



SPECIAL EDUCATION AND CHILDREN IN OUT-OF-HOME CARE

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 situation, contact us or an attorney of your choice.

WHO CAN MAKE SPECIAL EDUCATION DECISIONS FOR CHILDREN WITH DISABILITIES?

This fact sheet is about 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, field trip permission, homeschooling for children in out-of-home care placements. For help on those questions, you can contact the Juvenile Law Center (<http://www.jlc.org>).

Some of the decisions that are needed in the special education system are: asking for or agreeing that the child can be evaluated; attending an Individualized Education Program (IEP) meeting and agreeing or disagreeing with the proposed education plan or IEP by signing the Notice of Recommended Educational Placement, requesting mediation or a due process hearing because of a disagreement with the school, disagreeing with the school's discipline decisions, and much more. (For more information on these topics, consult ELC's Fact Sheets and our manual, *The Right to Special Education in Pennsylvania: A Guide for Parents*. All of ELC's publications can be found on our website www.elc-pa.org, or you can get a free copy by calling the Philadelphia number listed below).

Federal and state special education law only allows a "parent" to act on behalf of a student with a disability. But the law 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 (but NOT a child welfare caseworker, see below)
- 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"

Only if you fall into one or more of these categories can you make decisions about the child's special education needs or services. But, if you don't fall into one of the categories, the "parent" can still agree to let you participate in an IEP meeting or consult with you about the child's needs.

Caseworkers (Children & Youth, Department of Human Services, private children and youth caseworkers, group home employees)

Public and private children and youth caseworkers (including caseworkers at group homes) CANNOT make special education decisions for the children in their care. They also CANNOT be appointed as the child's "surrogate parent." Caseworkers have a lot of information that can be important to special education decisions. They should share that information with the legal decision-makers and attend IEP meetings when they are invited. But the caseworker CANNOT sign special education papers on the "parent/guardian" line.

Guardians *ad litem* (child's attorney)

If the child is in the child welfare (foster care) system or in the juvenile justice (delinquency) 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 has the power to make education decisions for the child, or the attorney is the child's "surrogate" parent.

What if the child has a foster parent or is living with a relative and also has a biological parent available to make decisions?

Under the law, foster parents, kinship care parents, and relatives with whom a child lives have the power to make special education decisions. But, these children may also have a living birth or adoptive parent whose parental rights have not been terminated and who also qualifies as the child's special education decision-maker. 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 refuses to approve the plan, the school cannot go around the parent by getting a foster parent, kinship parent, or other relative's agreement/signature. 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.

For example: Johnny is a ten-year-old student who has an IEP and 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 to be re-evaluated and a new IEP written for him. Who can give the school district permission to re-evaluate Johnny, attend the IEP meeting, and approve or disapprove the IEP?

- Johnny's biological mother is the first choice for decision-maker. The school must send her a written notice asking for her permission to re-evaluate Johnny. The school must also 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 new IEP for Johnny.
- If Johnny's mother responds to the school's questions - either by saying she will allow the re-evaluation or by saying she will not allow the re-evaluation - the school must follow her decision. The school CANNOT choose to have the foster parents sign the permission forms and attend the IEP meetings instead of Mrs. Grace, even if the school thinks Mrs. Grace is not making the best choices for her son.
- 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 can treat the foster parents as Johnny's parents. The school will then ask their permission to re-evaluate Johnny and ask them to attend the IEP meeting and make special education decisions for him.

WHAT IS A SURROGATE PARENT?

A surrogate parent is a volunteer appointed by a juvenile court judge or an education agency (which includes a school district, a public charter school, an intermediate unit, or an early intervention agency) to make special education decisions for children with disabilities.

The surrogate parent has all of the rights, and can make all of the special education or early intervention decisions, that are usually made by the child's parents. Surrogate parents can review educational records, request and consent to evaluations and re-evaluations, and challenge the recommendations of the education agency by filing complaints, asking for mediation, or requesting a hearing. *A surrogate parent does not have any rights outside of the special education system.*

When should an education agency appoint a surrogate parent for a child?

School districts (including charter schools) are responsible for assigning surrogate parents to school-aged children with disabilities. For pre-schoolers (ages three-five) the intermediate unit or early intervention agency is responsible. For children under age three in an early intervention program, the County Office of Mental Health and Mental Retardation must assign the surrogate parent.

