

The Comprehensive Guide to **Special Education Law**

Over 400 Frequently Asked Questions and Answers
Every Educator Needs to Know about the Legal
Rights of Exceptional Children and their Parents



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First published in 2012
by Jessica Kingsley Publishers
116 Pentonville Road
London N1 9JB, UK
and
400 Market Street, Suite 400
Philadelphia, PA 19106, USA

www.jkp.com

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Library of Congress Cataloging in Publication Data

Giuliani, George A., 1938-

The comprehensive guide to special education law : answering over 400 frequently asked questions about the legal rights of exceptional children and their parents / George A. Giuliani.

p. cm.

Includes bibliographical references and index.

ISBN 978-1-84905-882-7 (alk. paper)

1. Children with disabilities--Education--Law and legislation--United States--Miscellanea. 2. Special education--Law and legislation--United States--Miscellanea. I. Title.

KF4210.G58 2012

344.73'0791--dc23

2011049441

British Library Cataloguing in Publication Data

A CIP catalogue record for this book is available from the British Library

ISBN 978 1 84905 882 7

eISBN 978 0 85700 585 4

Printed and bound in the United States

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Disclaimer

The information in this book is intended for use as educational material to assist parents and professionals in understanding basic principles of special education law. The author has taken great care to provide in this book the most current and accurate information available concerning special education law on a wide variety of subjects. However, the information found herein is not intended in any way as legal advice and is not a substitute for individual consultation with an attorney. The book is not intended, and should not be used, as a substitute or replacement for individual legal advice. There is no substitute for individual consultation with a special education law expert. Reasonable efforts have been made to ensure the accuracy of the information contained in this book; however, the content and interpretation of laws and regulations are subject to change. The effect of future legislative, administrative, and judicial developments cannot be predicted. For these reasons, the utilization of these materials by any person represents an agreement to hold harmless the author and publisher for any liability, claims, damages, or expenses that may be incurred by any person as a result of reference to or reliance on the information contained in the book.

Requirements for Being a “Parent”

Who is a “parent” as defined under IDEIA?

Perhaps the most important element afforded under IDEIA is the right to parental participation at almost all stages of the special education process. To increase the odds that each child has a parent in the special education process, IDEIA does define the term “parent” but does so in a broad way.

Under IDEIA, a “parent” means:

1. A biological (natural) 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)
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, or
5. A surrogate parent who has been appointed in accordance with 34 C.F.R. 300.519.

[34 C.F.R. 300.30; 20 U.S.C. 1401(23)]

Note: The biological or adoptive parent, when attempting to act as the parent under this part and when more than one party is qualified to act as a 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.

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, then such person or persons shall be determined to be the “parent.”

Why is there such a broad definition of a parent under IDEIA?

IDEIA defines a "parent" broadly so as to include a wide variety of different caregivers, with many possible individuals in a caregiving role able therefore to qualify as a parent [34 C.F.R. 300.20].

Who is considered an adoptive parent?

An adoptive parent is a person who legally adopts a child of other parents as his/her own child. Adoption is the official transfer through the court system of all of the parental rights that a biological parent has to a child, along with an assumption by the adopting parent of all of the parental rights of the biological parents that are being terminated and are assumed in their entirety by the adoptive parents, including the responsibility for the care and supervision of the child, his/her nurturing and training, physical and emotional health, and financial support (Adoption Media LLC, 2011a).

Are biological or adoptive parents always presumed to be authorized to make educational decisions for the child even if other individuals also meet the definition of parent?

Yes. The biological or adoptive parents are always presumed to be authorized to make educational decisions for the child even if other individuals also meet the definition of parent, unless a judicial order states that specific individuals are to make the child's educational decisions.

If there is more than one "parent," then the biological or adoptive parent who attempts to act as parent for educational decisions is presumed to be the parent, unless he/she does not have legal authority to make educational decisions [34 C.F.R. 300.30(b)(1)].

