

SECTION 11

SURROGATE PARENTS

When to Appoint a SURROGATE PARENT

Districts have procedures in effect to appoint surrogate parents. Please contact your district's Special Education Director or your administration for specific appointment information for your district.

Due process ensures parent participation, appropriate assessment, equality of access to special education programs and timely removal from special education programs when special education services are no longer needed or desired by a responsible adult student (18 years of age or older). Congress recognized that special provisions must be made to guarantee that students who do not have parents available to act for them nonetheless have access to the substantive and procedural protections of the IDEA, and included two specific provisions to ensure that all students with disabilities have a "parent" to act on their behalf. The first provision provides an extremely broad definition of "parent". **The second provision, known as the "surrogate parent" mandate, provides for the appointment of another individual to act as the student's parent whenever the student is without a parent to act on his or her behalf.**

Basic Criteria for Appointing a Surrogate Parent

A public agency must ensure that the rights of a child are protected by determining the need for, and assigning, a surrogate parent whenever the child is referred or eligible for special education and either:

- no parent can be identified
- the public agency, after reasonable efforts, cannot locate a parent
- the parent's educational rights have been removed by a court of law
- the child is a ward of the State under the laws of that State and the parent's educational rights have been removed
- the child is an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 *United States Code* Section 11434a(6))

Important Facts about Wards and Dependents of the Court and Unaccompanied Homeless Youth –

Wards and Dependents of the Court

Under California law, there are both "dependent" children as well as children who are described as "wards" of the courts (California *Welfare and Institutions Code* sections 300, 601 and 602). A minor may be declared a ward of the court for habitual refusal to obey parents or guardians or truancy from school (California *Welfare and Institutions Code* Section 601). A minor may also be declared a ward for commission of a crime (California *Welfare and Institutions Code* Section 602). A "dependent" child may be one that is at risk of abuse or neglect by his or her parents (California *Welfare and Institutions Code* Section 300).

When a court decides that a minor is a ward or dependent, the court may limit the parent's educational rights (California *Welfare and Institutions Code* sections 361(a) and 726). If the court limits parental rights, it must issue an order clearly assigning those educational rights to another responsible adult. After limiting the parent's educational rights the court must document one of the following through a minute order (JV-535 and JV-536).

- appointment of an educational representative
- determination that the caregiver may make educational decisions
- referral to the LEA, or
- educational decisions made by the court with input from interested persons

(California *Rules of the Court*, Rule 5.650(b)).

An educational representative is the responsible adult who holds the educational rights for a child when the parent's or guardian's educational rights have been limited by the court (California *Rules of the Court*, Rule 5.502(13)). The appointed educational representative has the same rights and responsibilities as a surrogate parent regarding special education. This representative may also be referred to as a Court Appointed Special Advocate (CASA). If the court cannot identify an educational representative and the child is or may be eligible for special education and related services, the court must refer to the LEA (California *Rules of the Court*, Rule 5.650(b)(2)).

JV-535 and JV-536 must be served to the LEA no later than seven calendar days after the date of the court's order.

The LEA must make reasonable efforts to assign a surrogate parent within 30 calendar days after the court's referral.

If the LEA appoints a surrogate parent, it must send copies of the notice to the social worker or probation officer identified on JV-535. If the LEA does not appoint a surrogate parent within 30 days of receipt of the JV-535, it must, within the next seven calendar days, notify the court on form JV-536 of its inability to appoint a surrogate parent and its continuing reasonable efforts to assign a surrogate parent.

Silence of the court on the issue means the parent's rights have remained intact. The LEA should be notified by the placing agency pursuant to California *Government Code* Section 7579.1 et seq.

