



***Closing The Education Achievement Gap For Foster Youth --
Education Information Sharing Challenges and Legal Provision***

A. Introduction

It is well settled that the educational progress and attainment of children in foster care is a crucial factor in ensuring that the children our entire community undertakes to “raise” reach their full potential. While a quality education is a key component of every child’s successful transition to adulthood, a sound educational foundation is especially crucial for children who spend long periods of their childhood in foster care.

It is well documented that children residing in foster care have significantly lower educational attainment than similarly situated peers. Studies show that 75% of children in foster care are working below grade level, 35% are in special education, 46% do not complete high school (as compared to 16% of non-foster youth), and as few as 15% attend college.

Perhaps the single most important factor that negatively impacts education outcomes for any child is the lack of school stability. The typical foster child, however, experiences multiple school placements while also seeking to cope with multiple living situations. For many foster children, school is the one place where they might find stability, the one place where they are nurtured and supported by peers and teachers, the one place where they can develop a positive self-image and the one constant in an otherwise chaotic live. There is no doubt that academic success is crucial to every child’s successful transition to adulthood; for foster children it may be their only hope for the future.

Without basic educational skills and competence, these children have little chance of a stable and productive adult life. Not surprisingly the poor educational outcomes of youth in foster care lead to anything but a stable adult future. Within two to four years after emancipation from the foster care system:

- ? 51 % of foster youth are unemployed;
- ? 40 % of foster youth are on public assistance or incarcerated; and
- ? 25% of foster youth become homeless.

More can and should be done to address these disturbing figures and to work toward improved educational outcomes for abused and neglected youth.

B. California Legal Provisions and Problematic Interpretations of California Law Inhibiting Information Sharing

In 2003, the California Legislature passed Assembly Bill AB 490 in order to promote educational achievement through educational stability. This legislation recognized the critical need for all arms of the government to work together to close the education achievement gap experienced by foster youth. In particular, AB 490 clarified that placing agencies may access educational records in order to ensure that they can meet the educational needs of the children placed within their care.

California law expressly recognizes that placing agencies act in the role of the parent for foster youth, and as such, are responsible for tending to the youth's educational needs. California Education Code §49076(a)(11), as amended by AB 490, specifically permits the county placing agency access to educational records. Furthermore, California Education Code § 49077 mandates the release of educational information in compliance with a court order or a lawfully issued subpoena.

Some major school districts (most notably, Los Angeles Unified School District) do not believe that the Department of Children and Family Services is authorized, absent parental consent or court order in each individual case, to receive, review, or otherwise access the educational records of children who fall under the jurisdiction of the juvenile court. Despite California law to the contrary, these school districts have taken the position that state law conflicts with federal law (the Family Educational Rights and Privacy Act -- "FERPA") and is therefore invalid. The Los Angeles Unified School District also is apparently of the view that the Juvenile Court does not have the legal authority to issue a Blanket Order permitting placing agencies access to school records "because a Blanket Order lacks the specificity required under FERPA." These interpretations are directly at odds with policies adapted by various other jurisdictions across the country, including, Fresno, CA; San Diego, CA; Broward County, FL; Seattle, WA; New York, NY; San Luis Obispo, CA; and Sonoma County, CA.

The position that record access and information sharing is prohibited under FERPA causes great detriment to children in foster care by denying placing agencies access to basic and critical information necessary to (1) fulfill their legal obligations to the child and the court; (2) complete the Health and Education Passport; and (3) ensure the children are receiving an adequate education.

Furthermore, school districts often refuse to discuss a child's education with the child's attorney based on the district's belief that such a discussion would be a violation of FERPA. A school district's refusal to release information regarding a child's academics to the child's court-appointed attorney frustrates the attorney's ability to promote the child's best interests and ensure that the child's legal rights are protected. The detriment that children inevitably suffer as a result is evident by the academic achievement gap prevalent among foster youth.

C. Relevant Federal Law

The Federal Educational Rights and Privacy Act (FERPA), passed in 1974, protects the privacy interests of parents and students with regards to students' education records. Generally, FERPA requires states to provide for a parent's right to access their child's education records,

and to keep those records confidential unless the parent consents to the disclosure. Specifically, FERPA specifies the following rights of parents: (1) to not have education records released to third parties without the written consent of the parent; (2) to access and review their child's education records maintained by the school; and (3) to a hearing challenging what is in the student's education record. Specific provisions of FERPA include the following:

20 U.S.C. 1232g(a)(1)(A): Requires educational agencies and institutions to establish procedures for parents to access their child's educational records within 45 days of a request.

20 U.S.C. 1232g(b)(1): Addresses access to school records. This section states that educational records may only be disclosed with parental consent unless one of the enumerated exceptions applies.

20 U.S.C. 1232g(b)(2)(B): States that records may be released "in compliance with judicial order or pursuant to any lawfully issued subpoena, upon condition that parents are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency."

34 CFR Section 99.3 (FERPA Regulations): Defines "parent" as including "a natural parent, a *guardian*, or an *individual acting as a parent in the absence of a parent or a guardian*."