Under IDEIA, whenever a birth or adoptive parent is "attempting to act" on behalf of the child in the special education system, the school must treat that parent as the decision maker. This means that if the school proposes an IEP for the child and the birth or adoptive parent disapproves of the plan, the school cannot go around the parent by getting the agreement of a foster parent, kinship parent, or other relative. The school can only accept the decision of another person when the birth or adoptive parent is not "attempting to act" on behalf of the child, unless a judge has appointed an alternative decision maker for the child. In that case, the school must treat the person appointed by the judge as the only person authorized to make special education decisions for the child (Education Law Center, 2007).

Who is considered a foster parent?

A foster parent is a person who acts as parent and guardian for a child in place of the child's natural parents but without legally adopting the child.

Although this term has a wide variety of possible definitions, it is generally used to refer to adults who are licensed by the state or county to provide a temporary home for children whose birth parents are unable to care for them. These services may be provided with or without compensation, and can often continue for several months or even years, depending on the circumstances of the child and the foster parents (Adoption Media LLC, 2011b).

Under IDEIA, a foster parent can act as a parent unless state law prohibits the foster parent from acting as a parent [34 C.F.R. 300.30].

What rights do foster parents have in the educational decision making for a child in special education?

This is an issue for the states. Some states have separate provisions for the appointment of a foster parent as the educational decision maker. Check your state regulations as to the specific rights of foster parents in your school district. In the past, foster parents were only allowed to advocate for special education students in a limited number of circumstances. Those restrictions were eliminated under the Individuals with Disabilities Education Improvement Act of 2004 (Legal Services of Missouri, 2006).

Who is considered a guardian?

A guardian is a non-parent to whom the court gives authority to take responsibility for the care of a child. In special education, a guardian is a person who has the legal responsibility for providing the care and management of a child with a disability. An appointment of guardianship may be permanent or temporary. Guardians are often appointed for children when the parents are deceased (Judicial Council of California, 1995).

Who is considered a surrogate parent?

IDEIA requires each state to have specific procedures to protect the rights of the child whenever:

1. the parents of the child are not known, or
2. the [school district] cannot, after reasonable efforts, locate the parents
3. the child is a ward of the State under the laws of that State (e.g. in the custody of a public child welfare agency), or
4. the child is an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act.

[42 U.S.C. 11434(a)(6)]

A surrogate parent is appointed by the local education agency (LEA; the school district) or other responsible state agency to assume parental rights under the special education regulations in order to protect the student's rights [34 C.F.R. 300.519; 20 U.S.C. 1415(b)(2)]. A surrogate parent acts in the place of a child's natural parent to make decisions about the child's education when the child's natural parent is unavailable to make decisions. A parent is unavailable when he/she cannot be located or when he/she chooses not to act as a parent for the child. A parent is also unavailable if he/she has lost the ability to act as parent by court order. The surrogate parent makes decisions for a child with a disability in all matters relating to the identification, evaluation, and educational placement of the child and the provision of a free appropriate public education to the child.

Are surrogate parents required to have knowledge and skills that ensure adequate representation of the student?

Yes. Unlike other "parents," surrogate parents are required to have knowledge and skills that ensure adequate representation of the student [34 C.F.R. 300.519(d)(2)(iii)].

What rights does a surrogate parent have under IDEIA?

When a surrogate is appointed, he/she has all the rights and responsibilities under IDEIA [34 C.F.R. 300.519; 20 U.S.C. 1415(b)(2)]. The surrogate parent may represent the child in all matters relating to [34 C.F.R. 300.519(g)]:

1. the identification, evaluation, and educational placement of the child, and
2. the provision of a free appropriate public education (FAPE) to the child.

What are the guidelines for being a surrogate parent for a student?

Public agencies shall ensure that a person selected as a surrogate parent [34 C.F.R. 300.519(h)]:

1. is not an employee of the state educational agency (SEA), the LEA, or any other agency that is involved in the education or care of the child
2. has no interest that conflicts with the interest of the child represented
3. has knowledge and skills that ensure adequate representation of the child, and
4. is assigned not more than 30 days after there is a determination by the agency that the child needs a surrogate parent.

Can the state be considered a surrogate parent?

