

TRI-STATE REGIONAL SPECIAL EDUCATION CONFERENCE
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Non-Traditional Families – Who Are They and What Rights
Do They Have Under the IDEA?

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I. So, Who is a “Parent” Anyway?

Overview

Either parents or people acting in the place of parents, including surrogate or foster parents or guardians, can exercise rights under the IDEA. Note that the 2006 IDEA Part B regulations substituted the term "biological" for "natural" parent. The regulations further clarified that to be considered a "parent," a "guardian" must be a person generally authorized to act as the child's parent or authorized to make educational decisions for the child.

DEFINITION OF PARENTS UNDER THE IDEA

- To the list of individuals who may be considered parents, IDEA 2004 adds: "an individual who is legally responsible for the child's welfare." For a "person acting in the place of a parent" to be considered a parent, the child must be living with such person. 34 CFR 300.30(a)(4). 20 USC 1401(23)(C), 34 CFR 300.30(a).
- IDEA 2004 also prohibits foster parents from serving as parents if they are barred from doing so under state law. 20 USC 1401(23)(A), 34 CFR 300.30(a)(2).
- The 2006 IDEA Part B regulations, at 34 CFR 300.30(a), clarified that a parent is:
 1. A biological or adoptive parent of a child.
 2. A foster parent, unless state law, regulations, or contractual obligations with a state or local entity prohibit a foster parent from acting as a parent.
 3. A guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the state if the child is a ward of the state).

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4. An individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare.
 5. A surrogate parent who has been appointed in accordance with 34 CFR 300.519 or 20 USC 1439(a)(5).
- The regulation further provides in 34 CFR 300.30(b)(1) that: "Except as provided in paragraph (b)(2) of this section, the biological or adoptive parent, when attempting to act as the parent under this part and when more than one party is qualified under paragraph (a) of this section to act as a parent, must be presumed to be the parent for purposes of this section unless the biological or adoptive parent does not have legal authority to make educational decisions for the child."
 - "If a judicial decree or order identifies a specific person or persons under paragraphs (a)(1) through (4) of this section to act as the 'parent' of a child or to make educational decisions on behalf of a child, then such person or persons shall be determined to be the "parent" for purposes of this section." 20 USC 1401(23); 34 CFR 300.30(b)(2).
 - Because neither the divorce decree nor the custody order gave the father, the student's non-custodial parent, the right to make educational decisions, the 2d Circuit explained, he lacked standing to challenge the student's IDEA services. *Fuentes v. Board of Educ. of the City of New York*, 52 IDELR 152 (2d Cir. 2009), *cert. denied*, 109 LRP 66479, 129 S. Ct. 1357 (2009).
 - See generally, *Letter to Ford*, 41 IDELR 10 (OSEP 2003) (public agency must ensure the rights of a child are protected if no parents can be identified).

CHILDREN WHO LIVE WITH RELATIVES

- The IDEA does not address who the parent is in cases where a child with a disability is living with a relative other than his parents. The resolution of this issue is left to the states. Generally, a parent must live with the student and have a relationship with the student that can be characterized by a universally recognizable familial-type label, such as "guardian," "stepparent" or some type of blood relative. *Family & Children's Center, Inc. v. School City of Mishawaka*, 19 IDELR 780 (N.D. Ind. 1993). *See related decision at* 20 IDELR 1192 (7th Cir. 1994).
- A de facto guardianship can occur. An IHO acknowledged that because a student lived with his uncle until age 16, the uncle was the student's de facto guardian for the time the student lived with him. However, the IHO explained that the uncle's ability to act as the student's parent ended when the student left his uncle's home and entered into Department of Social Services custody. "[The uncle's] rights and responsibilities ... arose from his relationship to [the student] as a paternal uncle, [the student's] presence in his home, and the absence of natural parents in the Commonwealth," the IHO wrote. "In the absence of any legal document establishing further custodial rights, [the uncle's] rights and responsibilities were extinguished when DSS took custody of the student in 2002." *Milton Pub. Schs.*, 48 IDELR 145 (SEA MA 2007).
- An IHO learned that a student's aunt cared for the student on a daily basis, fed him, put him to bed, and made sure he got to school. Finding that the aunt was legally responsible for the student's welfare and properly considered to be a "parent" as defined by state law, the IHO clarified for the district that it could rely on her consent to evaluate and place the student. *Biddeford Sch. Dept.*, 44 IDELR 87 (SEA ME 2005).

STATE LAW DEFINITIONS

- A state may define the term "parent" more expansively than does IDEA, giving a wider range of individuals or entities the ability to represent children in IDEA claims. *Family & Children's Ctr. Inc. v. School City of Mishawaka*, 20 IDELR 1192 (7th Cir. 1994).
- The Florida Supreme Court approved a series of amendments to the Florida Rules of Juvenile Procedure providing that a child is entitled to a surrogate parent under Florida law if the parent, foster parent, or caretaker is unavailable, unwilling, or unable to make educational decisions for

the child. *In re: Amendments to the Florida Rules of Juvenile Procedure*, 53 IDELR 163 (Fla. 2009).

LIMITATIONS ON PEOPLE WHO CAN ACT AS PARENTS

- A state also may limit the ability of certain individuals who have legal responsibility for a child to be deemed a person acting as a parent. *Ysleta Indep. Sch. Dist.*, 29 IDELR 1093 (SEA TX 1998).
- 34 CFR 303.422(d) sets forth the criteria for selecting surrogates under Part C. A lead agency may not name as a surrogate any person who provides early intervention services to the child or to any family member. 34 CFR 303.422(d)(2)(i). Employees of state agencies are also ineligible to serve. 34 CFR 303.422(d)(2)(i).
- In *Letter to Baker*, 35 IDELR 10 (OSEP 2000), OSEP noted that a foster parent may act as a child's "parent" if permitted by state law and provided IDEA requirements are met. In the alternative, a guardian may serve as a parent, but not if the state itself is the guardian for a ward of the state.