FERPA defines "education records" as those materials maintained by the educational agency or institution, containing personally identifiable information directly related to a student. The following, however, are not included in this definition:

- ✍ Oral information based on personal observation or knowledge and not based on an education record (i.e. observations about a child's behavior);
- ✍ Records solely possessed by the maker, used only as a personal memory aid and not accessible or revealed to any other person except a temporary substitute for the maker of the record; and
- ✍ Records of the law enforcement unit of an educational agency or institution.

D. Interpreting FERPA

Many believe that child welfare departments qualify as a "parent" under FERPA as either a "guardian" or "an individual acting as a parent in the absence of a parent or a guardian" and are therefore entitled to access school records. The terms "guardian" and "individual acting as parent in absence of apparent or a guardian" are not further defined within the FERPA regulations. Because the placing agency is generally responsible for ensuring that a foster child's needs are met once the child is under the jurisdiction of the Juvenile Court, it is reasonable to conclude that the placing agency qualifies as "guardian." In addition, it is significant that the Individuals with Disability Education Act (IDEA) Regulations specifically

state that “the state” (i.e. placing agency and/or court) does not qualify as “guardian” for the purposes of IDEA [34 C.F.R. §300.20(a)], while FERPA has no such limitation.

Limiting “guardian” to non-state entities/individuals under IDEA may serve public policy since the state’s interests may at times conflict with a disabled child’s interests with respect to the child’s Individualized Education Program. However, the public policy being promoted by limiting the state’s ability to serve as guardian for the purposes of IDEA is not an issue under FERPA. Instead, public policy is best-served by including the state (i.e. social services) within the definition of “guardian” under FERPA and ensuring that the entity responsible for caring for a child is able to access records and meet the child’s educational needs. The fact that the IDEA regulations specifically prohibit “guardian” from including “the state,” while the FERPA regulation does not contain such a prohibition is therefore significant.

Interestingly, the New York City Board of Education Regulations specifically state that for purposes of records access, the definition of “parent” includes “an individual acting as a parent in the absence of a parent or guardian, *including the representative of a foster care agency*, who provides ongoing custodial care.” New York City Board of Education, Regulations of the Chancellor, A-820 III (D) – (Student Records: Confidentiality, Access, Disclosure and Retention).

The issue as to whether *foster parents* qualify as a “parent” under FERPA was addressed in the final rules implementing FERPA (34 CFR Part 99) published in the federal register on 11-21-1996 (61 FR 59292-01). That regulatory language provides further support for an expansive interpretation of the concept of “parent” under FERPA. In response to a concern regarding foster parent access to educational records, the federal Department of Education responded “The regulations already define the term parent in §99.3 to include ‘a parent of a student and includes a natural parent. A guardian, or an individual acting as a parent in the absence of a parent or a guardian.’ Thus, foster parents who are acting as a child’s parent would have the rights afforded parents under FERPA with respect to that child’s education records.” (61 FR 59294). Common sense would dictate that if a foster parent may access a child’s educational records pursuant to FERPA, the social worker ultimately responsible for ensuring the child’s needs are met would qualify under this provision as “an individual acting as a parent in the absence of a parent or guardian.”

A scan of MOUs nationwide between school districts and placing agencies/child welfare suggests that there are many school districts and placing agencies who interpret FERPA as allowing release of educational records to Children’s Services when the child is under the jurisdiction of the court (*see* Fresno County, CA; Broward County, FL; Seattle, WA; New York City, NY). Obtaining copies of education records is critical to ensure that a youth’s educational history is appropriately documented and the child’s educational needs are understood and accommodated. With the high mobility rates for youth in foster care, making sure that documentation from each school and each course completed (or even partially completed) is critical to helping that youth successfully complete school.

E. Possible FERPA Clarification

If headway cannot be made with those school districts that continue to view FERPA as a barrier to the sharing of educational records with child welfare professionals, the court, and child

advocates, there may be a need to amend FERPA to clarify its intent. Such an amendment could include adding three provisions to 20 U.S.C. 1232g(b)(1), the section that addresses the exceptions to the parental consent requirement for the release of educational records:

- ✍ Court-appointed attorneys, advocates, and/or Guardian ad Litem (GAL);
- ✍ The Juvenile Court presiding over a child’s dependency and/or delinquency proceedings; and
- ✍ Clarify that county placing agencies qualify as a “parent” under FERPA and may therefore access records for the purpose of fulfilling educational case management responsibilities required by the juvenile court or by law and to assist with meeting the educational needs of the child. Any FERPA language would need to make clear that the placing agency is acting in a parental role and is therefore not subject to the prohibition against re-disclosure.

F. Conclusion

Fifty years ago, in the landmark decision of *Brown v. Beard of Education*, 347 U.S. 483 (1954), the Supreme Court underscored the critical role that education plays in crafting a successful adult path. The court explained, “It is doubtful that any child may reasonably be expected to achieve in life if he is denied the opportunity of an education.” For youth in our foster-care system, who too often have no anchor, no mentor and no dependable family ties, a solid and stable education is that much more essential.

Through collaboration and the renewed commitment of all parts of our community, we can break the ongoing cycle of abuse, neglect and despair and raise an educated generation ready to face the future with confidence.