



Foster Youth: Left Behind By The No Child Left Behind Act?

By Jesse Hahnel

The reauthorization of the No Child Left Behind Act (NCLB) is in the midst of national discussion. It is the topic of presidential debates,¹ the House Committee on Education and Labor has begun NCLB hearings,² and numerous think tanks and policy groups have released recommendations for amending the Act and are lobbying for change.³ But lost in the clamor is a group of children who desperately need extra educational opportunities and support – youth in our nation's foster care systems. They are not mentioned in the Act, nor are they addressed in any of the major proposed amendments.⁴ Their omission is little noticed.

But a few organizations, those specifically committed to improving the lives of youth in foster care, have proposed amendments to NCLB that focus on foster youth. These proposals require states to provide specific educational and supportive services to children in the care of the state.⁵ This article highlights and provides an overview of these proposed amendments, and suggests that these reforms, though necessary, do not go far enough. Congress should also facilitate reform by utilizing an additional approach:

that of establishing goals and metrics by which improvement is measured, and then allowing local school administrators and others to decide the best means for achieving the desired ends.⁶

Two existing Acts provide apt models for the different approaches to foster youth educational reform: the McKinney-Vento Homeless Assistance Act (which contains specific requirements that states must follow) and the current NCLB (which establishes goals and allows states to choose the means to achieve them). Legislation embracing both approaches is necessary if we hope to improve the educational outcomes of foster youth.

I. The Need for Action

Perhaps more than any other group of children, foster youth depend on public education. The educational system provides positive role models for foster youth, the role models other children might find at home. It provides them a network of relationships other children receive through their extended family and family friends. It also provides the educational opportunities that foster children need to overcome their history of abuse, neglect, and separation.

Yet our nation's systems of public education routinely and systemically fail foster youth. Youth in out-of-home care score significantly lower than the general student population on statewide standardized tests.⁷ A three-state Midwest study found that even those foster youth that have completed 10th or 11th grade read at only a 7th grade level.⁸ Compared to their peers, foster youth are about half as likely to graduate from high school in five years,⁹ and significantly less likely to complete high school at all.¹⁰ And studies suggest that only 37 percent of the foster youth who graduate from high school go on to attend college, compared to 60 percent of all high school graduates.¹¹ Hard data is difficult to find (this is part of the problem), but there is little doubt that as a group, foster care children are being left behind.

The Existing Proposals: Requiring Specific Educational Opportunities and Services

The existing proposals to amend NCLB to include foster youth can be placed into three broad categories: (1) amendments intended to increase the school stability and attendance

1 Howard Kurtz, Power to the People (With Webcams), Washington Post, July 25, 2007.

2 California Department of Education, The Federal Update – March 2, 2007: NCLB Reauthorization Gains Momentum, <http://www.cde.ca.gov/re/tr/ga/march0207.asp#NCLB>.

3 See, e.g., The Commission on No Child Left Behind, Beyond NCLB, Fulfilling the Promise to Our Nation's Children (2007), http://www.aspeninstitute.org/site/c.hulWJeMRkPH/b.938015/k.40DA/Commission_on_No_Child_Left_Behind.htm; The Education Trust, Education Trust Recommendations for No Child Left Behind Reauthorization (2007), [www2.edtrust.org/NR/rdonlyres/5A150FED-85FD-4535-8DF6-](http://www2.edtrust.org/NR/rdonlyres/5A150FED-85FD-4535-8DF6-737A536EB0FB/0/EdTrustNCLBRecommendations41607.pdf)

737A536EB0FB/0/EdTrustNCLBRecommendations41607.pdf; the National Education Association, NEA's Positive Agenda for the ESEA Reauthorization (2006), <http://www.nea.org/esea/posagendaexecsum.html>.

4 See *Id.*

5 Most of the proposed amendments also supply funding for these services.

6 See generally Charles F. Sabel & William Simon, Destabilization Rights: How Public Law Litigation Succeeds, 117 Harv. L. Rev. 1015 (2004) (documenting how reform of such complex public institutions as school systems, mental health facilities, prisons, police departments, and public housing authorities follow this model).

7 Mason Burley & Mina Halpern, Wash. St. Inst. for Pub. Policy, Educational Attainment of Foster Youth: Achievement and Graduation Outcomes for Children in State Care 1 (2001), <http://www.wsipp.wa.gov/rptfiles/FCEDReport.pdf> (finding youth in out-of-home care attending public schools to have scored 15 to 20 percentile points below the general student population in statewide standardized tests).

