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**“EVERY CHILD NEEDS A CHAMPION”: FOSTER CHILDREN
WITH DISABILITIES AND THE APPOINTMENT OF
SURROGATE PARENTS UNDER IDEA**

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ABSTRACT

When a parent is absent, children in foster care who receive special education services are entitled to the appointment of a surrogate parent. This appointment is especially necessary due to the importance of the parent's role in special education law and the often enhanced educational needs of children in foster care. However, the logistics of how surrogate parents are appointed and trained vary widely across the country. This article examines the legal landscape of the appointment of surrogate parents for children in foster care who receive special education services both nationally and in Virginia. This article also reviews the training and appointment process in other states, including the strong role undertaken by state education agencies in ensuring the prompt appointment of trained surrogate parents. The article concludes with recommendations for improving these processes in Virginia, and examines methods to increase positive educational outcomes for Virginia's youth in foster care who receive special education services.

INTRODUCTION

Imagine this scenario¹:

Marissa is a 14-year-old girl living in a southeastern city in Virginia. She is intelligent and social, and enjoys music, fashion, and school. However, she experiences trauma related to her childhood. She was placed in foster care at age ten after she was removed from her mother's home due to her mother's substance abuse. Her father moved out of state two years ago and is unable to be located. Although she has some contact with her mother through supervised visits, these are sporadic depending on her mother's substance use, and she has no other consistent family contact. No one has been able to find her mother for the past six months. Her grandparents are deceased, and her other relatives live in other states and are unable to care for her. Her foster care workers at the local Department of Social Services (DSS) change frequently due to their high rate of turnover, and she lives in a group home owned by a private agency since she has not been placed with a foster family. Marissa has been diagnosed with an emotional disability, Oppositional Defiant Disorder (ODD), and ADHD, and has been receiving special education services under an Individualized Education Program (IEP) for these disabilities since she was eight years old. She attends a local public high school and is placed in a general education classroom with her peers with support from a special education teacher in her classroom.

¹ Marissa's story is a composite of stories and cases and does not represent any specific person or actual scenario.

In this situation, who is the "parent" to give consent for Marissa's special education services?

Marissa's situation is governed by a complex overlay of federal, state, and local law and guidance related to both her foster care placement and her receipt of special education services. Although federal law anticipates Marissa's situation by allowing for schools and juvenile court judges to appoint an educational surrogate parent, the logistics of how surrogate parents are appointed and trained vary widely depending on state law and guidance and local practices.² This can result in confusion among teachers and social workers about who should make decisions and when to appoint a surrogate parent. In turn, this can mean that children most in need of advocacy—children with disabilities in foster care—may not be afforded that protection.

This article uses Marissa's situation to analyze the various federal and state laws and practices regarding the appointment of a surrogate parent, including how "parent" is defined in special education regulations and when surrogate parents must be appointed. Although I cite to both national and state-specific studies, the purpose of this article is to recommend solutions for Virginia's surrogate parent process.

In Part I, I provide an overview of child welfare data in Virginia and nationally to contextualize why children with disabilities in foster care need strong education advocates. In Part II, I examine the laws related to who can act as the parent in kinship care arrangements and the issues that arise when child welfare workers, contrary to the law, act as the parent for special education purposes.³ In Part III, I turn to other states with robust surrogate parent training and appointment practices and discuss these practices as potential guideposts for Virginia. Finally, in Part IV, I discuss recommendations for implementing new guidance and practices in Virginia to support foster care youth with disabilities and their educational achievement.

I. CHILD WELFARE DATA & INFORMATION

According to the Virginia Department of Education (VDOE), there are more than 5,000 children in foster care in Virginia, eighty percent of whom are school-aged youth.⁴ Of the children in Virginia's foster care system, fifty-

² VA. DEPT OF SOC. SERV., KINSHIP CARE 2 (n.d.).

³ See generally *What is Kinship Care?*, THE ANNIE E. CASEY FOUND. (May 20, 2023), <https://www.aecf.org/blog/what-is-kinship-care>.

⁴ VA. DEPT OF SOC. SERVICES, FOSTERING CONNECTIONS AND THE EVERY STUDENT SUCCEEDS ACT: JOINT GUIDANCE FOR SCHOOL STABILITY OF CHILDREN AND YOUTH IN FOSTER CARE 1, 3 (2017).

seven percent are placed with non-relatives.⁵ Approximately ten percent of foster youth nationally live in a group home or institution, rather than a foster home or relative placement.⁶ Nationally, most children in foster care spend at least twenty months in care,⁷ and children of color are more likely to spend longer time in care.⁸ Although many foster children experience positive outcomes, others face a number of challenges when they age out of the foster care system, including increased rates of homelessness, poverty, teenage pregnancy, criminal involvement, and lower rates of academic achievement.⁹

Children in foster care are more likely to have a disability than children not in foster care.¹⁰ Thirty-one percent of children in foster care in Virginia have a diagnosed physical, mental, or behavioral disability, compared to 4.3% of children generally nationwide.¹¹ Of those children in foster care with a diagnosed disability, seventy-six percent of those disabilities were mental disabilities, which include depression, anxiety, and post-traumatic stress disorder (PTSD).¹² Nationally, children in foster care are 2.5-3.5 times more likely to qualify for special education services than children not in foster care.¹³ Studies estimate that between thirty to fifty percent of youth in foster care receive special education services, compared with fourteen percent of all students.¹⁴ Data from individual states suggest children in foster care are more than three times as likely than their peers to experience exclusionary

⁵ *Foster Care by the Numbers*, VA. DEPT OF SOC. SERVICES (Mar. 15, 2021), https://www.dss.virginia.gov/fosterVA/fostercare_facts.html.

⁶ U.S. DEPT OF HEALTH AND HUM. SERVICES: THE CHILDREN'S BUREAU, THE AFCARS REP. 1 (2021).

⁷ *Id.*

⁸ 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, 89 (2000).

⁹ See Race Media, *51 Useful Aging Out of Foster Care Statistics*, NAT'L FOSTER YOUTH INST. (May 25, 2017), <https://nfyi.org/51-useful-aging-out-of-foster-care-statistics-social-race-media/>.

¹⁰ Laura King & Aneer Rukh-Kamaa, *Youth Transitioning Out of Foster Care: An Evaluation of a Supplemental Security Income Policy Change*, 73 SOC. SEC. BULLETIN 3 (2013), [https://www.ssa.gov/policy/docs/ssb/v73n3/v73n3p53.htm#:~:text=Additionally%2C%20researchers%20have%20found%20that,\(Ringeisen%20and%20others%202008\)](https://www.ssa.gov/policy/docs/ssb/v73n3/v73n3p53.htm#:~:text=Additionally%2C%20researchers%20have%20found%20that,(Ringeisen%20and%20others%202008)).

¹¹ JOINT LEG. AUDIT AND REVIEW COMM'N., IMPROVING VIRGINIA'S FOSTER CARE SYSTEM 10 (2018); NATALIE A.E. YOUNG, U.S. CENSUS BUREAU, CHILDHOOD DISABILITY IN THE UNITED STATES: 2019, 6 (2021). The definition of a disability varies depending on the defining agency, and there are differences between a medical disability and an educational disability. If a child is diagnosed with a medical disability, they are not automatically eligible for special education services under the Individuals with Disabilities Education Act (IDEA) and the implementing federal and state regulations. For example, a child may have a medical diagnosis of ADHD but not be eligible for special education services under the category of Other Health Impairment (OHI), the disability category for ADHD. The medical disability must also have an adverse effect on the child's education for the child to be eligible for special education services. For Virginia's approach to eligibility for special education services, see 8VAC20-81-80.

