CHILDREN'S RIGHTS

CHILDREN'S RIGHTS LITIGATION COMMITTEE AMERICAN BAR ASSOCIATION

A STATE COURT REMEDY FOR THE *KEFFELER* PROBLEM: A CALL TO ACTION by Lewis Pitts

State foster care agencies taking Social Security Benefits (SSB) from foster children epitomizes the institutional immorality faced by children throughout our nation. There is a common practice around the nation of state or local foster care agencies, often called Child Protective Services (CPS) serving as payee for foster children and pocketing some or all of the child's Social Security Benefits (SSB) as reimbursement for costs of care. In 2003 the Supreme Court ruled that CPS could take a foster child's SSB to pay for the cost of foster care (*Washington State Dept. of Social and Health Servs. v.Guardianship Estate of Keffeler,* 537 U.S. 371 (2003)).

However, a recent unanimous decision by the North Carolina Court of Appeals upheld a trial judge's order barring the taking of SSB for a particular foster child (*In Re John G.*, 652 S.E. 2d 266 (2007)). It appears this is the first decision in favor of a foster child seeking to halt the pocketing of SSB by the institutional payee since *Keffeler* held the practice did not violate the Social Security Act. The decision and surrounding media attention illustrates that we can and should expose, attack and end this practice. What is argued below can have simultaneous multiple effects: stopping the taking of SSB from foster children, generating a public demand for full funding for children's services, and sparking the beliefs and actions that are consistent and necessary for democratic self-government at this time of crisis in every child welfare sphere. Frederick Douglass, former slave and great orator and

(continued on page 3)

Educational Decision Makers: What to do when their identity is not clear?

By Mara Q. Berke and Lauren B. Giardina

The process of advocating for an appropriate educational program for a child who has a disability typically is daunting for parents and guardians. When evaluating their child's academic history and needs, most parents do not know where to begin. While the process is complex in any situation, it becomes more complex when the identities of legal guardians or educational rights holders are unclear. This is particularly true when advocating for a child whose parents have an adversarial custody arrangement, the child is a ward of the state, or the child does not reside with his or her legal parent. In situations such as these, before any legal advocacy begins, it is important to determine the roles of each party, and identify who holds educational rights and who is the proper decision maker.

(continued on page 11)

In This Issue

Educational Decision Makers (continued from page 1)

Access to Educational Records

When advocating for an appropriate educational program for any child, the first step always should be to examine the child's educational records. This will enable the advocate to determine the child's educational history, needs, and any gaps in the program that may have an impact on the child. Federal law mandates that the educational records must be available to parents and guardians for review. The Federal Education Rights and Privacy Act ("FERPA") specifically mandates that no federal funds shall be provided to programs that deny a parent (or legal guardian) rights to his child's educational file (*20 U.S.C. §1232g*). FERPA further prohibits educational agencies from sharing such confidential information with any person without full consent of the parent, guardian, or child (*Id.*). FERPA is important for two reasons. It will assist any parent or guardian in ensuring that his or her child's educational file is available for review, which is significant during the advocacy process. However, it also ensures that a person who does not have legal educational rights cannot access those records. Thus if the child is in foster care, or has a custody agreement excluding one of the parents as an educational rights holder, it will be (or should be) impossible for a parent or guardian who has not been given educational decision-making rights to review those records. Further, this situation may impact the legal advocate's ability to access the child's records.

The statute that controls the special education rights of children who have disabilities is the Individuals with Disabilities in Education and Improvement Act ("IDEA") (*20 U.S.C. §1412, et. seq.*). The IDEA has a requirement similar to FERPA that parents or guardians of a child eligible for special education must have the opportunity to "examine all records relating to such child…" (*20 U.S.C. §1415(b)(1)*). The accompanying regulations further define access rights by including the right for a parent's representative to examine all records. Thus, a child's attorney may access the records with parental permission (*34 C.F.R. §300.613, 34 C.F.R. §300.501*). The law also presumes that a parent has legal authority to inspect the records unless the educational agency has been advised otherwise (*Id.*). Therefore, it is possible that an education agency may unknowingly provide access to a child's educational file to a person who does not have educational decision-making rights (such as a biological parent who does not hold legal custody of a child) if the agency has not been informed of the child's current custodial arrangement.

