

EDUCATIONAL DECISION MAKERS AND SURROGATE PARENTS IN PENNSYLVANIA:

**How to Ensure that Every Child in the Dependency and Delinquency Systems
Has an Active, Involved Adult to Make Education Decisions**

IMPORTANT: This publication is intended to provide a general overview of the law. However, each situation is different. If, after reading this publication, you have questions about how the law applies to your particular situation, contact the Education Law Center or an attorney of your choice.

It is extraordinarily traumatic for a child to encounter neglect or violence, be adjudicated “dependent” or “delinquent” by a court, and be removed from the parents’ home and placed with a foster family, or placed in a juvenile justice facility, or other out-of-home placement. Many children in this situation find stability and safety at school. But all children need active, engaged adults to make education decisions on their behalf and to ensure that their schools meet their needs. An engaged adult is critical to protecting the educational rights of a child. That person must ensure that the child is in the appropriate grade, classroom and school, verify that credits transfer when the child changes schools, and protect a child’s rights to fairness in school discipline proceedings. In addition, if a young child has a developmental delay, the parent or other adult must protect the child’s right to appropriate “early intervention” (“EI”) services, and if the child is over age 3 and has a qualifying disability, to a “free and appropriate public education.” A consistent, engaged adult who makes education decisions helps guarantee that these children do not get left behind.

Unfortunately, many children in foster care—particularly those living in congregate care settings such as group homes, supervised independent living facilities, residential treatment facilities, and hospitals—often have no adult in their lives to serve in this role. This can be true of youth in the delinquency system as well.

Thankfully, school districts and juvenile courts in Pennsylvania both play essential—and legally mandated—roles to ensure that every child has an active and competent adult to address their educational needs:

Educational Decision Makers (“EDMs”) are appointed by the juvenile court.

Pennsylvania’s Juvenile Court Procedural Rules require judges to address the educational needs of all children—including but not limited to children with special education needs—during all court proceedings, and to appoint an adult “Educational Decision Maker” (EDM) if there is no parent or guardian available or when the appointment of an EDM is in the child’s “best

interest.” If an EDM is appointed, that person trumps all others—including a surrogate parent appointed by a school district.

Surrogate Parents are appointed by the school district.

The Individuals with Disabilities Education Act (IDEA)¹ is a federal law that requires school districts to ensure that children who have been identified as needing special education or early intervention services, or who should be evaluated to determine eligibility, have an active engaged parent or other authorized adult to participate in the special education proceedings and to make special education decisions. A school district must appoint a “surrogate parent” within 30 days of determining that there is no birth or adoptive parent or other person authorized by the IDEA to act on the child’s behalf in special education or early intervention matters.

THE ROLE OF COURTS

What Must the Juvenile Court Judge Do?

At every hearing, the Juvenile Court judge must determine whether the child has a parent or other guardian to make education decisions for the child, or whether it is in the child’s best interest to appoint an EDM to serve in this role. Before appointing an EDM, a judge must provide notice to the child’s parent or guardian and allow that person an opportunity to be heard in court. A judge should not appoint an EDM if the child has a parent who is competent, willing, and available to make education-related decisions and who is acting in the child’s best interest.

What Should an EDM Do?

If a judge appoints an EDM, that person is responsible for making all education decisions for the child, including special education and early intervention decisions. For example, the EDM should make inquiries and take appropriate actions concerning: signing permission slips and attending parent-teacher conferences, deciding whether the child should change schools if his/her living placement changes (school stability), protecting the child’s rights in school discipline proceedings, monitoring the child’s academic progress including ensuring that the child receives the education needed to meet state standards, accessing any needed remedial services, and preparing for the child’s transition to post-secondary education, employment, and independent living. When the child is or should be receiving early intervention or special education services, an EDM also makes all decisions relating to the child’s special needs, including: requesting an evaluation or re-evaluation, deciding whether a child under age 3 (including all children with substantiated cases of abuse or neglect) should be screened, developing the child’s Individualized Education Program (“IEP”) or Individualized Family Service Plan (“IFSP”), and determining the child’s educational placement. The EDM must make decisions consistent with the child’s best interests.

