

Who Has Educational Decision-Making Rights Under The IDEA?

Districts sometimes struggle to determine who has educational decision-making rights under the Individuals with Disabilities Education Act (“IDEA”). A student with a disability may be placed in out-of-home or foster care, or a relative or family acquaintance may be voluntarily caring for the student. In those situations, and especially when parents and others are also involved, it can be difficult to determine who has authority to make educational decisions on behalf of the student. Two recent IDEA complaint decisions from the Wisconsin Department of Public Instruction (“DPI”) highlight the importance of sorting through the confusion to identify the correct party. This effort is critical to ensure the individual with authority has meaningful participation in decision-making and to identify circumstances (when a parent is not known or available) in which a surrogate parent should be appointed.

IDEA Complaint Decision 20-068

In IDEA Complaint Decision 20-068, the Student was placed by a court in the “temporary physical custody” of a relative. During the period that the Student was placed with the relative, the district regularly communicated with the relative about the Student, held an IEP team meeting to which the relative was invited and attended, and made changes to the IEP without a meeting through the use of Form I-10, Changes to IEP Without an IEP Team Meeting.

After the IEP was revised, the parent contacted the district and expressed concern that she had been excluded from communication about her child. She informed the district that even though the relative had physical custody of the child, she retained educational decision-making rights. Shortly after notifying the district of her exclusion, an individual acting on the parent’s behalf filed a complaint with DPI alleging that the district did not properly identify who was authorized to make special education decisions for the Student.

DPI determined that while the relative had temporary physical custody, the parent still remained the parent for educational decision-making purposes. Accordingly, the parent, not the relative, should have been invited to IEP team meetings and consulted regarding any changes to the IEP. Due to the district’s error, DPI directed the district to conduct an IEP team meeting with the parent to ensure she understood the contents of the IEP and to make any necessary revisions. DPI also directed the district to review and revise district policies and procedures to ensure that the district properly identifies individuals who are authorized to make special education decisions for a student with a disability.

IDEA Complaint Decision 20-062

In IDEA Complaint Decision 20-062, the Student was placed by the county in a foster home within the district’s boundaries. Shortly after that placement, the district received a special education referral for the Student from the county case worker. A county child protective services worker provided consent for testing. During the evaluation process while the Student was enrolled in the district, the district communicated with the county and foster parent. Approximately four months after the referral for a special education evaluation, an advocate working with the county requested that the District assign the advocate to be the surrogate parent for education purposes. The district granted the request.

An educational advocate working with the county filed an IDEA complaint alleging the district didn't properly conduct an evaluation under IDEA. In addition to addressing the evaluation, DPI found that the district did not properly determine who was authorized to make special education decisions for the Student. DPI stated that the district should have taken steps to determine if a surrogate parent was needed immediately upon learning that the Student was involved with the county and residing in a foster home. Such action is warranted because a foster parent generally cannot act as the parent for purposes of special education unless the parent(s)' rights have been extinguished by termination of parental rights, transfer of guardianship or legal custody, or by other court order. Indeed, DPI clarified that school districts should appoint a surrogate parent for a student with a disability whenever the Student's parents are not known, the district cannot locate the Student's parents after reasonable efforts, and/or the Student is a ward of the state. The district was directed to develop a corrective action plan to educate staff on the need to determine who is authorized to act as a parent and when the district must appoint a surrogate.

Analysis

When a student lives away from a parent, districts must be careful not to assume anything about the educational decision-making authority for the student. For example, if a student lives with their grandparents, a district should not assume the grandparents can give consent for purposes of special education. How, then, should a district proceed in those circumstances? They should use the information below to guide their decisions.

A district's first presumption should be that parents continue to have educational-decision making rights. Indeed, in the absence of a court order stating that an individual other than the parent has been granted educational decision-making authority or legal custody, or the parent's rights have been terminated, "the student's biological parent is presumed to have authority." (Complaint Decision 20-068)

When students are placed by a court or agency in an out-of-home placement or foster care setting, districts should first request documentation of all relevant court orders and, if necessary, seek legal assistance in reviewing and interpreting those court orders. When reviewing an order, districts should note the distinction between "physical custody," which is also known as placement, and "legal custody." Physical custody means the right to have physical custody of a child (i.e., placement), whereas legal custody grants the right and duty "to protect, train, and discipline the child, and to provide food, shelter, legal services, [and] education." (Wis. Stat. § 48.02(12) and (14)) An individual who has been given physical custody but not legal custody of a child does not have authority to make educational decisions for that child. Such authority is granted only with legal custody or a court order expressly granting the authority to make education decisions.

The second step in those situations is to determine if a surrogate parent should be appointed for education purposes. A district must appoint a surrogate for a student whenever 1) the child's parents are not known, 2) the district cannot, after reasonable efforts, locate the child's parents, or 3) the child is a ward of the state. A surrogate parent may not be an employee of the Department of Public Instruction, the district, or any other agency that is involved in the education or care of the child. It is also noteworthy that Wisconsin statutes require that districts "establish and maintain procedures to ensure" a child's right to a surrogate, if needed. (Wis. Stat. § 115.792(1)(a)2.) Finally, a court overseeing the student's care may also designate a surrogate if the student is a ward of the state and the surrogate is not an employee of DPI, the district, or an agency involved in the education or care of the student.

In other situations where friends or family are voluntarily caring for a child, arrangements are often informal and no documentation exists delineating roles and responsibilities. The first step in these situations, in the absence of any court order terminating the parent(s)' rights or assigning those rights to another person, is to assume that the biological parent continues to have all educational decision-making authority and proceed with affording the parent their full extent of rights.

If parents are not able to participate for some reason, the second step is to consider seeking a delegation of parental power. Through a power of attorney a parent may delegate educational decision-making rights to a relative or any other individual who is providing care to the student. Section 48.979 of the Wisconsin statutes provides a mechanism for "a parent who has legal custody of the child" to delegate "any of his or her powers regarding the care and custody of the child." Contained within this statute is a "Power of Attorney Delegating Parental Power" form that parents may use to enact such delegation.

If a delegation of power is utilized, districts should be aware of its limitations. A delegation of power under the statute may only be accomplished if “all parents who have legal custody” execute the form. A delegation under this provision may only remain in effect “for no longer than one year” unless the delegation “is to a relative of the child or the delegation is approved by the court.” Also, the parent may revoke the delegation of power at any time by providing the individual to whom power was delegated a written notice of revocation. Finally, a delegation of power “does not deprive the parent of any of his or her powers regarding the care and custody of the child.” Wis. Stat. § 48.979(2) Therefore, even if a parent with legal custody completes the power of attorney form, the parent retains authority to make educational decisions at any time and a district must honor the parent’s decisions.

Conclusion

Parents play a vital role in the special education process. Together with other members of the IEP team, they offer information and insight needed to develop an appropriate educational program. Consequently, districts should work hard to wade through the murkiest of facts to accurately determine the extent of a parent’s authority and if necessary, assign such authority to an individual who can act on the student’s behalf. Failure to make an appropriate determination may deprive the IEP team of important information and impair a district’s ability to provide the student a free appropriate public education. In addition, failure to do so may result in time-consuming and costly corrective action.

Boardman & Clark’s School Law Group is fully prepared to assist with these complex yet important determinations.

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