8 Mark E. Courtney et al., Chapin Hall Ctr. for Children at the Univ. of Chic., Midwest Evaluation of the Adult Functioning of Former Foster Youth: Conditions of Youth Preparing to Leave State Care 45 (2004), http://www.chapinhall.org/article_abstract.aspx?ar=1355.

9 Cheryl Smithgall et al., Chapin Hall Ctr. for Children at the Univ. of Chic., Educational Experiences of Children in Out-of-Home Care 27-30 (2004), http://www.chapinhall.org/article_abstract.aspx?ar=1372.

10 Scott Jofuts, Casey Family Programs, Educating Children in Foster Care: The McKinney-Vento and No Child Left Behind Acts 9 (2007), www.casey.org/Resources/Publications/McKinney-Vento_NCLB.htm.

11 *Id.*

of foster youth, (2) amendments requiring school districts to establish an educational “liaison” for foster youth, and (3) amendments aimed at increasing the supplemental educational services available to foster youth. These proposals derive directly from the McKinney-Vento Homeless Assistance Act (McKinney-Vento Act).¹² That Act, designed to address the educational needs of homeless children and youth,¹³ requires local school districts to provide specific services to homeless youth in order to receive McKinney-Vento Act funding.

Amendments Designed to Increase School Stability and Attendance

Studies routinely show that foster youth are much more likely than their peers to change schools, both during the school year and between school years.¹⁴ Studies also demonstrate that, in general, students who change schools are substantially less likely to graduate than their more stable peers.¹⁵

The decreased academic achievement associated with school change is at least partially caused by attendance loss.¹⁶ This problem is particularly acute for foster youth, whose school enrollment is often delayed for a variety of reasons, including failure to transfer immunization and academic records in a timely fashion.¹⁷

Not surprisingly, a number of proposed amendments to NCLB are designed to increase school stability

for foster youth and require schools to promptly enroll foster youth in school, despite missing records. Since the McKinney-Vento Act already provides homeless youth with these services, the proposed amendments to NCLB typically suggest that Congress extend these provisions of the McKinney-Vento Act to all foster children,¹⁸ with a commensurate increase in funding for the Act.¹⁹ Those McKinney-Vento provisions include permitting homeless children to continue attending their school of origin (the school in which they were last enrolled before becoming homeless) for the remainder of the academic year, even if they no longer reside in that school district, and even if they cease being homeless;²⁰ requiring school districts to provide transportation to and from this school;²¹ and requiring school districts to enroll homeless children in schools immediately, even when they lack required paperwork, such as medical and educational records and proof of residency.²²

Amendments Establishing Educational Liaisons for Foster Youth

Studies show increased student academic achievement when districts have a “liaison” who coordinates school district efforts to support select students through identification, enrollment, and referrals for services and programs.²³ Research suggests that foster youth especially would benefit from such liaisons as they frequently lack an advocate inside the education-

al system and often require coordination of a range of services spanning multiple governmental agencies.²⁴ The second category of proposal thus focuses on requiring Local Education Agencies to establish a foster youth liaison. Since the McKinney-Vento Act requires (and funds) such liaisons for homeless youth,²⁵ such proposals, as before, usually suggest extending the Act to cover foster youth and increasing funding for the Act.²⁶

Amendments That Provide Specific Support Services to Foster Youth

Finally, a number of suggested amendments focus on increasing specific support services to students in foster care. Because research suggests that the educational outcomes of students with multiple academic risk factors improve markedly when they are provided with stable adults and support structures in schools, some proposals would increase the number of guidance counselors serving foster youth.²⁷ Because a high percentage of foster youth face mental health challenges, contributing to school-related behavioral problems, which in turn affect their academic achievement,²⁸ some proposals suggest increasing the mental health services available to foster youth.²⁹ The most common proposal, however, recommends granting foster youth immediate eligibility for the supplemental educational services available under NCLB, rather than granting such services only to those foster care

12 The McKinney Homeless Assistance Act was enacted by Congress in 1987. Pub. L. 100-77, 101 Stat 482 (1987) (codified at 42 USC §§ 11301-11407 (2005)). The Act was strengthened in 1990 and 1994, then reauthorized and renamed the McKinney-Vento Homeless Assistance Act by the No Child Left Behind Act of 2001. Pub. L. 107-110, 115 Stat. 1425 (2002) (codified as 20 U.S.C. §§ 6301 et seq.).

