



How Can a Pennsylvania Child's Attorney Help a Child in Care Get Needed Special Education Help?

IMPORTANT: ELC's publications are intended to give you a general idea of the law. However, each situation is different. If, after reading our publications, you have questions about how the law applies to your particular situation, contact us for a referral, or contact an attorney of your choice.

WHAT DOES FEDERAL LAW MANDATE FOR THE EDUCATION OF CHILDREN WITH DISABILITIES?

The Individuals with Disabilities Education Act (IDEA)¹ is a federal law that requires local education agencies² to provide eligible children with 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 be sufficient in nature and degree to permit the child to make appropriate 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.

¹ This fact sheet applies to children and youth ages 3 to the end of the school term in which they turn 21.

² School districts are responsible for the education of school-age children. In Pennsylvania, preschool early intervention programs are usually operated by Intermediate Units, although in a few cases they are operated by school districts or private entities. In this fact sheet the term "school districts" includes all agencies that educate children from their third birthday through graduation or completion of the school year in which they turn 21.

WHO HAS THE LEGAL AUTHORITY TO MAKE SPECIAL EDUCATION OR EARLY INTERVENTION DECISIONS FOR A CHILD INVOLVED WITH THE CHILD WELFARE SYSTEM?

Under the IDEA, it is the "parent" who 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 substantive and procedural protections to work effectively, every eligible child who has 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 those in the child welfare system.

Unless the Court has appointed someone else, the IDEA Parent is the biological or adoptive parent as long as she is "attempting to act as a parent" in interactions with the school district. If the biological or adoptive parent is not available or is not "attempting to act as a parent," the IDEA Parent may be:

- » a foster parent
- » a Guardian who has the authority to act as the child's parent or who has the authority to make education decisions for the child
- » a family member with whom the child lives (such as a grandparent, stepparent), or someone who is legally responsible for the child's welfare, or
- » a Surrogate Parent who can be appointed by the school district or a judge.

WHAT AUTHORITY DOES A FAMILY COURT JUDGE HAVE TO APPOINT AN IDEA DECISION-MAKER FOR A CHILD?

New rules permit judges to appoint a Surrogate Parent for a child in the custody of the child welfare system who does not have a foster parent to make special education decisions for the child. The Surrogate Parent cannot be a person involved in the education or care of the child, which includes the child's caseworker.

A judge can also appoint a Guardian to make special education decisions for a child who has been adjudicated "dependent" if the judge determines that the appointment of an alternate decision-maker is in the child's "best interests." This person cannot be the child's caseworker. When a judge has appointed a specific person to be the Surrogate Parent or Guardian, only that person can make special education decisions for the child.

If a judge wants to ensure that a child is evaluated, but does not want to appoint a Surrogate Parent or an educational Guardian, the judge has another option. If the child is not living with the biological or adoptive parent or with a foster parent, a judge can suspend the birth or adoptive parent's education decision-making rights and can appoint a person to give consent to an initial evaluation (the first evaluation to determine whether a child is eligible for special education). However, that person does not have the authority to agree that the child should begin receiving special education services for the first time. Ask the judge to appoint a Surrogate Parent or an educational Guardian promptly so that there will be no delay if the child is eligible for special education and related services. (The school district can also conduct the initial evaluation for such a child without written consent if the biological or adoptive parent cannot be found despite reasonable efforts by the school district or the parent's education decision-making rights have been terminated by a court. But again, special education services cannot start without consent from a Surrogate or other IDEA Parent.)

WHAT IS YOUR ROLE AS THE ATTORNEY FOR THE CHILD?

It is critical to ensure that the child you are representing has an IDEA Parent. Use this list of quick tips to help ensure that the right decisions are being made for children who need special education services. Consult the Education Law Center website, www.elc-pa.org, for additional publications on the legal rights of children with disabilities, including children in the child welfare system.

TIPS FOR ATTORNEYS/ADVOCATES:

Whenever possible, support the biological or adoptive parent in her role as the IDEA Parent for the child. Unless the judge appoints someone else, an involved biological or adoptive parent is the IDEA Parent and has the authority to make special education decisions for the child - and the parent should be encouraged and supported in this role. The school district should treat the biological, adoptive, or foster parent of a child in care the same way it treats any other parent - it should provide the parent with mandated notices, include the parent in the IEP development, and so forth. If a child's attorney or advocate (or a foster parent or caseworker) feels it is important to attend meetings related to the child, the person should ask the biological or adoptive parent if she can participate.

Make sure that there is an IDEA Parent. If the biological or adoptive parent is not available or is not "attempting to act" (for example, the biological or adoptive parent is not responding to notices from the school, is not attending special education meetings, or tells the agency that she is not interested in playing this role), make sure that there is an alternate decision-maker. Unless a judge has appointed an alternate decision-maker, a foster parent automatically becomes the IDEA Parent if there is no biological or adoptive parent "attempting to act."

If there is no IDEA Parent, one option is to make sure that the school district appoints a Surrogate Parent. In Pennsylvania, if a child in care: 1) does not have anyone who meets the definition of an IDEA Parent (for example, the biological or adoptive parent cannot be identified or is deceased, and there is no foster parent available); or 2) the child qualifies as "unaccompanied homeless youth,"³ the school district must determine if a Surrogate Parent is needed and make reasonable efforts to appoint a surrogate parent not more than 30 days after such a determination. A Surrogate Parent cannot be a person who is providing education or child welfare services to the child - so a school official or teacher 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.

³ For more information about unaccompanied homeless youth visit the National Center on Homeless Education website at <http://www.serve.org/nche/>.

If the child is in the custody of a children and youth agency and has no foster parent, another option is to make sure that the court appoints a Surrogate Parent. If the school district has not appointed a Surrogate Parent, or the school's district's choice is not doing a good job, you can ask the court to appoint a Surrogate Parent at an emergency hearing or the next regularly scheduled court date. Be sure the judge's order includes a specific person to act as the child's Surrogate Parent and states that the individual is appointed "to make all special education decisions for the child." The judge cannot appoint a Surrogate Parent who is involved in the education or care of the child, which includes the child's public or private caseworker.

Another option is to ask the judge to appoint a Guardian. If a judge appoints a Guardian who is authorized to make educational decisions, that person trumps any other potential IDEA Parent, including a biological or adoptive parent who is "attempting to act" as a parent or a foster parent. The Guardian must be a specific person - the judge cannot appoint a child welfare agency. And again, the court cannot appoint the child's caseworker as the Guardian.

Make sure that the right person is selected to be the child's IDEA Parent. Ask the child or youth (or the child's caregiver) who would be the best decision-maker. Whenever possible, the child's attorney should suggest to the judge the best person to serve as the Surrogate Parent or Guardian - a family member other than the parent, a family friend or church member, a court-appointed special advocate (CASA), or the attorney herself.

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