



## WHO CAN MAKE SPECIAL EDUCATION DECISIONS FOR A CHILD WITH A DISABILITY IN OUT-OF-HOME-CARE IN PENNSYLVANIA?<sup>1</sup>

**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 or an attorney of your choice.

The Individuals with Disabilities Education Act (IDEA) is a federal law that mandates that children with disabilities who need help to learn are eligible for special education and other special services. The IDEA also describes how a parent or other caretaker can participate in decisions about whether a child should be evaluated, what services the child needs, how education agency's decisions can be challenged, and lots more. For the IDEA's substantive and procedural protections to work effectively, every child with a disability or who is thought to have a disability must have a "parent" who can act on her behalf. However, for children in the custody of a child welfare agency in out-of-home care, the birth or adoptive parent may not be available or able to make these decisions. This Fact Sheet describes the IDEA's sometimes complex and confusing rules about which adult can make special education decisions for a child in out-of-home care, and under what circumstances.

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<sup>1</sup> This Fact Sheet focuses on who can make decisions for children with disabilities who need special education services and who are in foster care or other child welfare placements. It does not tell you who can make other education decisions, such as school enrollment for a child in out-of-home care or permission for the child to go on a field trip. Because the current rules for the youngest children (under age 3) are being revised by the federal agency, these children are not discussed in this Fact Sheet. Preschoolers (age 3 to school-age) are included.

In general, the IDEA allows only a "parent" to act on behalf of a student with a disability. But the IDEA includes several categories of persons in the definition of "parent":

- A birth or adoptive parent
- The 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 who is caring for the child (such as a grandparent or stepparent), or someone who is legally responsible for the child's welfare, or
- A "Surrogate Parent."

If a person does not fall into one of the categories, that person cannot make special education decisions for the child. However, the "parent" can let the person participate in an Individualized Education Program (IEP) meeting or consult about the child's needs.

When a child is in an out-of-home placement, the issue of who can make special education decisions for the child can become complicated. Below are some common questions and issues that arise when deciding which adult in the child's life is authorized to make these decisions for a child in foster care.

### **WHO GETS TO MAKE SPECIAL EDUCATION DECISIONS WHEN THE CHILD HAS MORE THAN ONE POSSIBLE "PARENT?"**

Foster parents and relatives with whom a child lives can all be "parents" who have the power to make special education decisions for a child in care. These children may also have a living birth or adoptive parent whose parental rights have not been terminated and who might also qualify as the child's special education decision maker. How do you decide which adult currently has decision making authority for a particular child or whether a Surrogate Parent or guardian should be appointed by the school district or the court?

The law says that whenever a birth or adoptive parent is "attempting to act" on behalf of the child in the special education system, the school must treat that parent as the decision maker. This means that if the school proposes an IEP for the child and the birth or adoptive

parent disapproves the plan, the school cannot go around the parent by getting a foster parent, kinship parent, or other relative's agreement. The school can only accept the decision of another person when the birth or adoptive parent is not "attempting to act" on behalf of the child, unless a judge has appointed an alternative decision maker for the child. In that case, the school must treat the person appointed by the judge as the only person authorized to make special education decisions for the child (more on this below).

**For example:** Johnny is a 10-year-old student who lives with his foster parents, Mr. and Mrs. Field. Johnny's father is unknown and his mother, Mrs. Grace, is in jail. Johnny is not doing well in school and his teacher thinks that he needs a new IEP written for him. Who should the school district notify about the IEP meeting, and who can attend the IEP meeting and approve or disapprove the IEP?

- Unless the court has previously limited her right to make education decisions, Johnny's biological mother is the first choice for decision maker. The school must ask her to attend the IEP meeting (if she cannot attend the IEP meeting in person the school can arrange for her to participate by phone, or can ask for her input before the meeting). After the meeting, the school must ask her whether she approves of the IEP for Johnny.
- If Johnny's mother agrees to participate in the IEP process, the school cannot choose to have the foster parents attend the IEP meetings or make decisions about the IEP instead of Mrs. Grace, even if the school thinks Mrs. Grace is not making the best choices for her son. If there is legitimate concern that Mrs. Grace's decisions are not in Johnny's best interest or are detrimental to his education, a party to the child welfare case can petition the court to determine if Mrs. Grace should continue to make education decisions for Johnny or another decision-maker should be appointed..
- If Johnny's mother does not respond to the school's requests (or if she responds by saying "leave me out of it"), then the school must treat the foster parents as Johnny's parents (unless a judge, through a court order, identifies someone else as the "parent;" see below).