TRANSFER OF PARENTAL RIGHTS TO STUDENTS UPON THE AGE OF MAJORITY

- The 2006 IDEA Part B regulations, at 34 CFR 300.520(b), regarding the transfer of parental rights at the age of majority, has been revised to more clearly state that states must establish procedures for appointing 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 throughout the child's eligibility under Part B of the act if, under state law, a child who has reached the age of majority, but has not been determined to be incompetent, can be determined not to have the ability to provide informed consent with respect to the child's educational program.
- A District Court dismissed a student's parent from a due process complaint. Because the student had reached the age of majority under Kansas law, the court concluded that the mother lacked standing to pursue an IDEA action. The court recognized that parents have their own rights under the IDEA, and that the district's alleged offenses violated both the student's and the parent's rights. However, it pointed out that states are free to enact laws that transfer all of the parent's IDEA rights to the student when the student reaches the age of majority -- in this case, age 18. Although the student was 17 years old when the parent filed the complaint, the student turned 18 just eight days later. The parent's rights had transferred to the student on his 18th birthday. *Neville v. Dennis*, 48 IDELR 241 (D. Kan. 2007).
- A court denied the parents' request to reconsider the dismissal of their FAPE action against an Illinois district in light of *Winkelman v. Parma City Sch. Dist.*, 47 IDELR 281 (U.S. 2007). While the parents had both substantive and procedural rights under the IDEA during their daughter's childhood, those rights transferred to their daughter when she turned 18. It was the language of *Winkelman* that guided the District Court's decision. Under 20 USC 1415(m)(1), the court observed, the parents' IDEA rights transferred to the student when she reached the age of majority under Illinois law. The court explained that the statutory provision remained valid after *Winkelman*. "Rather than overruling this provision, the [Supreme Court] stated that this provision confirmed its view, stating that the IDEA '... presumes parents have rights of their own when it defines how States might provide for the transfer of the "rights accorded to parents" by [Section 1415(m)(1)(B)],' the court wrote. *Loch v. Board of Educ. of Edwardsville Community Sch. Dist. #7*, 48 IDELR 217 (S.D. Ill. 2007). See also *Loch v. Board of Educ. of Edwardsville Community Sch. Dist. #7*, 48 IDELR 277 (S.D. Ill. 2007).

II. Surrogate Parents

SURROGATE PARENTS - IN GENERAL

- IDEA 2004 emphasizes the importance of surrogate parents, particularly for homeless children, in its explanation of procedural safeguards at 20 USC 1415(b)(2). That section requires states to establish procedures to protect the rights of the child whenever the parents are not known; the district cannot, after reasonable efforts, locate the parents; or the child is the ward of the state. An individual assigned to act as a surrogate may not be an employee of the SEA, the LEA, or any other agency involved in the education or care of the child. The state must make reasonable efforts to ensure the assignment of a surrogate not more than 30 days after there is a determination by the agency that the child needs a surrogate. 20 USC 1415(b)(2)(B).
- The 2006 IDEA Part B regulations provide that a parent includes: "A surrogate parent who has been appointed in accordance with 34 CFR 300.519 or 20 USC 1439(a)(5)." 34 CFR 300.30(a)(5).

APPOINTMENT OF SURROGATE PARENTS UNDER 2006 IDEA PART B REGULATIONS

- Because a surrogate parent is included in the IDEA's definition of "parent," a surrogate parent may be accorded all of the procedural safeguards granted to parents under the IDEA, and it is the responsibility of these individuals to assert those rights. 34 CFR 300.519; see *Letter to Ford*, 41 IDELR 10 (OSEP 2003).
- Under 34 CFR 300.519(a), surrogate parents must be appointed to protect a child's rights when:
 - (1) No parent (as defined in 34 CFR 300.30) can be identified;
 - (2) The public agency, after reasonable efforts, cannot locate a parent;
 - (3) The child is a ward of the state under the laws of that state; or
 - (4) The child is an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act ([42 USC Sec. 11434a\(6\)](#)).
- The SEA must make "reasonable efforts to ensure the assignment of a surrogate parent not more than 30 days after a public agency determines that the child needs a surrogate parent." 34 CFR 300.519(h).

RIGHTS OF SURROGATE PARENTS AND LIMITATIONS ON APPOINTMENT UNDER IDEA PART C

- If a surrogate parent is appointed for an infant or toddler, the surrogate has all the rights that a parent has under Part C. 34 CFR 303.422(f).
- In *Letter to Baker*, 35 IDELR 10 (OSEP 2000), OSEP indicated that, under Part C regulations, the lead agency must appoint a surrogate parent for a child when necessary to protect the child's IDEA rights. OSEP noted that a foster parent may act as a child's "parent" if permitted by state law and provided IDEA requirements are met. In the alternative, a guardian may serve as a parent, but not if the state itself is the guardian for a ward of the state.
- The 2011 Part C regulations require a lead agency to make reasonable efforts to ensure that a surrogate parent is assigned not more than 30 days after a public agency determine that the child needs a surrogate parent.

