



Frequently Asked Questions (FAQ) Related to the Definitions, Roles, and Responsibilities of Parents, Persons Acting as the Parent of a Child, and Surrogate Parents

Over the years, the Department of Public Instruction (DPI) and the Department of Children and Families (DCF) have frequently received questions relating to the definitions of “parent,” “person acting as the parent of a child,” and “surrogate parent.” Those definitions are of particular importance when it comes to children under the guardianship of DCF and children with disabilities. A workgroup¹ was developed by the two Departments to attempt to respond to those questions which have been most frequently asked. This is not an exhaustive document and it should be noted that both Departments encourage school districts, county departments of social/human services, and tribal child welfare agencies to consult with their agency attorneys. This document does not constitute legal advice from either DCF or DPI.

Definition of “Parent” Under the Children’s Code and the Juvenile Justice Code (Wisconsin Statutes):

“Parent” means a biological parent, a husband who has consented to the artificial insemination of his wife under s. 891.40, or a parent by adoption. If the child is a non-marital child who is not adopted or whose parents do not subsequently intermarry under s. 767.803, “parent” includes a person acknowledged under s. 767.805 or a substantially similar law of another state or adjudicated to be the biological father. “Parent” does not include any person whose parental rights have been terminated. For purposes of the application of s. 48.028 and the federal Indian Child Welfare Act, 25 USC 1901 to 1963, “parent” means a biological parent, an Indian husband who has consented to the artificial insemination of his wife under s. 891.40, or an Indian person who has lawfully adopted an Indian child, including an adoption under tribal law or custom, and includes, in the case of a non-marital child who is not adopted or whose parents do not subsequently intermarry under s. 767.803, a person acknowledged under s. 767.805, a substantially similar law of another state, or tribal law or custom to be the biological father or a person adjudicated to be the biological father, but does not include any person whose parental rights have been terminated.

[Wis. Stat. §§ 48.02(13) and 938.02(13)]

Definition of “Parent” Under Special Education Law (Wisconsin Statutes):

“Parent” means any of the following:

1. A biological parent.
2. A husband who has consented to the artificial insemination of his wife under § 891.40.
3. A male who is presumed to be the child’s father under § 891.41.
4. A male who has been adjudicated the child’s father under subch. VIII of Ch. 48, under subch. IX of Ch. 767, by final order or judgment of an Indian tribal court or competent jurisdiction or by final order or judgment of a court of competent jurisdiction in another state.
5. An adoptive parent.
6. A legal guardian.
7. A person acting as a parent of a child.
9. A person assigned as a surrogate parent under § 115.792(1)(a)2.
10. A foster parent, if the right and responsibility of all of the persons specified in subds. 1. to 5. to make educational decisions concerning a child have been extinguished by termination of parental rights, by

¹ See membership of workgroup at the end of this document.

transfer of guardianship or legal custody or by other court order, and if the foster parent has an ongoing, long-term parental relationship with the child, is willing to make the educational decisions that are required of a parent under this subchapter and has no interests that would conflict with the interests of the child. [Wis. Stat. § 115.76(12)(a), Wis. Stats.]

Definition of “Parent” Under Federal Law (Individuals with Disabilities Education Act):

“Parent” means—

- (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; or
- (D) except as used in sections 1415(b)(2) and 1439(a)(5) of this title, an individual assigned under either of those sections to be a surrogate parent. [Ref. IDEA, 20 U.S.C. § 1401(23)]
The term does not include a foster child who has a foster parent who meets the definition of a parent in paragraph 20 U.S.C. § 1401(23). [IDEA, 20 U.S.C. § 1401(36)(B)]

Definition of “Parent” Under Federal Regulations (Individuals with Disabilities Education Act):

“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. [IDEA, 34 CFR § 300.30(a)]

Questions

- 1. Based on § 115.76(12)(a)10., can a foster parent of a child in the DCF Adoption program be considered a “parent” for special education purposes (e.g., IEP Team membership)?
Answer: Yes, if the conditions in subd. 10. are met.
- 2. Is there an order of priority of individuals under subds. 6. to 10.? (For example, could a foster parent under § 115.76(12)(a)10. be the parent only if a person identified in subds. 6., 7., or 9. is not the parent?)
Answer: No, this is not a prioritized listing.
- 3. What constitutes “an ongoing, long-term parental relationship with the child”? Who makes that determination? [Wis. Stat. § 115.76(12)(a)10.]

Answer: The determination is the responsibility of the LEA.

4. In a situation in where there appears to be a potential conflict between the interests of the foster parent and the foster child, who determines the interests of the child and whether the interests of the foster parent would conflict with them?

Answer: In most instances, the agency that licensed the foster parent or placed the child would make such a determination. The court could also make that determination.