## **WHAT IS A SURROGATE PARENT AND WHAT RIGHTS DOES A SURROGATE PARENT HAVE?**

A Surrogate Parent has all of the rights, and can make all of the special education decisions, that are usually made by the child's birth or adoptive parents. Surrogate Parents can review educational records, request and consent to evaluations and re-evaluations, and challenge the recommendations of the education agency (which includes a school district, public charter school, or an intermediate unit, and is generally referred to as the "school" in this Fact Sheet) by asking for mediation or by requesting a hearing. *A Surrogate Parent does not have any rights outside of the special education system.*

## **WHO CAN APPOINT A SURROGATE PARENT TO MAKE SPECIAL EDUCATION DECISIONS FOR A CHILD IN CARE, AND WHEN SHOULD A SURROGATE PARENT BE APPOINTED?**

A Surrogate Parent is a person appointed by a juvenile court judge or a school to make special education decisions for a child with a disability. Anyone, including a caseworker or a probation officer, who believes that a child with a disability needs a Surrogate Parent can request that one be appointed. School districts are responsible for appointing a Surrogate Parent for a child with a disability, or a child who is in need of an evaluation to determine if she has a disability, if:

- The school doesn't know who the parent is, or the school knows who the parent is but cannot locate that person after making reasonable efforts;
- The child has no "parent" under special education law (see discussion above at page 2 for who can be a "parent" under federal law);<sup>2</sup>
- The child qualifies as an "unaccompanied homeless youth."<sup>3</sup>

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<sup>2</sup> Remember, unless the court has appointed someone else, the foster parent is the "parent" if there is no birth or adoptive parent who is "attempting to act as a parent." So in that situation the school cannot appoint a surrogate parent.

<sup>3</sup> For more information about unaccompanied homeless youth visit the National Law Center on Homelessness and Poverty website, under Education, at <http://www.nlchp.org/content/pubs/McKinney%20Vento%202001%20Law%20Into%20Practice%20UnaccompaniedYouth2.pdf> and the National Center on Homeless Education website at <http://www.serve.org/nche/>.

In these situations the school must appoint a Surrogate Parent and must make reasonable efforts to do so within 30 days. Remember, a school cannot appoint a Surrogate Parent simply because the child's "parent" (which can be a birth parent, a person with whom the child lives who is acting as the parent, or a foster parent) disagrees with the school's proposed IEP. If the parent isn't making good choices, the school's only option is to request a special education hearing to challenge the decisions the parent is making for the child.

**For example:**

- If a child's birth parents have died and the child is living with an adult family member who is caring for her, that family member is the "parent" under the IDEA and can make special education decisions for the child. No Surrogate Parent is needed. It makes no difference whether the child started living with the relative informally or through a child welfare (kinship care) arrangement.
- A classic example of a child *who almost always needs a Surrogate Parent* is a child in a group home whose parents' rights have been terminated or whose parents cannot be found. A Surrogate Parent must be appointed because there is no one in the child's life who counts as a "parent" under the law and who can make special education decisions for the child.

A juvenile court judge also has the authority to appoint a Surrogate Parent for a child in the custody of a child welfare agency unless the child has a foster parent. Most often, this applies to a child in congregate care. If you believe such a child needs a surrogate, you can ask the court to appoint one at the next regularly scheduled court date. You can also request an emergency court hearing to have the surrogate appointed more quickly. Be sure the judge's order includes a statement that the birth or adoptive parent's right to make decisions for the child is suspended, lists a specific person to act as the child's "Surrogate Parent," and is specific that the individual is appointed "to make all special education decisions for the child." If a judge appoints a Surrogate Parent, that person preempts all other potential "parents" - even a Surrogate Parent who has been appointed by the school.

Although the court has this broad power to appoint a Surrogate Parent even if there is a birth or adoptive parent available, it should use this power sparingly and with consideration of the importance of keeping birth parents involved with the child's education.

## WHO CAN SERVE AS A SURROGATE PARENT FOR A CHILD UNDER THE IDEA?

Neither a judge **nor** a school can appoint an employee of a public or private child welfare agency (for example, a caseworker at a group home) as the child's "Surrogate Parent." Neither the school nor the court can appoint a person who works for the State education agency, the local education or preschool agency, or an agency that is involved in the care of the child. Schools must also ensure that the Surrogate Parent has no personal or professional interest that conflicts with the child's interest and that the person has the knowledge and skills to represent the child competently.

