



# Special Education Decision Making Role of Public School Educators

**B**etween one-third and one-half of school-age children in the foster care system receive special education services, compared to only 11% of all school-age children.<sup>1</sup> 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 school staff, child welfare agency staff, and the judge overseeing the child's case, understand and use the federal and state rules to make sure all eligible children have legally authorized special education decision makers.

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Helping children in the custody of a child welfare agency can be daunting for school staff. These children can be living with a foster family or in a group setting. One child can have an active birth or adoptive parent, while another is disconnected from her family. In addition to the parent, other people in the child's life can include a judge, a child welfare case-worker (or several), the child's attorney, a court-appointed volunteer, and others. Another challenge is that many of these children change living situations—and school districts—more frequently than other children.

Most educators are unfamiliar with the process for removing a child when a court finds the child was abused or neglected by her parents. A court can order that a “dependent” child be placed with a family member (called “kinship care”), a foster parent, or in an institutional setting, while services are put in place to make it possible for the child to return home. Even more confusing, a child can be placed with a foster parent or in a group setting and her parent can still have the legal authority to make special education decisions on her behalf.

This fact sheet will help you—the educator—understand these complex legal rules so every child with a disability in out-of-home care in your school has a legally authorized “parent” who can make special education decisions on her behalf.

## What is an “IDEA Parent”?

Under the Individuals with Disabilities Education Act (IDEA),<sup>2</sup> it is the “parent” who has decision-making authority. The IDEA Parent participates in decisions about whether a child should be evaluated and what services the child needs. The IDEA Parent has the authority to challenge the school district's decisions through a complex hearing and appeal process. For the IDEA's rules to work effectively, every child with an



eligible disability (or who needs an evaluation to determine if she has a disability) must have an IDEA Parent willing and able to advocate on her behalf.

## Who is the “IDEA Parent” for a child in the custody of a child welfare agency?

Under new IDEA rules, a judge has broad power to designate a specific person as the IDEA Parent for a child who is in the custody of a child welfare agency. Furthermore, the school district must accept that person as the IDEA Parent. Absent judicial intervention, a birth or adoptive parent whose parental rights have not been limited, and who participates in IEP meetings and is active in the special education or early intervention process, is the child’s IDEA Parent. This relationship is recognized even when the child is living in a foster home or a group setting. However, if the birth or adoptive parent is not “attempting to act,” the following people can be the IDEA Parent:

- a foster parent, (unless barred by state law from serving as the 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; or
- a Surrogate Parent (more on this below).

As with birth or adoptive parents, school districts must take steps to ensure that any IDEA Parent can participate effectively in the special education process. The school district must include the IDEA Parent in IEP meetings and notify the IDEA Parent of proposed changes. Therefore, the school district must know the IDEA Parent for each child it is educating. The legally authorized decision maker could be a person in the list of possible IDEA Parents, a person the court has determined is the IDEA Guardian, or a Surrogate Parent appointed by a court or school district.

## What must a school district do to ensure a surrogate parent is assigned as the child’s IDEA Parent?

School districts must determine if a Surrogate Parent is needed when:

- a child does not have anyone who meets the definition of an IDEA Parent (e.g., there is no birth or adoptive parent or parental rights have been terminated, there is no a foster parent, or the foster parent is barred by state law from serving as an IDEA Parent);
- the education agency cannot locate an IDEA parent after reasonable efforts;
- the child is a ward of the state under the laws of the state;<sup>3</sup> or
- the child qualifies as an “unaccompanied homeless youth.”<sup>4</sup>

For children in out-of-home care, a Surrogate Parent must always be appointed in situations 1 and 2.<sup>5</sup>

Whether a school district must appoint a Surrogate Parent for a child who is a state ward of the state depends on state law. 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. So, to determine which children qualify for Surrogate Parents in your state, it’s important to know how your state defines “wards of the state”—and to know whether the state requires that all or only some of these children have Surrogate Parents assigned. Remember, the child’s birth, adoptive, or foster parent could be appointed as the child’s Surrogate Parent.

When the school district determines that a Surrogate Parent is needed, it must make a reasonable effort to appoint a Surrogate Parent *within 30 days*. A Surrogate Parent cannot be a person who is an employee of an agency providing education or care for the child—*so a school official, a child’s caseworker, or staff from a residential treatment facility 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 decision maker for a child in out-of-home care?

Judges have extensive authority to appoint special education decision makers for children in care. Again, a person appointed by a judge takes priority over any other potential IDEA Parent.

- ✓ **Initial Evaluations:** A judge can appoint a person to consent to the child’s first special education evaluation. However, the person appointed cannot consent to special education services starting, so make sure an effective IDEA Parent is in the picture by the time the evaluation is completed. If the person the judge appoints consents to an initial evaluation, the school district must evaluate the child within 60 calendar days or within the state’s evaluation deadline if that is different.
- ✓ **A Surrogate Parent:** A judge can appoint a person to be a Surrogate Parent—and thus an IDEA Parent—when a 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. A Surrogate Parent cannot be a person employed by an agency that cares for or educates the child.
- ✓ **An IDEA Guardian:** A judge can appoint an IDEA Guardian to make special education decisions for a child whenever the appointment of an IDEA Guardian is in the child’s best interests. The Guardian cannot be the child’s caseworker.