¹² IMPROVING VIRGINIA'S FOSTER CARE SYSTEM, *supra* note 11, at 10.

¹³ NAT'L WORKING GRP. ON FOSTER CARE AND EDUC., FOSTERING SUCCESS IN EDUCATION: NATIONAL FACTSHEET ON THE EDUCATIONAL OUTCOMES OF CHILDREN IN FOSTER CARE 5 (2014).

¹⁴ ABA CTR. ON CHILD. AND THE L., FAST FACTS: FOSTER CARE & EDUCATION DATA AT A GLANCE 1 (2022).

discipline and about twice as likely to be chronically absent from school.¹⁵

Some studies show that children in foster care are less likely to receive high-quality supports and services related to their disability than those not in foster care, especially related to developing independent living skills and transition planning.¹⁶ Children in foster care who qualify for special education services are also less likely to have an education advocate present in school meetings compared to other children.¹⁷ Other studies demonstrate that even when proactively screened for special education needs, children in foster care did not receive services for nine to twelve months.¹⁸

However, studies also demonstrate that students who have a supportive advocate are more likely to make stronger educational progress and attend college.¹⁹

This data demonstrates the need for all children to have a designated decision-maker and educational advocate. The next section discusses the law around who acts as the educational decision-maker for children with disabilities in foster care.

II. WHO IS THE "PARENT" FOR SPECIAL EDUCATION PURPOSES FOR CHILDREN IN FOSTER CARE?

This section begins with an overview of the laws regarding who can act as the parent for special education purposes and the federal and state laws in Virginia regarding the appointment of surrogate parents. It further examines situations when a relative acts as the parent, such as when a child is placed in

¹⁵ IND. DEP'T OF CHILD SERVICES, INDIANA DEPARTMENT OF EDUCATION AND DEPARTMENT OF CHILD SERVICES FOSTER CARE EDUCATION DATA REPORT 2020-2021 SCHOOL YEAR 4 (2021); WASH. OFF. OF SUPERINTENDENT OF PUB. INSTRUCTION, 2020-2021 REPORT CARD: REGULAR ATTENDANCE (2021); Heather Griffis et al., *Supporting the Needs of Students Involved with the Child Welfare and Juvenile Justice System in the School District of Philadelphia*, THE CHILDREN'S HOSP. OF PHILA. RSCH. INST., June 2014, at 14; see WASH. OFF. OF SUPERINTENDENT OF PUB. INSTRUCTION, 2020-2021 REPORT CARD: DISCIPLINE RATE (2021); see generally COMM. FOR CHILD., RECENT TRENDS IN STATE LEGIS. EXCLUSIONARY DISCIPLINE REFORM 2 (2018).

¹⁶ See FOSTERING SUCCESS IN EDUCATION: NATIONAL FACTSHEET ON THE EDUCATIONAL OUTCOMES OF CHILDREN IN FOSTER CARE, *supra* note 13, at 5 (citing Sarah Geenen & Laurie E. Powers, *Are We Ignoring Youths with Disabilities in Foster Care? An Examination of Their School Performance*, 51 SOC. WORK 233, 239-40 (2006)).

¹⁷ See FAST FACTS: FOSTER CARE & EDUCATION DATA AT A GLANCE, *supra* note 14, at 2.

¹⁸ FOSTERING SUCCESS IN EDUCATION: NATIONAL FACTSHEET ON THE EDUCATIONAL OUTCOMES OF CHILDREN IN FOSTER CARE, *supra* note 13, at 5 (citing Christie L.M. Petrenko et al., *Do Youth in Out-of-home Care Receive Recommended Mental Health and Educational Services Following Screening Evaluations?*, 33 CHILD. & YOUTH SERVS. REV. 1911, 1911-1912, 1916, 1917 (2011)).

¹⁹ See Linda Darling-Hammond et al., *Implications for Educational Practice of the Science of Learning and Development*, 24 APPLIED DEVELOPMENTAL SCI. 97, 102 (2020).

a kinship care arrangement, and the issues that could arise when a child welfare worker, contrary to the law, acts as the parent for special education purposes. This section will conclude by returning to the initial question posed about Marissa's situation—who should act as her parent for special education purposes?

A. Legal Definition of Parent under IDEA

The Individuals with Disabilities Education Act (IDEA) confers rights not only on the disabled child, but on their parent as well.²⁰ 20 U.S.C. §1415(a) provides that state education agencies must adopt certain safeguards “to ensure that children with disabilities *and their parents* are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.”²¹ IDEA is replete with provisions that specifically empower parents, including: the right to inspect records, participate in meetings, consent to evaluations, dispute decisions of the school, and receive prior written notice of the school's actions relating to their child's special education services.²² Accordingly, the role of the person acting as the parent is absolutely essential with respect to the provision of special education services imagined by IDEA.

IDEA anticipates that the person acting as the parent for special education purposes may not be the biological parent of the child. Specifically, IDEA's regulations define a parent as:

- (1) A biological or adoptive parent of a child;
- (2) A foster parent, unless State law, regulations, or contractual obligations

²⁰ 20 U.S.C. § 1400 et seq. (2004).

²¹ 20 U.S.C. § 1415(a) (emphasis added); *see also* *Endrew F. v. Douglas Cnty. Sch. Dist.* RE-1, 580 U.S. 386, 399 (2017) (where the Court set forth a higher standard for FAPE, holding that to meet its substantive obligation under the IDEA, a school must offer an individual education program (IEP) reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances).

²² *See also* 34 C.F.R. § 300.504 (2024); *see generally* 34 C.F.R. § 300.503 (2024). For example, a parent's right to inspect records and participate in meetings is laid out in 34 C.F.R. § 300.501. It states in relevant part only, “[t]he parents of a child with a disability must be afforded, in accordance with the procedures of §§ 300.613 through 300.621, an opportunity to inspect and review all education records with respect to . . . the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child.” It further provides, “[t]he parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. Each public agency must provide notice consistent with § 300.322(a)(1) and (b)(1) to ensure that parents of children with disabilities have the opportunity to participate in meetings described in paragraph (b)(1) of this section. Each public agency must ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child. If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the public agency must use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing. A placement decision may be made by a group without the involvement of a parent, if the public agency is unable to obtain the parent's participation in the decision. In this case, the public agency must have a record of its attempt to ensure their involvement.”

with a State or local entity prohibit a foster parent from acting as a parent;

(3) A guardian generally authorized to act as the child's parent, or authorized to make early intervention, educational, health or developmental decisions for the child (but not the State if the child is a ward of the State);

(4) An individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or

(5) A surrogate parent who has been appointed in accordance with § 300.519 or section 639(a)(5) of the Act.²³

The regulations also specifically state that the biological or adoptive parent should be presumed to be the parent if they attempt to act as the parent under this section, unless a judicial order appoints another person to act as the parent.²⁴ This is the case even if the parent is no longer the child's custodian or the Court appoints another person as the guardian of the child, unless the parent's rights have been terminated.²⁵ It should be noted that a parent's lack of involvement in educational decision-making alone is not sufficient for the appointment of a surrogate parent, so long as the school knows the location of the parent and takes the required affirmative steps to involve them in decision-making.²⁶ In this situation, the school may need to take additional steps to obtain approval for its plan for special education services for a child.²⁷

As contemplated by 34 CFR § 300.30(a)(2) above, some states specifically prohibit foster parents from serving as the parent for IDEA purposes.²⁸ The

²³ 34 C.F.R. § 300.30 (2024).

