Special Education Series

Identifying Special Education Decision Makers for Children in Foster Care: State Law Questions

As an advocate for children in out-of-home care, many of the children you work with have disabilities, either identified or undiagnosed.[1] Federal and state special education laws give "parents" a central role in making sure children with disabilities get the help they need. This includes consenting to evaluations, approving education programs, and triggering administrative hearings to resolve problems that arise.

For children in child welfare custody, it can be challenging to make sure that there is a "parent" (within the meaning of federal special education law) for every child who needs one. Sometimes birth or adoptive parents are willing and able to play this role. Sometimes birth parents are unable to because they have lost their parental rights. You can help see that a child's education needs are met by ensuring someone is making education decisions for all children in care. Courts in particular are responsible for ensuring child well-being, which includes the child's education.

In 2004, Congress substantially amended the Individuals with Disabilities Education Act (IDEA).[2] The final implementing regulations were published in 2006.[3] Several of the changes explained who qualifies as an "IDEA Parent" to make special education decisions for children in out-of-home care. The amendments also clarified when juvenile court judges can appoint education decision makers for children in care who need or may need special help.[4]

What makes the federal rules trickier for state advocates to understand and apply is that several key IDEA provisions incorporate elements of state law, so you can't tell how to apply the federal rules unless you know specifics about your state rules.

This article identifies state law questions you must answer to understand how the IDEA rules work in your state. It shows how different state rules produce different results. The states highlighted here are examples of how clear answers to these questions give concrete guidance to your decision making. Knowing this information is important to ensure all children in care have legally authorized IDEA Parents. It can also help you identify when to pursue a rule change when your state rule (or the lack of a rule) makes it difficult for children in care to get the special help they need.

In making these determinations, keep these three guiding principles in mind:

- Preserve the birth or adoptive parents' rights to make education decisions whenever possible.
- Empower and direct courts when action is needed in these cases.
- Make sure an appropriate education decision maker is appointed promptly to represent the child.

Key State Rules

To figure out how the IDEA's special education decision-making rules work in your state, you will need to answer the following questions:

- Does your state law bar or limit a foster parent from being the IDEA Parent for a child in the foster parent's care?
- Does your state law designate some children as "wards of the state"?
- Does your state appoint Surrogate Parents for all state "wards of the state"?
- Does the juvenile court judge in your state have the authority to issue an order assigning a specific person to be the child's Education Guardian? What is the court's standard for making such an appointment?

The Child's IDEA Parent

Under the IDEA, the parent has the legal authority to make special education decisions for a child. The term "IDEA Parent" encompasses a range of potential people, first and foremost the birth or adoptive parent. School and child welfare staff and the child's advocate should make every effort to help the birth or adoptive parent be an effective and informed advocate for the child.

If no birth or adoptive parent can be found (which includes when parental rights have been terminated), or if the parent is not "attempting to act as the parent," other individuals listed in the federal definition of IDEA Parent can be considered.[5] These include:

- the foster parent UNLESS "State law, regulations, or contractual obligations with a State or local entity prohibits a foster parent from [being an IDEA Parent]…."
- a Surrogate Parent appointed by a public agency or a court
- a guardian generally authorized to act as the child's parent or to make education decisions for the child
- a person with whom the child is living who is acting as the parent
- a person legally responsible for the child's welfare

STATE LAW QUESTION: Is the Foster Parent barred or restricted from being the IDEA Parent?

To determine whether the foster parent of the child you are representing is the child's IDEA Parent, you need to know whether your state's law restricts a foster parent from serving as the IDEA Parent for a child in her care. This information is also needed to decide whether to ask the judge to appoint a person to consent to the initial evaluation of the child or to appoint a "Surrogate Parent."

About this Series

This article is part of a series focused on special education decision making. Other resources include:

- fact sheets explaining the roles of various individuals in selecting the education decion maker
- an overview of the IDEA's complex rules on this topic, *Special Education Decisions for Children in Foster Care: Everyone Has a Role*

Access these resources at: **www.abanet.org/child/education/publications**

How Does this Work?

