

# When the Parent is Not Apparent: Addressing Custodial Issues in Special Education

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### A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with a deeper understanding of the law pertaining to custodial issues under the IDEA. This material does not include every aspect of the law, nor does it discuss every case involving the IDEA. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

## I. Overview

The purpose of this material is to review the laws pertaining to the definition of “parent” in the field of special education. This material does not cover all aspects of the Individuals with Disabilities Education Act (“IDEA”) and does not include children who have been placed in court-ordered residential placements, foster homes (except as otherwise noted herein), or group homes, nor does it contain a complete discussion of all recent cases or opinions. The goal of this material is to provide the special education administrator with the tools necessary to assist in resolving questions about who has decision-making authority in special education matters.

## II. Who Is a Parent: Definitions Under Federal and State Law

The IDEA defines “parent” as:

- A. A natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent);
- B. A guardian (but not the State if the child is a ward of the State);
- C. An individual acting in the place of a natural 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; and
- D. . . . an individual assigned under [the IDEA’s provisions pertaining to becoming] a surrogate parent.

20 USC 1401(23); see also 34 CFR 300.30(a) (“Parent means (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); (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 [the IDEA]”).<sup>1</sup>

New Hampshire state law has further clarified the definition of parent as:

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<sup>1</sup> The Family Educational Rights and Privacy Act (“FERPA”) has its own definition of “parent”: “a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or guardian.” 32 CFR 99.3.

- a. A natural or adoptive parent of a child who has legal custody of the child;
- b. A guardian of a child, but not the state when the state has legal guardianship of the child;
- c. A person acting in the place of a custodial parent or guardian of a child, if no other custodial parent or guardian is available, who is designated in writing to make educational decisions on the child's behalf by such parent or guardian.
- d. A surrogate parent who has been appointed in accordance with RSA 186-C:14; or
- e. A foster parent of a child who has been appointed in accordance with RSA 186-C:14-a.

NH RSA 186-C:2, VII; see also Ed 1102.04(h) (“defining parent as “a biological or adoptive parent, surrogate parent, or a guardian. Parent does not mean the state when the state has legal guardianship”).

The IDEA affords a panoply of procedural safeguards for parents of students with disabilities, including, but not limited to, the right to provide informed, written consent to the provision of services and the right to request an administrative due process hearing in the event of a disagreement pertaining to the provision of FAPE. See e.g. 20 USC 1414, 1415; Ed 1100.01 et seq.

However, the IDEA is silent as to which school district is responsible for providing services to students whose parents reside in two different districts but share residential responsibility and decision-making. Letter to Biondi, 29 IDELR 972 (OSEP 1997) (noting that this determination would be made by State law).

### **III. The Relationship Between Custody and Residency**

Under New Hampshire law, students are required to attend school in the district in which they reside. See RSA 193:12, I. Making an accurate assessment as to a child's residency at the time of enrollment is an important and necessary component of the enrollment process. This is because the district of residence is generally responsible for developing an individualized education program (“IEP”) and the provision of a free, appropriate, public education. See RSA 186-C:7, I; see also RSA 193:12, VI(a) (noting that in a residency dispute, the pupil remains in attendance in the school in which he/she was last enrolled).

For students who reside with both parents, their legal residence (for purposes of school attendance) is with their parents. RSA 193:12, II(a). However, when the student's parents live apart or are divorced, they may have more than one potential district of residence.

When the parents live apart and are not divorced, legal residence is the residence of the parent with whom the child resides. RSA 193:12, II(a)(1).

In a divorce decree where the parents are awarded joint decision making responsibility<sup>2</sup> or joint legal custody, the legal residence of a minor child is the residence of the parent with whom the child resides.

In a divorce decree, or parenting plan developed pursuant to RSA 461-A, a child's legal residence for school attendance purposes may be the district in which either parent resides, provided the parents:

- Agree in writing to the district the child will attend and
- Each parent furnishes a copy of the agreement to the school district in which the parent resides.

RSA 193:12, II(a)(2). In addition, the parents must update their parenting plan to reflect this agreement. Id.; see also RSA 461-A:4, II (noting that a parenting plan may include provisions pertaining to "legal residence of a child for school attendance").

