



## Special Education Decisionmaking: What is the Role of the Judge?

Judges play an important role in ensuring children in foster care receive appropriate special education services.

### *Why Should Judges Ensure Children Have Someone to Make Special Education Decisions for Them?*

- ❖ **To ensure IDEA's requirements are followed.** The Individuals with Disabilities Education Act (IDEA) requires school districts to provide a "free appropriate public education" to children with a qualifying disability,<sup>1</sup> which means an individualized program of special education and related services.
- ❖ **To identify children who would benefit from special education services early so they can begin to be served.** Many children who have learning difficulties and need extra help do not have disabilities or require special education. But, there is also no doubt that many children in care have emotional and other disabilities and need specialized help. Research shows that the earlier a child with a disability is identified and served, the better the child's school and life outcomes. Service delays and other problems will be avoided only if judges and others working on behalf of children understand and use the IDEA's rules to make sure children have legally authorized decisionmakers.
- ❖ **To ensure a qualified person is in place to consent to and make decisions about special education services.** Determining who can make decisions for a child who needs special education begins with the IDEA's complex definition of "parent." A child cannot be evaluated or begin to receive special education services until an IDEA Parent has given written permission. Making sure that each child in the care of a child welfare agency has an effective IDEA Parent is the best way to ensure that children with disabilities in out-of-home care get special help to achieve their learning potential.

### *Who is the "IDEA Parent" for a Child in the Child Welfare System?*

The following people can serve as the "IDEA Parent":

- ◆ **An active birth or adoptive parent.** In the absence of judicial intervention, a birth or adoptive parent who is participating in IEP meetings and is otherwise actively involved in the special education or early intervention process should be viewed as the child's IDEA Parent. This is true even when the child is living in a foster home or a group setting.
- ◆ **Another qualified person.** If the birth or adoptive parent is not "attempting to act," any of the following individuals can be the IDEA Parent:
  - A foster parent not barred by state law from serving as an IDEA Parent
  - A guardian (both a general guardian or a guardian specifically authorized to make education decisions)
  - A person acting in the place of the parent with whom the child lives

- A person legally responsible for the child's welfare
- A surrogate parent

- ◆ **A person designated by the judge.** New federal rules give a judge broad power to designate a specific person to function as the IDEA Parent and make special education decisions for a child in the custody of a child welfare agency.

### *What Obligations Does a School District Have to Ensure That a Surrogate Parent is Assigned to Serve as the Child's IDEA Parent?*

- ❖ **Determining if a Surrogate Parent is needed.** Education agencies must determine whether a surrogate parent is needed when: 1) a child does not have anyone who meets the definition of an IDEA Parent; 2) the education agency cannot locate an IDEA Parent after reasonable efforts; 3) the child is a ward of the state under the laws of the state;<sup>2</sup> or 4) the child qualifies as an "unaccompanied homeless youth."<sup>3</sup> For children in out-of-home care, a Surrogate Parent must always be appointed in situations 1 and 2.
- ❖ **Appointing a Surrogate Parent for a child who is a ward of the state under the laws of the state.** Whether an education agency is required to appoint a Surrogate Parent for a child who is a "ward of the state under the laws of that state" depends on: 1) how a state defines "ward of the state"; and 2) the extent to which that state interprets federal law to permit or even require the appointment of a Surrogate Parent.

For example, some states read the IDEA to require that all children who are state "wards of the state" must have a Surrogate Parent appointed. Other states with similar rules only appoint Surrogate Parents for children who are state "wards of the state" when there is no IDEA Parent.

- ❖ **Making reasonable efforts to appoint a Surrogate Parent.** When the education agency determines that a Surrogate Parent is needed, it must make reasonable efforts to appoint a Surrogate Parent within 30 days.

The best option is a Surrogate Parent who knows the child well and has her confidence (a family member or foster parent). If no one else is available, the school district must recruit an individual, perhaps a local CASA member. A Surrogate Parent cannot be a person who is an employee of an education or child welfare agency providing education or care for the child – so a school official or child's caseworker cannot be a child's Surrogate Parent. A school district must also ensure that the Surrogate Parent has no personal or professional conflict with the child and that the person has the skills to represent the child competently.