In the case where the child is in the foster care system and his parentage or educational rights holder is unknown, "such surrogate may alternatively be appointed by the judge overseeing the child's care…" (*20 U.S.C. §1415(b)(2)(A)(i)*). If you are advocating for a child who is in foster care, it is imperative that such a surrogate be in place to request and obtain the child's educational file.

Federal law stresses the availability of these records by limiting the amount of time in which they must be provided and their cost. The regulations require that these records be provided within a reasonable amount of time, but in no case more than 45 days from the request (*34 C.F.R. §300.613*). Each state may have its own requirement for the length of time in which the records must be provided. For example, in California, the education code requires that these records must be provided within five business days of a written request. Further, while an educational agency may charge a fee for those records, that fee cannot be such that it "effectively prevent[s] parents from exercising their right to inspect and review those records" (*34 C.F.R. §300.617*). The child's district should have a fee waiver application to allow a low income child to access his records.

The accompanying regulations to the IDEA expand on a parent's right to inspect documents. Federal regulations require that upon parental request the educational agency must provide a list of "types and locations of educational records collected, maintained, or used by the agency" (*34 C.F.R. §300.616*).

Educational Decision Makers

In preparing to request the child's educational records, the legal advocate must identify the decision maker in the process. The decision maker is the person who holds the educational rights of the child and in many cases, is the child's biological parent. It is important to know the identity of the decision maker for many reasons. The person holding educational rights is often the only person who can access the child's educational file, consent to an Individualized Education Program

(continued on page 12)

Educational Decision Makers (continued from page 11)

("IEP") and any decisions made by the IEP team. However, in cases where the biological parents do not agree, or where the child's biological parent is not the educational rights holder (such as where the child is a ward of the state), the identity of the decision maker is more complex.

A. Separated/Divorced Parents

Parental rights to educational decisions in the divorce context depend upon the parent's legal custody arrangement, whether by parties' written agreement or Court order. One parent may have sole legal custody and have the right to make educational decisions alone without any participation or input by the other parent (*See Cal. Fam.Code* §3006). Note that each state has its own statute and case law defining legal custodial arrangements. The more typical custodial arrangement is where parents have joint legal custody which requires an ongoing decision-making process between parents who must consult one another (*See Cal. Fam.Code* §3006 for definition of joint legal custody; Child Custody Practice & Procedure §5.3 Joint Legal Custody for a discussion of various state definitions). In California, the Court or the parties' stipulated agreement should specify the circumstances under which the consent of both parents is required to be obtained in order to exercise legal control of the child and the consequences of the failure to obtain mutual consent. If the Court order or stipulated agreement does not specify areas of joint agreement, either parent acting alone may exercise legal control of the child (*See Cal. Fam. Code* § 3083; *In re Marriage of Buser* (1987) 190 Cal.App.3d 639, 643-644, 235 Cal.Rptr. 785, 787). Thus, joint consent is the exception, not the general rule. Usually, in cases where parents have difficulty reaching agreement, Courts specify areas of joint decision-making and can order educational decisions to one parent or a tie breaker parent (*See* Child Custody Practice & Procedure §5.3 Joint Legal Custody; note that in Pennsylvania this arrangement is not permitted).

From a practical standpoint, both parents in a divorce situation have the right to make educational decisions if they have not yet made formal legal arrangements regarding legal custody. Practical reality dictates that the parent with physical custody ultimately can decide legal custody matters since that parent is in control of the child. For example, the child who lives predominantly with one parent will attend school in that parent's school district. Educational decision-making becomes most difficult with joint physical custody where there is a 50/50 share of the custodial time, the parents share educational decision-making rights, and they live in different school districts. Another issue arises when the child has special needs where one parent desires the child to attend a therapeutic school and the other parent desires the child to be mainstreamed. This issue is further complicated by the fact that the child's school district may not be willing to fund a therapeutic school. Parents with joint legal custody must reach an agreement on such issues to avoid delays in meeting their child's educational needs. In some cases, the Court gets involved and makes specific educational orders or allocates decision-making authority. In these situations, the use of alternative dispute resolution options might best serve the parents and child.