If a parent is awarded sole or primary residential responsibility or physical custody, legal residence of a minor child is the residence of the parent who has sole or primary residential responsibility or physical custody. If the parent with sole or primary physical custody lives outside the state, the pupil does not reside in New Hampshire. RSA 193:12, II(a)(2).

If the court order includes equal or approximately equal periods of residential responsibility, the child's legal residence for school attendance purposes shall be as stated in the order. Id.

If the student is in the custody of a legal guardian appointed by a court of competent jurisdiction in New Hampshire or another state, then legal residence is where the guardian resides. RSA 193:12, II(a)(3).

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<sup>2</sup> "Decision-making responsibility" is defined as "the responsibility to make decisions for the child. It may refer to decisions on all issues or on specified issues." RSA 461-A:1, I.

Thus, as part of the enrollment process, your staff should request copies of any applicable parenting plans. The Office for Civil Rights (“OCR”) affirmed this obligation in Bonia (CA) Unified Sch. Dist., 39 IDELR 8 (OCR 2003).

In that case, parents were awarded joint residential responsibility<sup>3</sup> and joint decision-making for education purposes. Mother enrolled student in school and indicated that she had sole custody and decision-making authority. Subsequently, mom agreed that Student did not qualify for services under IDEA, and agreed instead to a Section 504 plan.

After the decision was made, Dad informed the district that he disagreed and requested that the student be re-identified under the IDEA. Neither parent provided the district with a copy of the court order establishing joint decision-making. The District did not agree to the request to re-identify and continued with the Section 504 plan. Dad filed a complaint with OCR, and OCR found that the District should have requested a copy of the court order at the time of enrollment. The District agreed to voluntary resolution, which included conducting an evaluation and meeting to discuss Student’s services, as well as various revisions to policies and procedures.

#### **IV. Joint Decision-Making Authority and the IDEA**

The IDEA provides that “the biological or adoptive parent, when attempting to act as the parent under [part B] and when more than one party is qualified [as a parent], must be presumed to be the parent for purposes of [part B] unless the biological or adoptive parent does not have legal authority to make educational decisions for the child.” 34 CFR 300.30(b)(1).<sup>4</sup>

This means that, unless there is a court order stating that a biological or adoptive parent does not have authority to make educational decisions, the biological or adoptive parent must be presumed to be a “parent” under the IDEA. See also Fauconier v. Committee on Special Educ., 37 IDELR 250 (S.D.N.Y. 2002) (“Congress never intended to deny a non-custodial parent the right to ensure his or her child is receiving a free and appropriate public education”); Val Verde Unified Sch. Dist., 114 LRP 16298 (Cal. State Educational Agency (“SEA”) 2014) (districts must review custody orders to determine which parent has decision-making authority under the IDEA; if the order does not state that consent of both parents is required, then either parent may provide consent).

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<sup>3</sup> New Hampshire law uses the term “residential responsibility” to refer to “custody.” RSA 461-A. In these materials, the two terms are used interchangeably.

<sup>4</sup> FERPA contains a similar provision, requiring that districts give “full rights under [FERPA] to either parent, unless the [district] has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights.” 34 CFR 99.4; see also Letter to Anonymous, 114 LRP 4688 (FPCO 2013) (noting that districts may ask for “legal certification denoting parenthood, such as a birth certificate or court order, from the parent requesting access” to records).

In many cases, both parents will be able to work together to make decisions for their children. However, there will be circumstances under which parents will have joint decision-making authority, and will not agree on the result. The Office for Special Education Programs (“OSEP”) has recognized that this can create difficulties for districts. See Letter to Cox, 54 IDELR 60 (OSEP 2009) (“disputes between parents who share the right to make educational decisions for their child, and who disagree about the provision of special education and related services for their child, may place an LEA in a difficult situation”).

The IDEA does not require that districts obtain consent from both parents. See e.g. 34 CFR 300.300 (discussing consent requirements). However, court orders may specify that parents have to agree on educational decisions, and they may also specify a process for parents to follow in the event of a disagreement.

