Special Education Series

Special Education Decision Making
Role of the Judge

Why should a judge make sure children under the court's jurisdiction have someone to make special education decisions for them?

Research shows that the earlier a child with a disability is identified and served, the better the child's school and life outcomes.

✔ **To ensure IDEA's requirements are followed.** The Individuals with Disabilities Education Act (IDEA) is a federal law that requires school districts to provide a "free appropriate public education" (FAPE) to children with a qualifying disability.[1] FAPE means an individualized program of special education and related services (including, for example, physical, speech, or occupational therapy; school health services; and psychological counseling). The special education and related services a child needs must be listed in an Individualized Education Program (IEP), and must offer the child the opportunity to make meaningful academic and behavioral progress in school. Whenever possible, children with disabilities should be taught what all students are learning in regular classrooms—with the extra help they need. Every state has adopted laws to implement the IDEA's requirements.

✔ **To identify children who would benefit from special education services early so they can begin to be served.** Many children who have learning difficulties and need extra help do not have disabilities or require special education. And children of color are at especially at risk of inappropriate placement in special education programs and are consistently overrepresented in such programs. There is also no doubt that many children in care have emotional and other disabilities and need specialized help. Between a third and half of school-age children in the foster care system receive special education services, compared to only 11% of all school-age children.[2] Research shows that the earlier a child with a disability is identified and served, the better the child's school and life outcomes. Service delays and other problems will be avoided only if judges and others working on behalf of children in the child welfare system understand and use the IDEA's rules to make sure children have legally authorized decision makers.

- **To ensure a qualified person is in place to consent to and make decisions about special education services.** Determining who can make decisions for a child who needs special education begins with the IDEA's complex definition of "parent." A child cannot be evaluated or begin to receive special education services until an IDEA Parent has given written permission. In most cases it is the IDEA Parent who consents to the first evaluation. It is the IDEA Parent who consents to services beginning under the Individualized Education Program (IEP), or disagrees with the IEP that the school district is proposing and uses the special education hearing and appeal system to get the services the child needs. Making sure that each child in the care of a child welfare agency has an effective IDEA Parent is the best way to ensure that children with disabilities in out-of-home care get special help to achieve their learning potential.

What is an "IDEA Parent"?

The following people can serve as the "IDEA Parent:"

- **A birth or adoptive parent.** In the absence of judicial intervention, a birth or adoptive parent who is participating in IEP meetings and is otherwise actively involved in the special education or early intervention process is the child's IDEA Parent. This is true even when the child is living in a foster home or a group setting.

- **Another qualified person.** If the birth or adoptive parent is not "attempting to act," any of the following individuals can be the IDEA Parent:
  - a foster parent unless barred by state law from serving as an IDEA parent
  - a guardian (both a general guardian or a guardian specifically authorized to make education decisions)
  - a person acting in the place of the parent with whom the child lives
  - a person legally responsible for the child's welfare
  - a surrogate parent (more on this below)

- **A person designated by the judge.** As detailed below, new federal rules give a judge broad power to designate a specific person to function as the IDEA Parent and to make special education decisions for a child in the custody of a child welfare agency.

What obligations does a school district have to involve the IDEA Parent in the special education process?

School districts must take steps to ensure that the IDEA Parent is involved in the special education process, such as including them in IEP

meetings and notifying them of proposed changes. Therefore, school districts must know who the IDEA Parent is for each child who is attending their schools. This could be a person who meets the IDEA's definition of parent, a person the court has determined is the IDEA Guardian, or a court or school district-appointed Surrogate Parent.

What obligations does a school district have to ensure that a Surrogate Parent is assigned to serve as the child's IDEA parent?

- ✔ **Determining if a Surrogate Parent is needed.** School districts must determine whether a surrogate parent is needed when: 1) a child does not have anyone who meets the definition of an IDEA Parent (for example, there is no birth or adoptive parent, there is no foster parent, or the foster parent is barred by state law from serving as an IDEA Parent); 2) the school district cannot locate an IDEA Parent after reasonable efforts; 3) the child is a ward of the state under the laws of the state;[3] or 4) the child qualifies as an "unaccompanied homeless youth."[4] For children in out-of-home care, a Surrogate Parent must always be appointed in situations 1 and 2.[5]

- ✔ **Appointing a Surrogate Parent for a child who is a ward of the state under the laws of the state.** Whether an education agency is required to appoint a Surrogate Parent for a child who is a "ward of the state under the laws of that state" depends on: 1) how a state defines "wards of the state" (e.g., all children upon entering the custody of the child welfare agency, or all children post-termination of parental rights) ; and 2) the extent to which those states interpret federal law to permit or even require the appointment of a Surrogate Parent for state "wards of the state" who still have an IDEA Parent such as an active birth or adoptive parent.

  For example, some states read the IDEA to require that *all* children who are state "wards of the state" must have a surrogate parent appointed. Other states with similar rules only appoint Surrogate Parents for children who are state "wards of the state" when there is no IDEA Parent. So, to determine which children qualify for Surrogate Parents in your state, it's important to know how your state defines "wards of the state" — and to know how it interprets the federal rules on appointing Surrogate Parents for these children.

- ✔ **Making reasonable efforts to appoint a Surrogate Parent.** When a school district determines that a Surrogate Parent is needed, it must make reasonable efforts to appoint a Surrogate Parent within 30 days. The best option is a surrogate parent (a family member or friend, a former foster parent) who knows the child well and has her confidence. If no one else is available, the school district must recruit a volunteer, perhaps a local CASA member. A Surrogate Parent cannot

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be a person who is an employee of an education or child welfare agency providing education or care for the child—so a school official or child's caseworker cannot be a child's Surrogate Parent. A school district must also ensure that the Surrogate Parent has no personal or professional conflict with the child and that the person has the skills to represent the child competently.

