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Matter of Kevin M.

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CHILD'S RIGHT TO RECEIVE ADEQUATE EDUCATION

New York Constitution Article XI, Section 1:

The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.

FAMILY COURT OF NEW YORK

ERIE COUNTY

In the Matter of Kevin M.[1]
(decided March 12, 2001)

Kevin M. was born on January 21, 1993 and had been in the current foster care placement for twenty-two months.[2] During a January 19, 2001 hearing to determine the discontinuation of parental visitation, it was discovered that Kevin was not attending school, had manifested serious psychological problems, and was not receiving psychological or psychiatric treatment.[3] A court appointed psychological evaluator testified at the hearing that Kevin identified his foster home as a permanent home, and wished to be called "Michael Doe".[4] In a subsequent February 27, 2001 foster care status review hearing, Kevin's law guardian introduced testimony from his counselor, caseworker and foster mother on the issues of Kevin's emotional well-being

[1] 187 Misc. 2d 820, 724 N.Y.S.2d 816 (Fam. Ct. Erie County 2001).
[2] *Id.* at 823, 724 N.Y.S.2d at 819.
[3] *Id.* at 820, 724 N.Y.S.2d at 817.
[4] *Id.* Since Kevin viewed his foster mother, Lorie Doe, as his "real" mother, he insisted on being called "Michael Doe" and did not perceive this placement as a foster home.

and education.[5] Despite testimony related to Kevin's overall improvement, the family court ordered that Kevin M. have immediate access to therapeutic services of a licensed psychologist and to commence attendance at regular school.[6]

Kevin and his sister were placed in separate foster care due to the abuse sustained at the hands of their mother.[7] Kevin was described as a timid child who took steps to disguise himself due to his extreme fear that his biological mother would "kidnap" him.[8] Kevin was diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD").[9] His foster mother home-schooled Kevin due to the ADHD.[10] While Mrs. Doe had no teaching credentials, Kevin was expected to take a standardized test at the end of the year.[11] Pertaining to his socialization, Kevin participated in Awana (a Christian version of Boy Scouts), Oasis (a Christian drama and choir group), church activities and a secular indoor soccer league.[12] Despite these attempts at socialization, the evidence clearly demonstrated that Kevin was not receiving the special education or therapeutic intervention he required.[13] However, the law guardian argued that Kevin considered his foster home his permanent home and identified his foster family as his "real" family.[14] Moreover, it was shown that a Social Services employee made an improper comment to his foster parents that there was "zero chance" Kevin would be

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[5] *Id.* at 829, 724 N.Y.S.2d at 823.

[6] *Kevin M.*, 187 Misc. 2d at 830, 724 N.Y.S.2d at 824.

[7] *Id.* at 821, 724 N.Y.S.2d at 818.

[8] *Id.* at 821-22, 724 N.Y.S.2d at 818. Dr. Eloise O'Brien, a licensed clinical psychologist, appointed to conduct a psychological evaluation of Kevin, testified that Kevin wore "jingle bells to bed at night and has shaved his head and wears glasses in order to be unrecognizable" to his biological mother to protect himself from being kidnapped by her.

[9] *Id.* at 823, 724 N.Y.S.2d at 819.

[10] *Id.* at 824, 724 N.Y.S.2d at 819.

[11] *Kevin M.*, 187 Misc. 2d at 824, 724 N.Y.S.2d at 819.

[12] *Id.*

[13] *Id.* at 825, 724 N.Y.S.2d at 820.

[14] *Id.* at 822, 724 N.Y.S.2d at 818.

returned to his biological parents, thus, further enabling this inappropriate bond to continue.[15]

Handicapped children are not a "suspect class," nor is the right to education classified as a fundamental interest[16] under federal standards. With no specifically enumerated right in the United States Constitution, Congress sought to address the issue of education for handicapped children by enacting the Individuals with Disabilities Education Act ("IDEA").[17] The basic purpose of the IDEA is to ensure that children with disabilities receive special education and related services designed around their specific and unique needs.[18] The Act provides federal money to qualified states to assist in the education of handicapped children. To qualify, a state must demonstrate that it has in effect a policy assuring the right to a "free appropriate public education" to all handicapped children.[19] Yet, the statute does not contain any language that describes a substantive standard of the level of education required for these children.[20] In fact, legislative

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[15] *Id.*

[16] San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, (1973).

[17] 20 U.S.C. § 1400 (1997).