An EDM must meet with the child at least once and as often as is necessary to determine what education decisions are in the best interests of the child. The EDM must also make specific recommendations to the judge regarding the timeliness and appropriateness of the child’s educational placement, transition

¹ 20 U.S.C. § 1400 *et seq.*; *see also* 34 C.F.R. § 300. 519.

planning, and the services the child needs. The EDM may be asked to appear in court and testify, and must have the knowledge and skills to ensure that he or she will adequately represent the child.

Who Can be an EDM?

If possible, the person appointed as EDM should already know the child well and have a good relationship with the child. The EDM could be, for example:

- A relative;
- A previous foster parent;
- A former teacher;
- A coach or mentor;
- A guardian ad litem (“GAL”) or the attorney representing the child (some attorneys may not be comfortable with this role or feel it is appropriate; a judge should always ask the attorney before ordering him or her to serve in this role); or
- A Court Appointed Special Advocate (“CASA”) if the volunteer is willing to serve in this role.

NOTE: Courts should only consider appointing CASA volunteers or GALs when there is no one else in the child’s life to fill this role.

It is important to consult the youth before appointing an EDM in his or her case and to consider carefully the child’s preferences. The EDM will be most effective if he or she *already* has or can build a trusting relationship with the youth.

If the child is involved with the special education or early intervention system (*i.e.* receives special education or early intervention services or needs to be evaluated to determine eligibility for services), the appointed EDM must participate in all meetings and will act as the child’s parent in the early intervention or special education process. Under the IDEA, *decisions for a child who is or may be eligible for special education cannot be made by an employee of an agency that is involved in the education or care of the child.* Therefore, a school employee, the child’s caseworker, juvenile probation officer, or an employee that works for a facility in which the child is living cannot serve as the EDM for that child in the special education system. For children under age 3, a surrogate parent cannot be an employee of the lead agency or any other public agency or EIS provider that provides early intervention services, education, care, or other services to the child or any family member of the child.

THE ROLE OF SCHOOL DISTRICTS

What Must the Child’s School District Do?

If a child is or may be eligible for special education or early intervention services, the IDEA requires the child’s school district, charter school, cyber charter school or early intervention agency to ensure that the child has an active birth or adoptive parent or other person authorized by the IDEA or a court to make decisions for him or her. The person who is designated to act as the “parent” under the IDEA is entitled to participate in all of the meetings and make all relevant decisions. If the school district cannot locate a biological or adoptive parent or other IDEA Parent from the list below, then it must appoint a “surrogate parent” within 30 calendar days. In some cases, a child may appear to have more than one IDEA parent from the list below and the school will need

to ascertain which person is the legally-authorized decision maker. This process is discussed below. In implementing the surrogate parent requirements for children under age 3 who are in foster care, the early intervention agency must consult with the child welfare agency that has been assigned care of the child.

How Can You Determine which Potential IDEA Parent Can Act for the Child?

Under the IDEA, potential IDEA Parents include:

- A biological or adoptive parent;
- A foster parent;
- An individual who has the authority to act as the child’s parent or who has the authority to make education decisions for the child (such as an EDM);
- A family member with whom the child lives who is acting as a parent (such as a grandparent or stepparent);
- A guardian who is legally responsible for the child’s welfare (but not any employee of a child welfare agency); or
- A surrogate parent assigned by the local educational agency (such as the school district or charter school) or the early intervention agency, or a court-appointed EDM.

If a court has not limited the biological/adoptive parent’s authority to make education decisions, the early intervention agency or school district must recognize that parent as the person authorized to make education decisions for the child so long as he or she is “attempting to act as the parent.” If the parent is not “attempting to act as the parent” (for example, is not responding to notices or attending meetings), and the child has a foster parent or one of the other potential “IDEA parents” listed above, the EI agency or the school district must then treat that person as the child’s IDEA Parent and allow that person to participate in meetings, give or deny consent, and make early intervention or special education decisions for the child. The “IDEA Parent” can challenge the EI agency’s or school’s proposals through the mediation and due process hearing procedures.

