



# Child Law Practice

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Helping Lawyers Help Kids

## LEARNING CURVES

### Special Education Decisions for Children in Foster Care: Everyone Has a Role<sup>1</sup>

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#### About the Legal Center for Foster Care and Education

The Legal Center for Foster Care and Education (Legal Center FCE) is a collaborative project between Casey Family Programs and the American Bar Association's Center on Children and the Law, in conjunction with the Education Law Center-PA and the Juvenile Law Center. Among its key roles, the Legal Center FCE:

- serves as a national technical assistance resource and information clearinghouse on legal and policy matters affecting the education of children in the foster care system.
- provides expertise to states and constituents, facilitates networking to advance promising practices and reforms, and provides technical assistance and training to respond to the growing demands for legal support and guidance.
- builds on the increasing momentum behind meeting the education needs of children in foster care, an issue that can help establish safety, permanency and well-being for children involved with the child welfare system.

For more information about the Legal Center FCE, visit [www.abanet.org/child/education](http://www.abanet.org/child/education)

Children in foster care often need help getting on the right path to educational success. For those needing special education services—and that's a large percentage of them—special education decisions must be made. These include approving that the school will perform the initial evaluation and agreeing with identified services and school placement for the child. Someone must make those decisions for children in foster care.

This article addresses who is the right individual to act in the education decision maker role. It is written for all individuals involved in a child welfare case, from judges and attorneys to parents, foster parents, and caseworkers. While not all of these individuals can themselves make education decisions, they all have a role in ensuring that the appropriate decision maker is identified.

#### What is the Individuals with Disabilities Education Act?

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 agencies' decisions can be challenged, and lots more.

For the IDEA's substantive and procedural protections to work effectively, every child with or who is thought to have a disability must have a "parent" who can act on her behalf. As early as 1975, when the Education for the Handicapped Act (the original name for the IDEA) was passed, Congress tried to ensure that children in the child welfare system benefited from its provisions requiring that, when the birth parent is unavailable, the school entity must appoint a surrogate parent to serve as the child's special education decision maker. But implementing the surrogate parent protection was left to school entities who were

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slow and uneven in their compliance.

In the IDEA 2004 reauthorization process, Congress tried to fix this problem. It gave judges clear authority to facilitate initial evaluations, to divest birth parents of control when necessary, and to appoint alternate decision makers when in the child's best interest. But the new statutory provisions, and the implementing regulations published in 2006, created almost as many questions as answers. This article 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.

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 (unless state law or the foster parent's contract prohibits the foster parent from being the special education decision maker);
- 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, 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 IEP meeting or consult with the person 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"?**

Under the law, foster parents, kinship care 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 has decision-making authority for a particular child?

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. The exception is if a court has appointed an alternative decision maker for the child. In that case, the school must treat the person appointed by the court as the only person authorized to make special education decisions for the child (more on this below).

#### **Case example:**

Johnny is a 10-year-old student who lives with his foster parents, Mr. and Mrs. Field. Johnny's father is un-

known 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 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 a legitimate concern that Mrs. Grace's decisions are not in Johnny's best interest or are detrimental to his education, the appropriate response is for a party to the child welfare case to petition the court to determine if Mrs. Grace should continue to hold the authority to make education decisions for Johnny.
- 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 court, through decree or order, identifies someone else as the "parent," see below). The school can then ask them to attend the IEP meeting and make special education decisions for him.

## What is a Surrogate Parent and what Rights Do They Have?

A 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 reevaluations, and challenge the recommendations of the education agency 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 education decisions for a child in care, and when should a surrogate parent be appointed?

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, a regional education agency, or a preschool early intervention agency<sup>2</sup>) 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 assigning a surrogate parent for a child with a disability, or a child who needs an evaluation to determine if she has a disability, if:

- The child has no "parent" under special education law (see discussion above for who can be a "parent" under federal law). Remember, the foster parent can be 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. (Note again, a court could appoint an alternative decision maker to be

## Did You Know?

### Number of Youth in Special Education

- Many Studies show anywhere between one-quarter and almost one-half (23%-47%) of children and youth in out-of-home care in the U.S. receive special education services at some point in their schooling.
- At both the elementary and secondary levels, more than twice as many foster youth as nonfoster youth in a Washington State study had enrolled in special education programs.
- Nearly half of the youth in foster care in the Midwest Study had been placed in special education at least once during the course of their education.
- Chicago public school students in out-of-home care between sixth and eighth grades were classified as eligible for special education nearly three times more frequently than other students.