Pennsylvania has no state law that bars or limits a foster parent from serving as an IDEA Parent. Therefore, in the absence of a court order dictating a different result, in Pennsylvania a foster parent is the IDEA Parent if there is no birth or adoptive parent in the picture or if the birth or adoptive parent is not "attempting to act" as the parent.

Other states' laws impose restrictions. For example, Vermont prohibits a foster parent from being an IDEA Parent unless she has been appointed as a Surrogate Parent by the Commissioner of Education or his/her designee.[6]

Sometimes state limitations on foster parents are indirect. For example, in New York the birth or adoptive parent makes special education decisions unless the parent's rights have been terminated, surrendered, or limited by a judge. Therefore, a foster parent in New York cannot be the IDEA Parent even when the birth parent is not "attempting to act" unless a court order suspending the parent's rights has been issued. So, even though this law focuses on the rights of birth or adoptive parents, it restricts the ability of foster parents to be IDEA Parents.[7]

Juvenile Court Judge's Appointment of a Surrogate Parent for Child who is an IDEA Ward of the State

A Surrogate Parent is another possible IDEA Parent. A juvenile court judge can appoint a Surrogate Parent for a child who is a "ward of the state." The 2004 amendments to the IDEA added a definition of "ward of the state" (hereafter referred to as an IDEA ward of the state).[8] An IDEA ward of the state is a child who "*as determined by state law*" is a foster child, a ward of the state, or who is in child welfare custody – *except that the child is not an IDEA ward of the state if the child has a foster parent who can be an IDEA Parent.*[9] Therefore, the more permissive the state is regarding whether foster parents can serve as IDEA Parents, the fewer children in care will qualify as IDEA wards of the state for whom courts can appoint Surrogate Parents. [10]

You must know the answer to this State Law Question—whether state law bars or limits the child's foster parent from serving as the child's IDEA Parent—before deciding whether the child you represent is an IDEA ward of the state for whom you can ask the judge to appoint a Surrogate Parent. For example, as noted above, Pennsylvania does not bar or limit foster

Mary and Peter

The scenarios below show typical problems faced by school districts, child welfare caseworkers, judges, and children's attorneys. The discussions explore how the answers to the questions raised in each scenario differ depending on state law.

Mary

Mary is placed with a foster family. She is doing very poorly in school and her foster mother thinks she should be evaluated for special education. The foster mother would be happy to be her special education decision maker. Mary's birth mother, who is very much in the picture, disagrees—her view is that Mary's poor performance is connected to her placement in care, not to a disability.

Q: Mary's foster mother wants her evaluated, but her only birth parent does not think an evaluation is needed. Can her foster mother step in as the education decision maker? What if Mary's mother is not in the picture? Can the judge help?

A: If no court has limited Mary's mother's right to be her education decision maker, and the mother is "attempting to act" as her parent, the school district must recognize the mother as the IDEA Parent. Should Mary's mother disappear, become inactive, or have her decision making or parental rights terminated, and if the state's rules do not bar or limit her foster mother from serving as an IDEA Parent, the foster mother can step into this role.

If Mary *is* an IDEA ward of the state— that is if state law does not permit foster parents to serve as IDEA Parents— the judge has two options: (1) get the initial evaluation moving by subrogating Mary's mother's rights to make education decisions and appointing a person (who could be the foster mother) to consent to Mary's initial evaluation, and (2) appoint a Surrogate Parent to make all special education decisions for Mary. Even if Mary is *not* an IDEA ward of the state, the judge could appoint an Education Guardian to be her IDEA Parent.

Peter

Peter entered care and was placed in a group home. His father is dead and his mother cannot be located. Peter was receiving special education services while he was living with his mother, but those services stopped when he entered care.* His caseworker wants services to resume and for a new IEP to be developed.

Q: Peter lives in a group home. His birth parents are out of the picture. Peter has already been identified as eligible for special education, but his services (illegally) stopped when he was placed. His caseworker also thinks Peter's IEP should be reviewed. Who has the authority to correct the illegal termination of Peter's services, convene an IEP meeting, and get the right services in place? What role can Peter's caseworker play a role?