13 Sheila O’Leary, *Educating Homeless Children*, 8 *Geo J. on Poverty L. & Pol’y* 513, 514 (2001).

14 See, e.g., Burley & Halpern, *supra* note 8, at 1 (finding that in Washington State, twice as many youth in foster care changed schools during the year, compared with the general student population); Courtney et al., *supra* note 9, at 41 (finding over a third of young adults to have reported five or more school changes while in foster care); Smithgall et al., *supra* note 10, at 46 (finding that over two-thirds of Chicago children entering foster care for the first time changed schools).

15 See, e.g., Russell W. Rumberger et al., *PACE Policy Brief, The Educational Consequences of Mobility for California Students and Schools 1-12* (1999) <http://www.education.ucsb.edu/rumberger/papers.htm> (finding that California high school students who changed schools even once were less than half as likely to graduate as those who did not change schools, even when controlling for other variables that affect high school completion); See also Russell W. Rumberger & Katherine A. Larson, *Student Mobility and the Increased Risk of High School Dropout*, 107 *Am. J. Educ.* 1, 1-35 (1998).

16 Susan Stone, *Child Maltreatment, Out-of-Home Placement and Academic Vulnerability: A Fifteen-Year Review of Evidence and Future Directions*, 29 *Children and Youth Services Review* 139, 154 (2007).

17 Jofus, *supra* note 11, at 11.

18 The Act currently encompasses those children “awaiting foster care placement”, but because neither the statute nor the accompanying regulations define what is meant by the phrase, states differ widely in their application of the McKinney-Vento Act to foster youth. See generally Sarah Hudson-Plush, student note, *Improving*

Educational Outcomes for Children in Foster Care: Reading the McKinney-Vento Act’s “Awaiting Foster Care Placement” Provision to Include Children in Interim Foster Care Placements, 13 *Cardozo J.L. & Gender* 83 (2006). Some states have passed legislation placing all youth in foster care under the domain of the McKinney Vento Act. See, e.g., Delaware House Bill 279. Other states have passed legislation granting youth in foster care many, but not all, of the services available under the Act. See, e.g., California Assembly Bill 490.

19 See, e.g., Jofus, *supra* note 11, at 6; Catholic Charities USA et al., *Recommendations for Improving Education Outcomes for Children and Youth in Foster Care Through Amendments to the McKinney-Vento Act/Education Reauthorization in the No Child Left Behind Act 2* (2007) www.clasp.org/publications/rec_nclb.pdf.

20 42 U.S.C. § 11432(g)(3)(B)(i), § 11432(g)(3)(G) (2005).

21 *Id.* § 11432(g)(4).

22 *Id.* § 11432(g)(3)(C)(i).

23 See, e.g., Andrea Zetlin et al., *Improving Educational Outcomes for Children in Foster Care: Intervention by an Educational Liaison*, 9 *J. of Educ. For Students Placed at Risk* 425, 427 (2004).

24 See, e.g., Judith M. Gerber & Sheryl Dicker, *Children Adrift: Addressing the Educational Needs of New York’s Foster Children*, 69 *Alb. L. Rev.* 1, 16-17 (2005).

25 42 U.S.C. § 11432(g)(6) (2005).

26 See, e.g., Jofus, *supra* note 11, at 15-17; Catholic Charities USA et al., *supra* note 34, at 6.

27 See, e.g., Jofus, *supra* note 11, at 20-21 (proposing increased funding for the Elementary and Secondary School Counseling Programs (ESSCP) under Title V, Part D, Subpart 2).

28 Stone, *supra* note 31, at 144.

29 Jofus, *supra* note 11, at 21-22 (proposing an increase in funding for grants to improve the mental health of children under Title V, Part D, Subpart 1.4, with funding targeted to high-poverty school districts).

students in schools that fail to meet established yearly goals, as is currently the law.³⁰ These supplemental educational services include tutoring and other educational interventions aligned with the state's content standards. Because the McKinney-Vento Act makes homeless youth eligible for such supplemental educational services regardless of the school the student attends, most such proposals again suggest amending the McKinney-Vento Act to cover all youth in foster care.³¹

Each of the above proposed amendments – increasing school stability and facilitating enrollment, providing educational liaisons, and facilitating access to supplemental educational services -- are supported by research suggesting that such measures will increase the academic achievement of foster youth. But are they sufficient to ensure foster youth will obtain “a high-quality education and reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments”?³² Unfortunately, these proposed amendments do not hold states accountable for actually raising the academic achievement of foster youth.

The next section suggests that in addition to the above amendments, a complementary approach should be employed, one holding states accountable for raising the academic achievement of youth in foster care while allowing states' the flexibility in choosing the means to do so.