### Special Education Advocacy

- In research done in 2000 by Advocates for Children of New York, Inc.:
  - 90% of biological parents surveyed did not participate in any special education processes concerning their child.
  - 60% of caseworkers/social workers surveyed "were not aware of existing laws when referring children to special education" and over 50% said "that their clients did not receive appropriate services very often while in foster care."
- A 1990 study in Oregon found that children who had multiple placements and who needed special education were less likely to receive those services than children in more stable placements. In that same study, 39% of children in foster care had Individualized Education Plans (IEPs) and 16% received special education services.
- A 2001 Bay Area study of over 300 foster parents found that "missing information from prior schools increased the odds of enrollment delays by 6.5 times."

Source: Citations for the studies mentioned above appear in: National Working Group on Foster Care and Education. *Fact Sheet: Educational Outcomes for Children and Youth in Foster and Out-of-Home Care*, December 2006.

the "parent" in this situation, but a school cannot).

- The education or early intervention agency knows who the parent is but can't locate that person after making reasonable efforts.
- The child is considered a "ward of the state" under the laws of the state. Some states define "ward of the state" broadly (for example, all children in custody of the child welfare agency), and others

define it more narrowly (for example, children whose parental rights have been terminated). In a state with a broad definition, many children in care can be entitled to a surrogate parent under this criterion.

- The child qualifies as an "unaccompanied homeless youth."<sup>3</sup>

In these situations the education agency must determine whether the child needs a surrogate parent, and

if so must make reasonable efforts to do so within 30 days. Remember, an education agency *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 or because the 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.

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**Examples:**

- 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.

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A juvenile court judge also has the authority to appoint a surrogate parent for a child in some circumstances. The court can appoint a surrogate parent for any child who is in the custody of a public welfare agency unless the child has a foster parent who is not prohibited by state law or contract to act as the child’s special education decision maker.<sup>4</sup>

If the child is believed to qualify for and need a surrogate, the court

may be asked to appoint one at the next regularly scheduled court date. An emergency court hearing may also be requested 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 is specific that the individual is appointed “to make all special education decisions for the child.”

Sometimes the judge cannot immediately identify a specific person to serve as the child’s education decision maker. In some jurisdictions, the judge can order the education agency to name a person to serve as the surrogate. Another option is for the judge to ask the local CASA program for help. However, once 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 broad power to appoint a surrogate parent even if there is a birth or adoptive parent available, it *must* use this power sparingly and consider keeping birth parents involved with the child’s education. For example, while Vermont appoints a surrogate for all children at the moment they enter foster care (that is, Vermont considers all children in child welfare custody to be “wards of the state under the laws of the state” and therefore eligible for a surrogate parent), a birth parent can be appointed as the surrogate.

### **Who can serve as a surrogate parent for a child under IDEA?**

Neither a judge **nor** a school can appoint a public or private child welfare caseworker (including a caseworker at a group home) as the child’s “surrogate parent.” Neither the education agency, the preschool agency, or 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. Education and preschool agencies 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 court judge to appoint a surrogate, try, whenever possible, to suggest *someone* known to the child who will be a good decision maker for the child. Naming someone specifically can also speed the appointment process. 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);
- *Court appointed special advocate (CASA)*;
- *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 and is willing to advocate on the child’s behalf* (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?**

The law requires the school district and preschool 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 a child in an out-of-home placement 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 school documents that it has made repeated attempts but cannot locate the parents;
- 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 appointed by the judge to represent the child consents to the initial evaluation.

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**Practice tip:**

If the school starts the initial evaluation under these circumstances, 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).

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**Can a judge appoint an alternative decision maker other than a surrogate parent?**

As noted above, a juvenile court judge can appoint a surrogate parent for a child in care unless the child has a foster parent who is legally permitted to function as the child's education decision maker. What happens if the child has a foster parent, but 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? Are there limits on the judge's authority to appoint whomever he thinks will do the best job?

Federal law states that a judge can appoint *a specific individual* (not an agency) to make special educational decisions for the child, even if there are other "parents" (for example, the birth parent, a foster

parent, or a surrogate parent) available. The judge can select a birth parent, a foster parent, a person with whom the child lives or who has legal responsibility for the child's welfare, or a "guardian" whom the court authorizes to make education decisions for the child. The person selected by the judge has the authority to make special education decisions for the child even if there are other possible "parents" available. The "guardian" appointed cannot be the child's caseworker.<sup>5</sup>

If the judge identifies 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 that this person should be afforded all rights of a "parent" in the special education system.

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**Case example:**

Johnny, a 10-year-old student, 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 treatment 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 either state law or 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."

