

This document pre-dates an amendment to the Family Educational Rights and Privacy Act, which allows for easier access of school records to child welfare agencies. 20 U.S.C. § 1232(g)(L).

For more information, see “Q&A How do Recent Changes to FERPA Help Child Welfare Agencies Get Access to Education Records” available at http://www.fostercareandeducation.org/Database.aspx?EntryId=1833&Command=Core_Download&method=inline.

Learn more about data and information sharing between child welfare and education agencies at <http://www.fostercareandeducation.org/AreasofFocus/DataInformationSharing.aspx>.



Special Education Decision Making Role of Child Welfare Caseworker

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.

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

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.¹ 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 caseworkers 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.

What education rights do children with disabilities have?

The Individuals with Disabilities Education Act (IDEA)² is a federal law that requires local school districts to offer children with a qualifying disability a “free appropriate public education” (FAPE). 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.

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

Under the IDEA, the “parent” has decision-making authority. The IDEA Parent participates in decisions about whether a child should be



evaluated and what services the child needs. It is the IDEA Parent who has the authority to challenge the school district's decisions through a complex hearing and appeal process. For the IDEA's rules to work effectively, every child with an eligible disability (or who needs an evaluation to determine if she has a disability) must have an IDEA Parent willing and able to advocate on her behalf. The IDEA Parent also has the right to decide whether the child's school records will be shared with the child welfare agency.

What is an "IDEA Parent"?

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 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, a school district 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 a school district must appoint a surrogate parent for a child who is a state ward of the state who already has an IDEA Parent depends on state law. 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 within 30 days.** When a school district determines that a Surrogate Parent is needed, it must make reasonable efforts to appoint a Surrogate Parent within 30 days. 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.

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

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 that 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 dependent 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.

Remember, special education procedures can be daunting for parents, and the caseworker can provide essential advice and support.

Tips for Caseworkers:

- ✓ **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 daunting for parents, and the caseworker can provide essential advice and support. The caseworker can also make sure 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 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.

- ✓ **You, the child’s caseworker, cannot make special education decisions for a child that is being served by your children and youth agency.** A child’s caseworker cannot sign the child’s IEP or be appointed as a Surrogate Parent or an education Guardian. However, if the child’s foster parent is serving as the child’s IDEA Parent, the foster parent has the same right to notice and to consent to school district proposals as the birth or adoptive parents would have.
- ✓ **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 caseworker can approach this task in different ways for different children. One option is to make sure the school has someone serving in the parent role for meetings and important education decisions. Another option is to remind school officials and other child welfare agency professionals that the birth parent retains education decision-making rights. The caseworker could ask the school district to appoint a Surrogate Parent if the child has no other IDEA Parent. Or, the caseworker could ask the judge to take one of the three actions outlined above.
- ✓ **Be vigilant that children who are living in group settings have IDEA Parents.** Children in group settings don’t have a foster parent who could potentially serve in the IDEA Parent role. These children are often highly mobile and largely “invisible” to the local education agency. If a Surrogate Parent is needed to advocate for the child’s education, ask the education agency or the court to appoint one within 30 days (or sooner if it’s urgent!).
- ✓ **Be proactive in suggesting an individual to serve as the IDEA Parent.** Ask the child or youth (or the child’s caregiver) who would be the best decision maker. Whenever possible, the caseworker should suggest to the judge or the school district the best person to serve as the Surrogate Parent or Guardian—a family member, a family friend or church member, a court-appointed special advocate (CASA), or in some cases the child’s attorney.
- ✓ **Work with your school district and your own agency to ensure that someone is maintaining a pool of well-trained Surrogate Parents.** Sometimes a child in care needs a Surrogate Parent appointed quickly, but no one who knows the child is available to serve in this role. It would help if the school district or child welfare agency had ready access to people willing to serve as Surrogate Parents. At the state and county levels, it helps if education and child welfare agencies collaborate to ensure these people are well trained and available in sufficient numbers to meet students’ needs.



Endnotes

¹ 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

² The IDEA also covers children with disabilities under school age. This fact sheet applies to children and youth ages 3 to 21, including preschoolers (children from their third birthday until school-age), but does 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.

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.