[18] Bd. of Educ. of the Pawling Cent. Sch. Dist. v. Schultz, 137 F. Supp. 2d 83, 89 (N.D.N.Y. 2001). This case arises from a dispute wherein the parties were unable to agree on a proposed individualized education program (IEP) prepared for Kevin Schultz, a student with a learning disability. The Schultzes requested an impartial hearing on the grounds that the district failed to offer Kevin a free appropriate public education. Subsequently, they removed him from the public school and enrolled him at a private school and sought tuition reimbursement. The district court ordered that the district was required to continue to reimburse the Schultzes for the cost of tuition during the pendency of the dispute.

[19] 20 U.S.C. § 1412, stating in pertinent part, "A state is eligible for assistance under this subchapter for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions: (1) Free appropriate public education."

[20] Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 189 (1982). This case arose when the petitioners challenged the individualized education program (IEP) prepared for their daughter, Amy Rowley, a deaf student. Petitioners sought to have a sign-language interpreter in Amy's classes, but the school administrators decided an interpreter was unnecessary. Thus, pursuant to the Education of the Handicapped Act (also

history confirms that Congress' objective was merely to assure that public education was available to handicapped children and not to guarantee any level of substantive education.[21] In *Board of Education v. Rowley,*[22] the Supreme Court read the legislative intent of the IDEA as not requiring states to provide specialized educational services to handicapped children that would be commensurate with opportunities provided other children.[23] Justice Rehnquist wrote in the *Rowley* opinion:

> The requirement that States provide "equal" educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. Similarly, furnishing handicapped children with only such services as are available to nonhandicapped children would in all probability fall short of the statutory requirement of "free appropriate public education"; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go. Thus to speak in terms of "equal" services in one instance gives less than what is required by the Act and in another instance more. The theme of the Act is "free appropriate public education," a phrase which is too complex to be captured by the word "equal" whether one is speaking of opportunities or services.[24]

The opinion further elaborates:

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known as the Individuals with Disabilities Education Act), judicial review is permitted after exhausting all administrative reviews. Both the district court and the New York Court of Appeals concluded that the IEP did not meet Amy Rowley's educational needs and held that the Act required the provision of a sign-language interpreter. The Supreme Court reversed and remanded.

[21] *Id.* at 192.

[22] 458 U.S. 176 (1982).

[23] *Id.* at 198.

[24] *Id.* at 198-99.

> [T]he Court of Appeals thus erred when they held that the Act requires New York to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children. Desirable though this goal might be, it is not the standard that Congress imposed upon States which receive funding under the Act. Rather, Congress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education.[25]

However, pursuant to the New York State Constitution, a child's interest in receiving an adequate education is constitutionally enumerated.[26] At the 1894 Constitutional Convention, the Education Article was adopted assuring "minimal acceptable facilities and services" which, as interpreted by the highest court in New York, implies "a sound basic education".[27] The New York Court of Appeals in *Board of Education, Levittown Union Free School District v. Nyquist* [28] "recognized a duty on the Legislature to ensure the availability of a sound basic education to all the children of the State."[29] Article XI of the New York State Constitution mandates that "[t]he legislature shall provide for the maintenance and support of a

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[25] *Id.* at 200.

[26] *Kevin M.*, 187 Misc. 2d at 827, 724 N.Y.S.2d at 821.

[27] Campaign for Fiscal Equity v. New York, 86 N.Y.2d 307, 315, 655 N.E.2d 661, 665, 631 N.Y.S.2d 565, 569 (1995). Plaintiffs, a not-for-profit corporation, brought a declaratory action claiming that the state's public school financing system is unconstitutional under the Education Article of the State Constitution, the Equal Protection Clauses of the State and Federal Constitutions, the Antidiscrimination Clause of the State Constitution and is unlawful under Title VI of the Civil Rights Act of 1964 and the United States Department of Education's regulations implementing Title VI. New York's Court of Appeals reinstated the cause of action based upon a violation of the New York Constitution and the Education Article, as well as the alleged violations of the Equal Protection Clauses of the Federal and State Constitutions and remanded. All other claims were dismissed.

[28] 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982).