A: Since Peter's birth parents are out of the picture, unless there is another individual with legal authority to make decisions for him, the school district has a duty to appoint a Surrogate Parent. Moreover, since Peter does not have a foster parent, he is clearly an IDEA ward of the state and the court can also appoint a Surrogate Parent to act on his behalf. Although Peter's caseworker cannot be the Surrogate Parent, there is an advocacy role for the caseworker to play in ensuring that a Surrogate Parent is appointed promptly.

*This article focuses on who can make special education decisions for a child, and thus does not discuss various substantive IDEA violations that arise in these case studies. However, note that the school district that terminated the services in Peter's IEP clearly violated his rights under the IDEA. The change in Peter's living arrangement should not have affected Peter's continued receipt of his IEP services. In fact, even if he moved into a different school district or a different state he should have continued to receive "comparable" services until a new IEP was agreed to by his IDEA Parent. 34 C.F.R. §300.323(e), (f). But that highlights the problem. Without an IDEA Parent to participate in the process, or to enforce Peter's legal rights through the hearing or the state complaint system, the Peters of the world end up without the help they need.

parents from serving as IDEA Parents. So, children living in foster homes in Pennsylvania cannot qualify as IDEA wards of the state. Thus a Pennsylvania juvenile court can appoint a Surrogate Parent only for children in the custody of the child welfare agency living in residential placements (who lack foster parents to serve as IDEA parents). By contrast, in a state where foster parents are barred from serving as IDEA Parents altogether, or only when stringent conditions are met, most children in foster care are IDEA wards of the state and the juvenile court has the authority under the IDEA to appoint Surrogate Parents to make education decisions for them.

Juvenile Court Judge's Appointment of a Person to Consent to an Initial Evaluation of an IDEA Ward of the State

The IDEA provides that a judge can subrogate the birth or adoptive parent's right to make education decisions for a child according to state law and appoint a person to consent to the initial evaluation of a child in state custody who is an *IDEA ward of the state*. The public agency can then evaluate the child without additional consent from the birth or adoptive parent. Again, to determine whether a child is an IDEA ward of the state, first determine whether your state's foster parents can be IDEA Parents. If NOT, all children in state custody are IDEA wards of the state and a court can appoint a person to consent to the initial evaluation of any child in the state's care. If the foster parents can be IDEA Parents, the court can take this step only for children who are not placed in foster homes.[11]

Public Agencies' Appointment of Surrogate Parents

A public agency[12] (usually a school district or a state education agency) must assign a Surrogate Parent for a child when no IDEA Parent can be identified or the IDEA Parent cannot be located after reasonable efforts.[13] Public agencies must also determine if a Surrogate Parent should be assigned if the child is a *"ward of the State under the laws of that State."*[14]

STATE LAW QUESTION: Does Your State Law Designate *Some* Children as "Wards of the State"?
To determine whether the school district has a duty to appoint a Surrogate Parent for the child you are representing under 34 C.F.R. §300.519(a)(3), you need to know whether your state law contains the concept "ward of the state" and, if so, which children meet that definition. Are all children under the supervision of a child welfare agency state wards of the state? Is legal custody required? Does it include only children with parents whose parental rights have been terminated? Can a child be a state ward of the state even if the child still has an engaged birth or adoptive parent?

STATE LAW QUESTION: Does Your State Appoint Surrogates for *All* State Wards of the State?
What is the result of a determination that a child is a state ward of the state? Under your state's law must a Surrogate Parent automatically be appointed for all state wards of the state even if there is an active birth or adoptive parent in the picture?

How Does this Work?
Pennsylvania does not have a state law "ward of the state." Therefore, Pennsylvania school districts never have to appoint a Surrogate Parent on this basis.