If the child has a “parent” under the IDEA (see list above), the school district does not need to “appoint” that person as the child’s surrogate parent. Unlike a juvenile court judge, who can appoint another person as EDM to act in the best interest of the child even if the child has a parent, an EI agency or a school district cannot appoint another person to make decisions for the child if the child has a “parent.” Remember, however, that if a court has appointed an EDM, the EDM makes education decisions for the child regardless of whether the biological/adoptive parent wants to serve in that role or whether there are other potential “parents” under the IDEA who are ready to serve that role. *If a court has appointed an EDM, that person trumps all other potential “parents” under the IDEA.*

When Must a School District or EI Agency Appoint a Surrogate Parent?

The school district or EI agency must take steps to ensure that the child’s rights are protected if:

- 1) The school district or early intervention agency does not know who the parent is;
- 2) The school or EI agency cannot locate the parent after making reasonable efforts to get in touch with them, such as calling and sending letters on multiple occasions;
- 3) The child has no “parent” under the IDEA (see above); or

- 4) The child is an “unaccompanied homeless youth” as defined by the federal McKinney-Vento Act and is eligible for special education.²

NOTE: “unaccompanied homeless youth” are youth who are not in the physical custody of a parent or guardian and who do not have a fixed, regular, and adequate nighttime residence.

Once a school district or EI agency has determined that a child in their jurisdiction needs a surrogate parent, it must assign a surrogate parent within 30 calendar days.

School districts and EI agencies have an *affirmative duty* to identify children in need of surrogate parents. Therefore, they must actively work to identify which children may need surrogate parents. This includes reaching out to residential facilities and homeless shelters located within their boundaries to determine whether any of the residents need surrogate parents and collaborating with children and youth agencies. When school districts or EI agencies identify children in these settings who are eligible for or may need special services, it is essential that they determine who is making educational decisions for the child (if anyone), that person’s relationship to the child, and whether that person is a qualified IDEA Parent.

To meet their 30-day obligation, school districts and early intervention agencies should maintain a pool of trained surrogate parents who are available for children in need. Early intervention agencies and school districts should also consider entering into interagency agreements with their local child welfare agency to identify children in need of surrogate parents and potential candidates to fill this role.

Remember, an EI agency or a school cannot appoint a surrogate parent simply because an existing IDEA Parent (*e.g.* a birth parent, a person with whom the child lives who is acting as the parent, or a foster parent) disagrees with its proposed IEP, IFSP, or other proposal. If the agency believes that the parent or other IDEA Parent is not making good decisions for the child, it can request a hearing to challenge the decisions or it can work with the county children and youth agency, juvenile probation agency, or the court system to have an alternate EDM appointed.

What Should a Surrogate Parent Do?

Like other “parents” under the IDEA, a surrogate parent has the right to make all of the special education or early intervention decisions that are usually made by the child’s biological or adoptive parents. Surrogate parents can review educational records, consent to evaluations, re-evaluations, and placements, request and participate in IEP and IFSP meetings, and challenge the recommendations of the agency by asking for mediation or requesting a hearing.

Nevertheless, unlike an EDM who can also make general education decisions (like sign permission slips), *a surrogate parent does not have any rights outside of the special education or early intervention systems.*

² For more information about unaccompanied homeless youth visit the National Law Center on Homelessness and Poverty website 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/>.

Who Can Be a Surrogate Parent?

Whenever possible, a surrogate parent should be someone who already knows and has a trusting relationship with the youth. Just as with a court-appointed EDM for a child with special education needs, *for a child 3 or older, a surrogate parent cannot be an employee of an agency involved in the education or care of the child.* This means a surrogate parent cannot be a child's case worker, juvenile probation officer, teacher, group home "house parent," or other employee of a public child welfare agency or private child welfare provider agency, school district, charter school, state educational agency, or a facility where the child lives. *For a child under age 3, a surrogate parent cannot be an employee of the lead agency or any other public agency or EIS provider that provides early intervention services, education, care, or other services to the child or any family member of the child.* In all cases, a surrogate parent appointed by a school or an early intervention agency cannot have a professional or personal interest that conflicts with the interests of the child, and must have knowledge and skills that ensure that he or she will adequately represent the child.

NOTE: A person otherwise qualified to be a surrogate parent will not be considered an employee of the agency solely because he or she is paid by the agency to serve in this role.

Are There Any Exceptions to The "No Employee" Rule for Children Older Than Age 3?