### *What Powers Do Judges Have to Appoint a Special Education Decisionmaker for a Child in Care?*

Judges have three options under the IDEA:

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- ◆ **Initial evaluations:** If the child is in the custody of the child welfare agency and is not living with the birth or adoptive parent or a foster parent who can serve as the IDEA Parent, a judge can suspend the birth 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. However, only an IDEA Parent can consent to the start of special education services – so it is good practice to move forward at the same time to ensure an effective IDEA Parent exists.
- ◆ **Surrogate Parent:** A judge can appoint a person to be a Surrogate Parent – and thus an IDEA Parent – whenever a child meets the IDEA's definition of “ward of the state.” This occurs when the child is in the custody of a child welfare agency *and* the child does not have a foster parent who can serve as the IDEA Parent.
- ◆ **IDEA Guardian:** The limits on a judge's authority to appoint a Surrogate Parent do not apply when a judge appoints an IDEA Guardian to make special education decisions on behalf of a child. To the extent permitted under state law (usually whenever it is in the child's best interests), a judge can appoint a person to serve as an IDEA Guardian to make special education decisions for a child. A judge can appoint an IDEA Guardian for a dependent child even when the child remains in the physical custody of the birth parent. Under federal law, an IDEA Guardian appointed by the court to make education decisions for a child is an IDEA Parent who preempts any other possible IDEA Parent, including the birth or adoptive parent or a foster parent. An IDEA Guardian cannot be the child's caseworker.

#### Practice Tips for Judges

- **Keep the birth or adoptive parent in mind.** Most children in care return to their birth or adoptive families. When possible and in the child's best interests, keep parents involved and empowered to make education decisions. If the birth parents are the appropriate people to make education decisions, it may be wise to clarify this in the court order.
- **Consider both permanent and temporary options for alternate decisionmakers.** For some children, it is in their best interest for the judge to appoint an alternate decisionmaker only for a limited period (for example,

when the parent is in the hospital), and to return decisionmaking power to the birth or adoptive parent as soon as possible. Other children require a more permanent solution. Birth and adoptive parents whose rights have not been terminated should be encouraged to petition the court for reinstatement of decisionmaking 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. Or, seek out someone known to the child. Consult the child's attorney, social worker, or the school district about family or friends who may be available to serve as the Surrogate Parent. Is a church member, CASA, or the attorney herself willing to volunteer?<sup>4</sup>
- **Be sure orders appointing Surrogate Parents or Guardians specifically reference the individual's power to make education decisions.** An order appointing a Surrogate Parent or Guardian should name a specific person and state the individual is appointed “to make all special education decisions for the child.”
- **Encourage developing Surrogate Parent pools, either through local or state education or child welfare agencies.** Maintaining a trained pool of qualified surrogates can help ensure timely appointments and appropriate advocacy by the individuals appointed.

*This article is adapted from a factsheet on judicial decisionmaking developed by the Legal Center for Foster Care and Education, a collaboration between Casey Family Programs and the ABA's Center on Children and the Law, with the Education Law Center-PA and the Juvenile Law Center. For more information or a copy of the full factsheet, visit [www.abanet.org/child/education/publications](http://www.abanet.org/child/education/publications).*

#### Notes

1. The IDEA covers children with disabilities from birth until graduation or the maximum age of eligibility under state law. Children under age 3 are entitled to appropriate “early intervention” services.
2. A ward of the state under the laws of the state is different from an IDEA ward of the state.
3. For more information about unaccompanied homeless youth, visit the National Law Center on Homelessness and Poverty at <http://www.nlchp.org/FA%5FEducation/>, and the National Center on Homeless Education at <http://www.serve.org/nche/>.
4. State law, regulations and standard of representation of children may determine whether this is an appropriate option.



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