"Person acting as a parent of a child" means a relative of the child or a private individual allowed to act as a parent of a child by the child's biological or adoptive parents or guardian, and includes the child's grandparent, neighbor, friend or private individual caring for the child with the explicit or tacit approval of the child's biological or adoptive parents or guardian. "Person acting as a parent of a child" does not include any person that receives public funds to care for the child if such funds exceed the cost of such care.

[Wis. Stat. § 115.76(13)]

Questions

5. Can an out-of-home care provider be a "person acting as a parent of a child"?

Answer: Yes, if approved by the child's biological or adoptive parents or guardian.

6. If legal custody has been transferred from the parent, can the parent still delegate someone to act as the parent of a child?

Answer: In most cases, the parent may make that delegation, unless the responsibility for making educational decisions on behalf of the child has been granted to another party by the court. If the parents' rights have been terminated, then they cannot make that delegation because they are no longer the parent.

7. When the court places a child with an adult (e.g., in out-of-home care), does that adult become the child's legal custodian?

Answer: No. The adult becomes the child's physical custodian. The court would have to make a separate decision to bestow legal custody on the adult with whom the child is placed. Under the Children's Code (Wis. Stat. Ch. 48), the court should transfer legal custody from the parent only when there is no less drastic alternative.

[Wis. Stat. §§ 48.02(12) and (14); 48.345(4) and 48.355(1)]

8. Does physical custody include the authority to make educational decisions?

Answer: No. Physical custody simply means actual custody of the child "... in the absence of a court order granting legal custody to the physical custodian." Legal custody confers the right and duty "to protect, train and discipline the child, and to provide food, shelter, legal

services, education and ordinary medical and dental care subject to the rights...and responsibilities of the...guardian...and subject to any residual parental rights and responsibilities and the provisions of any court order."

However, the out-of-home care provider (i.e., physical custodian), under the reasonable and prudent parent standard, may, absent any objection on the part of the parent, "... make decisions concerning a child's participation in age or developmentally appropriate extracurricular, enrichment, cultural, and social activities. ..." This would include, but is not limited to, granting permission for field trips and participating in sports.

[Wis. Stat. §§ 48.02(12), (14), and (14r); and 48.383]

9. Does legal custody include the authority to make educational decisions?

Answer: Yes. Legal custody does include that authority subject to the guardian's authority, the provisions of any court order, or residual parental rights. [Wis. Stat. § 48.02(12)]

10. Can the authority to make educational decisions reside with the parent as a residual parental right even if a legal custodian or a guardian has been appointed?

Answer: Yes, depending on the court order.

11. If the DCF is the child's guardian, can DCF identify the foster parent as a person acting as a parent of a child?

Answer: Yes, if the foster parent does not receive public funds to care for the child that exceed the cost of caring for the child.

12. Can it be assumed that public funds received by an out-of-home care provider to care for a child never exceed the cost of the child's care?

Answer: Yes.

13. Is an out-of-home care provider (including a foster parent) considered a parent under Wisconsin's pupil records law (Wis. Stat. § 118.125)?

Answer: No, unless a court has specifically granted the out-of-home provider those rights by court order.

Surrogate parent is appointed to protect the rights of a child with a disability. [Wis. Stat. § 115.792(1)(a)2.]
A surrogate parent **cannot** be an employee of:

- The Department of Public Instruction
- A Cooperative Educational Service Agency (CESA)
- The local educational agency
- Any other agency that is involved in the education or care of the child

A surrogate parent should be appointed by the LEA:

- Whenever the child's parents are not known
- The local educational agency cannot, after reasonable efforts, locate the child's parents
- The child is a ward of the state. If the child is a ward of the state, a judge overseeing the child's care may also appoint a surrogate for the child's parents if the surrogate meets the requirements above.

Questions

14. Can an employee of any agency (state, county, tribal, or private) that placed the child in out-of-home care be appointed as a surrogate parent?

Answer: No. Wis. Stat. § 115.792(1)(a)2. specifically states that an employee of any agency

that is involved in the care of a child cannot serve as a surrogate parent for the child. An agency which places a child in out-of-home care must have the authority to make such a placement and has, therefore, by definition, a responsibility to care for the child.

15. Can an employee of any agency (state, county, tribal, or private) that is responsible for the care of the child be appointed as a surrogate parent?

Answer: No. Wis. Stat. §§ 115.792(1)(a)2. specifically states that an employee of any agency that is involved in the care of a child cannot serve as a surrogate parent for the child.

16. Can a DCF adoption caseworker who is responsible for the child be a surrogate parent for the child?

Answer: No. Wis. Stat. § 115.792(1)(a)2. specifically states that an employee of any agency that is involved in the care of a child cannot serve as a surrogate parent for the child.