Yes. There are two exceptions to the general rule that an EDM or surrogate parent cannot be an employee of an agency involved in the care or education of the child for children aged 3 or older:

Exception #1: A caseworker or other agency employee can consent to an initial evaluation in very limited circumstances. Written consent of a parent is required before a child can first be evaluated to determine eligibility for special education services. However, the IDEA permits a school to start the initial evaluation without obtaining parent permission if the child is in the custody of the child welfare agency, is not living with the parent or with a foster parent, and *one* of the following applies:

- 1) The school documents that it has made repeated attempts but cannot locate the parents;
- 2) The parents' rights have been terminated; or
- 3) The birth parents' rights to make education decisions have been suspended by a judge and the judge has appointed an individual to consent to the initial evaluation.

NOTE: In this limited circumstance only, the judge can appoint a person to give this consent who is an employee of an agency involved in the education or care of the child, such as the county or a private provider child welfare agency. However, if the child is ultimately determined to be eligible, that person cannot consent to starting special education services. It is therefore essential that the school or the court immediately begin process of appointing an EDM or surrogate parent who can consent to the provision of special education services while determining if the child is eligible.

Exception #2: A temporary surrogate parent can be appointed for an "unaccompanied homeless youth." These are youth who are not in the physical custody of a parent or guardian and who do not have a fixed, regular, and adequate nighttime residence. For such youth, the staff of an emergency shelter, transitional shelter, independent living program, or street outreach program may be appointed as a "temporary surrogate parent" (even if that person is an employee of an agency involved in the care or education of the youth) *until such time as a surrogate parent who meets the usual requirements can be appointed.*

THE ROLE OF CHILD WELFARE AND JUVENILE PROBATION AGENCIES

How Can Courts, Child Welfare Agencies, Juvenile Probation Officers, Schools (or Early Intervention Agencies) Work Together to Address This Issue?

Collaboration among child welfare and/or juvenile probation, schools, early intervention agencies, and courts is critical to ensuring that every child in the dependency and delinquency systems has a legally authorized and active educational decision maker. Child welfare and juvenile probation staff are often the first to identify the need for a surrogate parent or EDM and should bring this issue to the attention of the court or, if appropriate, the EI agency or school district. Child welfare and juvenile probation staff may also have the best insights into who should serve as an EDM and who will work well with a youth. Schools and EI agencies should ask the case workers and juvenile probation officers whether the court has already appointed an EDM for the child. Judges need to keep this issue on their radar. If a judicial decree or order appoints an EDM for a child eligible for special education or early intervention services, that person must be treated by the school district or EI agency in the same manner as the child's parent with regard to education-related decisions and consent to screenings and services.

**PRACTICE TIPS FOR SCHOOL DISTRICTS, EARLY INTERVENTION AGENCIES, CHILD WELFARE STAFF,
JUVENILE PROBATION OFFICERS, JUDGES, AND ATTORNEYS**

1. ***MAKE SURE THAT THERE IS AN AUTHORIZED ADULT WHO IS ACTIVELY MAKING DECISIONS FOR THE CHILD.*** Make sure that each child has an active parent, EDM, or “IDEA Parent” (which could be a foster or surrogate parent) if the child is involved with the early intervention or special education systems. Be especially vigilant if the child is or might be eligible for special services and lives in a group home or other residential setting because such children do not have foster parents who can step into the IDEA Parent role. Also be alert if the child is in a homeless shelter.
2. ***WHENEVER POSSIBLE, SUPPORT THE BIOLOGICAL/ADOPTIVE PARENT TO CONTINUE IN THIS ROLE.*** Most children in out-of-home care return to live with parents who will need to work with the schools and advocate for their children. Even if another person—such as the foster parent—is temporarily assuming this role, the best practice is for the foster parent and the child welfare staff to keep the parent informed and engaged regarding all education decisions.
3. ***ENSURE THAT COURT ORDERS ARE SPECIFIC.*** A court order appointing an EDM should name a specific person, designate whether that person has the authority to make general education or special education decisions (or both), and make clear how long the appointment will last. *Remember, if the child is involved with the special education system, the person appointed cannot be a person who is an employee of an agency that is involved with the education or care of the child such as the child’s case worker or juvenile probation officer. For a child under age 3, the surrogate parent cannot be an employee of the lead agency or any other public agency or EIS provider that provides early intervention services, education, care, or other services to the child or any family member of the child.* The court must also provide the EDM notice of all hearings.
4. ***TRY TO APPOINT SOMEONE WHO KNOWS THE CHILD.*** It is important that, whenever possible, the EDM or surrogate parent be *someone known to the child* and who will make informed decisions in the best interest of the child. Having a specific person to suggest to the court or school district can also speed up the appointment process. Possibilities include: *Adult relatives* (even if the relative is not 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 education advocate); *a child’s attorney or guardian ad litem*; or *another adult who knows the child* (perhaps a church member or family friend). Before making a suggestion, *make sure that you consult with all involved parties—especially the youth!*
5. In some cases, there may not be anyone in the child’s life who can serve in the EDM/surrogate parent role. In these circumstances it may be necessary to appoint a person who is not known to the child, such as a Court Appointed Special Advocate (CASA) volunteer (if available). ***Courts, EI agencies, and school districts should maintain a pool of eligible and qualified EDMs and surrogate parents to assign to students with no one else in their lives to serve this role.***