²⁴ 34 C.F.R. § 300.30(b)(1) (2024) ("Except as provided in paragraph (b)(2) of this section, the biological or adoptive parent, when attempting to act as the parent under this part and when more than one party is qualified under paragraph (a) of this section to act as a parent, must be presumed to be the parent for purposes of this section unless the biological or adoptive parent does not have legal authority to make educational decisions for the child.").

²⁵ See 34 C.F.R. § 300.30 (2024); see also Letter from Melody Musgrove, Dir. of Off. of Special Educ. Programs, to Ronald Caplan, Dir. of Cmty. Educ., Bd. of Child Care (Sept. 6, 2011) (on file with author).

²⁶ 71 Fed. Reg. 46,689 (Aug. 14, 2006); see also *Surrogate Parent (Questions and Answers)*, VA. DEP'T. OF EDUC.: SPECIAL EDUC. AND STUDENT SERV., (2006) (stating, "[t]here is no statutory authority to permit the appointment of a surrogate parent when a parent is either unable or unwilling to attend a meeting in which a decision is made relating to a child's educational placement. In section 615(b)(2) of the Act, a public agency does not have the authority to appoint a surrogate parent where a child's parent is available or can be identified and located after reasonable efforts, but refuses, or is unable, to attend a meeting or otherwise represent the child. Educators are advised to consult with their legal counsel, as needed, to identify who has been assigned legal authority to make educational decisions for the child.").

²⁷ See CAL. DEP'T OF EDUC., *SURROGATE PARENTS IN CALIFORNIA SPECIAL EDUCATION: AN OVERVIEW 7* (2019) ("If the location of the parent(s) is known but the parent(s) fails or refuses to participate in the IEP meeting, the LEA may need to file for a due process hearing to obtain approval for the district's offer of a free appropriate public education.").

²⁸ See 34 C.F.R. § 300.30(a)(2) (2024).

reason for this may be that foster care placements are innately unstable—over a third of foster children experience more than two placements per year, meaning their living arrangements change three or more times per year.²⁹ Given the instability of foster care, states may choose to limit the ability of foster parents to act as parents for IDEA purposes. For example, Vermont prohibits foster parents from acting as the parent unless they have been appointed as the surrogate parent under that state’s surrogate parent program.³⁰ In Virginia, foster parents are empowered to act as parents.³¹

i. Appointment of Surrogate Parent

If no parent can be identified under the first four definitions contained in 34 C.F.R. § 300.30 (discussed *supra*), the school must appoint a surrogate parent.³² The process for appointing surrogate parents is described in IDEA.³³ The Act lays out multiple parameters, including when a surrogate parent should be appointed and the duties of the state and local agencies responsible for the education of the child with respect to surrogate parent appointments, to wit:

(a) General. Each public agency must ensure that the rights of a child are protected when—

- (1) No parent (as defined in § 300.30) can be identified;
- (2) The public agency, after reasonable efforts, cannot locate a parent;
- (3) The child is a ward of the State under the laws of that State; or
- (4) The child is an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(6)).

²⁹ *Child Welfare and Foster Care Statistics*, THE ANNIE E. CASEY FOUND. (May 30, 2023), <https://www.aecf.org/blog/child-welfare-and-foster-care-statistics>.

³⁰ See Special Education Rules, 2360 Vt. State Bd. of Educ. Rules §§ 2360.5.1(a)(18)(ii), 2361.1(bb)(2) (2022).

³¹ 8VAC20-81-10 (2021) (definition of “parent”); see VA. CODE § 22.1-213.1(A)(2) (2009).

³² See 34 C.F.R. § 300.519 (2024). Compare 20 U.S.C. § 1415(b)(2) (2004), with 20 U.S.C.A. § 1415(b)(2) (1999) (note that in the 2004 revisions to IDEA, several changes were made to ensure the prompt appointment of surrogate parents for children, including: authorizing judges to appoint surrogate parents, clarifying that unaccompanied homeless youth shall be appointed a surrogate parent by the school division, and required state education agencies to ensure surrogate parents were appointed within thirty days of determining a need for one).

³³ See 20 U.S.C. § 1415(b)(2) (2004) (stating, “[p]rocedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State” includes “the assignment of an individual to act as a surrogate for the parents, which surrogate shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child.” When a child is a ward of the State, “such surrogate may . . . be appointed by the judge overseeing the child’s care . . .” A surrogate parent for an unaccompanied homeless youth shall be appointed by the local education agency).

(b) Duties of public agency. The duties of a public agency under paragraph (a) of this section include the assignment of an individual to act as a surrogate for the parents. This must include a method—

- (1) For determining whether a child needs a surrogate parent; and
- (2) For assigning a surrogate parent to the child.

(c) Wards of the State. 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, provided that the surrogate meets the requirements in paragraphs (d)(2)(i) and (e) of this section.³⁴

As noted in part (c) here, IDEA anticipates that at times, the juvenile court judge in child welfare cases may appoint an educational surrogate parent for IDEA purposes. However, advocates disagree about whether juvenile court judges can and should appoint educational surrogates for IDEA purposes when another person who may act as the parent is available, such as a foster parent if that state allows foster parents to act as the parent for IDEA purposes.³⁵ IDEA goes on to discuss the criteria for the selection of surrogate parents in part (d) of 34 CFR § 300.519:

(1) The public agency may select a surrogate parent in any way permitted under State law.

(2) Public agencies must ensure that a person selected as a surrogate parent—

(i) Is not an employee of the SEA [state education agency], the LEA [local education agency], or any other agency that is involved in the education or care of the child;

(ii) Has no personal or professional interest that conflicts with the interest of the child the surrogate parent represents; and

(iii) Has knowledge and skills that ensure adequate representation of the child.³⁶

Under part (e) of CFR § 300.519, "[a] person otherwise qualified to be a

³⁴ 34 C.F.R. § 300.519 (2024).

³⁵ *Id.* at § 300.519(c); LEGAL CTR. FOR FOSTER CARE & EDUC., IDENTIFYING SPECIAL EDUCATION DECISION MAKERS FOR CHILDREN IN FOSTER CARE: STATE LAW QUESTIONS 7 (n.d.). Some advocates have considered whether the appointment of surrogate parents by judges may provide additional independence than those appointed by local educational agencies; see Rebekah Gleason Hope, *Foster Children and the IDEA: The Fox No Longer Guarding the Henhouse?*, 69 LA. L. REV. 349, 351 (2009) (stating "[t]he surrogate parent, appointed and trained by the school system, often rubber stamps the school's decisions, placing no checks on the appropriateness of the program given the child's individual needs.").