However, many states do have state wards of the state. In New York, all children and youth under age 21 who are placed or remanded through a juvenile delinquency, PINS, or child protective proceeding, are freed for adoption, are in the custody of the Commissioner of Social Services or the Office of Children and Family Services, or who are "destitute" are wards of the state regardless of whether the rights of the birth or adoptive parents have been terminated.[15] Arizona uses the IDEA ward of the state definition as its definition of state ward of the state.[16]

The effect of designating a child as a state ward of the state may differ across jurisdictions. Under the Arizona statute, a petition to appoint a Surrogate Parent shall be made only if an IDEA Parent cannot be identified, a public agency cannot find the parent after making reasonable attempts, or if the child is a ward of the state.[17] Thus, in Arizona, the designation of a child as a state ward of the state doesn't necessarily mean that a Surrogate Parent will be appointed, since there may still be a birth or adoptive parent or another IDEA Parent available. In contrast, in Vermont, all children who are state wards of the state will have a Surrogate Parent appointed, even when there is an active birth or adoptive parent (in those situations, the birth or adoptive parent could be the one appointed as a

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How State Law Affects Who Can Make Special Education Decisions for a Child in Care

Birth/Adoptive Parent

First determine if a birth or adoptive parent can be the IDEA Parent. They usually receive priority as the child's education decision maker.

If no birth or adoptive parent can be found, or the parent is "not attempting to act," any of the following people may be the IDEA Parent: foster parent, surrogate parent, guardian, person legally responsible for the child, or a person who the child lives with who acts as the parent. When considering if a foster parent, surrogate parent, or guardian can be the IDEA Parent, ask the relevant state law questions highlighted below.

Foster Parent

State Law Questions:

Q1. Does your state law bar/limit foster parent from being the IDEA Parent?

↘ **YES - the foster parent *may not* be the IDEA Parent.**
Examples:
- State law requires birth parent's rights to be terminated, surrendered, or limited by judge before foster parent can act.
- State regulations prohibit foster parent from being IDEA Parent unless approved as surrogate parent by commissioner of education.

↘ **NO - the foster parent *may* be the IDEA Parent.**
Example: State law has no restriction preventing the foster parent from being an IDEA Parent.

Surrogate Parent

State Law Questions:

Q1. Is child an **IDEA ward of the state** for whom a Surrogate Parent may be appointed by the court?

↘ **YES - a Surrogate Parent *may* be appointed.**
Examples:
- Child lives in residential placement.
- Child lives in state where foster parents are prohibited from serving as IDEA Parents.

↘ **NO - a Surrogate Parent *may not* be appointed.**
Example: Child has foster parent who can serve as the IDEA Parent.

Q2a. Does your state law designate *some* children as **state wards of the state**?

YES - Our state law defines state ward of the state specifically.
Examples:
- Our state ward of the state definition is the same as the IDEA definition of ward of the state.
- Our state defines all children adjudicated dependent as state wards of the state.

NO - Our state does not define state ward of the state.

Q2b. If YES to Q2a, does your state local education agency appoint Surrogate Parents for *all* **state wards of the state**?

↘ **YES - a Surrogate Parent is automatically appointed.**

↘ **NO - a Surrogate Parent is not automatically appointed.**
Examples:
- A birth or adoptive parent can act.
- A foster parent can act.

Guardian

State Law Questions:

Q1. Does juvenile court judge have authority under state law to assign someone as child's Education Guardian? What is the court's standard for making the appointment?

↘ **YES - the judge may appoint an Education Guardian.**
Examples:
- State statute explicitly authorizes appointment of Education Guardian.
- State views court's general authority to act in child's well-being to permit guardian appointment.

↘ **NO - the judge may not appoint an Education Guardian.**
Example: State does not view the judge as having authority to approve an Education Guardian.
Note: In these states, a situation could arise where a child lacks an active education decision maker or the decision maker is acting inappropriately, but the court's ability to intervene is limited.

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Surrogate Parent).[18]

What happens if the child is a state ward of the state and state law does not clearly list the consequences of that determination when there is a willing birth or adoptive parent? The comments to the federal IDEA regulations suggest that, in the absence of a court order to the contrary, the public agency must defer to the birth or adoptive parent.[19]

Juvenile Court's Appointment of Education Guardians

Even if the juvenile court judge lacks the authority to appoint a Surrogate Parent for a child, the judge probably has the authority to issue an order appointing a specific person to be the child's "Education Guardian." A "guardian … authorized to make educational decisions for the child" is one type of IDEA Parent.[20] The person selected cannot be the child's caseworker. At times, it may be necessary to ask a court to appoint an Education Guardian for a child you are representing. For example, in Pennsylvania if the birth parent is present but is unable or unwilling to perform this role, and the child is in a foster home—but the foster parent is not the best choice for the job—the lawyer's only choice is to ask the court to appoint an Education Guardian.[21]

STATE LAW QUESTION: Does the juvenile court judge have the authority under the state juvenile act or other state law to issue an order assigning a specific person to be the child's Education Guardian? What is the court's standard for making such an appointment?