COMPARISON OF EDMS AND SURROGATE PARENTS		
	EDM	Surrogate Parent
Who appoints?	A juvenile court judge.	School District, EI agency, or other local educational agency (such as a charter school). In some cases a juvenile court judge may appoint a surrogate parent directly.
For which children?	Children who are involved in the child welfare system and delinquency system. Not limited to children eligible for special education.	Only children who are eligible or may be eligible for special education or early intervention services. Not limited to children in dependency and delinquency system.
When is it appropriate to appoint?	Any time there is no one to serve in this role or such an appointment is in the child's best interests. The court must give notice to the child's biological or adoptive parent first.	When there is no "parent" under the IDEA.
What's the timing?	Any time.	Within 30 days after discovering the child needs a surrogate parent.
Who can be appointed?	<p>If child is not eligible for special education or early intervention, the court can appoint anyone to be an EDM; however, preferably the person will know the child already and/or be trained as an EDM volunteer.</p> <p>If the child is eligible for special education, the EDM cannot be an employee of the child welfare agency, juvenile probation, local education agency, state education agency, or have any conflict of interest with the child.</p> <p>For a child under age 3 eligible for EI services, the EDM cannot be an employee of the lead agency or any other public agency or EIS provider that provides early intervention</p>	<p>Surrogate parents cannot be employees of the child welfare agency, local education agency, state education agency, or have any conflict of interest with the child. Therefore, case workers, juvenile probation officers, group home staff or "house parents," school board members, and current teachers cannot be surrogate parents.</p> <p>For a child under age 3 eligible for EI services, a surrogate parent cannot be an employee of the lead agency or any other public agency or EIS provider that provides early intervention services, education, care, or other services to the child or any family member of the child.</p>

	services, education, care, or other services to the child or any family member of the child.	NOTE: A person otherwise qualified to be a surrogate parent will not be considered an employee of the agency solely because he or she is paid by the agency to serve in this role.
	Both EDMs and surrogate parents must have the knowledge and skills to ensure adequate representation of the child.	
What's the person's role?	Role depends on the court's order. Unless otherwise specified, an EDM makes all education decisions for the child, including: general education decisions such as signing permission slips, attending to disciplinary matters, school stability decisions, and making all special education and early intervention decisions, including placement and program decisions and transition planning.	Role is limited to special education and early intervention matters only.
How can this person be removed from their role?	When it is in the best interests of the child, the court may vacate the order appointing the person as an EDM, or appoint another EDM in their place, (e.g. if the child is now in a pre-adoptive placement and the prospective parent would like to assume education decisionmaking responsibilities).	A surrogate parent appointment by a school district will be automatically terminated when an IDEA Parent is located or identified; if a court appoints an EDM; or, if the child moves out of the school district. For an infant and toddler in early intervention appointed by an EI agency, the surrogate parent appointment will terminated if the IDEA Parent is located or identified; if the court appoints an EDM, or if the child turns 3. NOTE: The EI agency or school district may not remove a surrogate parent because it does not agree with his/her decisions.