³⁶ 34 C.F.R. § 300.519 (2024).

surrogate parent under paragraph (d) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent”.³⁷

Both the federal statute and implementing regulations under the IDEA make it clear that child welfare workers shall not act as the parent for IDEA purposes.³⁸ This prohibition extends to anyone employed by the state or local education agency or any agency involved in the education or care for the child.³⁹ Courts have found that this prohibition extends to employees of non-public agencies, when those agencies are involved in the care of a child.⁴⁰

The reason for this prohibition is multifold. First, the parent for IDEA purposes has the right to enforce the protections of IDEA, including through due process or state complaint mechanisms, and potentially through litigation against the local and state education agencies.⁴¹ It would be a significant conflict for an employee of a state or local agency acting as a parent to attempt to enforce that child’s rights against those same or related agencies, potentially limiting the potency of their parental rights under IDEA. Additionally, child welfare workers suffer extremely high turnover rates, indicating that child welfare workers may lack the consistency necessary to advocate for special education services on a year-to-year basis.⁴²

Finally, IDEA gives wide responsibility for decision-making to surrogate parents, and provides that the state education agency must ensure the appointment of a surrogate parent within a reasonable amount of time:

(g) Surrogate parent responsibilities. The surrogate parent may represent the child in all matters relating to—

(1) The identification, evaluation, and educational placement of the child; and

(2) The provision of FAPE to the child.

(h) SEA responsibility. The SEA must make reasonable efforts to ensure the assignment of a surrogate parent not more than 30 days after a public

³⁷ 34 CFR §300.519.

³⁸ 34 C.F.R. § 300.519(d)(2)(i) (2024); *see* 20 U.S.C. § 1415(b)(2)(A).

³⁹ 34 C.F.R. § 300.519(d)(2)(i) (2024); *see* 20 U.S.C. § 1415(b)(2)(A).

⁴⁰ Letter from Melody Musgrove, *supra* note 25 (noting, interestingly, that an attorney may act as a surrogate parent); *see also* Baer v. Klagholz, 771 A.2d 603, 636 (N.J. Super. Ct. App. Div. 2001).

⁴¹ 34 C.F.R. § 300.504 (2024) (summarizing the procedural safeguards available to parents).

⁴² CASEY FAMILY PROGRAMS, HOW DOES TURNOVER IN THE CHILD WELFARE WORKFORCE IMPACT CHILDREN AND FAMILIES? 2 (Aug. 2023) (“For about 15 years prior to the COVID-19 pandemic, child welfare turnover rates hovered between an estimated 20% and 40%, with an estimated national average of 30% and even higher turnover rates among child welfare trainees in some states. In comparison, annual turnover rates below at or below 12% are considered optimal in the health care and human services sectors.”).

agency determines that the child needs a surrogate parent.⁴³

Some state education agencies, such as in Delaware and Arizona, discussed more in Part III of this article, coordinate the appointments and training of surrogate parents within their own agencies. Other states, such as Virginia, delegate that responsibility to local education agencies (i.e., school divisions).⁴⁴ Courts have found that although IDEA provides the requirements for when surrogate parents must be appointed, IDEA does not require state educational agencies to develop uniform statewide methods for selecting or training surrogate parents.⁴⁵ However, some courts have found state agencies liable for failing to appoint surrogate parents when needed.⁴⁶

Case law provides additional information and context regarding the appointment of surrogate parents in certain situations. Moreover, IDEA's implementing regulations provide that surrogate parents must be appointed by the local education agency when a child with a disability reaches the age of majority but cannot provide informed consent for their educational

⁴³ 34 C.F.R. § 300.519 (2006).

⁴⁴ 8 VA. ADMIN. CODE § 20-81-220(B)(3) (2010) (delegating authority for the appointment of surrogates to the LEA); STATE SPECIAL EDUC. ADVISORY COMM., SSEAC MEETING MINUTES DRAFT: OCTOBER 13-14, 2022 3 (2022) ("Ms. Hunter asked if there is a specific training for surrogates. There is no specified training. A caseworker or social worker for the student cannot act as a parent."); *but see Surrogate Parent (Questions and Answers)*, *supra* note 26, at 3 (providing that surrogate parents must complete an SEA (state educational agency) sponsored training). Some states shorten the timeline for appointment of a surrogate parent. For example, New York requires the appointment of a surrogate within ten business days of determining the need for one, *see* N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(n)(3)(iii) (2014).

⁴⁵ *Baer v. Klagholz*, 339 N.J. Super. at 169-70; *see also* *In re C.S.*, 374 Mont. 289, 293-94 (2014) (giving preferential treatment to a foster parent over that of a surrogate parent appointed by the juvenile court judge to make decisions for a child who reached the age of majority but who lacked the ability to provide informed consent).

⁴⁶ *Edward B. v. Brunelle*, 662 F. Supp. 1025, 1031 (D.N.H. 1986). *See also* Paul J. Soska, III & Patrick D. Pauken, *Surrogate Parents Under the Individuals with Disabilities Education Improvement Act 2004: The Who, What, Why, When, and How*, 252 ED.L. REP. 551 (2010) (discussing, *Ramon H. v. Illinois State Board of Education*, (No. 91 C 6794, 1192 WL 186248 (N.D. Ill. July 30, 1992), in which a class action suit was filed against the Illinois state education agency for failing to appoint surrogate parents). Soska and Pauken noted, "the plaintiffs . . . claimed the state board of education failed to establish a 'workable method' for identifying State wards in need of surrogate parents as well as failing to recruit sufficient surrogate parents to meet the need. Soska at 47. As a result, the educational placements and services formulated for the children were done so without the presence or input of 'parents' to protect the children's rights." *Id.* The federal court found that the state education agency lacked a sufficient plan for identifying children with disabilities who were in need of surrogate parents for special educational purposes. *Ramon H.*, at 7).

program.⁴⁷ Courts have also supported relatives acting as foster parents that wanted to serve as a parent for IDEA purposes over the state-appointed surrogate parent—even when state regulations did not explicitly allow for foster parents to be appointed as a parent for IDEA purposes.⁴⁸ Courts have also upheld the appointment of educational decision-makers for children even when challenged by their parents, if the court finds that the appointment of the alternative decision-maker is in the child's best interest.⁴⁹ Although state laws control the care of a child whose parents are not available, courts have determined the appointment of a surrogate parent does not terminate the rights of a student's natural parents to participate in the educational process of their children.⁵⁰ Additionally, courts have limited the power of educational surrogates if the court finds that their decisions are not in the best interests of the child.⁵¹

Overall, there seems to be a general consensus that biological parents are most qualified to make decisions for their children, but that parents' rights may also be limited in favor of alternative decision-makers depending on the unique facts of each situation. However, it is clear that a strong educational decision-maker, acting in the best interest of the child, is crucial to ensuring children in foster care receive appropriate special education services. Finally, although state education agencies do not necessarily need to implement statewide programs to ensure the appointment of surrogate parents, state

⁴⁷ 20 U.S.C. § 1415(m)(2) (but note, this does not apply when the adult with a disability is declared incompetent); *see In re C.S.*, 374 Mont. at 290. 8 VA. ADMIN. CODE 20-81-220(B)(3) provides the Virginia regulation regarding the appointment of surrogate parents. To clarify, students remain potentially eligible for special education services through age twenty-one pursuant to 20 U.S.C. § 1418(a). In Virginia, students can continue to receive services through age twenty-two. Pursuant to 8 VA. ADMIN. CODE 20-81-10 (2024), "'age of eligibility' means all eligible children with disabilities who have not graduated with a standard or advanced studies high school diploma who, because of such disabilities, are in need of special education and related services, and whose second birthday falls on or before September 30, and who have not reached their 22nd birthday on or before September 30 (two to 21, inclusive) in accordance with the Code of Virginia. A child with a disability whose 22nd birthday is after September 30 remains eligible for the remainder of the school year.").