- 34 CFR 300.519(d) sets forth the specific criteria for the selection process of an appropriate surrogate parent under Part B of the IDEA. 34 CFR 303.422(d) sets forth the criteria for selecting surrogates under Part C.
- The agency is prohibited from naming as a surrogate any person who provides early intervention services to the child or to any family member. 34 CFR 303.422(d)(2)(i). Employees of state agencies are also ineligible to serve. 34 CFR 303.422(d)(2)(i).
- OSEP has advised that a state Social and Rehabilitative Services commissioner cannot make educational decisions for a child with a disability who is under state custody or act in the role of parent (or surrogate parent) for purposes of placing the child in a home school program. *Letter to Yudian*, 38 IDELR 245 (OSEP 2003).

TERMINATION OF PARENTAL RIGHTS

- Appointment of a surrogate parent under IDEA does not serve as a replacement for a parent in any other sense, and state law controls all other aspects of the care of a child whose parents are not available. Nothing in the IDEA suggests that appointment of a surrogate parent results in termination of the rights of a student's "biological" parents to participate in the educational process of their children. *John H. v. MacDonald*, 558 IDELR 366 (D.N.H. 1987).

DISINTERESTED PARENTS

- A district cannot appoint a surrogate parent in situations where otherwise available parents refuse to participate in the educational planning process. *Letter to Perryman*, 211 IDELR 438 (OSEP 1987).

BEST INTERESTS OF THE CHILD

- IDEA does not explicitly allow for the appointment of a surrogate parent when a parent acts in a manner that is opposed to, or inconsistent with, the best interests of the child. However, state law may afford more protection in such instances. See *Dundee Cent. Sch. Dist.*, 509 IDELR 191 (SEA NY 1987); *In re Amendments to the Fla. Rules of Juvenile Procedure*, 53 IDELR 163 (FL 2009) (child is entitled to a surrogate parent under Florida law if the parent, foster parent, or caretaker is unavailable, unwilling, or unable to make educational decisions for the child).

PARENTAL PARTICIPATION

- A district cannot obtain an injunction against parental participation in their IDEA-eligible child's educational program, even if the district can demonstrate bad faith on the part of the parents. *Board of Educ. of Northfield Twp. High Sch. Dist. 225 v. Roy H.*, 21 IDELR 1173 (N.D. Ill.

Under what circumstances are districts obligated to appoint surrogate parents?

The IDEA requires a district to appoint a surrogate parent for a child with a disability when: 1) no parent can be identified; 2) the agency cannot locate a parent after making reasonable efforts to do so; 3) the child is a ward of the state (as defined by state law); or 4) the child is an unaccompanied homeless youth as defined by the McKinney-Vento Homeless Assistance Act. Neither the IDEA nor the Part B regulations define what constitutes a "reasonable effort" to discover the parents' whereabouts. Accordingly, assessment of what is reasonable is made on a case-by-case basis. If the parents' whereabouts are known, the district cannot appoint a surrogate parent, even if the parents refuse to participate in the educational planning process.

COMMENTS TO THE 2006 REGULATIONS REGARDING SURROGATE PARENTS

Surrogate parents (Sec. 300.519)

Comment: A few commenters asked whether a student in the penal system has a right to a surrogate parent.

Discussion: Students with disabilities in State correctional facilities do not have an automatic right to a surrogate parent solely by reason of their confinement at a correctional facility. Public agencies must make case-by-case determinations in accordance with the requirements in Sec. 300.519, regarding whether a student with a disability in a State correctional facility needs a surrogate parent. Whether a student with a disability confined in a State correctional facility is considered a ward of the State, as defined in new Sec. 300.45 (proposed Sec. 300.44) whose rights must be protected through the appointment of a surrogate parent, is a matter that must be determined under State law.

Changes: None.

Comment: One commenter recommended defining the term "locate" as used in Sec. 300.519.

Discussion: "Locate," as used in Sec. 300.519(a)(2), regarding a public agency's efforts to locate a child's parent, means that a public agency makes reasonable efforts to discover the whereabouts of a parent, as defined in Sec. 300.30, before assigning a surrogate parent. We do not believe that it is necessary to define "locate" in these regulations because it has the same meaning as the common meaning of the term.

Changes: None.

Duties of public agency (Sec. 300.519(b))

Comment: A number of comments were received regarding the procedures for assigning surrogate parents. One commenter recommended requiring LEAs to appoint a surrogate parent unless the juvenile court has already appointed one. The commenter stated that this would avoid situations in which the LEA and juvenile court each believe that the other is assuming this responsibility and a surrogate parent is never appointed.

A few commenters recommended that the process for assigning surrogate parents within the 30-day timeframe be developed in collaboration with judges and other child advocates. Some commenters recommended that the regulations require the involvement of child welfare agencies, homeless liaisons, and any other party who has knowledge about the needs of homeless children or children in foster care in determining whether a surrogate parent is needed.

Discussion: It is not necessary to amend the regulations in the manner recommended by the commenters. To ensure that the rights of children with disabilities are protected, Sec. 300.519(b) requires public agencies to have a method for determining whether a child needs a surrogate parent and for assigning a surrogate parent to a child. Such methods would include determining whether a court has already appointed a surrogate parent, as provided under Sec. 300.519(c). Therefore, it is unnecessary to add language requiring LEAs to appoint a surrogate parent unless the juvenile court has already appointed one, as requested by a commenter. Section 300.519(d)(1) allows a public agency to select a surrogate parent in any way permitted under State law, and Sec. 300.519(h) requires the SEA to make reasonable efforts to ensure the assignment of a surrogate parent not more than 30 days after a public agency determines that the child needs a surrogate parent.