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**Can a guardian ad litem or child's attorney ever make education decisions under IDEA?**

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. Some jurisdictions see guardians ad litem (GALs) or child attorneys as appropriate individuals to make these decisions, while others don't allow the GALs or child attorneys to play the decision-maker role.

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**Final Thoughts**

This article attempts to make sense of these new and often confusing requirements. With more time and experience, there will be more questions and more answers. We'd love to hear from readers about what is happening in their states, and how they are interpreting and implementing the new regulations. 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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## Endnotes

1. This article 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* address who can make other education decisions, such as school enrollment for a child in out-of-home care or giving the child permission to go on a field trip.

2. Infants and toddlers (under age 3) with disabilities are also entitled to have a “surrogate parent” appointed if the birth or adoptive parents are not known or cannot be found. Because the current rules for the youngest children are being revised by the federal agency, these children are not discussed in this article. Preschoolers (age 3 to school-age) are included in the discussion.

3. For more information about unaccompanied homeless youth, visit the National Law Center on Homelessness and Poverty’s website, under Education, at [www.nlchp.org/FA%5FEducation/](http://www.nlchp.org/FA%5FEducation/), and the National Center on Homeless Education website at [www.serve.org/nche/](http://www.serve.org/nche/)

4. The IDEA says that a judge can appoint a surrogate parent for a child who is a “ward of the state.” The IDEA regulations contain a definition of “ward of the state.” That definition includes a child who is determined by the state to be a foster child, a ward of the state under the laws of the state, or is in the custody of a public child welfare agency, unless the child has a foster parent who is not otherwise prohibited from acting as the child’s parent. See 34 C.F.R. §§300.30, 300.45. Remember, a judge could appoint an alternative decision maker as the “parent” through decree or order; the judge just can’t appoint someone in this situation as the surrogate.

5. The IDEA regulations prohibit a judge from appointing the state as the “guardian” if the child is a “ward of the state.” 34 C.F.R. §300.30(a)(3). A ward of the state is defined in the IDEA as, among other things, any child who is in the child welfare system unless that child has a foster parent who meets the IDEA’s definition of parent. In our view, if the judge determines the foster parent cannot perform the role of parent for a child, the child is a “ward of the state” and the judge cannot appoint the “state,” that is a county or state employee, as the child’s “guardian.”

## RESEARCH IN BRIEF

### The Ties that Bind: Adoptive Parents Invest Much in Children

**L**aw and society stress the key role biological parents play for their children’s well-being. Two-parent biological families have long been viewed as the gold standard in providing support and nurturance for their children.

When biological parents are not doing a good job—are harming instead of nurturing their children—society often turns to adoptive parents. How do adoptive parents compare to nurturing two-parent biological parents? Until recently, little research has compared adoptive parents with biological and other family types. Greater attention has focused on biological and alternative families—stepparents, single parent families, and biracial families.

#### Parental Investment Study

A new study by sociologists at the University of Bloomington and the University of Connecticut examined the level of parental investment that adoptive parents make in their children compared to biological parents. It culled data from the Early Childhood Longitudinal Study, Kindergarten-First Grade Waves, which includes a nationally representative sample of U.S. families. The researchers analyzed the data to measure how parents allocate resources—economic, cultural, interactional, and social capital—toward their children. These measures were used to gauge parental investment levels across family types.

The study found two-parent adoptive families invest more time and financial resources in their children compared with two-parent biological parents. For example, two-parent adoptive families, compared to two-biological parent

families, had more books for their children, and were more likely to: have a home computer for their child’s use, involve their children in extracurricular activities, eat meals with their children, be involved in their children’s schools, and attend religious services with their children. The researchers found that age, education, and income influenced these findings, as adoptive parents as a group tend to be older, better educated, and have high family incomes.

Adoptive parents also outpaced biological parents in the number of cultural activities they provided their children. They were more likely than biological parents to play games, build things, and exercise with their children. They were also more likely to participate with their children in reading and math-related activities. Older maternal age did appear to affect the level of investment in “hands-on” activities that required more physical stamina by adoptive parents, according to the researchers.

One area in which adoptive parents were weaker was providing social capital resources for their children. The researchers found that adoptive parents were less likely to talk to parents of other children than biological parents. The researchers speculated that adoptive parents may feel alienated from other parents because their child-rearing experiences differ (i.e., they may lack experience with their child’s birth and early months/years that hinder bonding with other parents). Further, adoptive parents may find it hard to enter biological parents’ social circles, or they may not believe that talking to other parents directly helps their children.

The researchers also found the