⁴⁸ *See Converse Cnty. Sch. Dist. No. Two v. Pratt*, 993 F. Supp. 848, 856, 860 (1997) (finding that under the specific facts of the case, foster parents were "person[s] acting as a parent of a child" under federal regulations, with authority to approve IEP, precluding need to appoint a surrogate parent).

⁴⁹ *See, e.g., In re J.J.*, 69 A.3d 724, 732-34 (2013) (holding that the trial court's order at the pre-hearing conference appointing educational and medical decision makers for the children was not an abuse of discretion in a child dependency proceeding. The father had virtually no contact with the children for the past ten years, and he had only visited the children on one occasion prior to the pre-hearing conference).

⁵⁰ Judith M. Gerber & Sheryl Dicker, *Children Adrift: Addressing the Educational Needs of New York's Foster Children*, 69 ALBANY L. REV. 1, 62 n. 328 (2006); Andrew Hoffman & Amy M. Karp, *Strategies to Promote School Success for Children in Foster Care*, in *Child Welfare Practice Manual for Massachusetts* § 24.5.4 (2012); MASS. DEP'T OF PUB. HEALTH, EARLY INTERVENTION OPERATIONAL STANDARDS, 68 (2013) ("Even if the court does not allow the parent to make educational decisions and a surrogate is appointed, as long as reunification remains the goal, the EI provider must make every effort to have the natural parent participate in decision making about the provision of services.").

⁵¹ *L.C. v. Laurel Sch. Dist.*, 303 F.Supp.3d 265, 278 (D. Del. 2018).

education agencies may be found liable for failing to appoint surrogate parents when needed. Below, I discuss the process for the appointment of surrogate parents in Virginia.

B. Process for Appointment of Surrogate Parents in Virginia

The process for appointing surrogate parents in Virginia is laid out in the state's implementing regulations for IDEA, and, in many ways (with some additions and specifications), mirrors the federal regulations.⁵² Importantly, Virginia law clearly specifies that, upon placing a child in foster care, a social services agency must notify the principal and superintendent that the student is being enrolled, if the child was placed in a new school, and inform the principal of the parental rights status within seventy-two hours of student placement.⁵³ This provision, theoretically, ensures that schools are aware of whether the juvenile courts have appointed a surrogate parent and whether schools must make reasonable attempts to involve the biological parent in special education services for the child.

First, the Virginia regulations specifically provide that children do not require a surrogate parent "if the parent(s) or guardians are allowing relatives or private individuals to act as a parent."⁵⁴ If no parent can be identified or located, however, the local educational agency shall appoint a surrogate parent for a child with a disability.⁵⁵ If the child is a ward of the state, the judge overseeing the child's case may appoint a surrogate parent as the educational representative of the child, provided the appointed surrogate meets the requirements set forth in 8 VAC20-81-10 and 34 CFR 300.519(c).⁵⁶ Interestingly, 8VAC20-81-10 defines "ward of the state" as a child who, as determined by the state where the child resides, is a foster child, a ward of the state, or in the custody of a public child welfare agency.⁵⁷ However, the definition specifically does not include a foster child who has a foster parent who meets the definition of a "parent" under Virginia Code § 22.1-213.1.⁵⁸ The Virginia regulations, therefore, make it clear that when there is a foster parent who meets the definition of parent, no surrogate parent should be appointed.

Additionally, § 22.1-213.1 of the Virginia Code provides:

The local school division shall provide written notice to the biological

⁵² 34 C.F.R. § 300.519 (2006); *see* 8 VA. ADMIN. CODE § 20-81-220 (2023).

⁵³ VA. CODE § 63.2-900(D) (West 2024).

⁵⁴ 8 VA. ADMIN. CODE § 20-81-220(B)(1) (2023).

⁵⁵ *Id.* at § 20-81-220(B)(2).

⁵⁶ *Id.* at § 20-81-220(B)(4).

⁵⁷ *Id.* at § 20-81-10.

⁵⁸ *Id.*

or adoptive parents at their last known address that a foster parent is acting as the parent pursuant to this section, and the local school division is entitled to rely upon the actions of the foster parent pursuant to this section until such time that the biological or adoptive parent attempts to act as the parent.⁵⁹

Thus, Virginia law, in contrast to some other states, specifically empowers foster parents to act as parents for IDEA purposes. The implementing regulations go on to state the procedures for the appointment of surrogate parents in Virginia:

1. The local educational agency shall establish procedures in accordance with the requirements of this chapter, for determining whether a child needs a surrogate parent under 34 CFR 300.519(b).⁶⁰

2. The local educational agency shall establish procedures for assigning a surrogate parent to an eligible child. The surrogate parent shall be appointed by the local educational agency superintendent or designee within 30 calendar days of the determination that a surrogate parent is necessary.⁶¹

Once the appointment has been effected, the local educational agency is required to notify the child, the surrogate parent-appointee, and the person charged with the responsibility for the child.⁶² The surrogate parent serves for the duration of the school year for which the surrogate parent was appointed, unless a shorter time period is appropriate given the content of the child's IEP, and the appointment may be extended during the summer months as needed.⁶³ At the conclusion of each school year, the appointment of surrogate parents is renewed, or not renewed, following a review by the local educational agency.⁶⁴ Additionally, under the following circumstances, school divisions must establish procedures for changing or terminating the assignment of a surrogate parent before their appointment has expired:

a. The child reaches the age of majority and rights are transferred to the child or to an educational representative who has been appointed for the child in accordance with the procedures in 8VAC20-81-180;

b. The child is found no longer eligible for special education services and the surrogate parent has consented to the termination of services;

c. Legal guardianship for the child is transferred to a person who is

⁵⁹ 8 VA. CODE § 22.1-213.1(C) (2011).

⁶⁰ 8 VA. ADMIN. CODE § 20-81-10 (2021).

⁶¹ *See id.*

⁶² 8 VA. CODE § 22.1-213.1(C) (2011).

⁶³ 8 VA. ADMIN. CODE § 20-81-220(C)(1) (2023). For example, surrogate parents may be needed during the summer months to monitor the provision of Extended School Year Services (ESY), pursuant to 34 C.F.R. § 300.106 and 8VAC20-81-100(J)).

⁶⁴ *Id.* at § 20-81-220(C)(2).

able to carry out the role of the parent;

d. The parent(s), whose whereabouts were previously unknown, are now known and available; or

e. The appointed surrogate parent is no longer eligible [according to subsection E of this section].⁶⁵

Finally, the regulations provide for the identification, recruitment, and required qualifications of surrogate parents. The school division must first develop and maintain a list of individuals who can serve as surrogate parents, with preference for those within its jurisdiction, though the regulations acknowledge that some divisions will need to go outside the jurisdiction to find qualified surrogate parents.⁶⁶ Individuals not on the list may also serve as a surrogate parent at the discretion of the agency.⁶⁷ The regulations state that in such situations, "the needs of the individual child and the availability of qualified persons who are familiar with the child and who would otherwise qualify shall be considerations in the local educational agency's determination of surrogate eligibility."⁶⁸ The school division must also consider whether there is a relative available to serve as a surrogate parent, and whether the child should be consulted in the selection of the surrogate parent.⁶⁹ The local education agency shall ensure that the person appointed:

a. Has no personal or professional interest that conflicts with the interest of the child;

b. Has knowledge and skills that ensure adequate representation of the child;

c. Is not an employee of the Virginia Department of Education, the local educational agency, or any other agency that is involved in the education or care of the child; and

d. Is of the age of majority.⁷⁰

The regulations specify that a person who otherwise qualifies to be a surrogate parent is not an employee of the agency solely because the person is paid by the agency to serve as a surrogate parent.⁷¹

Guidance beyond these regulations regarding the appointment of surrogate

⁶⁵ *Id.* at § 20-81-220(C)(2)(a).