Unaccompanied Homeless Youth

The term "homeless children and youths"

(A) means individuals who lack a fixed, regular, and adequate nighttime residence (within the meaning of section 103(a)(1)); and

(B) includes

- (i) children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations; are living in emergency or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement;
- (ii) children and youths who have a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings (within the meaning of section 103(a)(2)(C));
- (iii) children and youths who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and
- (iv) migratory children (as such term is defined in section 1309 of the Elementary and Secondary Education Act of 1965) who qualify as homeless for the purposes of this subtitle because the children are living in circumstances described in clauses (i) through (iii).

The term "unaccompanied youth" is defined as a youth not in the physical custody of a parent or guardian (42 *United States Code* Section 11434a(6)).

A temporary surrogate parent may be appointed for a child who is an unaccompanied homeless youth. Such temporary surrogates may include appropriate staff of emergency shelters, transitional shelters, independent

living programs, and street outreach programs. These temporary surrogates may be employees of the State Education Agency (SEA), the LEA, or any other agency that is involved in the education or care of the child until a surrogate parent can be appointed that meets all of the appointment requirements.

Definition of parent, unavailable parent and voluntary assignment of Educational Rights

Parent means a natural, adoptive, or foster parent of a child, a guardian (but not the State if the child is a ward of the State), or 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.

Section 56028(4), regarding the definition of "parent", states that parent includes "A foster parent if the natural parents' authority to make educational decisions on the child's behalf has been specifically limited by court order in accordance with subsection (b) of Section 300.30 of Title 34 of the Code of Federal Regulations. The foster parent must be willing to perform the duties of a parent in the educational setting.

The appointment of a surrogate parent seriously compromises natural parents' rights to participate in the educational decisions affecting their child. Under IDEA, a surrogate parent need not be appointed for a student who has a known and available parent, guardian, or person acting as a parent. Even in cases where natural parents have lost legal custody of their child, courts have held they still have the right to advocate for the provision of a free appropriate public education. **Natural parents retain their rights with regard to the education of their child unless those rights are expressly abdicated or removed by the court.**

A parent is "unavailable" if, after documented reasonable efforts, the public agency cannot discover the whereabouts of the parent. What efforts are "reasonable" is determined on a case-by-case basis. Any effort that is not both diligent and thorough, however, may not be "reasonable." It may be reasonable to appoint a surrogate parent during the search for a parent, and to dismiss him or her if a parent is found. **"Reasonable efforts" may include such things as documented phone calls, letters, certified letters with return receipts, and visits to parents' last known addresses. A parent is not unavailable simply because the parent is non-responsive or uncooperative.** Educational agencies may use telephones, computers and other technology and strategies to gain the parent's participation.

Parent assigning Educational Rights

A parent may voluntarily explicitly state in writing and, revocable at any time, appoint a person to make educational decisions for his/her child. The person appointed is sometimes called an educational representative so as not to be confused with a surrogate who is appointed by the LEA.

Surrogate Parent Program

The need of students to have a surrogate parent will be determined by the LEA based upon California and federal law. The SELPA and/or LEA will develop and conduct surrogate parent training.

Training

While the IDEA does not expressly mandate training and support for surrogate parents, state and local educational agencies must ensure that surrogate parents who are appointed have "knowledge and skills" in order to provide adequate representation of the student. To assist surrogate parents in carrying out their responsibilities, state and local educational agencies should provide initial training that includes, at minimum, substantive and procedural information about the special education system and the role of the surrogate parent. Such training could be provided face-to-face by the educational agency or through the use of existing advocacy training sessions, television, videos or other technology devices.

Selection

When appointing a surrogate parent, the local educational agency shall, as a first preference, select a relative caretaker, foster parent, or court appointed special advocate, if any of these individuals exist and is willing and able to serve. If none of these individuals is willing or able to act as a surrogate parent, the local educational agency shall select the surrogate parent of its choice. If the student is moved from the home of the relative caretaker or foster parent who has been appointed as a surrogate parent, the local educational agency shall appoint another surrogate parent.