No, the state cannot be considered a surrogate parent even if the child is a ward of the state. Someone who is an employee of a state, local, or any other public agency that is involved in the education or care of the child cannot be a surrogate. This is because that person could have a conflict of interest with the child. For example, a teacher could not be a surrogate because he/she may be required to advocate for services for a child, but be hesitant to do so because it would create a financial burden for his/her employer. If a child is in the custody of children's services, a children's services worker could not be a surrogate for similar reasons (Ohio Legal Rights Service, 2005).

Someone who is an employee of a nonpublic agency that provides only non-educational care for the child can be a surrogate if he/she has the knowledge and skills, no conflict of interest and otherwise meets the criteria for being a surrogate parent, including surrogate training requirements [34 C.F.R. 300.519(h)].

Can a foster parent serve as a surrogate parent?

Yes, provided certain conditions are met. A foster parent may serve as a surrogate parent if the following four conditions are met [34 C.F.R. 300.30]:

- the natural parents' rights have been terminated
- the foster parent has a long-term relationship with the child
- the foster parent is willing to participate in the role of "parent," and
- no conflict of interest occurs with the foster parent assuming that role.

Note: A foster parent may also be appointed as surrogate parent for a foster child if the foster parent does not meet the qualifications to be a "parent" and meets the qualifications for being a surrogate.

How long can a surrogate parent act as surrogate parent?

A surrogate parent may continue to serve as long as he/she continues to meet the surrogate parent requirements of federal and state law. Every year, the school district is required to review the appointment of each parent surrogate to ensure that the rights of the child are protected. Similarly, the appointment of a surrogate for a child in early intervention must be reviewed at least annually. When a student with a disability turns the age of majority, all of the rights of the surrogate parent transfer to the student, unless the student has been determined to be incompetent under state law, in which case educational decisions would be made by the student's court appointed guardian (Ohio Legal Rights Service, 2005).

Is there a timeframe for assignment of a surrogate parent?

To ensure that children receive a speedy surrogate parent appointment, IDEIA now requires that schools make reasonable efforts to assign a surrogate parent within 30 days after determining that a child needs a surrogate [34 C.F.R. 300.519(h)].

When parents divorce, who exercises the rights under IDEIA?

Where parents are divorced, the question of which parent exercises rights under IDEIA is a question of state law and the judicial order in the divorce (*Taylor v. Vermont Department of Education*, 2002).

Who is considered a ward of the state?

Under IDEIA, [34 C.F.R. 300.45], a ward of the state means a child who, as determined by the state where the child resides, is:

1. a foster child
2. a ward of the state, or
3. in the custody of a public child welfare agency.

There is an exception. A ward of the state does not include a foster child who has a foster parent who meets the definition of a parent under IDEIA.

If the student is a ward of the state, the identification and location of the parent, as well as the status of residual parent rights, should be known. If these factors are not known, then the agency with which wardship resides is the agency that is responsible for the general care of the individual. That agency shall identify a surrogate parent.

Note: IDEIA allows for the appointment of a surrogate parent by a judge overseeing the case of a child who is a ward of the state, provided that the surrogate parent meets the requirements at 34 C.F.R. 300.519(c).

Is there a transfer of parental rights at the age of majority in special education?

Yes. Age of majority is the legal age established under state law at which an individual is no longer a minor and, as a young adult, has the right and responsibility to make certain legal choices that adults make (National Center on Secondary Education and Transition, 2002). Thus, when people use the term "age of majority," they are generally referring to when a young person reaches the age at which one is considered to be an adult. Depending upon state law, this usually happens at some point between 18 and 21 (National Center on Secondary Education and Transition, 2002).

Beginning not later than one year before the child reaches the age of majority under state law, the IEP must include a statement that the child has been informed of the child's rights under Part B of the Act, if any, that will transfer to the child on reaching the age of majority under 34 C.F.R. 300.520 [34 C.F.R. 300.320(c)].

How are children informed of the transfer of rights?

IDEIA does not specify the manner in which schools must inform children of any rights that will transfer to them upon reaching the age of majority. This is a matter best left to states, districts, and IEP teams to decide, based on their knowledge of the child and any unique local or state requirements.