We believe that the determination of whether public agencies collaborate with other parties, such as child welfare agencies or homeless liaisons, in appointing surrogate parents is best left to State discretion. There is nothing in the Act that would prohibit a public agency from collaborating with judges and child advocates in establishing a process for assigning surrogate parents, as recommended by the commenter. However, in situations where a public agency involves other parties in determining whether a surrogate parent is needed, the public agency must ensure that the confidentiality of personally identifiable data, information, and records collected or maintained by SEAs and LEAs is protected in accordance with Sec. 300.610 through 300.627, and that the privacy of education records is protected under FERPA and its implementing regulations in 34 CFR part 99.

Changes: None.

Comment: One commenter recommended retaining current Sec. 300.370(b)(2), which specifically mentions the recruitment and training of surrogate parents as a State-level activity for which funds provided under Part B of the Act may be used. One commenter requested clarification as to who should provide training for surrogate parents. A few commenters recommended that PTIs in each State be responsible for training surrogate parents.

Discussion: It is not necessary to retain current Sec. 300.370(b)(2) in order to permit the continued use of funds provided under Part B of the Act for the recruitment and training of surrogate parents. Section 300.704(b) and section 611(e)(2)(C)(i) of the Act provide that funds reserved for other State-level activities may be used for support and direct services, including technical assistance, personnel preparation, and professional development and training. This would include the recruitment and training of surrogate parents.

Determinations regarding who should conduct the training for surrogate parents are best left to the discretion of States and local officials. There is nothing in the Act or these regulations that requires or prohibits surrogate parent training to be conducted by PTIs.

Changes: None.

Comment: A few commenters recommended that a child have the same surrogate parent for each IEP Team meeting, eligibility meeting, and other meetings in which a parent's presence is requested by the public agency.

Discussion: The Act and these regulations do not address the length of time that a surrogate parent must serve. Nor do we believe that it would be appropriate to impose a uniform rule in light of the wide variety of circumstances that might arise related to a child's need for a surrogate parent. Even so, to minimize disruption for the child, public agencies should take steps to ensure that the individual appointed as a surrogate parent can serve in that capacity over the period of time that the child needs a surrogate.

Changes: None.

Wards of the State (Sec. 300.519(c))

Comment: Many commenters stated that the requirements for a surrogate parent for public wards of the State (when a judge overseeing a case appoints a surrogate parent) are less stringent than the requirements for surrogate parents for other children. The commenters stated that the requirements that surrogate parents have no personal or professional interest that conflicts with the interest of the child, and have knowledge and skills that ensure adequate representation of the child, as required in Sec. 300.519(d)(2)(ii) and (iii), respectively, should be required for surrogate parents for children who are wards of the State. One commenter recommended that court-appointed surrogate parents should have to meet Federal requirements for surrogate parents, not the requirements promulgated by LEAs. The

commenter stated that courts may have jurisdiction over cases from more than one school district and should not have to apply different standards depending on which school district is involved.

Discussion: The criteria for selecting surrogate parents in Sec. 300.519(d)(2)(ii) and (iii), which apply to surrogate parents appointed by a public agency for children with disabilities under Part B of the Act, do not apply to the selection of surrogate parents for children who are wards of the State under the laws of the State. Section 615(b)(2)(A)(i) of the Act provides that, in the case of a child who is a ward of the State, a surrogate parent may alternatively be appointed by the judge overseeing the child's care, provided that the surrogate parent is not an employee of the SEA, the LEA, or any other agency that is involved in the education or care of the child. We decline to impose additional requirements for surrogate parents for children who are wards of the State beyond what is required in the Act, so as to interfere as little as possible with State practice in appointing individuals to act for the child. However, we would expect that in most situations, the court-appointed individuals will not have personal or professional interests that conflict with the interests of the child and will have the knowledge and skills to adequately represent the interests of the child.

Changes: None.

Comment: One commenter recommended that the regulations clarify that if a parent under Sec. 300.30 is known and the child is a ward of the State, the public agency must appoint a surrogate parent only if the public agency determines that a surrogate parent is needed to protect the educational interests of the child. The commenter stated that the public agency should not appoint a surrogate parent without approval of a court of competent jurisdiction if the parent is the biological or adoptive parent whose rights to make educational decisions for the child have not been terminated, suspended, or limited.

Discussion: The commenters' concern is already addressed in the regulations. Section 300.30(b)(1) provides that when there is more than one party attempting to act as a parent, the biological or adoptive parent must be presumed to be the parent, unless the biological or adoptive parent does not have legal authority to make educational decisions for the child.

Changes: None.

Comment: Some commenters noted that the regulations do not protect a child who is a ward of the tribe in the same manner as a child who is a ward of the State. The commenters stated that this means that American Indian children have less protection than children of other ethnicities and recommended that the regulations clarify that wards of the State include children who are wards of a tribe of competent jurisdiction.

Discussion: The definition of State in new Sec. 300.40 (proposed Sec. 300.39) is based on section 602(31) of the Act, which does not include an Indian tribe or tribal governing body. Therefore, the Department does not have the authority to interpret ward of the State to include children who are wards of a tribe of competent jurisdiction. However this does not relieve States or the BIA of their responsibility to ensure that the rights of a child who is a ward of a tribe are protected through the appointment of a surrogate parent under Sec. 300.519 when no parent can be identified; when the agency cannot, after reasonable efforts, locate a parent; or when the child is an unaccompanied homeless youth.

Changes: None.