Another Approach to Reform: Holding States Accountable for Student Achievement

The NCLB's provisions work together to give states greater autonomy in exchange for increased account-

ability. The Act requires states to develop statewide academic content and standards³³ and to adopt a set of “high-quality, yearly student academic assessments” for determining each student's mastery of such standards.³⁴ The assessment results must be disaggregated by each major racial and ethnic group, by English proficiency status, by students with disabilities as compared to non-disabled students, and by economically disadvantaged students as compared to students who are not economically disadvantaged.³⁵ States must define Adequate Yearly Progress (AYP) for the student body as a whole, and for each subgroup, with the goal of having every student demonstrate “proficiency” by 2014.³⁶ The Act then provides two main mechanisms for holding schools accountable for student performance. The first is increased transparency: states are required to make public the performance of each subgroup, and to inform parents if their child's school fails to make AYP.³⁷ The second is “destabilization” – a series of increasingly severe improvements, corrective actions, or restructurings for schools failing to make AYP.³⁸

Unlike the provisions in the McKinney-Vento Act, the interventions required by the NCLB are not prescriptive in nature. Instead, they take the form of changes in school governance, characterized by replacement of school staff, decreased management authority at the school level, restructuring of the internal organizational structure of the school, state takeover, conversion to a charter, or school closure.³⁹ These changes in governance do not guarantee school improvement, but this method of reform does empower those closest to the children to make decisions as to the means for raising achievement.⁴⁰

II. Making the NCLB Work for Foster Youth

Adding a flexible, goal-oriented component to foster youth education reform would complement the existing proposed amendments that set forth specific requirements for states. The additional reforms could be accomplished by adding foster youth as a subgroup to the existing NCLB legislation, while at the same time holding state educational institutions and state child welfare agencies, not individual schools, accountable for the academic achievement of foster youth.

State Educational Agencies, not Schools, Should be Accountable for Foster Youth Academic Achievement

By including foster youth as a subgroup in the NCLB, agencies would become accountable for tracking and addressing the academic progress of foster youth and seeing that foster youth, as a group, demonstrate “proficiency” in order to avoid destabilization measures. Yet this approach works only if state educational agencies, not schools, are held accountable for foster youth achievement, as explained below.

Currently, individual schools are accountable for student subgroup achievement pursuant to NCLB. However, the NCLB has a reporting and accountability exemption for small subgroups: schools are not required to report on, nor are they held accountable for, the academic growth of subgroups for which “the number of students... is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student.”⁴¹ Because foster youth constitute a small percentage of the nation's overall student population⁴²

30 Under NCLB, students attending schools that fail to meet Adequate Yearly Progress goals for three consecutive years are eligible for special student services. 20 U.S.C. § 6316(b)(5)(B) (2005).

31 Jofus, *supra* note 11, at 19-21; Catholic Charities et al., *supra* note 34, at 2.

32 20 U.S.C. § 6301 (2002).

33 *Id.* § 6311(b).

34 *Id.* § 6311(b)(3)(A).

35 *Id.* § 6311(b)(3)(C)(xiii).

36 *Id.* § 6311(b)(2)(C)(v)(II), § 6311(b)(2)(F).

37 *Id.* § 6316(b)(6).

38 *Id.* § 6316(a).

39 *Id.* § 6316(b)(7)(C), § 6316(b)(8).

40 See generally James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. Rev. L. & Soc. Change 183 (2003) (arguing that such an approach is favorable because it allows states, school districts, and individual schools to experiment, learn from others, and constantly improve their resource allocation, management, and teaching methods).

41 *Id.* § 6311(b)(2)(I)(ii).

42 In 2005, slightly less than 1 percent of U.S. children were in foster care. U.S. Department of Health and Human Services, Administration for Children & Families: Trends in Foster Care and Adoption – FY2000 – FY2005, http://www.acf.hhs.gov/programs/cb/stats_research/afcars/trends.htm; U.S. Department of Commerce, U.S. Census Bureau News: Census Bureau Estimates Number of Children and Adults in the States and Puerto Rico (March 10, 2005), <http://www.census.gov/Press-Release/www/releases/archives/population/004083.html>.

and are rarely concentrated in any given school,⁴³ foster students in most schools will fall into the small subgroup exemption.

