



# Minimum Standards for AEA Procedures - Substitute Decision-Making for Special Education

## Introduction

### Establishment of Parental Appointment Procedure

Ordinarily when a child with a disability turns 18 years of age, is married, or is incarcerated in a correctional institution, all parental rights under Iowa Code chapter 256B (Special education) and Part B of the Individuals with Disabilities Education Act (IDEA) related to enrollment and participation in special education classes or support services transfer to the child. However, if a court or other “competent authority” has determined the child is not competent or unable to provide informed educational consent, such rights will be exercised by the individual appointed by the court or other competent authority to represent the educational interests of the child (Iowa Code § 256B.6(3)). In such a situation, the Iowa Department of Education (Department) must establish a procedure for appointing the parent of the child with a disability (or another person if a parent is not available) to make educational decisions for that child throughout their eligibility under the IDEA (Iowa Admin. Code r. 281—41.520(2)). The standards outlined in the following section set forth the minimum components of such a procedure.

### Adoption of “Competent Authority” Standards and Procedure

In addition, Iowa law provides the Department’s director with the authority to establish standards and a procedure to determine whether a “public agency”<sup>1</sup> is competent to determine a child’s inability to provide informed educational consent. Pursuant to this authority, the Department adopts the following standards for determining whether a public agency may appoint “the parent of a child with a disability, or, if the parent is not available, another appropriate individual, to represent the educational interests of the child” (Iowa Code § 256B.6(3)): The public agency must be an area education agency (AEA). No other public or private agency may use the procedure. This is due to the AEAs’ institutional expertise in appointing surrogate parents.

### Applicability

Each AEA must establish an appointment procedure consistent with the standards that follow when it appears that a child may be unable to provide informed educational consent. The AEA cannot use this procedure if a court has:

- Denied an application for a full guardianship (also called a general guardianship or plenary guardianship),
- Terminated a full guardianship, or
- Denied or terminated a specific request for a limited guardianship for educational purposes.

That court decision is conclusive on this question.

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<sup>1</sup> Iowa Code section 28E.2 defines “public agency” as “any political subdivision of this state; any agency of the state government or of the United States; and any political subdivision of another state.”

# Minimum AEA Procedures

## Provide the Child Notice

The AEA must provide the child with notice at the start of this procedure, as well as access to the evidence upon which the AEA based its conclusion that the child may be unable to provide informed educational consent. That notice must provide the child with an opportunity to respond to the allegations, present evidence, and call and question witnesses.

## Interview the Child

The child must be interviewed, either in-person or by video conference. To ensure meaningful communication with the child, the AEA should use the mode of communication specified in the child's individualized education plan (IEP). Any interview, regardless of the mode of communication, must be synchronous and must allow the fact-finder to observe the child and the child's answers.

## Review the Child's Information

In addition to the interview of the child, the AEA must review the following information:

- Information provided by the child;
- Information provided by the child's teachers and service providers;
- The child's evaluation reports;
- The child's IEP;
- The child's progress measurement data;
- The child's formative and summative assessment results;
- Information on the child's achievement in the general education curriculum;
- Information about the child's participation in extracurricular and cocurricular activities (if any);
- Information about the child's paid work history and other work activities (if any);
- Medical and social histories in the child's education records;
- Other information in the child's cumulative record;
- Information about other alternate decision makers for the child (e.g., substitute medical decision makers);
- Information provided by the child's parents or guardians; and
- Other relevant information about the child.

## Appropriately Trained and Objective AEA Employee Decides

An AEA's decision regarding whether the child is unable to provide informed educational consent:

- Must be made by an AEA employee with appropriate training and who is not involved in the child's education or care;
- Cannot be based on a single data point or piece of information; and
- Cannot be based solely on the wishes or demands of the child's parents.

## PRESUMPTION OF INFORMED EDUCATIONAL CONSENT AND OVERCOMING IT BY CLEAR AND CONVINCING EVIDENCE

The AEA must presume the child is able to provide informed educational consent. That presumption may only be overcome by clear and convincing evidence, when the evidence is considered as a whole. "Clear and convincing evidence" means there are *no serious or substantial doubts* as to the correctness [of] conclusions of law drawn from the evidence" (*In re C.B.*, 611 N.W.2d 489, 492 (Iowa 2000); emphasis added).

## *Insufficient Evidence to Overcome the Presumption of the Child's Ability to Provide Informed Educational Consent*

On its own, a child's diagnosis, disability "category," IEP service, or funding level is insufficient to overcome the presumption that the child is able to give informed educational consent. In addition, the AEA must consider whether the child is unable to provide informed educational consent, not whether the child has

difficulties in providing informed educational consent. If the child has difficulties but is still able to provide informed education consent, the AEA can provide supports to the child. Similarly, the AEA must consider whether the child is unable to provide informed educational consent, not whether the child makes decisions the adults in their life do not like or whether the child could make better decisions.

Insufficient examples include:

- “The child has autism.”
- “The child is in the Level III room.”
- “The child participates in the alternate assessment.”
- The child is able to make educational decisions and wants to terminate special education services. The child’s parents and teachers think it would be “better” for the child to continue to receive services.

## Parental Appointment for Child Determined Unable to Provide Informed Consent

If a child is determined unable to provide informed educational consent, the AEA must appoint a parent or parents (if available) for up to six months. If the parents have been denied appointment as the guardian or removed as guardian, they are—as a matter of law—unavailable (*In re J.H.*, 27 D.o.E. App. Dec. 867 (2013)). If the child’s parents are unavailable, the AEA must appoint another suitable person (which may be an individual from the AEA’s surrogate parent roster).

## Provision of Notice

Because it relates to the provision of a free appropriate public education, the AEA must provide the child and other parties with a prior written notice of the appointment of an educational decision maker or refusal to appoint an educational decision maker (Iowa Admin. Code r. 281–41.503). The child and other parties have the IDEA’s procedural safeguards available to them.

## Appointment Renewal

An appointment under this procedure lasts for a fixed time, not to exceed six months. Before the end of an appointment under this procedure, the AEA may seek to renew it. If the AEA seeks to renew the appointment, like in the initial procedure, the AEA must presume the child is able to provide informed educational consent and that presumption must be overcome by clear and convincing evidence when considered as a whole.

## Appointment Termination

If a court appoints a full guardian or a guardian for the limited purpose of making educational decisions, the appointment terminates as soon as the AEA receives notice of the guardian’s appointment.

## Questions and Additional Information

For questions and more information, please contact Kim Drew at [kim.drew@iowa.gov](mailto:kim.drew@iowa.gov).