In the context of revoking consent to special education and related services, OSEP has opined that when one parent revokes consent, the District must provide both parents with the required written prior notice and must cease providing services. Letter to Cox, 54 IDELR 60 (OSEP 2009). If the other parent disagrees, he/she cannot request due process to reinstate services because the district has not taken any action. Id. Instead, that parent would be required to request an evaluation, which the district would treat as an initial evaluation. Id.

OSEP has also opined that either parent may revoke consent, not just the parent who has provided consent. Letter to Ward, 56 IDELR 237 (OSEP 2010).

In West Washington Sch. Corp., 114 LRP 52923 (Ind. SEA 2014), the child’s parents were divorced and shared joint custody of a child with a disability. On October 24, mother requested an IEP Team meeting to discuss increasing speech services. The district sent both parents notice of the team meeting, which was scheduled for November 12. The meeting notice included various options for the parents to respond, including indicating that they would attend the meeting, requesting an alternate method of participation, or requesting that the meeting be rescheduled. Mother returned the form indicating that she would attend; father did not return his form, although he had previously attended meetings without returning the form.

On the morning of the meeting, father called the school, stating that he had just received the notice (which was mailed to him) and could not attend the meeting. He requested that the meeting be rescheduled. Despite the father’s request, the district convened a legally-constituted team meeting. The team agreed to increase the amount of speech services and amended Student’s IEP. Father filed a complaint, alleging a violation of the IDEA.

After an investigation, the SEA determined that the district did not violate the IDEA because it had provided both parents with more than 10 days-notice of the team meeting, and mother attended the meeting. The SEA noted that nothing in the IDEA requires that both parents attend the meeting. In addition, although the court-order specified that the parents had joint decision-making, it did not provide for extra protections beyond what the IDEA required.

A similar result was reached in Sheils v. Pennsbury Sch. Dist., 64 IDELR 294 (E.D. Pa. 2015), where the court held that one parents' agreement with an administrative decision was sufficient to modify the stay-put placement.

In that case, divorced parents shared custody of their children. In June 2013, student's IEP Team agreed that he participate in co-taught inclusion classes for all academic subjects and spend 94% of the school day in a regular education classroom. Shortly after the start of the school year, student's teachers expressed concern about his progress, and in December, the team proposed to amend student's program to provide for additional resource room support. Mother agreed, but father disagreed and requested due process.

After a hearing, the hearing officer found that the least restrictive environment "was a split-program where the student receives some instruction in a resource room setting and some in an inclusive regular education classroom ... Instruction in reading and writing shall take place in a resource room setting. Instruction in mathematics shall take place in an inclusive regular education setting. . . ."

Father appealed, and filed a motion, seeking to postpone implementation of the hearing officer's order. Mother, although not a party to the appeal, agreed with the Hearing Officer's order.

The court noted that the stay put provision states, in part: "If the hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal *agrees with the child's parents that a change in placement is appropriate, that placement must be treated as an agreement between the State and the parents* for purposes [of the stay put provision]. (Emphasis in original). The court rejected dad's argument that the stay-put provision requires consent of both parents, and held that one-parent's agreement with the hearing officer's decision was sufficient to alter the stay put placement.

The court found that "the pendency provision of the IDEA was not intended to hinder a change in placement when a parent agrees with the Hearing Officer and district that the change is appropriate."



## V. The Role of the “Non-Custodial” Parent

Even if a child’s parents do not share decision-making or residential responsibility, the non-custodial parent will still retain rights under the IDEA, unless the court order clearly specifies otherwise. See e.g. 34 CFR 300.30(b)(1). Cape Henlopen Sch. Dist., 114 LRP 35279 (De. SEA 2014), illustrates a situation where the father did not have decision making authority.

In that case, Parent filed a complaint with the State Department of Education, alleging that the district improperly invited student’s step-father to the meeting, and improperly failed to consider/respond to father’s input in the development of Student’s IEP and the educational process.

In 2010, a mediator recommended that mother “be given the interim duty of final decision in regards to the educational needs of the children,” and the family court issued an order implementing this recommendation.