[29] *Campaign for Fiscal Equity*, 86 N.Y.2d at 315, 655 N.E.2d at 665, 631 N.Y.S.2d at 569, (citing *Levittown*, 57 N.Y.2d at 48, 439 N.E.2d at 369, 453 N.Y.S.2d at 652.)

system of free common schools, wherein all the children of this state may be educated."[30] Pursuant to section 3212(2)(d) of the New York State Education Law, proof must be furnished that a child who is not attending a public school is attending a private or parochial school.[31] Without such proof, it is presumptive evidence that the child is not attending school and makes out a prima facie case of educational neglect.[32] Moreover, New York State Education Law § 3204 (4-a)[33] provides that "[e]very pupil, having been determined to be a 'child with a handicapping condition' by a committee on the handicapped, shall be offered an opportunity to receive benefits of an appropriate public education."[34] This committee will "identify, review and evaluate at least annually, the status of each child with a handicapping condition . . . and to make recommendations to the child's legal custodian and the Board of Education as to appropriate educational programs and placement."[35] Moreover, foster parents are obligated by the New York State Department of Social Services, in accordance with Title 18, section 443.3(b) of the New York State Department of Social Services Regulations,[36]

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[30] N.Y. CONST. art. XI, § 1.

[31] N.Y. EDUC. LAW § 3212 (2)(d) (McKinney 2001), which provides, "[S]hall furnish proof that an individual who is not attending upon instruction at a public or parochial school in the city or district where the person in parental relation resides is attending upon required instruction elsewhere. Failure to furnish such proof shall be presumptive evidence that such individual is not attending."

[32] *Kevin M.*, 187 Misc. 2d at 827, 724 N.Y.S.2d at 822, (quoting Matter of Christa H, 127 A.D.2d 997, 513 N.Y.S.2d 65 (4th Dept. 1987)).

[33] N.Y. EDUC. LAW § 3204 (4-a. Special Education) (McKinney 2001).

[34] *Kevin M.*, 187 Misc. 2d at 830, 724 N.Y.S.2d at 823.

[35] *Id.* at 829, 724 N.Y.S.2d at 822 (citing N.Y. Educ. Law § 4401 (2)).

[36] N.Y. COMP. CODES R. & REGS. tit. 18, § 443.3 (b), provides in pertinent part,

> Certified and approved foster parents must execute an agreement . . . [that they] will: (1) enable children received at board to mingle freely and on equal footing with other children in the household and in the community and to be accepted as members of the household and share in its pleasures and responsibilities; (2) arrange for children of

to provide socialization with other children in the community and to have the advantages gained from regular school attendance.[37] The *Kevin M.* court recognized that Kevin was entitled to protections afforded by § 3204, and ordered the prompt evaluation of his disability and an individualized education program ("IEP") be formulated and implemented.[38] These recommendations were to be presented to Kevin's legal custodian, The Erie County Department of Social Services, as well as the Board of Education.[39]

A state has the power to impose reasonable regulations for basic education.[40] Absent a fundamental right, such as religious beliefs affirmed in *Wisconsin v. Yoder,* or some other liberty interest rooted in the Federal Constitution, a state's interest in universal compulsory education is strong.[41] Mrs. Doe's assertion that Kevin's ADHD was the reason for home schooling was insufficient to renounce a child's right to a formal education. Clearly a special needs child, Kevin may take advantage of professional educational intervention[42] pursuant to section 4402

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school age to attend school regularly as required by the Education Law . . . .

[37] *Kevin M.*, 187 Misc. 2d at 828, 724 N.Y.S.2d at 822.

[38] *Id.* at 829-30, 724 N.Y.S. at 823.

[39] *Id.* at 831, 724 N.Y.S.2d at 824.

[40] Wisconsin v. Yoder, 406 U.S. 205, 213 (1972). Wisconsin's compulsory school-attendance law required children to attend public or private school until the age of sixteen. Respondents, members of the Amish community charged with violating the compulsory school attendance statute, alleged that the statute violated their rights under the First and Fourteenth Amendments. The Amish objection is rooted in religious concepts whereby the values taught by a high school education is in direct contrast to the Amish values and their way of life. Amish children grow in their faith and their relationship to the Amish community during their adolescence and are prepared for adult baptism into the Amish community. The trial court denied the motion to dismiss the charges; the Wisconsin Circuit Court affirmed the convictions and the Wisconsin Supreme Court reversed based upon the Free Exercise Clause of the First Amendment. The U.S. Supreme Court affirmed.

[41] *Id.* at 215.

[42] *Kevin M.*, 187 Misc. 2d at 829, 724 N.Y.S.2d at 823.

