

The Legal and Practical Issues Related to Surrogate Parents under the Special Education Laws



"If we passed a law to make education illegal for anyone under 21, we'd have the smartest teenagers in the world!"

Karen Haase
karen@ksbschoollaw.com
KSB School Law
@KarenHaase



Educational Issues with NE Court-Involved Students

- High Mobility (2 or more schools per year):
 - 4.1% of non wards
 - 23.6% of state wards
- Absenteeism
 - Non state wards missed 7.2 days on average
 - State wards missed 11.7 days on average
 - Abuse-neglect 10.1
 - OJS 12
 - Status offender 20.9

http://dshs.ne.gov/children_family_services/Documents/EdSnapShot2015.pdf

Educational Issues with NE Court-Involved Students

- NeSA Scores
 - Math
 - 30.3% of non wards below standard
 - 64.9% of state wards below standard
 - Reading
 - 22.8% of non wards below standard
 - 52% of state wards below standard
- Graduation (overall, not cadre)
 - 84.1% of non wards
 - 43.5% of state wards

http://dshs.ne.gov/children_family_services/Documents/EdSnapShot2015.pdf

A word about extracurriculars

- Not part of the data tracked by the NE State Ward Statistical Snapshot
- Nebraska Strengthening Families Act (LB 746 2016)
 - Requires that caregivers be trained and authorized to apply the "reasonable and prudent parent standard" to decisions involving the "participation of the child in age or developmentally appropriate activities"
 - does not give children in out-of-home care special rights to participate based on their status as foster children

North Carolina study (2001)

- | | |
|--|---|
| <ul style="list-style-type: none"> ▪ GPA <ul style="list-style-type: none"> • Activities: 2.98 • Non-activities: 2.17 ▪ Absences <ul style="list-style-type: none"> • Activities: 6.3 • Non-activities: 11.9 ▪ Discipline referrals <ul style="list-style-type: none"> • Activities: 33.3% • Non-activities: 41.8% | <ul style="list-style-type: none"> ▪ Dropout Rate <ul style="list-style-type: none"> • Activities: .6% • Non-activities: 10.32 ▪ Graduation rate <ul style="list-style-type: none"> • Activities: 99.4% • Non-activities: 93.5% |
|--|---|

College Entrance Examination Board study (2005)

- SAT scores analyzed for 480,000 students
- Statistically significant difference related to activity participation
- Controlled for:
 - Academic achievement
 - Native language of household
 - Family socioeconomic factors
 - Effects magnified for students of color

Special Education Issues For Children In Child Welfare System

- Between 30-40% of school-age children in the foster care need special education services
- Compared to 11-15% of their peers

www.fostercareandeducation.org/OurWork/NationalWorkingGroup.aspx

Why A Child Needs A "Parent" In the Special Education Process

- Special education is a parent-driven process. Nothing happens without a "parent"-- an active, involved decisionmaker who can consent to an evaluation, services, placement, and advocate for a child with disabilities.
- The IDEA confers specific rights and obligations on the "IDEA Parent."

Who is a parent?



"A body goes through changes during the teen years. When you started dating, my hair turned gray. When you started driving, I got heart palpitations..."

A parent is...
(34 CFR 300.30)

- Natural or adoptive parent of a child

A parent is...
(34 CFR 300.30)

- Two caveats to "parent" definition:
 - Presumption in favor of Biological or Adoptive Parent if
 - Bio./adoptive parent still has legal authority
 - Bio./adoptive parent is "attempting to act as the parent"
 - Unless a court orders someone else to act as the "parent"
 - So if no bio parent, but there is a foster parent, foster parent is the "parent"

See 34 C.F.R. § 300.30(b)

A parent is...
(34 CFR 300.30)

- Natural or adoptive parent of a child
- A foster parent
- A guardian but not the state if the child is a ward of the state (thus no caseworkers)
- An individual acting in the place of a natural or adoptive parent with who the child lives who is legally responsible for the child's welfare

Surrogate parent
(34 CFR 300.519)

- The LEA shall appoint a surrogate parent when:
 - no parent can be identified
 - Or be located
 - Or child is a ward of the state
 - Or child is unaccompanied homeless youth.