When asking a school or a juvenile judge to appoint a surrogate, try to suggest someone known to the child who you think will be a good decision maker for the child. Having a specific suggestion can also speed up the appointment process.

If they are willing, possibilities include:

- *Adult relatives* (even if the relative isn't in a position to have the child live in his or her home, the relative may be involved in the child's life and be the best choice for the child's special education advocate)
- *A Court Appointed Special Advocate (CASA)*
- *A child's attorney or guardian ad litem* (some attorneys may not be comfortable with this role or feel it is appropriate, so be sure to ask the attorney before you recommend him or her), or
- *Another adult who knows the child* (perhaps a church member or a responsible family friend)

## IS THERE A WAY TO "JUMP START" THE INITIAL EVALUATION PROCESS WHEN NO PARENT IS AVAILABLE TO CONSENT?

Yes. The law requires the school to get written permission from the child's "parent" (or surrogate) before it can evaluate a child who is not receiving special education. Sometimes, the school believes that the child needs to be evaluated, the child does not have any "parent" available to sign the permission form, and no surrogate has been appointed. The law solves this problem by allowing the school to start the initial evaluation without getting a parent's

permission if the child is in the custody of the child welfare agency, and is not living with the birth or adoptive parent or with a foster parent, and:

- The school documents that it has made repeated attempts but cannot locate the parents, or
- The birth parents' rights have been terminated under State law, or
- The birth parents' rights to make education decisions have been suspended by a judge, and an individual who has been appointed by the judge consents to the initial evaluation.

**TIP:** If the school starts the initial evaluation under these circumstances, you should also ask the school (or the juvenile court judge) to appoint a Surrogate Parent in the meantime. Why? Even if the child is found eligible for special education, a school cannot give the child any special education services without the written permission of the child's "parent" (or Surrogate Parent).

### **CAN A JUDGE APPOINT AN ALTERNATIVE DECISION MAKER IF THE CHILD HAS A FOSTER PARENT?**

As noted above, a juvenile court judge cannot appoint a Surrogate Parent for a child in the custody of a child welfare agency if the child has a foster parent. However, even if the child has a foster parent, if the judge thinks that it would be in the child's best interest for someone else to perform the role of special education decision maker, the judge can appoint a specific individual to serve as a "guardian" (who cannot be the child's caseworker) whose authority is limited to making special education decisions for the child. The judge can also appoint an educational guardian for a child who has been adjudicated dependent but who is not in the custody of a child welfare agency. If the judge identifies a specific person as the child's educational guardian, the judge should enter an order clearly stating that person has the power "to make all education decisions for the child" and should be afforded all of the rights of an IDEA parent in the special education system.

Johnny is a 10-year-old student who has an IEP and has recently moved in with a new foster family. Johnny's father is unknown and his mother, Mrs. Grace, is in a drug rehabilitation program. The judge overseeing Johnny's case wants to limit Johnny's mother's education

decision making rights while she is in rehab. While Johnny's foster parents are not barred by their contract from serving as Johnny's special education decision maker, the judge thinks the better choice would be Johnny's aunt, since she has consistently looked out for him when his mother has been inattentive or unavailable. The judge could enter an order making the aunt the "guardian" with "the power to make all education decisions for Johnny" and "to act as Johnny's parent in the special education system."

## **CAN A GUARDIAN AD LITEM OR CHILD'S ATTORNEY EVER MAKE EDUCATION DECISIONS UNDER IDEA?**

If the child is in the child welfare system or in the juvenile justice system, she may have a court-appointed attorney. These attorneys do not have the power to make special education decisions for the child unless there is a court order that clearly states that the attorney is the "guardian" who has the power to make education decisions for the child, or the attorney is the child's "Surrogate" Parent.

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This Fact Sheet attempts to make sense of these new and often confusing requirements. If you have additional questions or are facing a school or court that is interpreting and implementing these rules differently, we would like to hear from you. The more attention we give to these important issues, and the more uniformity we can create in applying these procedures, the more we can help children in the child welfare system and their birth or new families get the full benefit of the IDEA's protections.

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Prepared by: *Education Law Center (Rev7/08)*  
(215) 238-6970  
[www.elc-pa.org](http://www.elc-pa.org)