(2) (a) of the Education Law.[43] In conjunction with the education laws, regulations by the New York State Department of Social Services create obligations upon foster parents to enable children placed in foster homes to socialize with other children in their community.[44] The court found that Kevin's isolation, both with regard to his education and community socialization, were contrary to regulatory direction and clearly not in his best interests.[45]

The Supreme Court has recognized that a fundamental liberty interest protected by the Due Process Clause exists for the right of parents to "establish a home and bring up children" and "to control the education of their own."[46] Twenty-one years after its decision in *Meyer v. Nebraska*,[47] the Court confirmed in *Prince v. Massachusetts*[48] the right of parents to decide on the upbringing of their children as a right of constitutional dimension: "It is cardinal with us that the custody, care and nature of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither

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[43] N.Y. EDUC. LAW § 4402(2)(a) (McKinney 2001), states in pertinent part, "The board of education or trustees of each school district shall be required to furnish suitable educational opportunities for children with handicapping conditions . . ." Section 4402(1)(b)(1) states in pertinent part, "The board of education or trustees of each school district shall establish committees and/or subcommittees on special education as necessary to ensure timely evaluation and placement of pupils." Section 4402(2) states,

> Such committees or subcommittees shall identify, review and evaluate at least annually, the status of each child with a handicapping condition and each child thought to be handicapped who resides within the school district. Such review shall consider the educational progress and achievement of the child with a handicapping condition and the child's ability to participate in instructional programs in regular education.

[44] *Kevin M.*, 187 Misc. 2d at 828, 724 N.Y.S.2d at 822.

[45] *Id.*

[46] Troxel v. Granville, 530 U.S. 57, 65 (2000) (citing Meyer v. Nebraska, 262 U.S. 390 (1923)).

[47] 262 U.S. at 390.

[48] 321 U.S. 158 (1944).

supply nor hinder."[49] Given this significant precedent, there can be no doubt that the United States Constitution protects the fundamental right of parents in directing the future of their children.[50] Against this backdrop of constitutional rights, the *Kevin M.* court while, at the same time, hearing motions on the termination of parental rights admonished the Department of Social Services for their failure to rehabilitate Kevin's mother for the eventual reunion of mother and child.[51] So firmly rooted is the concept of "family," that a number of Supreme Court cases[52] have defined family as: "[f]irst, the usual understanding of "family" implies biological relationships, and most decisions treating the relation between parent and child have stressed this element."[53]

Similarly, the New York Court of Appeals acknowledged "that the right of a parent, under natural law, to establish a home and bring up children is a fundamental one."[54] Thus a second and equally important issue raised by the *Kevin M.* court is whether it can be said that the relationship between foster parents and a foster child rise to the level of what is recognized as a "family," thus permitting foster parents to decide the educational future of foster children.[55] While a biological relationship is not

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[49] *Troxel*, 530 U.S at 65-66, (citing *Prince*, 321 U.S. at 166); *see also* Santosky v. Kramer, 455 U.S. 745 (1982); Parham v. J.R., 442 U.S. 584 (1979); Quilloin v. Walcott, 434 U.S. 246 (1978); Stanley v. Illinois, 405 U.S. 645 (1972).

[50] *Troxel*, 530 U.S. at 66.

[51] *Kevin M.*, 187 Misc. 2d at 830, 724 N.Y.S.2d at 823.

[52] *See* Moore v. East Cleveland, 431 U.S. 494 (1977); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); *Stanley*, 405 U.S. at 645; Griswold v. Connecticut, 381 U.S. 479 (1965).

[53] Smith v. Org. of Foster Families for Equality & Reform, 431 U.S. 816, (1977) (citing *Stanley*, 405 U.S. at 651).

[54] *In re* Jewish Child Care Ass'n of N.Y., 5 N.Y.2d 222, 156 N.E. 2d 700, 183 N.Y.S.2d 65 (1959). Habeas corpus proceeding to determine custody of an infant placed in a foster home at the time she was one year old. For four years the foster parents actively sought to adopt the child despite the refusal by the child's biological mother. The trial judge ordered that 'in the best interests of the child' she be taken from the foster parents. Both the appellate division and the Court of Appeals affirmed. *Id.*

[55] *Smith*, 431 U.S. at 842.

present in a foster family, a child who has been with foster parents since infancy develops strong emotional, loving and interdependent attachments.[56] These familial bonds promote a way of life and fulfill socializing functions, as would a natural family.[57] However, there are important differences between a natural family and a foster family.[58] Foster families have their roots in a contractual arrangement between the state and the family.[59] This arrangement eliminates any right to family privacy recognized by our Federal Constitution.[60] Without the liberty interest of family privacy, a foster parent cannot stand in an *in loco parentis*[61] relationship making legal, e.g. educational-type decisions, for a foster child.[62] More importantly, state agencies retain legal custody of foster children and agency supervision sends a clear message to foster parents that they do not have the full authority of a legal custodian.[63] Moreover, natural parents retain legal guardianship and the right to act with respect to the

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[56] *Id.* at 844.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Smith*, 431 U.S. at 844.