⁶⁶ *Id.* at § 20-81-220(C)(2)(b)-(c).

⁶⁷ *Id.*

⁶⁸ *Id.* at § 20-81-220(C)(3).

⁶⁹ *See id.* at § 20-81-220(D)(1).

⁷⁰ 8 VA. ADMIN. CODE § 20-81-220(D)(2) (2023).

⁷¹ *Id.*

parents is sparse. Virginia's publicly available guidance documents for the appointment of surrogate parents have not been updated since 2006.⁷² Additionally, and unlike several other states, Virginia offers no clearly defined statewide training for surrogate parents.⁷³

In considering who shall act as the parent for a foster child, either under the definition of parent or under the surrogate parent appointment process, school divisions must consider the appropriateness of a relative who may be able to serve in that role.⁷⁴ The next section discusses the particular considerations given to relatives acting as the parent for children with disabilities in foster care.

C. Kinship Care Arrangements and "Parent" under IDEA

Kinship care is an arrangement where relatives step up to take care of a child when a parent is otherwise unable to.⁷⁵ More than 2.5 million children reside in kinship care arrangements in the United States.⁷⁶ Nearly fifteen percent of children in Virginia are in adoptive, foster or kinship families (i.e., not a biological child or stepchild of the adult head of household).⁷⁷

Kinship care can be informal, such as when a grandparent is raising a child with the permission of the parent and without the involvement of the state, or more formal, such as when the state places a child with a relative as an alternative to foster care or as a foster child.⁷⁸ In those instances, the relative may act as the parent for IDEA purposes, and kinship guardians are empowered to make educational decisions for the child.⁷⁹ Children in kinship care arrangements have remarkably better outcomes than children in non-relative foster care.⁸⁰ However, children in kinship care who experience trouble in school may be less likely to receive needed early intervention or special

⁷² *Surrogate Parents*, VA. DEP'T OF EDUC. (Aug. 2006), <https://www.doe.virginia.gov/home/showpublisheddocument/36003/638056782209130000>; see also *Surrogate Parents Fact Sheet*, VA. DEP'T OF EDUC. (Aug. 2006), <https://www.doe.virginia.gov/home/showpublisheddocument/36005/638056783180430000>.

⁷³ SSEAC MEETING MINUTES DRAFT: OCTOBER 13-14, *supra* note 44; *Surrogate Parent (Questions and Answers)*, *supra* note 26, at 3.

⁷⁴ See *What is Kinship Care?*, *supra* note 3.

⁷⁵ See *id.*

⁷⁶ *Id.*

⁷⁷ *About*, FORMED FAMS. FORWARD, <https://formedfamiliesforward.org/about/> (last visited Feb. 16, 2024) (citing the 2019 U.S. Census).

⁷⁸ See *What is Kinship Care?*, *supra* note 3; see also, KINSHIP CARE, *supra* note 2, at 1.

⁷⁹ 34 C.F.R. § 300.30(4).

⁸⁰ See also *What is Kinship Care?*, *supra* note 3; see, e.g., FOSTERING SUCCESS IN EDUCATION: NATIONAL FACTSHEET ON THE EDUCATIONAL OUTCOMES OF CHILDREN IN FOSTER CARE, *supra* note 13, at 15.

education services than their peers in nonrelative foster care.⁸¹ This demonstrates the need for kinship caregivers to be trained on special education rules and advocacy.

Virginia's regulations around who can act as the parent, and in considering the appointment of surrogate parents, highlight the importance of relatives acting in those roles. However, when a relative attempts to act as a parent for IDEA purposes, § 22.1-3 of the Virginia Code also controls, providing, in relevant part:

Local school divisions may require one or both parents and the relative providing kinship care to submit signed, notarized affidavits (a) explaining why the parents are unable to care for the person, (b) detailing the kinship care arrangement, and (c) agreeing that the kinship care provider or the parent will notify the school within 30 days of when the kinship care arrangement ends, as well as a power of attorney authorizing the adult relative to make educational decisions regarding the person. A school division may also require the parent or adult relative to obtain written verification from the local department of social services where the parent or parents live, or from both that department and the department of social services where the kinship provider lives, that the kinship arrangement serves a legitimate purpose that is in the best interest of the person other than school enrollment . . . A local school division may enroll a person living with a relative in a kinship care arrangement that has not been verified by a local department of social services.⁸²

Anecdotal evidence from stakeholders across the state indicate that while some school divisions in Virginia require these affidavits, others do not.⁸³ More research and state guidance are needed around what is required when a relative attempts to act in the role of a parent, when and how school divisions are requiring affidavits, and the effect this has on the school's requirement to involve the biological parent in decisions.

D. Analysis of Marissa's Situation

This article began with the imagined scenario of Marissa, a child with disabilities in foster care in Virginia, and asked: under these circumstances, who should act as Marissa's parent? First, the school should consider whether it

⁸¹ C. CASANUEVA ET AL., U.S. DEP'T OF HEALTH & HUM. SERVICES: OFF. OF PLAN., RSCH. & EVALUATION, CHILD WELL-BEING SPOTLIGHT: CHILDREN LIVING IN KINSHIP CARE AND NONRELATIVE FOSTER CARE ARE UNLIKELY TO RECEIVE NEEDED EARLY INTERVENTION OR SPECIAL EDUCATION SERVICES 1-2 (2020).

⁸² VA. CODE § 22.1-3 (2023).

⁸³ See VA. DEP'T OF EDUC., ENROLLMENT IN VIRGINIA PUBLIC SCHOOLS (2022) (detailing the procedures for establishing residency for public school enrollment purposes). The discrepancy as to which Virginia schools are enforcing the affidavit requirement under § VA. CODE § 22.1-3 is a personal observation by the author, discovered through interviews and other experiences.

is possible to locate her mother, but this is unlikely since no one has been able to find her for several months. Marissa does not have a foster parent since she is placed in a group home, and her social workers are barred from acting as her parent for IDEA purposes under federal and state law. She also does not have a relative available to make decisions for her. Therefore, Marissa must be appointed an educational surrogate parent, either by the juvenile court judge or the school.

As discussed in Part I, appointing a strong advocate for Marissa is critical to her future educational stability and wellbeing. For example, the advocate could ensure that she stays in the least restrictive environment with her peers rather than a private day placement. The advocate could also ensure Marissa receives the behavioral health supports she needs, and hold the school accountable for providing the services in her IEP.

III. OTHER STATE PRACTICES

Several states, including Arizona, California, Connecticut, Delaware, Hawaii, Illinois, Massachusetts, Maine, Missouri, and Vermont, have developed statewide surrogate parent programs to ensure that children in foster care are assigned trained surrogate parents quickly when needed.⁸⁴ For example, Delaware's state educational agency contracts with a statewide nonprofit, the Parent Information Center (PIC) of Delaware, to administer the Surrogate Parent Program for the state.⁸⁵ PIC maintains a pool of surrogate parents and a statewide training model to ensure appointed parents are uniformly qualified to act as advocates in special education cases.⁸⁶ Likewise, Arizona maintains a list of qualified surrogate parents through their state education department.⁸⁷ The state trains surrogate parents via a statewide training module and coordinates the appointments of surrogate parents when one is needed by the local education agency.⁸⁸ In California, the law requires the state education agency to "develop a model surrogate parent training module and manual that shall be made available to local educational agencies."⁸⁹ This training module

⁸⁴ FOSTERING SUCCESS IN EDUCATION: NATIONAL FACTSHEET ON THE EDUCATIONAL OUTCOMES OF CHILDREN IN FOSTER CARE, *supra* note 13, at 5.