Presence of Parent Prevents Appointment of Surrogate



Garvey Elem. Sch. Dist.
110 LRP 30543 (SEA CA 2010)

- Parent's legal guardian had work conflict
- Consented to a last-minute appointment of surrogate parent
- ALJ:
 - District not permitted to appoint surrogate when parent/guardian is involved
 - Consent did not excuse meeting without presence of parent

Cincinnati City Schs.
114 LRP 4850 (SEA OH 2013)

- Student placed in foster care
- Juvenile court ordered that mother be included in treatment team planning and placement meetings
- School appointed surrogate parent
- State Dep't of Ed:
 - Court did not terminate mother's educational rights
 - Placement in foster care alone not sufficient

Charles County Schs.
111 LRP 55027 (SEA MD 2010)

- Student placed in group home by county department of juvenile services
- School appointed surrogate parent
- State Dep't of Ed:
 - School failed to make sufficient efforts to contact mother or grandfather
 - Placement in group home alone not sufficient

Letter to Caplan
58 IDELR 139 (OSEP 2011)

- CWA director – is surrogate parent required when:
 - Court assigned limited guardianship to state agency and parent is available
 - Court assigned guardianship and reunification sought
 - Court has revoked educational rights
- OSEP:
 - We do not believe 34 CFR 300.519(b) requires automatic appointment of surrogate parent for every child who is a ward of the State
 - Decision lies with the school, not the CWA
 - Key is whether 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

A parent is... (34 CFR 300.30)

- Natural or adoptive parent of a child
- A foster parent
- A guardian but not the state if the child is a ward of the state (thus no caseworkers)
- An individual acting in the place of a natural or adoptive parent with who the child lives who is legally responsible for the child's welfare

What if the Parent is Being a Jerk?

- School can't appoint a surrogate just because the bio./adoptive parent is "uncooperative" or won't attend a meeting (*Letter to Perryman*, 211 IDELR 438 (OSEP 1987))
- School can't appoint surrogate due to a parent acting in a manner opposed to, or inconsistent with the best interests of the child (*Dundee Cent. Sch. Dist.*, 509 IDELR 191 (SEA NY 1987))

Presence of Another Adult Prevents Appointment of Surrogate



"But you can't quit soccer! I'd just be a regular mom!"

Presence of Another Adult Prevents Appointment of Surrogate

- Foster
- *In loco parentis*

Converse County Sch. Dist.
63 IDELR 21 (Mont. 2014)

- 19 year old student with autism
- Biological mother's parental rights terminated
- Foster father willing to make educational decisions
- School appointed surrogate
- Court
 - IDEA does say school required to appoint surrogate parent when child is a ward of the state
 - But IDEA also defines "parent" to include foster parent unless state law prohibits
 - Foster parent willing and without conflict, therefore no surrogate necessary

Brownsburg Cmty. Sch. Corp.
114 LRP 32827 (SEA IN 2014)

- Student placed in foster care with Aunt and Uncle
- School appointed Aunt and Uncle as surrogate parents
- Mom sent e-mail: The judge lifted the restrictions and [Student] and I am [sic] spending lots of time together.
- School proceeded with IEP meetings with Aunt and Uncle; mom sued
- State Department of Ed:
 - Student placed in care of foster parents
 - Mother did not provide any documentation to the contrary
 - Foster parent willing and without conflict, therefore no surrogate necessary

Marysville Joint Unif. Sch. Dist.
114 LRP 6934 (SEA CA 2014)

- Student ward of court
 - Court made no finding about "educational rights"
 - Placed in transitional housing program
- Assigned "independent study mentor"
 - Responsible for arranging and transporting her to medical appointments
 - Helped student with life skills decisions (financial, self-care, etc.)
- School treated mentor as *in loco parentis*
- Student sued after aged out (21) seeking more services
- Court
 - Mentor acted in parental role
 - School properly declined to appoint surrogate