B. Foster Parent

If you are advocating for a child who is in foster care (a ward or dependent of the state), it may be difficult to ascertain who holds the educational rights of that child. First, you should determine whether the child is a ward of the state. Federal education law defines a ward of the state as a child who is a foster child, a ward of the state, or in custody of a public child welfare agency, but not a child who has a foster parent or guardian already appointed to be an educational rights holder. (*34 C.F.R. §300.45*.)

Then, it is important to identify who is acting as the parent. Federal law defines a parent as a natural, adoptive, or foster parent of a child (unless the foster parent is prohibited by State law from serving as parent), a guardian, an individual acting in place of the natural or adoptive parent with whom the child resides and who is responsible for the child's welfare, or an individual assigned as a surrogate (*20 U.S.C. §1401(23), 34 C.F.R. §300.30*). If the child resides in a group home, institution, juvenile hall, or in a state that does not allow a foster parent to serve as an educational decision maker, the child may not have an educational rights holder. The identity of the decision maker must be ascertained before you advocate for the child.

(continued on page 13)

Educational Decision Makers (continued from page 12)

You should note that in many cases, the educational rights of a parent are not automatically removed when the child is removed from the home. There may be cases where upon removal of the child from his or her parents' custody, the court has failed to remove educational rights from that parent and reassign them to the acting guardian. As such, there may be children who have not interacted with their parents in several months or years, but whose parents have retained educational decision making authority. In cases such as these, it is important to petition the dependency court judge to appoint a new or interim educational decision maker. On the other hand parents who retain their educational rights might be capable and interested in participating in the planning for their child's education. To the extent that such an arrangement is feasible and does not put the child at risk, continuing to involve the parents in the decision-making process might be an important way to continue to involve the parents in their child's life.

In the cases described above, where the child does not have an educational decision maker, a surrogate parent must be appointed (*20 U.S.C. §1415(b)(2)*). A surrogate parent is a person appointed to oversee the child's care (*34 C.F.R. §300.519(c)*). Federal law requires that a surrogate be assigned within 30 days, or as soon as possible (*20 U.S.C. §1415(b)(2), 20 U.S.C. §1439(a)(5))*/ The state educational agency ("SEA") must also make "reasonable efforts to ensure the assignment of a surrogate parent not more than 30 days after a public agency determines that the child needs a surrogate parent" (*34 C.F.R. §300.519(h.))*. That person must be neutral; he or she cannot be an employee of any educational agency that provides services to the child, does not have any interest that conflicts with the child-surrogate parent relationship, and has the ability to advocate for the child (*34 C.F.R. §300.519(c)*). That surrogate parent may then represent the child in all matters pertaining to the child's educational program (*34 C.F.R. §300.519(g)*). Some states have educational surrogate programs to appoint volunteers to fill the role of surrogate for children in state custody (for example, see http://www.espprogram.org/). Others may appoint foster parents to the role. It is crucial to identify the surrogate early to avoid any confusion about the identity of the educational decision maker.