Criteria for selection of surrogates (Sec. 300.519(d))

Comment: Many commenters recommended that the regulations require public agencies to develop procedures to terminate the appointment of a surrogate parent if the person does not perform the duties of a surrogate parent. The commenters stated that such procedures should be developed in collaboration

with the child welfare agency, as well as any other party knowledgeable about a child's need for surrogate assignments, including homeless liaisons, court-appointed special advocates, guardians ad litem, attorneys, or judges.

Discussion: If a public agency learns that an individual appointed as a surrogate parent is not carrying out the responsibilities of a surrogate parent in Sec. 300.519(g), the public agency, consistent with its obligation to protect the rights of children with disabilities under the circumstances set out in Sec. 300.519(a), would need to take steps to terminate the appointment of a surrogate parent. It is up to each State to determine whether procedures to terminate surrogate parents are needed and whether to collaborate with other agencies as part of any procedures they may choose to develop.

Changes: None.

Comment: A few commenters stated that the regulations should specify that an LEA cannot replace a surrogate parent simply because the surrogate parent disagrees with an LEA.

Discussion: As noted in the response to the prior comment, public agencies have a responsibility to ensure that a surrogate parent is carrying out their responsibilities, so there are some circumstances when removal may be appropriate. A mere disagreement with the decisions of a surrogate parent about appropriate services or placements for the child, however, generally would not be sufficient to give rise to a removal, as the role of the surrogate parent is to represent the interests of the child, which may not be the same as the interests of the public agency. We do not think a regulation is necessary, however, as we believe that the rights of the child with a disability are adequately protected under Section 504 of the Rehabilitation Act (Section 504) and Title II of the Americans with Disabilities Act (Title II), which prohibit retaliation or coercion against any individual who exercises their rights under Federal law for the purpose of assisting children with disabilities by protecting rights protected under those statutes. See, 34 CFR 104.61, referencing 34 CFR 100.7(e); 28 CFR 35.134. These statutes generally prohibit discrimination against individuals on the basis of disability by recipients of Federal financial assistance (Section 504) and prohibit discrimination against individuals on the basis of disability by State and local governments (Title II).

Changes: None.

Non-employee requirement; compensation (Sec. 300.519(e))

Comment: A few commenters recommended that the regulations state that a foster parent is not prohibited from serving as a surrogate parent for a child solely because the foster parent is an employee of the SEA, LEA, or other agency that is involved in the education or care of the child.

Discussion: A child with a foster parent who is considered a parent, as defined in Sec. 300.30(a), does not need a surrogate parent unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent, consistent with Sec. 300.30(a)(2). Therefore, there is no need to change the regulations in the manner suggested by the commenters.

Changes: None.

Unaccompanied homeless youth (Sec. 300.519(f))

Comment: A few commenters requested clarification on how long the appointment should be for a temporary surrogate for an unaccompanied homeless youth. A few commenters also requested clarification on how the conflict of interest, and knowledge and skills requirements for surrogate parents apply to temporary surrogate parents for unaccompanied homeless youth.

Discussion: Section 300.519(f) allows LEAs to appoint a temporary surrogate parent for a child who is an unaccompanied homeless youth, without regard to the requirement in Sec. 300.519(d)(2)(i) that a surrogate parent not be an employee of any agency involved in the education or care of the child. Thus, a temporary surrogate parent for an unaccompanied homeless youth may include State, LEA, or agency staff that is involved in the education or care of the child.

The Act does not specify how long a temporary surrogate parent can represent the child. Nor do we believe it is necessary or appropriate to specify a time limit for a temporary surrogate parent, as the need for a temporary surrogate parent will vary depending on the specific circumstances and unique problems faced by each unaccompanied homeless youth.

Section 300.519(f) specifically allows the appointment of a temporary surrogate parent without regard to the non-employee requirements in Sec. 300.519(d)(2)(i). There are no similar exceptions for the requirements in Sec. 300.519(d)(2)(ii) and (iii). Therefore, temporary surrogate parents for unaccompanied homeless youth must not have a personal or professional interest that conflicts with the interest of the child the surrogate parent represents, and must have the knowledge and skills that ensure adequate representation of the child, consistent with Sec. 300.519(d)(2)(ii) and (iii), respectively.

Changes: None.

Surrogate parent responsibilities (Sec. 300.519(g))

Comment: A few commenters requested a definition of "surrogate parent." Some commenters stated that Sec. 300.519(g) provides only general parameters regarding the responsibilities of surrogate parents and does not provide guidance on specific duties or responsibilities of surrogate parents. The commenters stated that, at a minimum, the regulations should require that States develop duties and responsibilities for surrogate parents, such as meeting with the child, participating in meetings, and reviewing the child's education record.

Discussion: We do not believe that it is necessary to define "surrogate parent" because Sec. 300.519(g), consistent with section 615(b)(2) of the Act, clarifies that a surrogate parent is an individual who represents the child in all matters related to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child. This is a longstanding provision and is intended to describe the areas in which a surrogate parent may represent the child.

We believe that the provisions in Sec. 300.519 are sufficient to ensure that public agencies fulfill their obligation to ensure that the rights of children are protected in the circumstances in Sec. 300.519(a). Therefore, we believe it is unnecessary, and would be over regulating, to specify in these regulations requirements for surrogate parents to meet and get to know the child prior to meetings, as recommended by one commenter. Likewise, we do not believe that it is necessary to require public agencies to develop specific duties and responsibilities for surrogate parents because public agencies already must ensure that a surrogate parent has the knowledge and skills that ensure adequate representation of the child, consistent with Sec. 300.519(d). However, if a public agency determined there was a need to specify the duties and responsibilities for surrogate parents, there is nothing in the Act or these regulations that would prohibit them from doing so.

