

**DETERMINING THE IDEA PARENT AND
THE RESPONSIBILITIES OF THE RESIDENT DISTRICT**

By

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1. Definitions

(a) Federal Definition of “Parent” (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 § 300.519 or section 639(a)(5) of the Act.

(b) (1) 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.

(2) 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. (Authority: 20 U.S.C. 1401(23))

(b) Wyoming Definition of “Parent”

“Parent: A parent of a student, including a natural parent, a foster parent, a guardian, an individual acting as a parent in the absence of a parent or a guardian, or any individual meeting the definition of 34 CFR §300.30.”

(c) What are some rights that parents possess?

(i) Seeking a service plan and evaluations for students placed by their parents in a private school when FAPE is not at issue. 34 CFR §300.131.

(A) Be wary of refusing to evaluate these private school students in the school district of residence. Student might be entitled to two evaluations by two different districts.

(ii) Inspecting and reviewing the student’s education records, without unnecessary delay and prior to any IEP meeting, due process hearing or resolution session but not later than 45 calendar days. 34 CFR §300.611-.624.

(iii) Requesting a due process hearing or filing a state complaint. 34 CFR §300.151, -507.

(iv) Receipt of procedural safeguards. 34 CFR §300.504(a).

(v) Consenting to an initial evaluation. 34 CFR §300.300.

(vi) Consenting to services.

(vii) Revocation of consent for services. 34 CFR §300.300

(viii) Provision of prior written notice. 34 CFR § 300.503.

(d) Some important points regarding parental issues and the IDEA.

(i) Either parent may give consent to special education decisions and initial placements. In other words, it only takes the consent of one parent to allow a special education action to be implemented. (See, however, the issue addressed below regarding revocation of consent to provide all special education services.

(ii) There is a right to presume that either parent can give consent. It is the parent’s obligation to produce records showing that the other parent does not have rights. 34 CFR 200.613.

- (iii) Custody does not typically govern who can give consent, unless there is a court order addressing the issue of who can make educational decisions or there is a state statute to the contrary. Letter to Biondi, 29 IDELR 972 (OSEP 1997); *see e.g.*, Fuentes v. Board of Education of the City of New York, 109 LRP 24642 (N.Y. 2009) and Fuentes v. Board of Education of the City of New York, 109 LRP 34126 (2nd Cir. 2009).
- (iv) *See also*, Crowley v. McKinney, 400 F.3d 965 (7th Cir. 2005) stating: “we greatly doubt that a non-custodial divorced parent has a federal constitutional right to participate in his child’s education at the level of detail claimed by the plaintiff.”
- (v) It is unusual to find a court order that revokes parent rights or establishes one parent’s authority to make educational decisions to the exclusion of the other parent.
- (vi) It does not appear that it is the responsibility of the school district to investigate whether a court order may exist which limits one parent’s rights. The parents should supply a copy of any pertinent order to the school district.
 - (A) If an order is produced, be sure to check that it has been signed by the judge rather than just submitted to the court as a draft order.
 - (B) Give a copy of the order to the other parent and ask them to supply a more recent order in case this order is not the latest one on the subject of parental authority.
 - (C) Obtain legal guidance in interpreting court orders, if necessary.
 - (D) Do not be surprised when some parents and attorneys do not understand that the granting of custody to one parent does not automatically give that parent sole educational rights.
 - (E) Parents may be surprised that only one parent’s consent is typically required.
 - (F) In most cases, the school district can accept the consent of the parent with whom it agrees.
- (vii) Social services workers do not have authority to give consent to special education actions.
- (viii) Foster parents may have authority under state law to give consent but deal with the biological or adoptive parents in the first instance unless they cannot be easily located or their rights have been terminated. *See* Letter to Caplan, 58 IDELR 139 (OSEP 2011).