[61] BLACK'S LAW DICTIONARY 542 (6th ed. 1991) defines *in loco parentis* as "[i]n the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties, and responsibilities. "Loco parentis" exists when person undertakes care and control of another in absence of such supervision by latter's natural parents and in absence of formal legal approval, and is temporary in character and is not to be likened to an adoption which is permanent."

[62] Andrews v. County of Otsego, 112 Misc. 2d 37, 41, 446 N.Y.S.2d 169, 172 (Sup. Ct. Otsego County 1982). Plaintiff voluntarily surrendered her infant son to the Otsego County Department of Social Services. While the infant was in the custody of foster parents, he sustained an eye injury. Suit was brought on behalf of the infant child against the foster parents and the Department of Social Services for negligent supervision. The foster parents moved for a dismissal claiming that an infant child does not have a cause of action against a parent for the negligent failure to supervise and as foster parents they should be treated as natural parents. The court concluded that public policy supports a cause of action for negligent supervision against foster parents and denied their motion to dismiss.

[63] *Smith*, 431 U.S. at 827.

child in certain circumstances.[64] The foster parent-child relationship is designed to be temporary, merely providing a stable environment with the benefits of a family setting, until the child can return to its biological parents or be permanently placed in an adoptive home.[65] Additionally, it is well established that New York courts have "admonished foster parents against conducting themselves in a manner inconsistent with their responsibility to prepare the child for eventual return to the parental home."[66]

In summary, New York, vis-à-vis New York State Constitution, has created a right to education despite the fact that there is no corresponding federal constitutional right. The closest the federal government has come to creating such a right is through the enactment of the Individuals with Disabilities Education Act that provides federal money to states to assist in the education of handicapped children. While states need to demonstrate that a policy assuring the right to a free appropriate public education is in place, the Act falls short of mandating any substantive standard level of education.

This federal quasi-right of education and absolute right under the New York State Constitution cannot be reconciled with the Supreme Court's observation in *Parham v. J.R.*:[67] "[m]ore

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[64] *Id.*

[65] People v. Nassau County Dep't of Social Serv., 46 N.Y.2d 382, 387, 386 N.E.2d 235, 238, 413 N.Y.S.2d 626, 629 (1978). An infant's natural mother placed him in a temporary placement while she contemplated the surrender of the child for permanent adoption. Four days after his birth he was placed with appellants on a foster care basis. Upon receiving the mother's surrender of the child, the Department of Social Services notified the foster parents of their intent to remove the child from their care for the purpose of permanent placement. Appellants sought adoption of the child, but were denied by the department. Delays in litigation resulted in the child remaining with the foster parents for two years. Appellants sought protection under Subdivision 3 of section 383 of the Social Services Law, which provides that foster parents who have cared for a child continuously for two years may apply to adopt the child and are entitled to be given a preference over all other adoption applicants. The supreme court denied the application for adoption. Both the appellate court and the Court of Appeals affirmed.

[66] *Kevin M.*, 187 Misc. 2d at 825, 724 N.Y.S.2d at 820.

[67] *Id.* at 682.

important, historically it has recognized that natural bonds of affection lead *parents* to act in the best interests of their children."[68] It is understood that foster parents are only "temporary parents" and merely because of the provisional nature of the relationship, they are precluded from making decisions beyond the day-to-day supervision of the child.[69] Thus, without the federal constitutional protection of family privacy or religious belief, foster parents are unable to assert the indisputable liberty interests of care, custody and management of a child, as afforded a biological parent.[70] Consequently, a state's interest ensuring that children are provided a public education supersedes decisions by foster parents; yet remain subordinate to those of the biological parent.[71] The *Yoder* court notably quoted Thomas Jefferson, who said early in our history, "some degree of education is necessary to prepare our citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society."[72] For foster children, whose early lives may be burdened by abuse and neglect, education and socialization can be extremely beneficial, and more importantly, in the best interests of the child.

Donna A. Napolitano

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[68] *Troxel*, 530 U.S. at 68 (citing *Parham*, 442 U.S. at 602) (emphasis added).

[69] *Smith*, 431 U.S. at 827.

[70] *Kevin M.*, 187 Misc. 2d at 828, 724 N.Y.S.2d at 822.

[71] *Yoder*, 406 U.S. at 215.

[72] *Id.* at 221.