School accountability would also be undermined by the high mobility of foster care students. Knowing that foster students are less likely to be present and tested at the end of the academic year, schools might feel less inclined to focus services and resources on them. Conversely, the schools to which foster students transfer would be held accountable for their academic results, regardless of how late in the year they enrolled.⁴⁴

In order to overcome these problems, NCLB amendments should hold state educational agencies, instead of schools, accountable for the academic performance of foster youth. Treating foster youth as a state-wide subgroup eliminates small sample sizes and reduces the impact of foster youth's high mobility. More importantly, it recognizes that many policies affecting schools, and the performance of foster students in schools, are made at the district and state level. Most public schools do not control the amount (if any) of additional funding they receive for foster care students, the composition of students entering their school, or the quality of the services, such as foster student liaisons, provided by the district. Thus, it makes sense to hold state educational agencies accountable for raising the achievement of foster youth.⁴⁵

Accountability Should Also Extend to State Child Welfare Agencies

Accountability should not end with state educational agencies. Foster youth, unlike the general student population, frequently interact with and depend on other state agencies.

Because of this, it makes sense to hold a state's child welfare agency responsible for the academic achievement of foster students. Indeed, that was the approach taken by Plaintiffs in *Braam v. Washington*,⁴⁶ a case brought by the National Center for Youth Law and others⁴⁷ challenging Washington State's child welfare system. The case settled after extensive litigation, with Washington's Division of Children and Family Services (DCFS) agreeing to take full responsibility for improving "the educational achievement of adolescents in the custody of DCFS".⁴⁸ The settlement implementation plan was built around accountability measures, requiring the agency to decrease the difference between the educational achievement of the foster care population and the general population with a special emphasis on increasing the percentage of foster youth with a high school diploma to equal that of the general population.⁴⁹ The plan provided timelines and benchmarks for monitoring the agency's success in raising foster student achievement.⁵⁰ While the agency was required to take certain concrete steps such as establishing "educational outreach positions to assist children in out-of-home care in meeting higher educational goals" and offering "caregivers training on educational advocacy skills,"⁵¹ it was free to accomplish the accountability goals through different means upon approval by a specially appointed panel.

So which agency should be held accountable – the state educational agency or the state child welfare agency? In order for reform to work, both must be accountable. An example illustrates. Imagine that state educational agencies alone were held responsible for raising the academic achievement of foster students. In

order to decrease school instability, the educational agency might decide to fund transportation for foster students whose foster placement changes during the school year, allowing them to complete the academic year in their "school of origin." Yet the resources the educational agency spends on transportation might be better spent on increasing foster youth placement stability (thus avoiding school transfers altogether) – an issue under the domain of the state's child welfare agency.

Now imagine that the child welfare agency alone is held accountable. The child welfare agency might spend endless resources on supplemental educational services for foster youth to compensate for the fact that most foster youth are placed into schools with less experienced teachers and lower per-pupil funding, issues more effectively remedied by the state or district educational agencies.

Because the educational achievement of foster youth is affected by the policies of a number of state agencies, each agency must contribute to increasing the academic achievement of foster care students. The role each agency plays will depend on the circumstance of the state, which is ultimately responsible for the children in its care. These agencies should be held accountable for ensuring that foster youth receive the supports, services, and opportunities necessary for them to achieve academically.

The Need for Action Revisited

The impending reauthorization of NCLB provides an important opportunity to ensure that foster youth are included in education system reforms. In order to achieve the best results for foster youth, legislative reforms should come in two forms. First, the

43 See, e.g., Smithgall at al., supra note 3, at 11 (finding no general Chicago Public School to have more than 6 percent of its student population in out-of-home care at any one time).

44 This is a problem for all students with high mobility.

45 State educational agencies might then hold districts or schools accountable should they see fit.

46 81 P3d 851 (Wash. 2003).

47 Plaintiffs' counsel in *Braam v. State of Washington* are the National Center for Youth Law, Columbia Legal Services, and Bellingham, WA attorney Timothy Farris.

48 *Braam v. State of Washington* Final Settlement 12 (2004), http://www.youthlaw.org/litigation/ncyl_cases/child_welfare/5/ [hereinafter *Braam* Final Settlement].

49 *Braam* Settlement Implementation Plan 66-68 (2006), <http://www.wsipp.wa.gov/braampanel/timeline.asp> [hereinafter *Braam* Implementation Plan].

50 *Id.*

51 *Braam* Final Settlement, supra note 50, at 12.

law should require that states provide specific services such as increased school stability, educational liaisons, and supplemental educational services – all provisions of existing proposals to amend NCLB. Second, the law should hold states accountable for improving the academic achievement of foster youth while being given the flexibility to choose the best methods to do so

– an approach modeled by the current structure of the NCLB. Congress could accomplish the second type of reform by including foster youth as a subgroup in the NCLB, and then holding state educational agencies and child welfare agencies, not schools, accountable for foster youth achievement. By embracing both approaches to educational reform, we can better ensure that foster youth will not be left behind.

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