- (ix) A guardian *ad litem* does not serve as a parent.
- (x) A person with whom the child actually lives may qualify as a parent.
- (xi) A parent may assert IDEA rights in court on a *pro se* basis on behalf of the child because the Supreme Court of the United States has held that the rights under the IDEA are the parents to assert until the student reaches the age of eighteen. See Winkelman v. Parma City Sch. Dist., 550 U.S. 516 (2007).
- (xii) A parent cannot assert the child’s rights in court *pro se* under Section 504 or the ADA.
 - (A) “It is well-settled that, absent special circumstances, a parent may not litigate a claim *pro se* on behalf of children. Myers v. Loudoun County Public Schools, 418 F.3d 395, (4th Cir. 2005).” See Shaw v. Lynchburg Dept. of Social Services, 109 LRP 6048 (W.D. Va. January 29, 2009).
- (xiii) Do not forget that parental rights transfer to the child at age 18. A parent cannot initiate a due process hearing after the child turns 18, even if the events complained of occurred prior to the child reaching the age of 18. See Neville, et al. v. Dennis, et al., 48 IDELR 241 (D. Kan. 2007).
- (xiv) It is best practice to give all notices under the IDEA to both parents in order to protect against future claims of a failure to give notice. This approach also may assist in starting the statute of limitations to run.
 - (A) Please work with both parents even if one parent clearly designates that the other parent will make all educational decisions.

2. Interpretations Regarding Parents and Rights based on Letter to Cox, 54 IDELR 60 (OSEP 2009).

(a) ***In Virginia: FAQ 003-10 (Revocation of Parent Consent)***

Q. Both parents have the legal authority to make educational decisions for their child with a disability. One of the parents asks the LEA to cease special education and related services for the child. The other parent disagrees. The LEA contends that the child remains eligible for special education and related services.

a. Which parent’s consent right prevails?

b. Can the parent who consents to the child’s continuing eligibility request mediation or due process to contest the other parent’s consent revocation?

A. *The U.S. Department of Education's Office of Special Education Programs (OSEP) has responded to the Virginia Department of Education's inquiry in this regard:*

- *As long as the parent has the legal authority to make educational decisions for the child, the LEA must accept either parent's revocation of consent for the purposes of 34 CFR §300.300(b)(4). The federal regulation governs the requirements relative to parent consent revocation. The LEA must provide the parent with prior written notice in accordance with 34 CFR §300.503 before ceasing the provision of special education and related services. 34 CFR §300.300(b)(4)(i).*
- *If a parent, including a parent other than the parent who revoked consent, later requests that his or her child receive special education and related services, the LEA must treat this request as a request for an initial evaluation under 34 CFR §300.301, rather than a reevaluation under 34 CFR §300.303.*
- *Under 34 CFR §300.300(b)(4)(ii), the school division may not use mediation or due process to overcome a parent's written revocation of consent for the continued provision of special education and related services. OSEP further states that a parent who opposes the cessation of the child's eligibility in this instance cannot request mediation or due process to resolve the dispute. This is because a decision by one parent to revoke consent is not an action by a "public agency", and the parent may only file a due process request with respect to actions which are the responsibility of the local school division, and not by another parent. In effect, the hearing officer has no role to play as the matter is not one over which s/he has jurisdiction.*
- *Similarly, mediation is not an option as mediation is designed to resolve disputes between a public agency and a parent. OSEP states that if the parents disagree with each other, the LEA may recommend to the parents alternative dispute resolution options to resolve their disagreement, such as through local family mediation services. [Letter to Cox, OSEP, 2009; 110 LRP 10357]*

Summary point: *Although in the past, we understood that the school division needed the consent of one parent to move forward with an action, this is an exception that allows a parent to essentially "trump" the consent of the other parent. Specifically, if both parents have the legal authority to make educational decisions for the child, and if one parent revokes, in writing, consent for the child to receive special education and related services, the LEA must terminate services, **even if** the other parent has consented or is willing to consent for the child to receive special education and related services.*

- (b) In a later interpretation, USDOE refused to reverse this decision. See Letter to Ward, 111 LRP 13076 (OSEP 2010).