What powers do judges have to appoint a special education decision maker for a child in out-of-home care?

Judges have 3 options under the IDEA:

- ✔ **Initial evaluations:** If the child is in the custody of the child welfare agency and is not living with the birth or adoptive parent or a foster parent who can serve as the IDEA Parent, a judge can suspend the birth or adoptive parent's right to make education decisions for the child and can appoint another person to consent to the child's first special education evaluation. But remember, only an IDEA Parent (which can include a Surrogate Parent or a Guardian, discussed below) can consent to special education services starting—so it's good practice to move forward at the same time to ensure an effective IDEA Parent is in the picture.

- ✔ **Surrogate Parent:** A judge can appoint a person to be a Surrogate Parent—and thus an IDEA Parent—whenever a child meets the IDEA's definition of "ward of the state." This standard is met when the child is in the custody of a child welfare agency AND the child does not have a foster parent who can serve as the IDEA Parent. A Surrogate Parent cannot be a person employed by an agency who provides child welfare or education services to the child.

- ✔ **IDEA Guardian:** The limits on a judge's authority to appoint a Surrogate Parent do not apply when a judge appoints an IDEA Guardian to make special education decisions on behalf of a child. To the extent permitted under state law (usually whenever the appointment of an IDEA Guardian is in the child's best interests), a judge can appoint a person to serve as an IDEA Guardian to make special education decisions for a child. A judge can appoint an IDEA Guardian for a dependent child even when the child remains in the physical custody of the birth parent. Under federal law, an IDEA Guardian appointed by the court is an IDEA Parent who preempts any other possible IDEA Parent, including the birth or adoptive parent or a foster parent. An IDEA Guardian cannot be the child's caseworker.

About this Series

This is one of six fact sheets geared to different audiences:

- children's attorneys
- judges
- caseworkers
- foster parents
- foster youth
- educators

View all fact sheets at:
www.abanet.org/child/education

Tips for Judges:

- ✔ **Keep the birth or adoptive parent in mind.** Most children in care return to their birth or adoptive families. So, when possible and in the child's best interests, keep parents involved and empowered to make education decisions for their children. If the birth parents are the appropriate people to make education decisions, it may be wise to clarify this in the court order.

- ✔ **Consider both permanent and temporary options for alternate decision makers.** For some children, it is in the child's best interest for the judge to appoint an alternate decision maker only for a limited period (for example, when the parent is in the hospital), and to return decision-making power to the birth or adoptive parent as soon as possible. Other children require a more permanent solution. Birth and adoptive parents whose rights have not been permanently terminated should be encouraged to petition the court for reinstatement of decision-making authority whenever they are able to resume these responsibilities.

- ✔ **When appointing a Surrogate Parent or a Guardian, consult all involved parties.** When possible, ask the child whom she would prefer? Or, seek out someone known to the child. Consult the child's attorney, social worker, or the school district about family or friends who are invested in the child's well-being and may be available to serve as the Surrogate Parent. Is a church member, a court appointed special advocate (CASA), or the attorney herself willing to volunteer?[6]

- ✔ **Be sure orders appointing Surrogate Parents or Guardians specifically reference the individual's power to make education decisions.** A Surrogate Parent or Guardian has all special education decision-making rights. An order appointing a Surrogate Parent or Guardian should name a specific person and state the individual is appointed "to make all special education decisions for the child."

- ✔ **Encourage developing Surrogate Parent pools, either through local or state education or child welfare agencies.** Maintaining a trained pool of qualified surrogates can help ensure timely appointments and appropriate advocacy by the individuals appointed.

Endnotes

[1] The IDEA covers children with disabilities from birth until graduation or the maximum age of eligibility under state law. The rules described in this Fact Sheet apply to school-aged children and preschoolers (children from their third birthday until school-age), but do not address the separate rules for children birth through age three. Younger children under age three are entitled to appropriate "early intervention" services, which must be set out in an "Individualized Family Service Plan." Another federal law, §504 of the Rehabilitation Act of 1973, also requires public school districts to provide a "free appropriate public education" to students with disabilities, and to make reasonable accommodations to permit these children to benefit from all aspects of the school program. Some students with disabilities who are not eligible under the IDEA may still be entitled to the protections of §504.

[2] Terry L. Jackson & Eve Müller, *Foster Care and Children with Disabilities* (National Association of State Directors of Special Education, Inc., Forum, February 2005), available at http://www.nasdse.org/publications/foster_care.pdf

[3] A ward of the state under the laws of the state is different from an IDEA ward of the state. An IDEA ward of the state is defined in the IDEA as a child in the custody of a child welfare agency who does not have a foster parent who can serve as an IDEA parent.

[4] For more information about unaccompanied homeless youth, visit the National Law Center on Homelessness and Poverty website, under Education, at www.nlchp.org/FA%5FEducation/, and the National Center on Homeless Education website at www.serve.org/nche/.

[5] An unaccompanied homeless youth under McKinney-Vento can have an active birth or adoptive parent, or can be living with a person who is acting as the child's parent—in which case no other IDEA parent is required. However, the IDEA also provides that appropriate staff from shelters, independent living programs, and street outreach programs may be appointed as a "temporary surrogate parent" even if the staff person is involved in the care or education of the child until a permanent surrogate parent is assigned by the court or the school district.

[6] The judge could appoint the child's attorney or other child advocate (for example, a CASA) as the education decision maker for the child, but much will depend on state law and regulations whether this is appropriate in your state. For attorneys who represent children, the issue may be affected by the standard of representation used in your state or jurisdiction. Federal law is clear that the person appointed cannot be the child's caseworker or any employee of the state if the child is a ward of the state.