Changes: None.

SEA responsibility (Sec. 300.519(h))

Comment: Some commenters recommended requiring LEAs to report to the SEA when a child needs a surrogate parent so that the SEA can fulfill its obligation to ensure that surrogate parents are assigned within the 30-day timeframe required in Sec. 300.519(h). Some commenters requested clarification

regarding what it means for the SEA to make "reasonable efforts" to appoint surrogate parents within the 30-day timeframe. The commenters recommended that SEAs track whether LEAs or courts appoint surrogate parents in a timely manner and provide technical assistance to LEAs and courts that fail to meet the 30-day timeframe.

Some commenters stated that LEAs spend too much time determining that a surrogate parent is needed and prolong the decision that a surrogate parent is needed until the LEA is ready to appoint the surrogate parent. One commenter stated that children in residential care facilities often have an immediate need for a surrogate parent and waiting 30 days to appoint a surrogate parent could cause lasting damage to a child.

Discussion: It would be over-regulating to specify the specific "reasonable efforts" that a State must take to ensure that a surrogate parent is appointed within the 30-day timeframe required in Sec. 300.519(h), because what is considered a "reasonable effort" will vary on a case-by-case basis. We do not believe we should require LEAs to report to the State when a child in their district needs a surrogate parent or to require SEAs to track how long it takes LEAs and courts to appoint surrogate parents because to do so would be unnecessarily burdensome. States have the discretion to determine how best to monitor the timely appointment of surrogate parents by their LEAs. States also have discretion to use funds reserved for other State-level activities to provide technical assistance to LEAs and courts that fail to meet the 30-day timeframe, as requested by the commenters.

Under their general supervisory authority, States have responsibility for ensuring that LEAs appoint surrogate parents for children who need them, consistent with the requirements in Sec. 300.519 and section 615(b)(2) of the Act.

Therefore, if an LEA consistently fails to meet the 30-day timeframe or unnecessarily delays the appointment of a surrogate parent, the State is responsible for ensuring that measures are taken to remedy the situation.

Changes: None.

III. Divorced and Noncustodial Parents

DIVORCED PARENTS GENERALLY

- Parents that have the right to make educational decisions for their children are "parents" under the IDEA. See 34 CFR 300.30(a). When the parents of a child with a disability are divorced, the parental rights under the IDEA apply to both parents, unless a court order or other state law specifies otherwise. 71 Fed. Reg. 46,568 (2006).
- The IDEA states that if a judicial decree or order identifies a person or persons to act as the parent of a child or to make educational decisions on behalf of a child, then that person would be determined to be the parent. It was intended to add clarity about who would be designated a parent when there are competing individuals who could be considered a parent under that provision. 34 CFR 300.30(b)(2).

NONCUSTODIAL PARENTS

- Noncustodial parents typically do not have the authority to make educational decisions, absent an agreement to the contrary, and are therefore not parents under the IDEA. See *Fuentes v. Board of Educ. of the City of New York*, 52 IDELR 152 (2d Cir. 2009), *cert. denied*, 109 LRP 66479, 129 S. Ct. 1357 (2009). See also *Needham and Newton Pub. Schs.*, 35 IDELR 44 (SEA MA 2000).

- States have the authority to determine who may make educational decisions on behalf of a child, so long as they do so in a manner consistent with federal statutes. *Taylor v. Vermont Dep't of Educ.*, 38 IDELR 32 (2d Cir. 2002); and *Easton Bd. of Educ.*, 50 IDELR 148 (SEA CT 2008).
- At least one court has recognized that noncustodial parents may possess continuing rights regarding a child's education and thus have standing under the IDEA. See, e.g., *Navin v. Park Ridge Sch. Dist. No. 64*, 36 IDELR 235 (N.D. Ill. 2002), *aff'd*, 49 F. App'x 69, 104 LRP 18051 (7th Cir. 2002).

DIVORCED PARENTS WITH JOINT CUSTODY

- Court decisions vary regarding the extent of IDEA rights for parents with joint custody. In one SEA decision, parents with joint custody disagreed on educational decision-making, and the hearing officer granted them each the option to request due process, notwithstanding the other's opposition. *Westside Union Sch. Dist.*, 35 IDELR 88 (SEA CA 2001). Another SEA decision stated that divorced parents must resolve between themselves any disagreement they may have about their child's education before involving administrative reviewers. *North Allegheny Sch. Dist.*, 26 IDELR 774 (SEA PA 1997).
- Where the parents have a custody agreement that spells out the educational rights of the parents, courts will look to that agreement to determine the extent of the parent's rights. *Rockaway Twp. Bd. of Educ.*, 43 IDELR 80 (SEA NJ 2005) (holding that a district had to return the student to his mainstream classes during the proceedings because the mother's unilateral consent for the district to classify the student as special education eligible was invalid under the terms of the parents' divorce decree); and *Upper Darby Sch. Dist.*, 36 IDELR 285 (SEA PA 2002).
- Where a parent with shared legal custody, but not physical custody, challenges an IEP agreed to by the other parent who has both legal and physical custody, a district might be justified in relying on the custodial spouse, thereby shutting out the other parent from the educational decision-making process. *Doe v. Anrig*, 558 IDELR 278 (D. Mass. 1987); and *Lower Moreland Twp. Sch. Dist.*, 18 IDELR 1160 (SEA PA 1992).