17. Can a foster parent (or other out-of-home care provider) be appointed a surrogate parent for the child?

Answer: Yes, if the procedural safeguards under Wis. Stat. § 115.792(1)(a)2. are met and if the foster parent has an ongoing, long-term parental relationship with the child, is willing to make the educational decisions that are required of a parent, and has no interests that would conflict with the interests of the child. [Wis. Stat. § 115.76(12)(a)10.] If the child is a ward of the state, the surrogate parent may be appointed by the school district or a judge overseeing the child's care.

IEP Team consists of all of the following:

1. The parents of the child [Wis. Stat. § 115.78(1m)(a); 34 CFR 300.321(a)(1)]
2. At least one regular education teacher of the child if the child is, or may be, participating in a regular education environment [Wis. Stat. § 115.78(1m)(b); 34 CFR 300.321(a)(2)]
3. At least one special education teacher who has recent training or experience related to the child's known or suspected area of special education needs or, where appropriate, at least one special education provider of the child [Wis. Stat. § 115.78(1m)(c); 34 CFR 300.321(a)(3)]
4. A representative of the local education agency:
 - a. Who is qualified to provide or supervise the provision of special education
 - b. Who is knowledgeable about the general education curriculum, and
 - c. Who is knowledgeable about and authorized to commit the available resources of the local educational agency (who may be another member of the IEP team if the criteria are met) [Wis. Stat. § 115.78(1m)(d); 34 CFR 300.321(a)(4)]
5. An individual who can interpret the instructional implications of evaluation results, who may otherwise be a team member [Wis. Stat. § 115.78(1m)(e); 34 CFR 300.321(a)(5)]
6. An appropriate therapist if the child is suspected to need occupational therapy or physical therapy or both [Wis. Adm. Code § PI 11.24(7)(e); 34 CFR 300.321(a)(6)]
7. A DPI-licensed speech or language pathologist when documenting a speech or language impairment and the need for speech or language services [Wis. Adm. Code § PI 11.36(5)(e); 34 CFR 300.321(a)(6)]
8. At the discretion of the parent or local educational agency, other individuals who have knowledge or special expertise about the child, including related services personnel as appropriate. The determination of the individual's knowledge or special expertise is made by the party (parents or public local educational agency) who invited the individual to be a member of the IEP team [Wis. Stat. § 115.78(1m)(f); 34 CFR 300.321(a)(6) and (c)]
9. Whenever appropriate, the child [Wis. Stat. § 115.78(1m)(g); 34 CFR 300.321(a)(7)]
10. At least one person designated by the school board of the child's school district of residence who has knowledge or special expertise about the child when the student is attending a public school in a nonresident school district under Full-Time Open Enrollment Law, or a tuition waiver under Wis. Stat. § 121.84(1)(a) or (4). [Wis. Stat. § 115.78(1m)(h)]

In addition to the above members, the local educational agency invites the following:

11. To the extent appropriate, a representative of any participating agency that is likely to be responsible for providing or paying for transition services, if the parents or the child who has reached the age of majority provides consent [34 CFR 300.321(b)(3)]
12. The student, when the purpose of the meeting will be consideration of the postsecondary goals for the child and the transition services needed to assist the child in reaching those goals. If the student does not attend the IEP Team meeting, the local educational agency takes other steps to ensure consideration of the student's preferences and interests. [34 CFR 300.321(b)(1) and (2)]
13. If requested by the parent, at the initial IEP Team meeting for a child previously served under Part C, the Part C service coordinator or other representatives of the Part C system will be invited [34 CFR 300.321(f)]

Questions

18. Who may invite someone with knowledge or special expertise about the child to an IEP meeting? Must the parent approve?

Answer: Either the parent or the LEA may invite a person described in Wis. Stat. §

115.78(1m)(f) to participate on the IEP team without the approval of the other party. However, if the person with knowledge or special expertise about the child is not allowed access to pupil records under Wis. Stat. § 118.125(2), such as an out-of-home care provider, then that person can participate in the IEP team meeting only with the consent of the parent. To be clear, the parent has the authority to prevent the person’s participation by virtue of the parent’s authority to provide or not provide consent to share information; the parent does not have the authority to prevent the person’s participation because the parent disagrees with the LEA’s determination that the person has knowledge or special expertise about the child.

[IDEA Complaint Decision 12-054 re: Racine Unified School District; Dec. 13, 2012; DPI]

19. Would the child’s caseworker or foster parent be considered “other individuals who have knowledge or special expertise about the child”?

Answer: Yes. However, this determination would have to be made by the inviting party.

20. If parents retain their parental rights, can the court under Ch. 48 appoint someone to allow the school to assess the child for purposes of an IEP?

Answer: No. Only the parent can approve this. *[Wis. Stat. §§ 115.777(3)(e) and 115.76(12)]*

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