The IDEA is not the source of a family court judge's authority to act. The court's jurisdiction, the scope of its authority, and the standard for it to make such an appointment depend on state law—usually the state's juvenile act or the court rules. To determine whether to ask the judge to appoint an Education Guardian, first determine if the state's juvenile act permits a court to make such an appointment and under what circumstances.

Although Pennsylvania does not explicitly authorize a juvenile court to designate an Education Guardian, the state's juvenile act gives courts authority to enter an order of disposition that is "best suited to the protection, and physical, mental, and moral welfare of the child."[22] A Pennsylvania court is operating well within this statutory authority if it appoints an Education Guardian for a child.

A judge should appoint an Education Guardian for a child only when the court cannot appoint a Surrogate Parent (for example, because the child has a foster parent who can serve as the IDEA Parent, but that foster parent isn't the right person to serve in that role). The IDEA bars a person from serving as a Surrogate Parent if he is an employee of the school district or any other agency involved in the education or care of the child. Examples of people prohibited from serving as a Surrogate Parent are the child's caseworker, teacher, or caretaker at a residential treatment facility. An Education Guardian cannot be "the state if the child is a ward of the State."[23] That clearly bars the child's caseworker, but less clearly bars others with potential conflicts.

Conclusion

These rules are confusing, and one size does not fit all in all states. Once you figure out the rules in your state, identifying the education decision maker becomes simpler. This article may have raised issues for your state to address, either to fill in gaps where state law is silent or unclear or to make sure advocates know how your state interprets and implements these legal provisions. This is essential to ensure all children in care who need special education help get it from independent and caring IDEA Parents.

Endnotes

[1] Casey Family Programs has compiled some of the research on the education and special education needs of these children. For example, it notes that "numerous studies indicate anywhere from one-quarter and almost one-half (23%-47%) of children to youth in out-of-home care in the U.S. receive special education services at some point in their schooling." www.casey.org/NR/rdonlyres/A8991CAB-AFC1-4CF0-8121-7E4C31A2553F/598/National_EdFactSheet_2008.pdf

[2] 20 U.S.C. §§1400, *et seq.*

[3] 34 C.F.R. §§300.1, *et seq.*

[4] Another important addition was the explicit inclusion of "wards of the state" in states' Child Find obligation. 20 U.S.C. §1412(a)(3). Child Find requires states to establish policies and procedures to identify, locate, and evaluate all children in need of special education and related services and to determine whether they are receiving needed services. 34 C.F.R. §300.111(a). Part C of the IDEA, which covers infants and toddlers with developmental delays, was amended to require participating states to establish policies and procedures that would require the referral for early intervention services of children under age 3 who are involved in a substantiated case of child abuse or neglect, or who have been affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure. 20 U.S.C. §1437(a)(6). While there is some overlap, in general this article

discusses only the rules under IDEA Part B, that is, the rules that pertain to children with disabilities from age three to graduation or until their IDEA protections end (usually age 21).

[5] 34 C.F.R. §300.30(a).

[6] Vermont State Board Of Education Manual Of Rules And Practices §§ 2369 (f); 2360.3(17)(a)(4).

[7] 8 N.Y.C.R.R. § 200.1(ii)(3).

[8] 20 U.S.C. §1401(36), 34 C.F.R, §300.45.

[9] 34 C.F.R. §300.45(b).

[10] The authors read 34 C.F.R. §300.519(c) as permitting family court judges to appoint Surrogate Parents only for children who are IDEA wards of the state. This contrasts with public agencies (usually school districts or state education agencies) who must determine whether Surrogate Parents are needed for children who are "wards of the state under the laws of the state." See 34 C.F.R. §300.519(a)(3). See discussion of public agencies' responsibilities *infra*.