**Special Problem:
Unaccompanied Homeless Youth**

- McKinney-Vento Homeless Assistance Act (42 U.S.C. §11431 et. seq.)
 - lack a fixed, regular, and adequate nighttime residence
 - Includes:
 - Living with family or in motel
 - Abandoned
 - Living in cars, parks, etc
 - Migratory children
 - Abused, homeless, not yet in system
 - Aged out of foster and homeless
 - awaiting foster care

**Special Problem:
Unaccompanied Homeless Youth**

- ESSA removed "awaiting foster care" from homeless definition
 - Effective 12/10/16 in NE
- Instead CWAs and LEAs must meet school stability provisions of Title I of ESSA (Fostering Connections Act requirements)

Timeline for Appointing Surrogate

- Should appoint within 30 days – 34 CFR 300.519(h)

Surrogate Parent Responsibilities



Surrogate parent responsibilities

- May represent the child in all matters relating to
 - The identification, evaluation, and educational placement of the child
 - The provision of FAPE to the child
- The surrogate must complete a surrogate training program

Qualifications of Surrogate Parents

- School must recruit volunteers
- Must have knowledge and skills to represent child
 - School must train
 - Does not apply to judge-appointed surrogates, so school can't force them to attend training
- May not be:
 - Employees of school district
 - Employees of NE Dept. of Ed.
 - Employees of "any agency that is involved in the education or care of the child"
 - DHS, Children & Youth or Private Agency workers

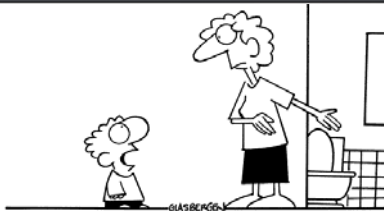
Qualifications of Surrogate Parents

- Can't have a conflict of interest
 - "Conflict" is defined by U.S. Dept. of Ed as coming from the employer relationship (e.g., can't be teacher in another school district, or in the group home where child is living)
 - Does not apply to court-appointed surrogates
- Must have knowledge and skills to represent child

Letter to Shatley, 62 IDELR 301 (OSEP 2013)

- School attorney wrote to ask whether IDEA allowed state court judge to appoint members of the legal aid organization to be surrogate parents when they also advocate for these same children in both education-related and non-education-related matters.
- OSEP:
 - Where a judge appoints the surrogate parent, the applicable IDEA requirements are only those in 34 CFR § 300.519(c) (may not be an employee of the SEA, LEA, or any other agency involved in the child's education or care)
 - The IDEA doesn't strictly bar a judge from assigning a legal aid employee to act as a child's surrogate parent, even if the individual also represents the child in noneducational matters. The only caveat is that the court-appointed surrogate must not be employed by an agency involved in the child's education or care
 - 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[s] in appointing individuals to act for the child.

Special Issues with Infants and Toddlers

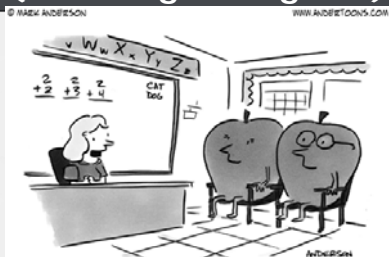


"Why do I need to learn potty training? Is it something I'll use later in life? Will it help me get into a good college? Do chicks dig guys who are potty trained?"

Special Issues with Infants and Toddlers

- Definition of "student" under Neb. Rev. Stat. § 79-215 for educational stability issues
- If LEA offers preschool education and child is in foster care, ESSA educational stability rules apply - ESEA § 1111 (g)(1)(E)
- If a surrogate parent is appointed for an infant or toddler, surrogate has all the rights of a parent under Part C - 34 CFR 303.42(f)

LEA Responsibilities to the Parent (including surrogates)



"I must tell you, your Timmy is my favorite student."

