



Understanding Guardianships, Legal Custody, and Physical Custody for School Professionals in Wisconsin

Purpose

While parents usually retain legal authority over important decisions regarding their children, there are sometimes exceptions made by the court. This document outlines basic information about public and private guardianships, legal custody, and physical custody in Wisconsin to assist school professionals in supporting students and families. After definitions are described, some common questions and answers related to educational decision-making authority are discussed.

This document is intended as a guide for local educational agencies and community partners. This document is intended solely to provide general information, and nothing written here shall be understood to constitute legal advice or a legal service. For specific legal advice, an attorney should be consulted.

Additional considerations related to this topic can be found in the following DPI Resources:

- [Educational Services Frequently Asked Questions \(FAQ\)](#)
- [Frequently Asked Questions \(FAQ\) Related to the Definitions, Roles, and Responsibilities of Parents, Persons Acting as the Parent of a Child, and Surrogate Parents](#)
- [Parent Consent Requirements When Parents Who Share Legal Custody Do Not Agree Bulletin](#)
- [Student Records and Confidentiality](#)
- [DPI's Guide to Adult Services](#)
- [DPI's Information Update Bulletin 19.01 Supported Decision-Making Agreements.](#)
- [Administration of Medications in WI Schools](#)

Types of Private Minor Guardianships ([Wis. Stat. § 48.9795](#))

Guardianship is a legal relationship in which one party is empowered to act for the benefit of another (Kids Matter Inc. n.d.). A guardian is given the legal authority to make important decisions about the child's life, such as their education, medical needs, shelter, and more. Guardianship transfers the decision-making authority and legal responsibility of the child to the guardian; however, parents' rights are not terminated. Parents may still make decisions regarding any rights not given to the guardian. The court order will specify which rights and duties are transferred to the guardian. Guardianship is different from adoption where parents' rights are terminated. *Note:* Placement of a child with a foster parent, or other out-of-home care provider, does not mean that the foster parent has been granted guardianship of the child.

Full Guardianships

- This type of guardianship transfers all the decision-making authority and duties to the child's new guardian that other full guardians have under Ch. 48, absent any other type of order that may limit the guardian's authority, such as a visitation order for the child.
- There is no requirement to set an expiration date for a full guardianship; so, unless a lesser period of time is provided, it will continue until the child's 18th birthday unless the child marries or the guardianship is otherwise terminated.

Limited Guardianships

- This type of guardianship transfers specific, limited duties and decision-making authority to the new guardian and may allow the child's parent to maintain certain duties and/or decision-making authority for the child.



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- Under limited guardianships, the court must specify the duties of the guardian and parent(s) and must identify an expiration date of the guardianship, which may be extended.

Temporary Guardianships

- This type of guardianship allows for the transfer of specific, limited duties and decision-making authority when the child's particular situation, including the inability of the child's parent to provide for the care, custody, and control of the child for a temporary period of time, requires the appointment of a temporary guardian.
- Temporary guardianship can be ordered for up to 180 days, with the option to extend the temporary guardianship for an additional 180 days with good cause.
- The court must limit the authority to those acts reasonably related to the need for guardianship.

Emergency Guardianships

- This type of guardianship may be put into effect when the child's welfare requires the immediate appointment of an emergency guardian, and the court must limit their authority to those acts reasonably related to the reasons for the appointment.
- This type of guardianship can be ordered for up to 60 days and provides limited decision-making authority to the guardian.

Child Welfare Guardianships

Public Guardianships Specific to Child in Need of Protection or Services (CHIPS)/ Juvenile in Need of Protection or Services (JIPS) Proceedings ([Wis. Stat. § 48.977](#))

- Public guardianships specific to CHIPS/JIPS proceedings require that the child has been adjudged to be in need of protection or services under specified grounds in order to petition for the appointment of a guardian. Under this section, the appointed person might have full guardianship, or the court can order that the guardianship be limited to only certain duties and decision-making authority. *Note:* Placement of a child in out-of-home care does not mean that the foster parent or out-of-home care provider has guardianship of the child.

Post-Termination of Parental Rights Guardianship ([Wis. Stat. § 48.427](#))

- Guardianship could be transferred to a county department, the state, a child welfare agency, or under some circumstances, an individual. For public adoptions, guardianship is generally transferred to the state (the Wisconsin Department of Children and Families) at the time of termination of parental rights (TPR) before an adoption is finalized with an individual.

Adult Guardianships under Chapter 54

- An adult who is unable to make personal or financial decisions may need a guardian. Guardianship laws in Chapter 54 explain that a person needing assistance with decision-



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making should have this done with methods that are "least restrictive" to personal liberty and their ability to exercise their rights. Parents and others do not automatically become guardians of an individual with a disability when they turn age 18. In order to have a legally authorized decision-maker for another person, the court must be petitioned for a guardian to be appointed. Guardianship under Chapter 54 can be complex, and the court has the ability to limit guardianship to very specific decision-making authority.

