who lose their children to foster care are not bad people, but may need help temporarily); Symposium, *The Rights of Parents with Children in Foster Care: Removals Arising from Economic Hardship and the Predictive Power of Race*, 6 N.Y. CITY L. REV. 61, 74 (2003) (statement of Martin Guggenheim) ("There is a shocking presumption generated by fear, by otherness, by a lot of things—that the parents of children in foster care are bad for their children. They don't love them enough or they don't have the ability . . . to raise them well. And I'm here to say that in my 30 years of work in this field, that is the most despicable slander of all, and the most difficult falsity to refute.").

128. *Smith v. Org. of Foster Families for Equal. Reform*, 431 U.S. 816, 824 (1977) (suggesting that a notable proportion of foster care placements are voluntary). As *Smith* articulates:

[Voluntary placements] occur when physical or mental illness, economic problems, or other family crises make it impossible for natural parents, particularly single parents, to provide a stable home life for their children for some limited period. Resort to such placements is almost compelled when it is not possible in such circumstance to place the child with a relative or friend, or to pay for the services of a homemaker or boarding school.

*Id.* at 824–25; *see also id.* at 834 (noting that some voluntary proceedings might occur because of the state's threat of neglect proceedings). Voluntary placement of a child in foster care, however, does not necessarily permit voluntary withdrawal. On the contrary, such a withdrawal often requires the approval of the court or a supervising agency. Kevin M. Ryan, *Stemming the Tide of Foster Care Runaways: A Due Process Perspective*, 42 CATH. U. L. REV. 271, 306–07 (1993).

129. Rebekah Gleason Hope, *Foster Children and the IDEA: The Fox No Longer Guarding the Henhouse?*, 69 LA. L. REV. 349, 360–61 (2009).

130. Godsoe, *supra* note 9, at 125.

131. *Id.* at 84–85 (citing 20 U.S.C.S. § 1414 (LexisNexis 2010)); *see also* 34 C.F.R. § 303.404 (2005) (describing parental consent as a prerequisite for certain action on behalf of a child and detailing the course of action to be followed in the absence of consent).

particularly “relies on parents to enforce the identification and appropriate placement of children with disabilities.”<sup>132</sup>

Yet parents with children in foster care sometimes neglect or refuse to provide consent—even when services are clearly necessary by any standard—and thereby deprive their children of an education tailored to their needs.<sup>133</sup> For example, caseworkers have stated that biological parents, in some circumstances, refuse to sign the proper consent forms for testing or special programs.<sup>134</sup> Of course, parental refusal to provide consent may sometimes be proper if, for example, the school district's service recommendations are inappropriate and do not address the child's specific needs. Nonetheless, “[t]he absence of adult advocates in the educational system for foster children—resulting from a lack of parental support and the prohibitions on other adults, such as child protection workers, filling this role . . . mean[s] that many do not receive the evaluations and referrals that they require.”<sup>135</sup>

According to certain state laws, state or local educational authorities may use the IDEA's due process hearing mechanisms to seek an order overriding a parent's refusal to consent to the child's evaluation for special education eligibility.<sup>136</sup> However, as one observer notes, “[T]he default is often not to evaluate and refer children without parental advocacy, let alone without parental consent.”<sup>137</sup> As a result, foster children sometimes do not have access to special education programs.

There may be benefits, therefore, to either relieving the educational system's reliance on parental consent, or allowing educational guardians to serve as substitutes for parents whose decision-making ability is impaired or otherwise compromised. Given the constitutionally meaningful and protected role of parental autonomy for fit parents,<sup>138</sup> the preferred approach would permit an educational guardian to substitute for parents who are unable to effectively guard the educational interests of their children in foster care. Therefore, although

132. Godsoe, *supra* note 9, at 138.

133. *See, e.g., supra* note 9 and accompanying text (discussing the concern that many foster children's special needs remain unaddressed).

134. Miller, *supra* note 43, at 554.

135. Godsoe, *supra* note 9, at 101.

136. *See supra* note 67 and accompanying text (explaining that the IDEA requires an initial finding through appropriate legal processes that the biological parent of a child is not the suitable person to make educational decisions before another individual is appointed to fill such role).

137. Godsoe, *supra* note 9, at 85 n.13.

138. *See supra* Part II.A (discussing the constitutional protection of the parent-child relationship afforded primarily by the Fourteenth Amendment and Supreme Court decisions reinforcing said protection).

states may not often be the ideal guardian,<sup>139</sup> states might beneficially exercise their *parens patriae*<sup>140</sup> power to limit the educational decision-making authority of parents whose children are in foster care and whose educational decision-making authority may be impaired. In their stead, states may appoint educational guardians who might act more in the children's best interests<sup>141</sup>—as California has done.

Of course, the California law also has the potential to be overused and overly intrusive on parental rights. This can be problematic when, in many cases, it may be in the child's best interests for the parents to remain involved in educational decision making, especially if eliminating parents from the educational decision-making process undermines subsequent efforts at family reunification.

Nonetheless, temporary limitation of parental rights to make special educational decisions and the appointment of educational guardians might be a more flexible way to serve foster children's interests than the current legal structure in states such as New York. To minimize the potential for abuse, and to protect parents' due process rights, the state or local court should conduct a thorough hearing on the issue of whether the parents' educational decision-making ability is impaired or otherwise compromised before it can limit the parents' right to make special educational decisions for the child in foster care.