Some advocates read 34 C.F.R. §300.519(c) as permitting judges to appoint surrogate parents for children who are wards of the state under state law. There is some support for this reading in the comments to the IDEA regulations. See, 71 Fed. Reg. 46711 (2006). This reading gives greater authority to judges in states that categorize many or all children in care as state wards of the state, and limits the authority of judges in states with no or limited definitions. Remember, however, that regardless of the breadth of the courts' authority to appoint Surrogate Parents, judges can still appoint an Education Guardian who is "authorized to make educational decisions for the child…." See, 34 C.F.R, §300.30(a)(3).

[11] Again a digression—a public agency has the authority under the IDEA to request a hearing to overturn an IDEA Parent's (including a birth or adoptive parent's) refusal to consent to an initial evaluation—a time-intensive method of getting the necessary consent to conduct an initial evaluation. 34 C.F.R. §300.300(a)(3). However, the public agency cannot use this route to overturn an IDEA parent's refusal to consent to services beginning. 34 C.F.R. §300.300(b)(3).

[12] A public agency is a state or local governmental agency or a public charter school that is "responsible for providing education to children with disabilities." 34 C.F.R. §300.33.

[13] 34 C.F.R. §300.519(a)(1),(2).

[14] 34 C.F.R. §300.519(a)(3). Finally, a school district must determine whether a Surrogate Parent should be assigned to "an unnaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(6))." 34 C.F.R. §300.519(a)(6). However, in the case of an unaccompanied homeless youth, a temporary Surrogate Parent can be appointed without regard to whether the person is involved in the education or care of the child—a restriction that otherwise applies to any person appointed as a Surrogate Parent for a child. 34 C.F.R. §300.519(f).

[15] 8 N.Y.C.R.R. § 200.1.

[16] Ariz. Rev. Stat. Ann. § 15-761(41).

[17] Ariz. Rev. Stat. Ann. § 15-763.01(A).

[18] The comments to the IDEA regulations confirm that it is up to state to decide whether all children who are state wards of the state are automatically assigned Surrogate Parents, or only if there is no IDEA Parent willing and able to serve.

> If a child who is a ward of the state already has a person who meets the definition of parent in §300.30, and that person is willing and able to assume the responsibilities of a parent under the Act, a surrogate parent might not be needed.

(Emphasis in the original). 55 Fed. Reg. 46566 (2006).

[19] The comments to 34 C.F.R. §300.519(c) refer back to 34 C.F.R. §300.30(b)(1), which "provides that when there is more than one party attempting to act as a parent, the birth or adoptive parent must be presumed to be the parent, unless the birth or adoptive parent does not have legal authority to make educational decisions for the child." 71 Fed. Reg. 46711 (2006).

[20] 34 C.F.R. §300.30(a)(3).

[21] In this scenario, an Education Guardian really is the ONLY option. The school district cannot appoint a Surrogate Parent because an IDEA parent exists (the birth parent or the foster parent), the child is not a ward of the state under state law, and the child is not an unaccompanied homeless youth. The court can't appoint a Surrogate Parent because the child is not an IDEA ward of the State—she has a foster parent who is not barred from serving as the IDEA Parent—the foster parent is just unwilling to serve or is not the best choice.

[22] 42 Pa. C.S.A. § 6351(a). See also, In re Tameka M, 525 Pa. 348, 580 A.2d 750, 357 (Pa. Super. Ct. 1990) (juvenile act should be construed to encourage action related to the best interests and protection of the child).

[23] 34 C.F.R. §300.30(a)(3).

Let Us Help You

The Legal Center for Foster Care and Education offers technical assistance around these complicated special education decision-making issues. Contact us if you need help:

- identifying the education decision maker for a child in out-of home care
- understanding how the federal IDEA rules work in your state
- understanding how your state law affects who can be the education decision maker for a child
- identifying the specific roles attorneys, judges, caseworkers, educators, foster parents and others can play in ensuring education decisions are being made for a child in out-of home care

Visit www.abanet.org/child/education for more information and a project contact list.