If you believe a child needs a surrogate, write the school's principal, director of special education, or the County or early intervention agency and request that one be appointed. Keep a copy of the letter you send and be sure to put a date on it. The agency should appoint the surrogate parent within 30 days. If the education agency is taking too long or is refusing to appoint a surrogate, you can file a complaint with the State. (For more information on filing a complaint, see ELC's Fact Sheet *How to Resolve Special Education Disputes*.)

For a child with a disability, an education agency must appoint a surrogate parent to be the education decision-maker for the child when:

- There is no one who meets the definition of "parent" under special education law
 - This means the child's birth or adoptive parents are dead, or the birth or adoptive parents' parental rights have been terminated by a court, or the school cannot find the birth or adoptive parents after making reasonable efforts to locate them
 - AND the child is not living with a relative, has no guardian, foster parent, kinship parent, or other surrogate parent
- Children who qualify as "unaccompanied homeless youth" are also eligible for surrogate parents (for more information on which children meet the definition of unaccompanied homeless youth, visit the Pennsylvania Department of Education's homeless initiative home page at www.pde.state.pa.us/homeless).

In these situations the education agency must appoint a surrogate parent, whenever possible within 30 *calendar* days. The surrogate parent must have the knowledge and skills necessary to help the child and cannot have any conflict of interest with 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 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 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.

Can surrogates be appointed for children who are NOT YET in special education?

Surrogate parents can be appointed for children who need an evaluation to determine if they have a disability and are eligible for special education.

Who can ask an education agency to appoint a surrogate parent for a child?

Anyone who believes that a child with a disability is in need of a surrogate parent can request that one be appointed, including caseworkers and probation officers.

Can the Juvenile Court appoint a surrogate parent for a child?

For children with disabilities over age three who are involved in the child welfare system, the juvenile judge overseeing the child's case also has the power to appoint a surrogate parent. If you believe the 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 specific person to act as the child's "surrogate parent" and "to make all special education decisions for the child." For children under age three, the law is unclear whether a juvenile judge can appoint the surrogate.

If this is your situation, you can ask the judge to enter an order directing the child welfare caseworker or the child's attorney to request a surrogate parent from the early intervention agency serving the child.

Are the rules different when a school district appoints a surrogate parent or a judge appoints a surrogate or other education decision-maker?

Schools can only appoint surrogate parents when the child is an unaccompanied homeless youth or the child does not have anyone to act as her "parent" under the law. This means that the school cannot appoint a surrogate parent for a child who has a foster parent even if the child's birth parents are missing or dead. Why? Because, when there is no birth parent in the picture who is actively involved in making special education decisions for the child, the law considers the child's foster parent to be her "parent" and permits the foster parent to make decisions for the child in the special education system. In this situation there is no need to appoint a surrogate parent. As discussed above, education agencies also CANNOT appoint a surrogate parent simply because the child's birth parent disagrees with the school's proposed IEP or because the birth parent is *uncooperative*. If the parent is uncooperative or 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.

A juvenile court has the authority to appoint a surrogate parent when there is no other "parent" available to make special education decisions for the child. Although the law is not entirely clear, we believe that a juvenile court judge also has the authority to appoint a specific education decision-maker for any child involved in the child welfare system, including children whose birth parents are not missing or dead and including children who have foster parents. If the judge decides to identify a specific person as the child's education decision-maker, the judge should enter an order clearly stating that person has the power "to make all education decisions for the child" and also clearly stating that this person should be afforded all of the rights of a "parent" in the special education system. But remember, most children in the child welfare system have "reunification" as their permanency goal and they will eventually return to their birth or adoptive parents who, in most cases, will then be responsible for special education decisions. It is important to keep the birth parent involved in the school programming decisions for these children while they are in care.

For example:

Johnny is a ten-year-old student who has an IEP and lives with his foster parents, Mr. and Mrs. Field. Johnny's father is unknown and his mother, Mrs. Grace, is in rehab. Johnny's permanency goal is reunification and, if his mother successfully completes the rehab and a parenting class, Johnny will return to her care.