Dispute Resolution Options

A. Parents in Conflict

In most cases, parents in conflict should opt for alternatives to Court intervention. Ultimately, ADR serves their children's best interest in reduction of conflict and may have less impact on their parenting ability, not to mention their wallets. These alternative approaches to conflict resolution include mediation (free in some state Courts or private), collaborative family law, co-parent counseling, and parenting coordination (known as Parenting Plan Coordinator or Special Master) (See www.lacfla.org for California chapter and www.collaborativepractice.com, the International Academy of Collaborative Professionals, for more information about the collaborative process and professionals in your jurisdiction). The Association of Family and Conciliation Courts defines parenting coordination as "a child-focused alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner, educating parents about children's needs, and with prior approval of the parties and/or the court, making decisions within the scope of the court order or appointment contract" (Guidelines for Parenting Coordination Developed by the AFCC Task Force on Parenting Coordination (2006) Fam. Ct. Rev., Vol. 44 No. 1, 164-181, 165). Model Standards and Guidelines for the Parenting Plan Coordinator's role, practice, training and other requirements and Model Standards for Divorce Mediation are provided by the Association of Family and Conciliation Courts (See www.afccnet.org). A sample Stipulation and Order Appointing Parenting Plan Coordinator ("PPC") was developed recently by a committee of the
Los Angeles County Bar Association (See www.lacba.org, link to section, then family law; note that authors recommend adding a time frame for PPC decision -making at each level of decision-making, since this is not included in the sample stipulation). Some states, such as Idaho, allow PPCs to be appointed by the Court, while other states, such as California, mandate that the appointment shall only be by written parental agreement (Idaho R.Civ.Proc. Rule 16; Cal. Const., Art VI, §1; *Ruisi v. Thierot* (1997) 53 Cal.App.4th 1197 [court cannot be divested of its judicial power]; *Cal. Fam.Code* §3160, *Cal. Evid.*

(continued on page 14)

Educational Decision Makers (continued from page 15)

Code §730, *Cal. Code Civ. Proc.* §1280 *et. seq.* [authority for parties' agreement]; *see also* Parenting Coordination for High-Conflict Families (2003) Fam. Ct. Rev. Vol. 41, No. X., 1-17).

Parents may be able to work with therapists as mediators or two co-parent counselors to resolve educational decisions. Another option is to jointly agree to allow an education expert to resolve any school-related issues. If parents are stuck in the Court carousel, they may request Minor's Counsel or a focused child custody evaluation These alternatives are costly and take longer to bring the issue to conclusion (*See Cal. Fam.Code* §3150 for appointment of minor's counsel; *See also Unif.Marriage & Divorce Act* § 310 which has been adopted in many state courts and allows for the appointment of Minor's Counsel, also known as Guardian Ad Litem; *See* 22 Am. Jur. Trials 347, Child Custody Litigation, §84 Guardian *Ad Litem*).

B. Foster Children

Children with disabilities in the foster care system typically face a greater challenge in receiving appropriate educational placement and services. A foster child holds the same due process rights under federal law as a child who is not a ward of the state. However, if a surrogate parent determines that a due process hearing is the only way to effectively receive an appropriate education, issues develop over who will advocate for the child and who will fund that advocate. Additionally, a due process hearing typically requires expert testimony and assessment, which can be coupled with high fees.

Presently, there is no statute that requires a higher level of attentattention to children who are wards of the state. As such, it is difficult to obtain appropriate legal representation and experts for educational issues. Many legal services organizations offer *pro bono* services for children in foster care, as do many independent experts. Additionally, you may petition the dependency court to fund independent evaluations (this is not always successful, but is worth the attempt). Seeking such *pro bono* assistance may be the only option to receive the necessary funding to litigate due process hearings. For a list of *pro bono* children's law programs in each state, see the Directory of Children's Law Programs, maintained on the website of the Children's Rights Litigation Committee at http://www.abanet.org/litigation/committees/childrights/

Conclusion/Recommendations

It is important at the beginning of the dissolution process to provide support and educational information to parents to help them focus on their children, rather than their anger at the other parent and past wrongs. Attorneys should encourage their clients to attend divorce support groups, seek family and/or individual therapy and co-parent education. If these steps are taken at the beginning of the process, it may enable these parents to work together. There are always those high conflict cases where such supports will make no difference. In such cases, very detailed legal custody orders are needed. In these cases, orders awarding one parent the ability to break the deadlock in certain decisions or carve out decisions that shall be made by each parent may be useful to resolve the decision-making issues. Alternatively, appointing a PPC to assist high conflict parents in educational decision-making is helpful. PPC appointment has the added benefit of oversight by a neutral therapist or attorney who gets to know the parents and the children and address matters more promptly than the Court process once established. On a personal note, as a divorced parent of a child with special needs who previously had educational decision-making authority, one author has found the PPC process useful. When a third party makes the decision, the other parent is less likely to undermine the decision, which ultimately benefits and supports the child.

For a child in foster care, it is essential to determine who holds the educational decision making rights for that child, and to request appointment of an educational surrogate if needed.

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