Learn More

For more special education resources visit:  
[www.abanet.org/child/education/publications](http://www.abanet.org/child/education/publications)

## Tips for Educators

- ✓ **When possible, support the birth or adoptive parent as the IDEA Parent for the child.** Most children in care return to live with their parents. The school district must treat the parent of a child in care the same way it treats any other parent. The school district should provide the parents with mandated notices, include the parents in developing the IEP, and notify them of changes and their right to contest those changes. So long as the court has not divested an active parent of this authority, the parent—not the school district or the child welfare agency—decides who can attend the IEP meeting. If the parent is deceased, can't be found, or their parental rights have been terminated, make sure the child has an active IDEA Parent.
- ✓ **In 2004, Congress changed the IDEA to include foster parents as possible IDEA Parents.** If the child is living with a foster parent who is not barred by state law from acting as the child's IDEA Parent, and either the birth or adoptive parent is unavailable, the school district should treat the foster parent as the child's IDEA Parent unless the judge has designated someone else to perform this role. A birth or adoptive parent may be unavailable if the parent is dead, cannot be located, parental rights have been terminated, or the parent is not "attempting to act" as the education decision maker for the child. If the child's foster parent is serving as the child's IDEA Parent, the foster parent has the same rights the birth or adoptive parents would have.
- ✓ **The child's caseworker can never be the child's IDEA Parent or an IDEA Guardian.** The only possible decision-making role for the child's caseworker is to consent to an initial evaluation if the judge has issued an order authorizing the caseworker to give such consent. The caseworker is not authorized to approve or disapprove an IEP under any circumstances. The caseworker cannot serve as the child's Surrogate Parent. If there is no birth or adoptive parent or other IDEA Parent, and if the court has not designated someone to perform this role, the school district should promptly appoint a Surrogate Parent for the child.
- ✓ **Be vigilant that children who are living in group settings have IDEA Parents.** The IDEA requires the state, including school districts, to identify, evaluate, and provide special education and related services to all children. It explicitly includes children who are wards of the state and children who are highly mobile. This duty to identify, evaluate, and serve children is called "Child Find." States must be clear about which school district is responsible for fulfilling these Child Find duties for children living in group settings. If you are not sure about the rules for your school district, check with your state education agency. If the responsible agency determines a Surrogate Parent is needed, the agency should appoint one within 30 days (or sooner if it's urgent).

### About this Series

This is one of six fact sheets geared to different audiences:

- children's attorneys
- judges
- caseworkers
- foster parents
- youth in foster care
- educators

View all fact sheets at:

[www.abanet.org/child/education/publications](http://www.abanet.org/child/education/publications)

- ✓ **Make sure the right person is selected as the child’s Surrogate Parent.** Ask the child’s caseworker to recommend a family member or other adult who knows the child and is willing to serve as the Surrogate Parent. Ask the child who she would prefer. If there is no such individual, the school district must locate a volunteer. Some states operate Surrogate Parent programs that can help. If your state doesn’t have such a program, the school district should maintain a pool of trained volunteers so it can appoint a Surrogate Parent for a child within the 30-day period (or sooner). Check with the child welfare agency to see if there are volunteers or others who could help. Also, try to find volunteers who will stick with the child over time and in another school district if the child’s living arrangement changes. Continuity and quality of representation is key.



## Endnotes

<sup>1</sup> 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 [www.nasde.org/publications/foster\\_care.pdf](http://www.nasde.org/publications/foster_care.pdf)

<sup>2</sup> The IDEA also covers children with disabilities under school age. This fact sheet applies to children and youth ages 3 to 21, including preschoolers (children from their third birthday until school age), but does not address the separate rules for children birth through age 3. Younger children (under age 3) are entitled to appropriate “early intervention” services, which must be set out in an Individualized Family Service Plan. Another federal law, Section 504 of the Rehabilitation Act of 1973, also requires public school districts to make reasonable accommodations so children with disabilities can benefit from all aspects of the school program. Some students with disabilities who are not eligible under the IDEA may still be entitled to the protections of Section 504.

<sup>3</sup> A ward of the state under the laws of the state differs from an IDEA ward of the state. An IDEA ward of the state is defined in the IDEA as a child in the custody of a child welfare agency who does not have a foster parent who can serve as an IDEA parent.

<sup>4</sup> For more information about unaccompanied homeless youth, visit the National Law Center on Homelessness and Poverty Web site, under Education, [www.nlchp.org/FA%5FEducation/](http://www.nlchp.org/FA%5FEducation/), and the National Center on Homeless Education Web site, [www.serve.org/nche/](http://www.serve.org/nche/).

<sup>5</sup> An unaccompanied homeless youth under McKinney-Vento can have an active birth or adoptive parent, or can be living with a person who is acting as the child’s parent—in which case no other IDEA parent is required. However, the IDEA also provides that appropriate staff from shelters, independent living programs, and street outreach programs may be appointed as a “temporary surrogate parent,” even if the staff person is involved in the care or education of the child, until a permanent surrogate parent is assigned by the court or the school district.