In 2012, student enrolled in the district as a “homeless” student; he was identified in fall 2013 due to autism. At the time of the identification meeting, student lived with his mother and step-father, and a “Protection from Abuse” order was in place against father. The order prohibited father from “threatening, molesting, attacking, harassing or committing any other act of abuse against Mother and minor child(ren) residing in Mother’s household. It further ordered Father to stay 100 yards away from Mother’s person, residence, and workplace, stay away from the School, and not contact or attempt to contact Mother in any way.”

After receiving the order, the district consulted with its attorneys, who advised it not to provide information to father as long as the order was in effect.

The next IEP meeting occurred in May 2014; mother attended the meeting. At the time of the meeting, Student lived with mother and step-father. The protective order had been lifted and student had “therapeutic visitations” with father. Both parents were invited to the meeting; student’s step-father was not invited, but was listed on the meeting notice as a “possible” participant, to give father notice that mother might elect to invite him.

Following the meeting, father filed a complaint, alleging substantive and procedural violations of the IDEA, including alleging that the district failed to obtain his consent to the initial eligibility determination and subsequent decisions pertaining to IEP and placement.

The SEA found in favor of the district, noting that the mother was authorized to provide consent, and under the 2010 order, father was not authorized to provide consent. In addition, during the period when the protective order was in effect, the

district was precluded from inviting him to participate in events at school. In addition, the SEA found that the inclusion of the step-father as a person who "may" attend the meeting, did not violate the IDEA. The SEA noted that mother has the right under the IDEA to invite third parties with knowledge about the student, such as step-father, and that if the district had attempted to preclude step-parent from attending, it would have violated mother's rights under the IDEA.

This case further illustrates the importance of obtaining any applicable orders from parents regarding custody and the like.

## **VI. Additional Considerations**

In addition to receiving copies of court orders pertaining to parental rights and responsibilities, districts may also receive copies of restraining orders that may limit a parent's ability to visit the school building. See e.g. RSA 461-A:9, -10 (noting that ex parte and restraining orders may include provisions pertaining to contacting or entering school, or requiring that one parent remain a specified distance from the other parent). If a parent provides you with a copy of a restraining order, it will be important to determine the extent to which the order limits the other parent's access to the school building, and whether the order specifies that the parent has lost rights under the IDEA.

If the order limits access to the school building, but does not limit IDEA rights, then it will be necessary to afford that parent alternate means of access, such as convening more than one meeting or allowing the parent to participate via phone. See e.g. West Des Moines Community Sch. Dist., 115 LRP 24353 (Iowa SEA 2015) (domestic violence restraining order issued against the father prohibited him from having any contact with the mother; district did not violate the IDEA when it included the father in the team meeting by allowing for a delayed telephonic relay).

These orders could also provide for "no contact" with the parent's child; if that is the case, it will be important for school staff to be aware of those limitations so that they may appropriately limit that parent's access to the child. For example, if an order precludes a parent from having contact with their child, school staff may create risk for the district – and the child – if they dismiss the child into that parent's custody. See e.g., Flowers v. Port Arthur Indep. Sch. Dist., 115 LRP 14393 (E.D. Tex. 2015) (dismissing a claim that the district violated the father's constitutional rights by dismissing his daughter to a third party, who was not on the list of "authorized" individuals for dismissal, and remanding state claims for negligence to the state court).

### **A. Foster and Surrogate Parents**

At times, there will be circumstances under which no biological or adoptive parent is available. In such cases, the IDEA and State law provide that a third party can serve as the "parent" under the IDEA. If the student does not have a legal guardian,

then a third party may be appointed either as a surrogate parent or a foster parent. State law and regulations include provisions outlining the processes for designating a surrogate parent or foster parent. See RSA 186-C:14, -14-a; Ed 1115-1116.

## **VII. Conclusion**

As part of the determination of residency, districts should request copies of parenting plans for parents who are divorced, separated, or never married. Once residency has been established, these orders will be important for determining the extent of the parental rights under the IDEA. For example, should both parents receive meeting notices, procedural safeguards, written prior notices, and the like?<sup>5</sup> Will it be necessary to provide for an alternate method for parental participation in the IEP meeting (telephone)? Obtaining copies of relevant court orders will assist in ensuring that parents are not denied rights under the IDEA.

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<sup>5</sup> Similarly, the court order will assist in determining the extent of the parents' rights to access educational records under FERPA.