⁸⁵ *Surrogate Parent Program*, PARENT INFO. CTR. OF DEL., INC., <https://picofdel.org/educational-surrogate-parent-program/> (last visited Feb. 16, 2024); *Our Work*, PARENT INFO. CTR. OF DEL., INC., <https://picofdel.org/our-work/> (last visited Feb. 16, 2024) (PIC also acts as the state's Parent Training and Information Center (PTI) as mandated by IDEA pursuant to 20 U.S.C. §§ 1471 and 1472).

⁸⁶ *Our Work*, *supra* note 85.

⁸⁷ *Surrogate Parents*, ARIZ. DEP'T OF EDUC. (Mar. 24, 2022), <https://www.azed.gov/specialeducation/surrogate/>.

⁸⁸ *Id.*

⁸⁹ CAL. GOV'T CODE § 7579.5 (m) (West 2008).

is widely available and comprehensive.⁹⁰

Very few national surveys have been conducted to consider broadly the practices of state education associations regarding the appointment of surrogate parents. The most comprehensive survey was completed in 2009 by the National Association of State Directors of Special Education (NASDSE) in coordination with the Legal Center for Foster Care and Education—a project of the American Bar Association's Center on Children and the Law. Forty-one state- and non-state jurisdictions responded to the survey.⁹¹ This study, although now almost fifteen years old, nonetheless provides a crucial snapshot of the variety of ways states coordinate their educational surrogate parent programs, and their contrast to Virginia.

Of the forty-one states who responded to the survey, thirty-four states have issued policies or formal guidance regarding IDEA surrogate parent requirements or other relevant state law requirements.⁹² Thirty-eight states described the proactive steps they took in training school divisions on locating a biological parent and knowing when to appoint an educational surrogate.⁹³ For example, Oklahoma provides training to school divisions regarding parent participation and provides parent support to the state's parent training and information center.⁹⁴ Idaho also requires contact with the biological or adoptive parent prior to determining the need for a surrogate.⁹⁵

Other states have formalized memorandums of understanding or other informal relationships between the state education agency and the state child welfare agency. For example, the Illinois State Board of Education and the Illinois Department of Children and Family Services have a standing agreement stating their responsibility to train foster parents regarding special education services and the expectation that foster parents will serve as surrogate parents.⁹⁶ Nebraska created forms for child welfare workers to inform schools of whether biological parental rights remain intact.⁹⁷

In particular, at the time of the survey, twelve of the forty responding states

⁹⁰ See generally SURROGATE PARENTS IN CALIFORNIA SPECIAL EDUCATION: AN OVERVIEW, *supra* note 27.

⁹¹ Eve Müller, *Surrogate Parents and Child. with Disabilities: State-Level Approaches*, INFORUM: NAT'L ASSOC. OF STATE DIRECTORS OF SPECIAL EDUC., Nov. 2009, at 2.

⁹² *Id.* at 3.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*; see also DEP'T OF EDUC. STATE OF IDAHO, SURROGATE PARENT PROCEDURES AND Forms 1 (2020) (advising school districts to use a variety of methods to locate a parent, including a visit to their last known address).

⁹⁶ Eve Müller, *supra* note 91, at 4; see also CARMEN I. AYALA, ILL. STATE BD. OF EDUC. SPECIAL EDUC. DEP'T, EDUCATIONAL SURROGATE PARENT PROGRAM FREQUENTLY ASKED QUESTIONS (2021) (answering general questions about the expectations of foster parents).

⁹⁷ Eve Müller, *supra* note 91, at 4.

operated a statewide program pertaining to surrogate parents.⁹⁸ Five of these identified IDEA reauthorization as an impetus for developing a statewide surrogate program; two identified complaints or litigation as an impetus; and two identified implementation of state statutes and/or regulations.⁹⁹ Each of the twelve used their statewide programs for training and recruitment of surrogate parents.¹⁰⁰ The number of children served annually by the statewide surrogate parent programs varied widely: Arizona reported serving 180; Maine reported serving approximately 600; Massachusetts served approximately 1,100, and Illinois reported serving 1,985.¹⁰¹ Importantly, the survey noted that “although only just more than a quarter of respondents described having a statewide surrogate parent program that addresses recruitment, training and retention of surrogates, all 12 of these states emphasized the value of a statewide system for ensuring that children with disabilities receive appropriate services.”¹⁰²

Oversight by state education agencies strongly influences local education agency practice, the quality of services they provide to students, and their compliance with federal law.¹⁰³ A robust monitoring system and statewide coordination of the appointment and training of surrogate parents ensures enhanced accountability for school divisions in complying with the surrogate parent requirements. Evidence suggests that some schools and school divisions are failing to ensure that surrogate parents are properly advocating for student interests in line with relevant law and guidance. In one egregious example, the U.S. Department of Justice (DOJ), through a 2004 civil rights investigation into the Arizona Juvenile Department of Corrections (ADJC), discovered that “rather than appoint a surrogate when a youth's parents cannot or will not participate in the IEP process, the facilities simply have adults who have never even met the youth sign the IEP.”¹⁰⁴ DOJ kept their

⁹⁸ *Id.*

⁹⁹ *Id.*; see also Soska & Paulken, *supra* note 46 (discussing *Edward B. v. Brunelle* (662 F. Supp. 1025), in which a class action was filed against a state education agency due to failure to appoint educational surrogate parents when necessary under IDEA); see also Ramon H. v. Illinois State Board of Education, No. 91 C 6794, 1992 U.S. Dist. LEXIS 11798.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* The number of children served statewide may depend on several factors. One of these factors may be whether the state allows foster parents to act and how they are counting surrogate and foster parents.

¹⁰² *Id.* at 7.

¹⁰³ See, e.g., MELISSA JUNGE & SHEARA KRVARIC, COUNCIL OF CHIEF STATE SCH. OFFICERS, A GUIDE TO STATE EDUCATIONAL AGENCY OVERSIGHT RESPONSIBILITIES UNDER ESSA: THE ROLE OF THE STATE IN THE LOCAL IMPLEMENTATION OF ESSA PROGRAMS 1 (2017) (noting, “[u]ltimately, how an SEA carries out its oversight responsibilities has a strong influence on the services LEAs provide to students.” Although this document references ESSA, it indicates the strong influence and responsibility SEAs have over LEAs in monitoring and ensuring compliance with federal law).

¹⁰⁴ Letter from Office of the Assistant Attorney General, to The Honorable Janet Napolitano, Governor of Arizona (Jan. 23, 2004) (on file with U.S. Dep’t of Just.).

compliance monitoring open through 2007, when it determined AJDC had resolved the issues noted in the 2004 investigation.¹⁰⁵ Had Arizona been using a statewide monitoring and training system on the use of surrogate parents, perhaps these educational violations could have been avoided.

In this section, I detailed several strategies other states have taken to strengthen their local surrogate parent appointment and training process. The next and final section of this article will suggest recommendations for Virginia to improve its own processes.