Conflict of Interest

Individuals, who would have a conflict of interest in representing the student, as specified under federal regulations, shall not be appointed as a surrogate parent. "An individual who would have a conflict of interest," for purposes of this section, means a person having any interests that might restrict or bias his or her ability to advocate for all of the services required to ensure a free appropriate public education for an individual with exceptional needs, as defined in Section 56026 of the Education Code.

Except for individuals who have a conflict of interest in representing the student, and notwithstanding any other law or regulation, individuals who may serve as surrogate parents include, but are not limited to, foster care providers, retired teachers, social workers, and probation officers who are not employees of a public agency involved in the education or care of the student. The surrogate parent shall not be an employee of a public or private agency that is involved in the education or care of the student. If a conflict of interest arises subsequent to the appointment, another surrogate parent shall be appointed.

Hold Harmless

The surrogate parent and the local educational agency appointing the surrogate parent shall be held harmless by the State of California when acting in their official capacity except for acts or omissions that are found to have been wanton, reckless, or malicious.

Duties and practices

The surrogate parent shall serve as the student's parent and shall have the rights relative to the student's education that a parent has under Title 20 (commencing with Section 1400) of the United States Code and pursuant to Part 300 of Title 34 (commencing with Section 300.1) of the Code of Federal Regulations. The surrogate parent may represent the student in matters relating to identification, assessment, instructional planning and development, educational placement, reviewing and revising the individualized education program, and in all other matters relating to the provision of a free appropriate public education for the student. Notwithstanding any other provision of law, this representation shall include the provision of written consent to the individualized education program including non-emergency medical services, mental health treatment services, and occupational or physical therapy services pursuant to this chapter. The surrogate parent may sign any consent relating to individualized education program purposes. As far as practical, a surrogate parent should be culturally sensitive to his or her assigned student.

A surrogate parent must meet with the child at least one time and be limited to visitations at the school. Should a home visit appear necessary, it will be made only after contact with the social service guardian agency involved and the LEA. After the surrogate has received permission to make the home visit, the surrogate is to be accompanied by another person selected by the LEA for this purpose.

The surrogate parent will utilize the district address and telephone number if it is necessary to provide this information in their role as surrogate. The surrogate parent may also meet with the child at the school on

additional occasions, attend the child's individualized education program (IEP) meetings, review the child's educational records, and consult with persons involved in the child's education.

Caseloads for surrogate parents will be determined by mutual agreement between the surrogate and the LEA.

The surrogate parent shall comply with federal and state law pertaining to the confidentiality of student records and information, and shall use discretion in the necessary sharing of the information with appropriate persons for the purpose of furthering the interest of the child.

Termination or replacement of Surrogate Parent

A surrogate parent should be terminated or replaced only when he/she wishes to relinquish his/her responsibilities or when, in the judgment of the multi-disciplinary team (which should include the surrogate parent), there is another individual who has closer ties to the student who is willing to be appointed the surrogate parent, or the surrogate is no longer qualified based on federal and state qualifications and standards. Removal of the rights of a surrogate parent may occur **for any of the following reasons:**

1. The parent or guardian returns and assumes educational responsibility for the student.
2. The student is no longer a ward or dependent of the court and a parent/guardian has been named and located. The court reinstates the right of the parent/guardian to make educational decisions for the student who is a ward or dependent of the court.
3. The student reaches the age of majority unless the student is declared incompetent by a court of law.
4. The student is no longer eligible for special education and related services.
5. The LEA or SELPA Director/Designee terminates the appointment of the surrogate parent.
6. The surrogate parent is found to have a conflict of interest or otherwise no longer meets the criteria for appointment.
7. The surrogate parent takes actions which threatens the well-being of the assigned student.
8. The student moves out of the SELPA.
9. The student becomes emancipated, married, or meets other criteria, which eliminates his or her need for a surrogate parent.
10. The surrogate engages in illegal activities.

Nothing in this section shall be interpreted to prevent a parent or guardian of an individual with exceptional needs from designating another adult individual to represent the interests of the student for educational and related services.