



How Can a Pennsylvania Judge 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.

WHY IS IT IMPORTANT FOR A JUDGE TO ENSURE THAT THE RIGHT PERSON HAS THE AUTHORITY TO MAKE SPECIAL EDUCATION DECISIONS FOR THESE CHILDREN?

The Individuals with Disabilities Education Act (IDEA) is a federal law that requires school districts to provide a "free appropriate public education" to children with a qualifying disability.¹ 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 school and life outcomes. Youth in the foster care system often experience critical delays and other obstacles to appropriate IDEA services. However, when judges and others working on behalf of children in the child welfare system understand and use the IDEA's rules on education decision-making, youth receive the services they deserve.

The IDEA cannot work effectively for a child in foster care unless she has a clearly identified "parent" under the Act's complex definition. A child cannot be evaluated or begin to receive special education services until an IDEA Parent has given written permission. Only the

¹ This fact sheet covers children with disabilities from age 3 until graduation or the end of the school term in which the children turn 21.

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 http://www.nasdse.org/publications/foster_care.pdf

IDEA Parent has the authority to help the school district develop an appropriate Individualized Education Program (IEP) for the child or to disagree with the IEP that the school district is proposing and use the special education hearing and appeal system to get the services the child needs. **Making sure that each child has an effective IDEA Parent is the best way to ensure that children with disabilities who are involved with the child welfare system get the special help they need.**

WHO IS THE "IDEA PARENT" FOR A CHILD INVOLVED WITH THE CHILD WELFARE SYSTEM?

As described more fully below, under new federal rules a judge has broad power to designate a specific person to function as the IDEA Parent. This person can make special education decisions for a child the court has determined is dependent or who is in the custody of the child welfare system. In the absence of such judicial intervention, a biological or adoptive parent who is participating in IEP meetings and is otherwise actively involved in the special education process is the child's IDEA Parent. This is true even when the child is living in foster or congregate care. If the biological or adoptive parent is deceased, cannot be located, or is not "attempting to act" as the parent, a foster parent with whom the child is living automatically becomes the IDEA Parent. If the child is living with and being cared for by a relative or other adult who is not a foster parent, the adult is also considered to be an IDEA Parent.

WHAT OBLIGATION DOES A SCHOOL DISTRICT HAVE TO ENSURE THAT THERE IS A SPECIAL EDUCATION DECISION-MAKER FOR A CHILD?

If no IDEA Parent can be located, the school district must determine if a Surrogate Parent is needed. If the child is an "unaccompanied homeless youth" under the McKinney-Vento Act (42 U.S.C §11434a(6)), the school district has a legal obligation to appoint a Surrogate Parent to be the child's special education decision-maker. This Surrogate Parent must be a specific person (rather than an agency) and cannot be someone involved in the education or care of the child (such as the child's teacher or caseworker). The Surrogate Parent must also be someone who has no personal or professional interest that conflicts with the child's interest, and the person must have the knowledge and skills needed to represent the child effectively.

WHAT POWERS DO JUDGES HAVE UNDER THE IDEA TO APPOINT A SPECIAL EDUCATION DECISION-MAKER FOR A CHILD IN OUT-OF-HOME CARE?

Judges have three options:

1. Initial evaluations: If the child is in the custody of the child welfare agency and is not living with the biological or adoptive parent or a foster parent (including a kinship care foster parent), a judge can suspend the biological 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 as discussed below) can consent to special education services starting - so it is good practice to move forward at the same time to ensure that there is an effective IDEA Parent in the picture.
2. A Surrogate Parent: A judge can appoint a person to be a Surrogate Parent - and thus an IDEA Parent - if the child is in the custody of a children and youth agency AND the child does not have a foster parent who is acting as the IDEA Parent. The judge cannot appoint as a Surrogate Parent a person who provides child welfare or education services to the child.
3. A Guardian to Make Education Decisions: A judge can appoint a person to serve as an educational Guardian. The Guardian can make special education decisions for a child who has been determined to be dependent, regardless of whether the child is in the custody of the child welfare agency or is in foster care or kinship care. Under the IDEA, a Guardian appointed to make education decisions for a child is an IDEA Parent who preempts any other possible IDEA Parent, including the biological or adoptive parent or a foster parent. A Guardian cannot be the child's caseworker.

TIPS FOR JUDGES:³

- **The biological or adoptive parent should be the first choice as education decision-maker.** Most children in care return to their biological or adoptive families, so it is important to keep these individuals involved and empowered to make education decisions for

³ Consult the full article in the ABA Child Law Practice, April 2007, for additional information.

their children when possible and in the child's best interests. The children and youth agency should give the biological or adoptive parent the support she needs to do this job well.

- **Consider both permanent and temporary options for alternate decision-makers.** For some children, it is in the child's best interest for the judge to appoint an alternate decision-maker only for a limited period (for example, when the parent is in the hospital), and to return decision-making power to the biological or adoptive parent as soon as possible. Other children require a more permanent solution. Biological and adoptive parents whose rights have not been permanently terminated should be encouraged to petition the court for reinstatement of decision-making authority whenever they are able to resume these responsibilities.
- **When appointing a Surrogate Parent or a Guardian, consult all involved parties.** When possible, ask the child whom she would prefer. Consult the child's attorney, social worker, or the school district about family or friends who are invested in the child's well-being and may be available to serve as the Surrogate Parent. Is a church member, a Court Appointed Special Advocate (CASA), or the attorney herself willing to volunteer?
- **Be sure that Court Orders appointing Surrogate Parents or Guardians specifically reference the individual's power to make education decisions.** A Surrogate Parent or Guardian has all special education decision-making rights. An order appointing a Surrogate Parent or Guardian should name a specific person and state that the individual is appointed "to make all special education decisions for the child." The Order should also make clear how long the appointment will last.

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