District/schools must seek

- Consent for evaluation
 - District/school may request due process hearing if parent refuses
- Consent for initial placement
 - Required before a student receives any special education and related services
 - If parents refuse, district/schools may not place or serve student in special education

Written Prior Notice

- Written Prior Notice to parents is required when the LEA initiates or changes, or refuses to initiate or change:
 - identification
 - evaluation
 - educational placement
 - provision of a free appropriate public education of the student

Written Prior Notice (cont.)

- This notice must be provided in:
 - Written language understandable to the general public
 - The native language or other mode of communication used by the parent

Opportunity to Participate

- Parents must be notified of their opportunity to participate in meetings regarding:
 - identification
 - evaluation
 - educational placement
 - provision of a free appropriate public education of the student

Notice of Meeting

- Districts/Schools must provide Notice of Meetings to parents with enough advance notice to ensure that parents can participate
- A written record must be kept of the district/schools attempts to arrange a mutually agreed on time and place for such meetings

Progress Reports

- District/school must provide periodic reports of progress on IEP goals to parents

A Surrogate Parent's Right to Education Records

- Have the right to see all of the child's education records.
- Have the right to retain the privacy of those records, including preventing the LEA from sending the records to someone else without your written permission (until the youth is 18 or older at which time this right passes to the student).
- The school must give surrogate parents a free copy of the child's IEP.

Parent's Rights in Discipline Process

- The child is expected to follow his or her school's code of conduct.
- However, children receiving special education services have certain rights when it comes to school discipline. Some rules a school must follow are:
 - The IEP team must decide if the child's disability caused the misbehavior for which the school wants to discipline the child.
 - Parent MUST participate in this process.

Parent's Rights in Discipline Process

- Must conduct manifestation determination before suspending for more than 10 school days
- Special rules for drugs, weapons, or serious injury
- The rules about discipline of students with disabilities are complicated – seek advice from an expert.

Christina Sch. Dist.
111 LRP 69556 (SEA Del. 2011)

- School appointed surrogate parent for homeless child in custody of CWA, adopted IEP
- Student proposed suspension for violation of school rules
 - Did not provide surrogate notice of suspension
 - Did not provide surrogate notice of manifestation determination
 - Did not provide notice of formal disciplinary hearings
- Surrogate filed complaint with State DOE
- DOE
 - School obligated to treat as parent for all purposes once appointed
 - Student placed back in prior placement
 - School required to engage in training

A Parent's Right to an Independent Evaluation ("IEE")

- Parent may request an independent educational evaluation if she thinks the school's evaluation was not done properly.
- Parent can ask the school to pay for an educational evaluation of child by an approved evaluator who does not work for the LEA.
- However, if the district believes that an independent evaluation is unnecessary and a hearing officer decides that the school's evaluation is appropriate, parent can still pay for own evaluation.

Parent's Right to Disagree

- Parent may raise disagreements with the school district at the IEP meeting, before the IEP meeting and at anytime.
- Parent may request an IEP meeting to address these concerns.
- LEAs must document a parent's disagreements with the school on the NOREP where applicable.
- Parents should be actively encouraged to communicate disagreements and need to understand what a school is willing or not willing to do.
- Disagreements are inevitable and an important part of providing effective services.

Parent's Right to Remove

- Parent can unilaterally decide to withdraw a child with a disability from the receipt of special education and related services at any time.
 - Parent must request this in writing to LEA
 - Request includes every aspect of special education and related services; it is "all or nothing"
- School district/LEA:
 - May not challenge decision by taking Parent to due process
 - May not continue to provide special education and related services to the child
 - Must provide a NOREP/Prior Written Notice within 10 calendar days after receipt of written revocation before stopping the provision of special education and related services
- LEA will not amend child's education records or to remove references to receipt of special education services

The Legal and Practical Issues Related to Surrogate Parents under the Special Education Laws



Karen Haase



(402) 804-8000

karen@ksbschoollaw.com

www.ksbschoollaw.com

 KSB School Law  @KarenHaase