Under the law, Johnny's mother has the power to make education decisions for him and the school cannot appoint a surrogate parent to replace her. The judge overseeing Johnny's case may want to limit Johnny's mother's education decision-making rights while she is in rehab. If so, the Judge could enter an order giving Johnny's foster parents, his guardian *ad litem*, or another adult "the power to make all education decisions for Johnny" and "to act as Johnny's parent in the special education system." But because everyone plans to have Johnny return to his mother's care, it may make more sense for the judge to allow Johnny's mother to keep her education rights, and direct the children and youth caseworker to provide her with help so that she can be effective in her advocacy for Johnny.

Who CANNOT be a surrogate parent?

The following people CANNOT be a child's surrogate parent:

- An employee of the Pennsylvania Department of Education
- An employee of the education or early intervention agency that is serving the child;
- An employee of any public or private agency responsible for the education or care of the child (this includes the child's public and private agency caseworkers, the child's probation officer, and staff at any group home or residential treatment facility where the child is living)

Who should be a surrogate parent?

If you ask a school or a juvenile judge to appoint a surrogate, you may be asked to suggest someone (this can certainly speed up the process!). Some possibilities include:

- *Adult relatives* (even if the relative isn't in a position to have the child live in 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)*
- *The child's attorney or guardian ad litem (some attorneys may not be comfortable with this role, so be sure to ask the attorney before you recommend him or her) or*
- *Another adult who knows the child and is willing to advocate on the child's behalf (perhaps a church member, teacher, or responsible family friend)*

Can a birth parent ask that a surrogate parent be appointed for her child?

Sometimes a birth parent who still has education rights may want another person (at least for some period of time) to serve as a surrogate parent and help the child get special education services. This may be helpful when the parent lives far away from the child's placement, the parent is in jail, or the parent is otherwise not available to participate in special education decisions for the child. The parent should make the request to the education agency in writing and state in the letter that she reserves the right to be the child's decision-maker in the future. It is up to the school district, charter school, intermediate unit, or early intervention agency to decide whether to grant this request. Under these circumstances, even if a surrogate parent is appointed, the birth parent should have a right to see the child's records, and the school should continue to send notice of all meetings and decisions to the child's birth parent.

Initial Evaluations & Surrogate Parents

The law requires the school district, charter school or early intervention agency 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 evaluation without getting a parent's permission if:

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

TIP: If the school starts the 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).

WHAT HAPPENS WHEN A CHILD WITH A DISABILITY MOVES TO ANOTHER SCHOOL DISTRICT OR CHARTER SCHOOL?

Initial evaluations

School districts have 60 school days (after the parent gives written permission for the evaluation) to complete the initial evaluation of a child. Charter schools and early intervention agencies (for children age three-five) have 60 calendar days to complete the initial evaluation. It is important to understand that this timeline does not run from the date of the request for an evaluation, but from the date the "parent" signs the Permission to Evaluate form. (For more information on special education evaluations, see ELC's Fact Sheet entitled, *Evaluating Your Child*.)

Generally, if the child moves to a new school district, charter school, or preschool early intervention agency during the initial evaluation, the new school or preschool early intervention agency must finish the evaluation by the original due date. The evaluation can only be extended if the parent agrees to a different timeline and the school ensures that the evaluation is completed promptly.

Re-evaluations

If a child with a disability moves while a re-evaluation is underway, the new and old school districts, charter schools, or preschool early intervention agencies must coordinate with each other and exchange records to ensure that the evaluation is completed promptly.

Transferring an IEP to a new school district or charter school

If a student with an IEP from a public school district or a charter school moves to a new school district or charter school, the new school must provide the child with a free appropriate public education. This means that the child must be given services comparable to those in the last IEP until the new school either (1) adopts the old school's IEP as its own or (2) implements a new IEP that has been written at an IEP team meeting with the family. This rule applies whenever a child moves from one public school or charter school to another public school or

charter school during the school year - even if the child moves to Pennsylvania from another state! However, if the child is coming from another state, the school may ask the parents for permission to evaluate the child before writing a new IEP. But in the meantime, the child must be given services comparable to those in the last IEP.

If the child changes schools *over the summer*, the new public school district or charter school can choose either (1) to follow the old IEP or (2) to write a new IEP with the family before the next school year begins.

Whenever a child changes school districts (or goes to a new charter school), the new school must request the child's school records, including the IEP and other special education records, from the old school. The law says the new school has to make this request "promptly." The old school must respond to this request by sending the records. If the old school is in Pennsylvania, then it has 10 school days to send the records to child's new school. (If the old school is out of state, it must respond "promptly.").

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