DIVORCED PARENTS WITH NO JOINT CUSTODY

- A noncustodial parent does not have the right to request a due process hearing unless the custody agreement expressly grants the parent authority to make educational decisions for the child. *Fuentes v. Board of Educ. of the City of New York*, 52 IDELR 152 (2d Cir. 2009), *cert. denied*, 109 LRP 66479, 129 S. Ct. 1357 (2009) (holding that noncustodial parents do not have the right to make educational decisions, and by virtue of that, have no standing to challenge IDEA services). See also *Beaverton Sch. Dist.*, 41 IDELR 48 (SEA OR 2004) (holding that because the mother did not want to change the student's placement, her rights as the custodial parent trumped the rights of the father, who, under state law, could inspect school records and consult with school staff about the student's welfare to the same extent as the custodial parent).

INSPECTION RIGHTS

- The IDEA requires that an agency presume that a parent has authority to inspect and review records relating to his child, unless the agency has been advised that the parent does not have the authority under applicable state law governing such matters as guardianship, separation, and divorce. 34 CFR 300.613.

RIGHTS OF FOSTER PARENTS

- The definition of "parent" in the IDEA expressly includes a foster parent, unless state law, regulations, or contractual obligations with a state or local entity prohibit a foster parent from acting as a parent. 34 CFR 300.30(a)(2).

- If a judicial decree or order identifies a specific person or persons to act as the "parent" of a child or to make educational decisions on behalf of a child, e.g., a foster parent, then such person or persons shall be determined to be the "parent" for the purposes of the IDEA. 34 CFR 300.30(b)(2).

IV. Financial Responsibility - FAPE and Children of Divorced Parents

RESPONSIBILITY FOR FAPE: NONCUSTODIAL PARENT LIVES IN DIFFERENT SCHOOL DISTRICT THAN CUSTODIAL PARENT

- Generally, when parents are divorced, the student's residence is that of the custodial parent, based on the assumption that the student lives with the custodial parent. Typically, state law assigns responsibility for FAPE to the school district in which the parent with sole or primary physical custody lives. *Cumberland Reg'l High Sch. Dist. Bd. of Educ. v. Freehold Reg'l High Sch. Dist. Bd. of Educ.*, 51 IDELR 62 (3d Cir. 2008, unpublished).
- The school district in which a noncustodial divorced parent lives is not obligated under the IDEA to share the costs of providing FAPE with the school district in which the custodial parent lives. *George H. and Irene L. Walker Home for Children v. Town of Franklin*, 20 IDELR 665 (Mass. 1993); *Roxbury Twp. Bd. of Educ. v. West Milford Bd. of Educ.*, 23 IDELR 69 (N.J. Sup. Ct., App. Div. 1995), *cert. denied*, 111 LRP 59359, 670 A.2d 1066 (N.J. 1996).

RESPONSIBILITY FOR FAPE: PARENTS SHARE LEGAL AND PHYSICAL CUSTODY AND LIVE IN DIFFERENT SCHOOL DISTRICTS

- In instances where divorced parents reside in different districts and share custody, OSEP advises that state law controls the issue of respective responsibilities of the school districts, and that as long as a student with a disability is provided FAPE by the school district deemed responsible by the SEA, federal law requirements in this regard are satisfied. *Letter to Biondi*, 29 IDELR 972 (OSEP 1997).
- One approach is to apportion financial responsibility between the school districts in which the parents reside, if permitted by state law. *Letter to Biondi*, 29 IDELR 972 (OSEP 1997); *Linda W. v. Indiana Dep't of Educ.*, 24 IDELR 651 (N.D. Ind. 1996), *aff'd*, 32 IDELR 66 (7th Cir. 1999), *cert. denied*, 111 LRP 59364, 531 U.S. 816 (2000); and *Maine Sch. Administrative Units 43 and 52*, 17 IDELR 773 (SEA ME 1991).
- An impartial hearing officer determined that two Massachusetts districts were jointly responsible for funding a 14-year-old student's private placement. Although a divorce decree gave the student's mother sole physical custody of the student, the evidence showed that the student resided with his father in another school district for two days out of every school week. *Hamilton-Wenham Reg'l Sch. Dist.*, 49 IDELR 58 (SEA MA 2007).
- Whether a student is a resident of a particular school district is a question of state law. When the law is not clear on the matter, a court may apply equitable principles to determine which district is responsible for the student's IDEA services. The student here was receiving services in the residential facility at the time of her parents' divorce. Because the parents shared custody, the mother's new district of residence had to share the cost of the student's services. The court affirmed an administrative order requiring two school districts to equally share the costs of a 19-year-old student's residential placement. *Cumberland Reg'l High Sch. Dist. Bd. of Educ. v. Freehold Reg'l High Sch. Dist. Bd. of Educ.*, 48 IDELR 75 (D.N.J. 2007, unpublished), *aff'd*, 51 IDELR 62 (3d Cir. 2008, unpublished)

RESPONSIBILITY FOR EDUCATION DECISIONS - IN GENERAL

- 34 CFR 300.30(b)(2) states that if a judicial decree or order identifies a person or persons to act as the parent of a child or to make educational decisions on behalf of a child, then that person would be determined to be the parent. This section clarifies who would be designated a parent when there are competing individuals under 34 CFR 300.30(a)(1) through 34 CFR 300.30(a)(4) who could be considered a parent.

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

- In 2004, Congress substantially amended the Individuals with Disabilities Education Act (IDEA). (1)
- The final implementing regulations were published in 2006. (2)
- 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. (3)
- 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. (4)
- This section 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.
- 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. Care has 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:
 1. Does your state law bar or limit a foster parent from being the IDEA Parent for a child in the foster parent’s care?
 2. Does your state law designate some children as “wards of the state”?
 3. Does your state appoint Surrogate Parents for all state “wards of the state”?
 4. 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

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."