- For more information about Adult Guardianships, please see [DPI's Guide to Adult Services](#).
- **Supported decision-making agreements** - Guardianship is only one option for adult students with a functional impairment. Supported decision-making agreements are an alternative to guardianship, and provide an additional option for individuals and families seeking assistance with life decisions. Supported decision-making agreements permit an adult student, at least 18 years of age, with a functional impairment to enter into a written agreement with a supporter(s) of their choosing to help them gather information, understand their options, and communicate their decisions to others. Local education agencies (LEAs) are required to provide students and their parents with information on supported decision-making under Chapter 52 of the Wisconsin Statutes, other alternatives to guardianship, and strategies to remain engaged in the student's secondary education.
- For more information about Supported Decision-Making Agreements, please see DPI's [Information Update Bulletin 19.01 Supported Decision-Making Agreements](#), and [Supported Decision-Making: Because Choices Matter](#).

The Distinction between Legal Custody and Physical Custody

- "Legal custody" means a legal status created by the order of a court, which 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, duties, and responsibilities of the guardian of the child and subject to any residual parental rights and responsibilities and the provisions of any court order. [Wis. Stat. § 48.02\(12\)](#).
- "Physical custody" means actual custody of the person in the absence of a court order granting legal custody to the physical custodian. For a child in out-of-home care, legal custody is generally held with the parent but could also be with the child welfare agency or another individual. Physical custody is held with the person with whom the child is living (e.g., the out-of-home care provider), [Wis. Stat. § 48.02\(14\)](#).
- "Physical placement" means the condition under which a party has the right to have a child physically placed with that party and has the right and responsibility to make, during that placement, routine daily decisions regarding the child's care, consistent with major decisions made by a person having legal custody." [Wis. Stat. § 767.001\(5\)](#).



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Questions and Answers Relating to the Educational Decision-Making Authority of Parents, Guardians, and Custodians

1) What rights are afforded to parents under the 14th Amendment to the United States Constitution?

Under the due process clause of the 14th Amendment, parents have a fundamental right to make decisions concerning the care, custody, and control of their children, including the right to direct the upbringing and education of children under their control. However, that right is neither absolute nor unqualified. Parents do not have a fundamental right to direct how a public school teaches their child or to dictate the curriculum at the public school to which they have chosen to send their child. (*Larson v. Burmaster*, 2006 WI App 142, 295 Wis. 2d 333, 720 N.W.2d 134.)

2) Who may enroll a student in school when a parent or guardian is not available?

State law does not specify who may enroll a child in school. A school district's obligation to enroll a student is based on the student's residency, not based on who may be engaging in the actual enrollment process on behalf of the student. [Wis. Stat. § 121.77\(1\)](#). A school district may deny education services only if a student is not a resident of the district or if a student is currently expelled from another Wisconsin public school district. [Wis. Stat. § 120.13\(1\)\(f\)](#).

It should also be noted that compulsory attendance laws state that "any person having under control a child... shall cause the child to attend school...". [Wis. Stat. § 118.15\(1\)\(a\)](#). Further, when a pupil has withdrawn from the recovery charter school, a school board shall "[p]rovide assistance to a person who has control over the pupil to meet the requirements under s. 118.15". [Wis. Stat. § 120.12\(26\)\(a\)](#).

A district might wish to create a process for situations that arise when the parent or guardian is not present at enrollment, including what steps to take if a child welfare professional, out-of-home care provider, or other non-parent/guardian wishes to enroll a child. The district also has an obligation under the McKinney-Vento Homeless Assistance Act to enroll an unaccompanied homeless youth immediately, even before the district obtains necessary enrollment documents, such as proof of age.

Additional information regarding residency can be found in [DPI's Clarification Regarding Residency; Constitutional Requirements, Compulsory Attendance and Fiscal Implications for Students Living Away From Their Parents](#).

3) What is the difference between a guardian and a custodian?

The main difference between guardianship and custody is that guardianship is given to a non-biological parent, and custody is provided to the child's biological parents. Guardianship refers to a legal relationship in which one party is empowered to act for the benefit of another (*Kids Matter Inc. n.d.*). Custody of a child is generally granted to one or both of the child's parents based upon a number of factors. In general, guardians are appointed to care for a child if a child's parents become incapable of doing so.



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4) Does physical custody include the authority to make educational decisions?

No. Physical custody simply means actual custody of the child “. . . in the absence of a court order granting legal custody to the physical custodian.” [Wis. Stat. § 48.02 \(14\)](#).

5) Does legal custody include the authority to make educational decisions?

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\(12\)](#).

6) 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?

Yes, depending on the court order.

7) Does a Guardian ad Litem (GAL) have the same authority as a guardian?

No. The GAL has none of the rights or duties of a general guardian. [Wis. Stat. § 48.235\(3\)\(a\)](#). The guardian ad litem is an attorney who may be appointed by a court in certain proceedings to advocate in the best interest of the child. [Wis. