

DEFINITION OF PARENT

School personnel must determine the appropriate person(s) to make educational decisions on behalf of the child. Those individuals are to receive notice, give or revoke consent, file formal complaints, request mediation, file due process, give or deny permission for release of records, and so forth. School personnel must use the State definitions of "parent," "person acting as a parent," and "education advocate," and the Federal definition of "foster parent" in considering who the legal educational decision maker is:

State Statute:
KSA 72-961(m)(n)(o)

- (m) "Parent" means a natural parent, an adoptive parent, a person acting as a parent, a legal guardian, or an education advocate.
- (n) "Person acting as parent" means a person such as a grandparent or a stepparent with whom the child lives or a person other than a parent who is legally responsible for the welfare of a child.
- (o) "Education advocate" means a person appointed by the state board in accordance with the provisions of KSA 38-1513a, and amendments thereto. A person appointed as an education advocate for a child shall not be: (1) An employee of the agency which is required by law to provide special education or related services for the child; (2) an employee of the state board, the department, or any agency which is directly involved in providing educational services for the child; or (3) any person having a professional or personal interest which would conflict with the interests of the child.

Federal Regulation:
Sec. 300.20(b)

- (c) Foster parent. Unless State law prohibits a foster parent from acting as a parent, a State may allow a foster parent to act as a parent under Part B of the Act if--
 - (1) The natural parents' authority to make educational decisions on the child's behalf has been extinguished under State law; and
 - (2) The foster parent--
 - (i) Has an ongoing, long-term parental relationship with the child;
 - (ii) Is willing to make the educational decisions required of parents under the Act; and
 - (iii) Has no interest that would conflict with the interests of the child.

Under another State law, the Child in Need of Care Act, KSA 38-1513a (Appendix D), foster parents in Kansas are allowed to be the legal educational decision maker, IF they have been trained as Education Advocates of the child, assigned to perform those duties, and would fulfill the Federal requirements under 34 CFR 300.20(b)(2).

The following checklist in Figure 1-3 is provided as a guide to school personnel to help determine the legal educational decision maker:

FIGURE 1-3

WHO CAN SIGN TO GIVE CONSENT FOR EDUCATIONAL DECISIONS?

1. Are Parents available?

A. ___ **Natural (birth) parent(s)** - If parents are divorced, notify both parents unless a court order precludes this from happening. Consent from one parent is sufficient.

B. ___ **Adoptive parent(s)** - If adoption is not final, an Education Advocate is needed; documentation is the Decree of Adoption.

C. ___ **Stepparent(s)** -- Means that the stepparent has the child at home, or is legally responsible for the child's welfare.

D. ___ **Other** -- If parent rights have been severed or relinquished, see #2 or #3.

2. Have parent rights been severed or relinquished? (Person acting as a parent)

A. ___ **Guardian** -- Means a court-appointed guardian makes decisions on behalf of the child. The district needs documentation for the child's file (Letter of Guardianship). A guardian is an individual, not the State if the child is a ward of the State.

B. ___ **Person, other than a parent, who is acting in the place of a parent** -- Means a grandparent or stepparent with whom the child lives, or a person who is legally responsible for the child's welfare.

C. ___ **Foster parent** -- Means that to make educational decisions for the child, the natural parents' rights have been legally severed, the foster parent has an ongoing, long-term parental relationship with the child, is willing to make the educational decisions required of parents, and has no interest that would conflict with the interests of the child. The foster parent must be appointed as an Education Advocate of the child (see #3).

3. Has an Education Advocate been assigned?

___ **When the child is in Social and Rehabilitation Services (SRS) custody because the parent is unknown or unavailable or parent rights have been severed, or if the child is in Juvenile Justice Authority (JJA) or Department of Corrections (DOC) custody and needs an Education Advocate** -- An Education Advocate is appointed to make educational decisions for the child. When a child is in SRS custody and parents are unknown or unavailable or parent rights have been severed, the SRS caseworker, supervisor, contractor, or subcontractor agency/organization does **NOT** have legal authority to grant consent for educational decisions, unless the person is the appointed Education Advocate. The local SRS caseworker assigned to a Child in Need of Care determines that the parent is unknown or unavailable or parent rights have been severed. The caseworker contacts either Families Together (785-233-4777 or 800-264-6343) or KSDE (785-296-3869 or 800-203-9462) to have an Education Advocate for the child appointed. The district should work through its local SRS office to request an Education Advocate for the child, and should have written documentation for the child's file (KSDE letter assigning the Education Advocate). Similarly, if the child is in the custody of JJA or DOC, and either agency determines that the child is a Child in Need of Care, the JJA or DOC caseworker contacts Families Together to ask that an Education Advocate for the child be assigned.

OTHER LEGAL EDUCATIONAL DECISION MAKERS

In various circumstances, individuals who are not the student's parents may be the legal educational decision makers and may sign for consent. Education Advocates (referred to as "surrogate parents" in Federal law) may act on behalf of the student when parents are unknown or unavailable.

The State Special Education for Exceptional Children Act (KSA 72-961 et seq.) gives the State education agency (SEA), the Kansas State Department of Education (KSDE) the authority to name Education Advocates to act on behalf of the student, if parents are unknown or unavailable. The State statute also defines Education Advocate as "a person appointed by the state board [of education] in accordance with the provisions of KSA 38-1513a, and amendments thereto. A person appointed as an education advocate for a child shall not be: (1) An employee of the agency which is required by law to provide special education or related services for the child; (2) an employee of the state board, the department, or any agency which is directly involved in providing educational services for the child; or (3) any person having a professional or personal interest which would conflict with the interests of the child" (KSA 72-962(o)).

In Kansas, a foster parent who wants to act as a parent in making educational decisions for a child must receive the training and be appointed as an Education Advocate. There may be other circumstances when a judge orders someone to serve as the child's legal education decision maker. In those instances, the district must follow the judge's orders. Documentation from the court must be retained in the student's file.

State Law:
KSA 38-1513a

When the court has granted legal custody of a child in a hearing under the Kansas code for care of children to an agency, association or individual, the custodian or an agent designated by the custodian shall have authority to make educational decisions for the child if the parents of the child are unknown or unavailable. When the custodian of the child is the secretary, and the parents of the child are unknown or unavailable, and the child appears to be an exceptional child who requires special education, the secretary shall immediately notify the state board of education, or a designee of the state board, and the school district in which the child is residing that the child is in need of an education advocate. As soon as possible after notification by the secretary of the need by a child for an education advocate, the state board of education, or its designee, shall appoint an education advocate for the child.

Federal Regulation:
Sec. 300.515. Surrogate parents

- (a) General. Each public agency shall ensure that the rights of a child are protected if--
 - (1) No parent (as defined in Sec. 300.20) can be identified;
 - (2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or
 - (3) The child is a ward of the State under the laws of that State.
- (b) Duty of public agency. The duty of a public agency under paragraph (a) of this section includes the assignment of an individual to act as a surrogate for the parents. This must include a method--
 - (1) For determining whether a child needs a surrogate parent; and
 - (2) For assigning a surrogate parent to the child.
- (c) Criteria for selection of surrogates.
 - (1) The public agency may select a surrogate parent in any way permitted under State law.
 - (2) Except as provided in paragraph (c)(3) of this section, public agencies shall ensure that a person selected as a surrogate--
 - (i) Is not an employee of the SEA, the LEA, or any other agency that is involved in the education or care of the child;
 - (ii) Has no interest that conflicts with the interest of the child he or she represents; and
 - (iii) Has knowledge and skills that ensure adequate representation of the child.
 - (3) A public agency may select as a surrogate a person who is an employee of a nonpublic agency that only provides non-educational care for the child and who meets the standards in paragraphs (c)(2)(ii) and (iii) of this section.
- (d) Non-employee requirement; compensation. A person who otherwise qualifies to be a surrogate parent under paragraph (c) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.
- (e) Responsibilities. The surrogate parent may represent the child in all matters relating to--
 - (1) The identification, evaluation, and educational placement of the child; and
 - (2) The provision of FAPE to the child.

1. Assigning Education Advocates

KSDE and the Kansas Department of Social and Rehabilitation Services (SRS) have developed a system for assigning Education Advocates when necessary. Details of the Education Advocate system are given in KAR 91-40-24. KSDE contracts with Families Together (the State's Parent Information and Training Center) to:

- provide training for potential Education Advocates,
- receive referrals for students who need an Education Advocate,
- match an Education Advocate to the student,
- notify KSDE to appoint the Education Advocate, and
- provide support for Education Advocates.

Education Advocates are appointed for students ages 3 to 18 who are in the custody of SRS, the Department of Corrections (DOC), or the Juvenile Justice Authority (JJA); are receiving special education services or need an evaluation to determine eligibility for services; and whose parents are unknown or unavailable, whose parent rights have been terminated, or whose parents have a court order of "no contact" against them. NOTE: For a 2-year-old who is being transitioned from Infant-Toddler Services, if parents are unknown or unavailable, an Education Advocate may be appointed to provide consent to conduct an evaluation, be invited to an IEP meeting, and other special education actions required under Part B of IDEA-97, as opposed to Part C Infant-Toddler consent requirements.

If the student's legal guardian is the Secretary of SRS or the Commissioner of DOC or JJA, and the student appears to have an exceptionality and requires special education services, the Secretary of SRS or the Commissioner of DOC or JJA immediately contacts Families Together and the school to notify them that the student needs an Education Advocate. As soon as possible, Families Together and KSDE appoint the Education Advocate. Students at age 18 become their own educational decision makers, unless a judge has determined that they are not capable of doing so and has appointed a guardian.

KSDE sends the formal letter of appointment to the Education Advocate, with a copy to the special education director at the student's school, the building principal, and the student's primary SRS, DOC, or JJA caseworker. KSDE and Families Together retain copies of the appointment letter.

For more information about obtaining an Education Advocate, contact Families Together, 800-264-6343 or 785-233-4777, or the Kansas State Department of Education, 800-203-9462.

2. Canceling the Appointment of an Education Advocate

Education Advocate appointments will be canceled when:

- The parent is available to represent the student;
- The student moves to a new location (if the new placement is not within a reasonable driving distance from the Education Advocate's home);
- Students are 18 years old or are of age (16 and married) and have legal rights themselves (unless the student is in the custody of SRS, DOC, or JJA);
- The Education Advocate resigns his or her appointment;
- The student is legally adopted or placed in a "relative placement";
- The student no longer receives special education services;
- At the request of SRS;
- At the request of JJA, if the student is in JJA custody; or
- At the request of DOC, if the student is in DOC custody.

3. Social and Rehabilitation Services Responsibilities

The Procedures Manual of the SRS Children and Family Services Commission states that when SRS staff determines that a child in SRS custody appears to be a student with exceptionalities who may require special education services and the parents are unknown, unavailable, or have their rights terminated, SRS must:

- a. Document in the case record that the parents are unknown, unavailable, or their rights have been terminated; and
- b. Contact Families Together (800-264-6343 or 785-233-4777) to request that an Education Advocate be appointed.

"Unavailable" means SRS has documented that at least two pieces of certified mail were sent to the parent's last known address, and were sent back unclaimed.

Sometimes it is difficult to determine the situation with parents. There is a difference between "unavailable" and "unwilling." An uncooperative parent is not necessarily unavailable. A parent who can be located by mail, personal visits, or phone is not unavailable, even though s/he does not respond to the school's attempts to involve him or her in the student's education. This is especially true when the school needs the parent's consent. In these circumstances, the school must try to mediate, ask for a due process hearing, or go to court. The exception would be if no parent consent has been given to conduct a reevaluation, or to make a substantial or material change in the IEP; under Federal and State regulations, the district may move ahead without parent consent. (See Chapter 7, Reevaluation.)

If a parent is in jail, s/he is not technically "unavailable" but certainly unable to attend an IEP meeting. However, that does not preclude him/her from participating via conference call.

4. Juvenile Justice Authority Responsibilities

If a student is in a Juvenile Center, the Juvenile Justice Authority (JJA) is obligated to follow the same procedures as SRS, if JJA has legal custody of the student. Accordingly, the school deals with the JJA representative for notice and consent requirements, when the caseworker has been trained and appointed as an Education Advocate for the child.

5. Department of Corrections Responsibilities

If a student is in an Adult Correctional Facility, the Department of Corrections (DOC) is obligated to follow the same procedures as SRS and JJA, if the DOC has legal custody of the student. Accordingly, for students with disabilities (not giftedness), the school deals with the DOC representative for notice and consent requirements, when the caseworker has been trained and appointed as an Education Advocate for the child.

6. Students at Age 18

IDEA-97 states that "beginning at least one year before the child reaches the age of majority under State law [18 in Kansas], a statement that the child has been informed of his or her rights under IDEA, if any, that will transfer to the child on reaching the age of majority." The fact that a child has a disability is irrelevant in the eyes of the court for purposes of adult rights. On or before the child's 17th birthday, it is the school's responsibility to inform the parents or legal educational decision makers and the student that at age 18, students have attained the age of majority in Kansas and have become their own educational decision makers. Schools also inform parents of other options. For example, it may be that for some students, a guardianship or a more limited form of transfer of rights would be

necessary. Schools should tell parents about resources for additional information about this topic. (See the list of suggested resources at the end of this chapter.)

Discussions about transfer of rights at the age of majority are very appropriate in the context of developing the student's transition plan. Beginning at age 14 or before, students are to be invited to their IEP meetings and should be included in the decision making process. This would include transition planning, as well as other decisions about the student's future.

For students attaining the age of majority, schools must provide Prior Written Notice and obtain informed consent for specified special education actions (same requirements as for parents). For students whom a court has judged to be unable to fulfill these responsibilities, schools must provide Prior Written Notice and obtain informed consent from the person whom the court has appointed as the legal guardian.

When a student reaches the age of majority, school personnel must provide Prior Written Notice both to the student and to the parents. Either the school or the student may invite the parents as persons who are knowledgeable about the student. Federal regulations (34 CFR 300.517 and 300.574) and Kansas law (KSA 72-989) provide direction to school personnel on this issue.

Federal Regulations:

Sec. 300.517. Transfer of parental rights at age of majority

- (a) General. A State may provide that, when a student with a disability reaches the age of majority under State law that applies to all students (except for a student with a disability who has been determined to be incompetent under State law)--
- (1)(i) The public agency shall provide any notice required by this part to both the individual and the parents; and
 - (ii) All other rights accorded to parents under Part B of the Act transfer to the student; and
 - (2) All rights accorded to parents under Part B of the Act transfer to students who are incarcerated in an adult or juvenile, State or local correctional institution.
 - (3) Whenever a State transfers rights under this part pursuant to paragraph (a)(1) or (a)(2) of this section, the agency shall notify the individual and the parents of the transfer of rights.

Sec. 300.574. Children's rights

- (a) The SEA shall provide policies and procedures regarding the extent to which children are afforded rights of privacy similar to those afforded to parents, taking into consideration the age of the child and type or severity of disability.
- (b) Under the regulations for the Family Educational Rights and Privacy Act (34 CFR 99.5(a)), the rights of parents regarding education records are transferred to the student at age 18.
- (c) If the rights afforded to parents under Part B of the Act are transferred to a student who reaches the age of majority, consistent with 300.517, the rights regarding educational records in 300.562-300.573 must also be transferred to the student. However, the public agency must provide any notice required under section 615 of the Act to the student and the parents.

**State Statute:
KSA 72-989**

When a person who has been determined to be a child with a disability reaches the age of 18, except for such a person who has been determined to be incompetent under state law:

- (a) An agency shall provide to both the person and to the person's parents any notice required by this act;
- (b) all other rights accorded to parents under this act transfer to the person;
- (c) the agency shall notify the person and the parents of the transfer of rights; and
- (d) all rights accorded to parents under this act transfer to the person if incarcerated in an adult or juvenile federal, state or local correctional institution.

The Family Educational Rights and Privacy Act (FERPA, Appendix F) regulations also govern the release of information about the IEP meeting: "(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by 99.30 if the disclosure meets one or more of the following conditions:...(8) The disclosure is to parents of a dependent student, as defined in section 152 of the Internal Revenue Code of 1954" (34 CFR 99.31(a)(8)).

If the student is living at home and parents claim the student as a dependent on their tax return, parents are entitled to records of the IEP meeting. If the student is not living at home and is not claimed as a dependent, parents are not entitled to records of the IEP meeting. However, if the school invites the parents as individuals with special expertise about the child and as a member of the IEP Team they have a legitimate educational interest, confidential information from the IEP meeting may be disclosed to the parents without consent of the student.

7. School Responsibilities

In summary, before taking any special education actions for students receiving special education services whose parents are unknown or unavailable, the school must follow these steps:

- a. Try to locate the student's legal educational decision maker;
- b. Contact SRS to decide if the student is a Child in Need of Care, or if the student's legal educational decision maker cannot be located or found;
- c. Inform the appropriate SRS area office if the student is in the custody of the Secretary of SRS and the parent is unknown or unavailable;
- d. Inform the regional JJA office if the student is in the custody of the Commissioner of JJA and the parent is unknown or unavailable;
- e. Inform the Commissioner of DOC if the student is in the Commissioner's custody and the parent is unknown or unavailable;
- f. Try to find the natural parent at the last known address for a student who is not living with a natural parent, stepparent, or guardian and who is not in SRS, DOC, or JJA custody. If these attempts fail, the school must determine if the child needs an Education Advocate by contacting the SRS area office to determine if the student is a Child in Need of Care; the Department of Corrections; or the regional JJA office. The school must keep a log of phone calls, visits, and copies of letters to show attempts to contact or locate the student's parents; and
- g. Mail or personally deliver Prior Written Notices to the Education Advocate, or other legal educational decision maker.

If the student is in SRS, DOC, or JJA custody, the school should ask the student's primary SRS, DOC, or JJA caseworker to decide if the student needs an Education Advocate. SRS, DOC, or JJA will then contact Families Together (800-264-6343 or 785-233-4777) to ask for an Education Advocate to be appointed. SRS, DOC, or JJA caseworkers do not have the legal authority to sign for parent consent, unless they have been trained and appointed as Education Advocates for that student.

If the parent is in jail, the parent is not "unknown or unavailable." The school should try to set up a method for the parent to participate via conference call. Parent consent can then be obtained through the mail.

However, the term "parent" is specifically defined in the Kansas special education statutes, at K.S.A. 72-962(m). This statutory definition of the term "parent" does not include a person who receives a power of attorney from a parent to make educational decisions. The intent of this statute (as well as other statutes such as K.S.A. 38-1513a -- referred to above in question no. 1) is that if there is no person (who meets the statutory definition of the term "parent") available and willing to make educational decisions for an exceptional child, an education advocate must be appointed. A power of attorney may not be used by a parent to undermine the intent of this statute.

There are, as I stated previously, very limited circumstances in which a parent may effectively execute a power of attorney vesting educational decision making authority in another person. The statute cited above, K.S.A. 72-962(m), includes, in its definition of the term "parent," the term "person acting as a parent." The term "person acting as a parent" is defined in K.S.A. 72-962(n) and includes a person, "such as a grandparent, stepparent or other relative with whom the child lives or a person other than a parent who is legally responsible for the welfare of a child." K.S.A. 72-962(n). Interestingly, however, Kansas regular education statutes, at K.S.A. 72-1046(d)(2), define the term "person acting as a parent" somewhat differently. This regular education statute includes, as part of its definition of the term "person acting as a parent," the following: "(B) a person, other than a parent, who is liable by law to maintain, care for, or support the child, or who has actual care and control of the child and is contributing the major portion of the cost of support of the child, or who has actual care and control of the child with the written consent of a person who has legal custody of the child, or who has been granted custody of the child by a court of competent jurisdiction." This definition, as I indicated earlier, is found in a regular education statute rather than a special education statute. However, I believe a parent might successfully argue that it is not contrary to these statutes, as a whole, to use a power of attorney to authorize a person, who meets the definition of a "person acting as a parent" under K.S.A. 72-1046, to make educational decisions for their exceptional child

Therefore, I believe that, as a general rule, a parent may not use a power of attorney to authorize other persons to make educational decisions for their exceptional children. However, in the limited circumstances specified in K.S.A. 72-1046(d)(2), I believe a parent may effectively use a power of attorney to authorize another person to make educational decisions for the parent's exceptional children. Those circumstances include only situations in which the person receiving the power of attorney is: (1) a person who is liable by law to maintain, care for, or support the child; (2) a person who has actual care and control of the child and is contributing the major portion of the cost of support of the child; (3) a person who has actual care and control of the child with the written consent of a person who has legal custody of the child; or (4) a person who has been granted custody of the child by a court of competent jurisdiction.

Kansas clarification of the term "parent" after IDEA 2004

KSDE SSS has been asked to address a couple of questions regarding who may make educational decisions for a child with an exceptionality. In consultation with the general counsel of this agency, our response to those questions is below. To view the complete memo go to www.kansped.org :

(1) May foster parents make educational decisions on behalf of their foster children?

Some confusion on this issue appears to have developed as a result of a change to the definition of the term "parent" in IDEA 2004. At section 602(23), IDEA 2004 defines the term "parent," in part, by stating that the term "parent" means a natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent). Accordingly, some have interpreted this section to mean that a foster parent now meets the definition of the term "parent" and may make educational decisions for his/her foster child.

It is important to notice, however, that after including foster parents in the definition of the term "parent," the statute adds the words "unless a foster parent is prohibited by State law from serving as a parent." Kansas law addresses a foster parent's authority regarding educational decision making in two separate statutes. First, K.S.A. 38-1513a, states that whenever a child with a disability is in the custody of S.R.S. and the child's parents are unknown or unavailable, the Secretary of S.R.S. must immediately notify the state board of education and the school district where the child is attending that the child is in need of an education advocate. Second, K.S.A. 72-962(m) defines the term "parent" to include a foster parent "if the foster parent has been appointed the education advocate of an exceptional child." This second statute effectively prohibits a foster parent from exercising the authority of a parent unless the foster parent is appointed the education advocate for a particular child.

It is, therefore, clear under Kansas law that all exceptional children in the custody of S.R.S., whose parents are unknown or unavailable, require an education advocate to make educational decisions on their behalf. It is also clear that a foster parent may be appointed the education advocate for a foster child. Without such appointment as an education advocate for a particular foster child by the state board of education through Families Together, however, a foster parent does not have authority to make educational decisions for a foster child in their care

(2) May a child's parent execute a signed and notarized statement (power of attorney) authorizing another person to make educational decisions regarding the parent's child?

I believe the answer is that a parent may do so, but only under very limited circumstances. A parent, of course, may make educational decisions for his/her child.