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139. See Carter Dillard, *Child Welfare and Future Persons*, 43 GA. L. REV. 367, 374 n.21 ("The state makes an extraordinarily bad parent that appears to border on the unfit."); Godsoe, *supra* note 9, at 84 ("Under-funded and overburdened child protection and education systems fail in their mission of adequately overseeing children's healthy development in school and at home."); John Schomberg, *Equity v. Autonomy: The Problems of Private Donations to Public Schools*, 1998 ANN. SURV. AM. L. 143, 145 (1998) ("[E]ducation must fight for tax money against other high-demand public services such as public health, mass transit, and crime prevention.").

140. See *supra* note 32 and accompanying text (noting that the concept of *parens patriae* allows the state to restrict certain parental rights and activities in order to protect the best interests of the child).

141. Although beyond the scope of this Article, there may be financial costs associated not only with the appointment of educational surrogates, but also with the provision of special education for those foster children qualifying for it. Nonetheless, these costs may be offset by the savings associated with producing productive citizens through the foster care system. In the current system, meanwhile, "[c]hildren who have grown up or left foster care fill the nation's jails, mental hospitals and welfare rolls." Jill Chaifetz, *Listening to Foster Children in Accordance with the Law: The Failure to Serve Children in State Care*, 25 N.Y.U. REV. L. & SOC. CHANGE 1, 8 (1999). This is true even though the United States already spends billions of dollars on the foster care system every year. See, e.g., Jim Moye & Roberta Rinker, Essay, *It's a Hard Knock Life: Does the Adoption and Safe Families Act of 1997 Adequately Address Problems in the Child Welfare System?*, 39 HARV. J. ON LEGIS. 375, 377 (2002) ("Of the 581,000 foster children, 55% are supported through federal funds. The total cost to administer the foster care system in America is over \$7 billion a year.").

Of course, the specific appointment of an educational decision-making authority on behalf of foster children may vary. Although foster parents may be given more rights in the education of foster children,<sup>142</sup> states may prefer to appoint independent educational surrogates, especially if the children must move between foster homes. Furthermore, independent educational decision makers might better be able to specialize in learning and addressing foster children's educational needs. Nonetheless, it is true that children's best interests are more complicated than just their educational interests, which would otherwise be uniformly aided by the expertise of an independent educational specialist. However, whoever the guardian of a foster child's educational interests, whether a parent or not, this guardian must clearly understand the imposed duty to advocate for the child in the educational setting. The proactive consideration of children's education and the appointment of an educational guardian will, at the very least, underscore for parents, foster parents, and others the importance of guarding children's educational interests.<sup>143</sup> In the meantime, however, such attention to foster children's education continues to be lacking,<sup>144</sup> though California's model does offer guidance for the resolution of some of these issues.

#### IV. CONCLUSION

The parent-child relationship is constitutionally protected and parents hold a bundle of rights that includes the right to direct the education of their children. Nonetheless, the law permits governmental intervention for a child's welfare—both in the form of the child's temporary placement in foster care and the permanent termination of parental rights. While all parental rights are terminated in the latter situation,

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142. "Several district courts have found a limited liberty interest in the foster family relationship." Godsoe, *supra* note 9, at 128 (citing *Rodrigues v. McLoughlin*, No. 96-CV-1986, 1999 WL 9834 (S.D.N.Y. Jan. 8, 1999); *Brown v. Cnty. of San Joaquin*, 601 F. Supp. 653 (E.D. Cal. 1985); *Rivera v. Marcus*, 533 F. Supp. 203 (D. Conn. 1982)); see Godsoe, *supra* note 9, at 143–46 (discussing the potential for foster parents to play more of an advocacy role for their foster children); see also Gerber & Dicker, *supra* note 5, at 25–26 ("A foster parent serving as the child's 'parent' under the IDEA in special education matters, however, will acquire records access rights under FERPA." (citing 20 U.S.C.A. § 1401(23)(A) (West Supp. 2005))). But see Pitts, *supra* note 1, at 341, 344 (noting that foster parents and employees of government agencies may fear speaking out against the foster care system for fear of repercussions).

143. See also Krebs & Pitcoff, *supra* note 102, at 363 (noting the importance of accustoming foster youth to the aspiration for higher education).

144. "In one study, 65% of foster care youths reported that a parent or guardian had never attended a teacher conference." Atkinson, *supra* note 77, at 192.

parents often, especially in states such as New York, retain many of their parental rights when their children are in foster care.

However, if the educational decision-making ability of parents of foster children is impaired or otherwise compromised, their retention of the right to make educational decisions may be counterproductive to the protection of the educational interests of foster children. For this reason, California has permitted the limitation of parental educational decision-making rights upon a child's entry into foster care, giving the state a mechanism by which to better align children's education with their best interests.

This model, therefore, may offer certain insights for states seeking to better protect and promote the educational interests of foster children. In the meantime, however, scores of foster children across the country will continue to be at risk of failing to realize their educational potential. When foster children fail, so, too, has the foster care system that was designed to protect them.