



Many children who have learning difficulties and need extra help do not have disabilities or require special education. And children of color are 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. But service delays and other problems will be avoided only if children's attorneys and others working on behalf of children in the child welfare system understand and use the Individuals with Disabilities Education Act (IDEA) to ensure children have legally authorized decision makers.

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What Does Federal Law Mandate for the Education of Children with Disabilities?

The IDEA is a federal law that requires local education agencies to provide a "free appropriate public education" (FAPE) to children with a qualifying disability.³ A child with a disability is entitled to a program of special education and related services that will permit her to make meaningful academic and behavioral progress. These services must be listed in an Individualized Education Program (IEP). Whenever possible, children with disabilities should be taught in regular classrooms and learn what other students are learning—with the extra help they need.

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 the special help they need to achieve their learning potential.



Who is the “IDEA Parent” for a Child in Out-of-Home Care?

The following people can serve as the “IDEA Parent:”

- ✓ **An active 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 should be viewed as 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 not 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 the Education Agency Have to Involve the IDEA Parent in the Special Education Process?

Education agencies must take steps to ensure that the IDEA Parent is involved in the special education process, including them in IEP meetings and notifying them of proposed changes. Therefore, education agencies must know who the IDEA Parent is for each child they are serving. 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 education agency-appointed Surrogate Parent.

What Obligations Does a School District Have to Ensure a Surrogate Parent is Assigned to Serve as the Child’s IDEA Parent?

- ✓ **Determining if a Surrogate Parent is needed.** Education agencies 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, a birth or adoptive parent or a foster parent who is not barred by state law from serving as an IDEA Parent); 2) the education agency

cannot locate an IDEA Parent after reasonable efforts; 3) the child is a ward of the state under the laws of the state;⁴ or 4) the child qualifies as an “unaccompanied homeless youth.”⁵ For children in out-of-home care, a Surrogate Parent must always be appointed in situations 1 and 2.⁶

- ✓ **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” (for example 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.

When the education agency determines that a Surrogate Parent is needed, it must make reasonable efforts to appoint a Surrogate Parent within 30 days.

- ✓ **Making reasonable efforts to appoint a Surrogate Parent.** When the education agency 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 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 Authority Does a Family Court Judge Have to Appoint an IDEA Decision Maker for a Child?

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

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child and can appoint another person to consent to the child's first special education evaluation. Remember, only an IDEA Parent (which can include a Surrogate Parent or a Guardian as 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 above limits on a judge's authority to appoint a Surrogate Parent do not apply when a judge decides to appoint 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 who can make special education decisions for a child. A judge can appoint an IDEA Guardian for a child who has been determined to be “abused or neglected” even when the child remains in the physical custody of the birth parent. Under the federal law, an IDEA Guardian appointed by the court to make education decisions for a child 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.

Tips For Attorneys/Advocates:

- ✓ **Whenever possible, support the birth or adoptive parent as the IDEA Parent for the child.** 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. Remember, special education procedures can be very daunting for parents, and the caseworker can provide essential advice and support. The caseworker can also make sure that the school district treats the parent of a child in care the same way it treats any other parent. The school district should provide the parents mandated notices, include the parents in the IEP development, and notify them of changes. The caseworker should also respect the parent's rights. If a caseworker wants to attend meetings related to the child, the person should ask the parents for permission to participate. The caseworker can be an advocate for the child's needs and also a support to the parents in their decision-making role.

- ✓ **Make sure there is an IDEA Parent.** Many different people can be viewed as the IDEA Parent, and the rules for these determinations are complicated. A child's attorney can approach this task differently for different children. One option might simply be to make sure that the school has someone serving in the parent role for meetings and important education decisions. Another might be to remind the school officials and child welfare agency professionals that the birth parent retains education decision-making rights. The advocate could ask the judge to take one of the three actions outlined above. Or, the advocate could do all of these things in some cases!

- ✓ **If the current IDEA Parent is not the right person to make education decisions for the child, determine who the right person would be and advocate with the school or the court that she be identified as the education decision maker.** For example, the attorney might ask the court to assign a Guardian or a Surrogate Parent if the parent, although active, is not acting in the best interest of the child when making education decisions. In another case it might make sense to ask the court to assign a particular individual to serve as a Surrogate Parent. As a child's attorney you should suggest a specific person to serve in this role who is known to the child or who you think would do a good job. Ask the child or youth (or the child's caregiver) who they think would be the best decision maker. This may include a family member such as an aunt or cousin, a family friend or church member, or a court-appointed special advocate (CASA).

- ✓ **If no other more appropriate person is available, consider whether you want to serve (or whether it is appropriate in your role to serve) as the child's Surrogate Parent or Guardian.** The judge or the school district could appoint the child's attorney or other child advocate (for example, a CASA) as the IDEA Parent for the child, but much will depend on state law and regulations whether this is possible in your state. For attorneys who represent children, the decision may depend on the standard of representation in the state or jurisdiction.

- ✓ **Know your state law and how it affects who can be an education decision maker and when.** Know your state's law. Can foster parents serve as IDEA Parent? Does your state law consider some children to be wards of the state, and if so who is included in that category? Until you know certain things about your state law and how it interacts with the federal rules, you cannot be sure what the federal rules mean in your state.

- ✓ **If a Surrogate Parent is needed, make sure she is appointed timely, has the appropriate training and expertise to make decisions, and has the support to do a good job.** Once a decision is made that a Surrogate Parent is needed (whether it is through a school



or court appointment) make sure the appointment occurs quickly, but not more than 30 days after the determination that one is needed. Also, a child’s attorney can help make sure that the person being appointed has the ability, skills, and information to fulfill her role. For example, a Surrogate Parent appointed by the school may have plenty of expertise about special education law, but may need more information about the foster care system or specific information about the child. The child’s aunt may be appointed by the court or the school, but may need some help understanding how the special education process works and her role.

- ✓ **Advocate for agencies to maintain Surrogate Parent pools—lists of trained and willing people who can serve in the Surrogate Parent role.** Either the school or the child welfare agency could maintain lists of qualified people who can serve as Surrogate Parents. This could help avoid delay in appointing qualified people when a Surrogate is needed. Some states have created statewide programs that have helped in many ways, including ensuring continuity of the Surrogate Parent when the child moves to a different part of the state.

Endnotes

¹ This fact sheet is intended for attorneys who represent children in dependency cases. The advice may also apply to other advocates (including nonattorney advocates) who represent children in out-of-home care.

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 www.nasdse.org/publications/foster_care.pdf

³ 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.

⁴ 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.

⁵ 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/.

⁶ 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.