IV. RECOMMENDATIONS FOR VIRGINIA

As noted previously, Virginia offers no clearly defined statewide training for surrogate parents.¹⁰⁶ The state's publicly available guidance documents for the appointment of surrogate parents have not been updated since 2006.¹⁰⁷ Although robust guidance exists for the prompt placement and enrollment of children in foster care in school in Virginia, significantly less guidance is available for the appointment of surrogate parents for children with disabilities in foster care.¹⁰⁸

Although it is possible that this issue is not as widespread given foster parents' abilities to act as surrogate parents under the Virginia law, anecdotal evidence suggests that school divisions across the state struggle to implement the requirements of state and federal law regarding the need for surrogate parents.¹⁰⁹ Anecdotal evidence also suggests that at least in some divisions, child welfare workers continue to act as the parent, despite state guidance to the contrary.¹¹⁰ Additionally, with no statewide program, there is little

¹⁰⁵ Letter from U.S. Dep't of Educ. Office for Civil Rights to XXXX, Interim Superintendent (Nov. 16, 2018) (on file with Arizona Dep't of Ju. Corr.).

¹⁰⁶ See SSEAC MEETING MINUTES DRAFT: OCTOBER 13-14, *supra* note 44 (noting the surrogate parent FAQs from August of 2006 provide that surrogate parents must complete an SEA "state educational agency" sponsored training).

¹⁰⁷ *Surrogate Parent (Questions and Answers)*, *supra* note 26 (showing the Frequently Asked Questions sheet for Surrogate Parents has not been updated since 2006); see also *Surrogate Parents Fact Sheet*, *supra* note 72 (showing the Fact Sheet for Surrogate Parents has not been updated since 2006).

¹⁰⁸ See generally FOSTERING CONNECTIONS AND THE EVERY STUDENT SUCCEEDS ACT: JOINT GUIDANCE FOR SCHOOL STABILITY OF CHILDREN AND YOUTH IN FOSTER CARE, *supra* note 4.

¹⁰⁹ See *Surrogate Parent (Questions and Answers)*, *supra* note 26 (showing that surrogate parents are only used for children with disabilities); Nathaniel Cline, *Feds Identify 'Significant' Ongoing Concerns with Virginia Special Education*, VA. MERCURY (Mar. 20, 2023), <https://www.virginiamercury.com/2023/03/20/feds-identify-significant-ongoing-concerns-with-virginia-special-education/> (explaining that the Virginia Department of Education is failing to meet and implement federal regulations when it comes to children with disabilities).

¹¹⁰ These comments are based on interviews with other special education advocates and author experience working in the field.

accountability to ensure surrogate parents are trained and qualified to provide advocacy for students.

Virginia must focus more on this issue. The state legislature could direct the Joint Legislative Audit & Review Commission (JLARC) to review this issue further and suggest additional recommendations. The legislature or the state Board of Education could also direct the VDOE to implement a statewide training program for surrogate parents. VDOE could also make publicly available when and how surrogate parents are appointed, and create a database of qualified surrogate parents maintained by VDOE staff for schools to appoint from when needed.

As noted in this article, research overwhelmingly suggests that children placed with relatives have better outcomes than children placed in foster care.¹¹¹ Often those relatives are best able to act as the parent for IDEA purposes because of their shared history and knowledge of the child. However, more must be done to ensure kinship caregivers, as well as foster parents, have the tools to advocate for special education services and supports for the children in their care. Any training program made available to surrogate parents should also be made available to kinship caregivers acting as the parent for special education purposes. Our own state's parent education and information center, PEATC, may be a useful vehicle for this training.¹¹² Additionally, more guidance is needed for school divisions to ensure uniformity of practices when relatives attempt to act as parents for IDEA purposes. For those children who do not have a parent or relative available to act as the parent, and for whom the foster parents are unable or unwilling to act as the parent for IDEA purposes, surrogate parents remain a critical way for children with disabilities in foster care to receive the educational services to which they are entitled.

To that end, Virginia must also do more to ensure local education agencies are filtering information to IEP teams about their obligation to involve the biological parents of children in foster care in the educational process, and the restrictions on not allowing social workers or case managers to act as the parent for a foster child.¹¹³ This can be accomplished through additional training on this issue for local special education teachers and case managers.

¹¹¹ Laura King & Aneer Rukh-Kamaa, *supra* note 10; IMPROVING VIRGINIA'S FOSTER CARE SYSTEM, *supra* note 11; NATALIE A.E. YOUNG, *supra* note 11; FOSTERING SUCCESS IN EDUCATION: NATIONAL FACTSHEET ON THE EDUCATIONAL OUTCOMES OF CHILDREN IN FOSTER CARE, *supra* note 13; STEPPING UP FOR KIDS, THE ANNIE E. CASEY FOUND. (2012); *What is Kinship Care?*, *supra* note 3.

¹¹² *Homepage*, PARENT EDUC. ADVOC. CTR. (2024), <https://peatc.org/> (PEATC is Virginia's parent training and information center under 34 C.F.R. § 300.31.); *see* 34 C.F.R. § 300.31 (2006).

¹¹³ Again, although foster care workers and social workers may not serve as parents for special education purposes, they can be crucial advocates for foster children to be swiftly appointed surrogate parents.

When parents are not available, the VDOE must play a stronger role in ensuring surrogate parents are promptly appointed, and that school divisions receive ongoing guidance regarding the need for surrogate parents. This could include creating a database of available surrogate parents across the state maintained by VDOE, the development of training materials and resources to advise schools of their obligations regarding surrogate parent appointment, and developing a statewide training program for surrogate parents, as in other states.

Moreover, additional research is needed regarding the frequency of surrogate parent appointments by school divisions and juvenile court judges in Virginia.¹¹⁴ For states that provide statewide surrogate training, it would be useful to compare the educational outcomes of children in foster care who receive a surrogate parent under the statewide program, versus foster children who receive a surrogate parent in states without statewide guidance, such as Virginia. Ultimately, this research would demonstrate whether and how the state's regulations on the appointment of surrogate parents are being followed, and the impact that delayed appointment of qualified surrogate parents has on foster children with disabilities. Additionally, additional research could show weaknesses in the advocacy of surrogate parents, which may be useful for designing new training programs.

V. CONCLUSION

Rita Pierson, a teacher and lifelong advocate for children's education, said in her Ted Talk (now viewed over 15 million times), "[e]very child deserves a champion—an adult who will never give up on them, who understands the power of connection and insists that they become the best that they can possibly be."¹¹⁵ Our student Marissa, from the beginning of this article, represents the many bright and engaged children with disabilities in foster care that we have in Virginia. Each and every one of them deserve a champion to ensure they are able to reach their full educational potential. Virginia can and should take additional steps to ensure this happens.

¹¹⁴ Cf. H.B. 1089, 2024 Gen. Assemb., Reg. Sess. (Va. 2024) (introduced in the 2024 General Assembly session, H.B. 1089 has a provision to develop a data dashboard related to special education data that would specifically disaggregate data based on foster care status, among other things. The data dashboard is not, however, intended to track surrogate parent appointments. At the time of the writing of this article, it has been sent to Governor Glenn Youngkin with an action deadline of April 8, 2024).

¹¹⁵ Rita Pierson, *Every Kid Needs a Champion*, TED TALKS EDUC. (May 2013), https://www.ted.com/talks/rita_pierson_every_kid_needs_a_champion.

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