- (i) “There is no requirement in Part B that the public agency obtain consent for the initial provision of special education and related services, or accept revocation of consent for the child’s continued receipt of special education and related services, from both parents with legal authority to make educational decisions on behalf of the child. Further, Part B does not condition a public agency’s ability to accept from a parent with legal authority to make educational decisions on behalf of that child a revocation of the consent for that child’s continued receipt of special education and related services on the agreement of the child’s other parent, who provided consent for the initial provision of special education and related services to the child.”
- (ii) “We appreciate that public agencies may have difficulty with this interpretation when both parents with legal authority to make educational decisions on behalf of their child disagree on the revocation of consent. Nevertheless, for the reasons explained above, we continue to believe that the policy clarification in the August 21, 2009 Letter to Cox is consistent with applicable Part B requirements, and therefore decline your request to change that interpretation.”
- (iii) Question: what happens if one parent revokes consent for all special education services and the other parent immediately refers the student for initial evaluation again? Are school districts caught in a bind?

(c) ***Virginia: FAQ 009-10: CONSENT WHEN PARENTS DISAGREE***

Q. Are the requirements related to revocation of consent applicable to matters other than the child remaining eligible for special education and related services? If both parents have equal standing and disagree when parental consent is required - thus one provides consent and the other disagrees, either orally or in writing - what is an LEA required to do? For example, if the IEP team develops an IEP with parental involvement and one parent provides consent for implementation and the other refuses consent, what is the school division required to do? Must school personnel implement the IEP with the consent of one parent, or work to achieve the consent of the other parent before implementation?

The key to this answer is that the regulations use the term “parent(s)” indicating that only one parent is required to provide consent. Thus, even if only one parent provides consent, under these regulations, the school division must move forward with the action for which consent has been provided. Consequently, using the example provided in the question, if one parent provides consent to implement the IEP, the school division is required to implement the IEP. The parent who disagrees may use the dispute resolution options of mediation and/or due process to address concerns; however, in the interim, the school division is obligated to rely upon the consent that has already been provided.

Note: This is different than the circumstance when a parent revokes consent for a student to continue to be eligible for special education and related services. For information in that case, please refer to FAQ 003-10, which addresses Revocation of Consent.

(d) POWER OF ATTORNEY

- (i) Be careful about acting on a power of attorney given by a parent to an advocate authorizing the advocate to act in the parent's stead.
- (ii) A different situation may result if a parent is in the military and gives a power of attorney to the step-parent. The step-parent can act if the child is living with the step-parent and meets the definition of a parent under the State regulations. This approach is not the same as acting on the basis of the power of attorney.

3. Residency 20 U.S.C. § 1413(a)(1).

- (a) The obligation of the district is to educate students who reside within the school district. (Except for students served under service plans).
- (b) Residency includes the intent to reside permanently. Residency is determined by state law. See, Union School Dist. v. Smith, 15 F.3d 1519, 1525 (9th Cir. 1994).
- (c) See e.g., Catlin v. Sobol, 93 F.3d 1112 (2nd Cir. 1996); Manchester Sch. District v. Crisman, 306 F.3d 1 (1st Cir. 2002).
- (d) The IDEA does not define the term resident. See also, J.S. v. Shoreline Sch. Dist., 220 F. Supp. 2d 1175, 1191-2 (W.D. Wash. 2002), Linda W. v. Indiana Dept. of Educ., 927 F. Supp. 303, 307 (N.D. Ind. 1996) *aff'd* at 200 F.3d 504 (7th Cir. 1999).
- (e) When parents misrepresented their residence to obtain funding for residential placement, they were responsible to repay the costs of the residential program. See County School Board v. Fuller, 18 IDELR 621 (Va. Cir. 1991)