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. (5)
- 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. (6)

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." (7)
- The 2004 amendments to the IDEA added a definition of "ward of the state" (hereafter referred to as an IDEA ward of the state).
- 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.*(8)
- 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. (9)
- 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 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.

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.
- 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.

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. (10)

Public Agencies' Appointment of Surrogate Parents

- A public agency (11) (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. (12)
- 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.*" (13)

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. (14)
- Arizona uses the IDEA ward of the state definition as its definition of state ward of the state. (15)
- 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. (16)
- 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 Surrogate Parent). (17)

- 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. (18)

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. (19)
- 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. (20)

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." (21)
- 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."
- That clearly bars the child's caseworker, but less clearly bars others with potential conflicts.

Endnotes

- (1) 20 U.S.C. §§1400, *et seq.*
- (2) 34 C.F.R. §§300.1, *et seq.*
- (3) 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).

- (4) 34 C.F.R. §300.30(a).
- (5) Vermont State Board Of Education Manual of Rules And Practices §§ 2369 (f); 2360.3(17)(a)(4).
- (6) 8 N.Y.C.R.R. § 200.1(ii)(3).
- (7) 20 U.S.C. §1401(36), 34 C.F.R. §300.45.
- (8) 34 C.F.R. §300.45(b).
- (9) 34 C.F.R. §300.519(c) permits 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).
- (10) 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).
- (11) 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.
- (12) 34 C.F.R. §300.519(a)(1),(2). 34 C.F.R. §300.519(a)(3). Finally, a school district must determine whether a Surrogate Parent should be assigned to “an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(6)).”
- (13) 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).
- (14) 8 N.Y.C.R.R. § 200.1.
- (15) Ariz. Rev. Stat. Ann. § 15-761(41).
- (16) Ariz. Rev. Stat. Ann. § 15-763.01(A).

- (17) 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).
- (18) 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).
- (19) 34 C.F.R. §300.30(a)(3).
- (20) 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.
- (21) 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).

VI. Recent Case Law

1. *Converse County Sch. Dist. No. Two v. Pratt*, [27 IDELR 580](#) (D. Wyo. 1997)
Because a 6-year-old boy's foster parents were acting as his parents, the appointment of a surrogate parent was not necessary.
2. *Garvey Elementary Sch. Dist.*, [110 LRP 30543](#) (SEA CA 2010)
The fact that a student's legal guardian consented to the last-minute appointment of a surrogate parent when a work conflict prevented her from attending a scheduled IEP meeting did not justify the district's decision to conduct the meeting without her. An ALJ noted that the district was not permitted to appoint a surrogate when the student's parent or legal guardian had the right to make educational decisions.
3. *Baltimore City Pub. Schs.*, [112 LRP 39019](#) (SEA MD 04/05/12)
A Maryland district violated the IDEA by failing to take steps to determine whether a 17-year-old student with multiple disabilities became a ward of the state following his placement in a group home. The Maryland ED found that the district should have taken steps to obtain the court order that placed the student in the custody of the Department of Social Services.
4. *Charles County Pub. Schs.*, [111 LRP 55027](#) (SEA MD 2010)
Noting that the district did not produce documentation of its efforts to contact the student's mother or grandfather about an upcoming IEP meeting, the state ED found that the district did not make reasonable efforts to identify and locate the parent. The district violated the IDEA by failing to determine whether the student, who had been placed in a group home by the county department of juvenile services, required a surrogate parent.

5. *Prince George's County Pub. Schs.*, [110 LRP 72086](#) (SEA MD 2010)
Because the only court order in the student's educational record that related to the student's custody was more than two years old and applied only if the mother was unavailable, the district should have taken steps to obtain the most current court order. The district's failure to determine whether the student was a ward of the state who required a surrogate parent amounted to an IDEA violation.
6. *New York City Dep't of Educ.*, [46 IDELR 88](#) (SEA NY 2006)
Although a student with a disability was 18 years old, a New York district had an obligation to assign the student a surrogate parent. The whereabouts of the student's parents were unknown, and New York law did not provide for a transfer of parental rights under the IDEA when a student reaches the age of majority.
7. *Cleveland Mun. Schs.*, [110 LRP 74240](#) (SEA OH 2010)
The Ohio ED found that the district did not violate the IDEA by failing to appoint a surrogate parent for a student with an emotional disturbance, as the student had reached the age of majority under state law and there was no evidence that he needed an individual to make educational decisions on his behalf.
8. *Ysleta Indep. Sch. Dist.*, [30 IDELR 571](#) (SEA TX 1999)
Under both federal and state laws, the district was required to appoint a surrogate parent for the 7-year-old child. The role of the guardian ad litem was limited to representing the best interests of a child in court proceedings and acting as an advisor to the court on the child's behalf. Thus, the breadth of the guardian ad litem's legal position was much narrower than that of a surrogate parent.
9. *Letter to Caplan*, [58 IDELR 139](#) (OSEP 2011)
Not every child temporarily residing in foster care or a group home requires a surrogate parent under the IDEA. The key is whether the child's biological or adoptive parent retains the authority to participate in the development of the child's IEP and make other educational choices for the child.
10. *Letter to Ford*, [41 IDELR 10](#) (OSEP 2003)
A public agency must ensure the rights of a child are protected if no parents can be identified, if it cannot determine the parents' whereabouts after reasonable efforts, or if the child is a ward of the state under the state's law. Under such circumstances, the public agency has the obligation to assign a surrogate parent.

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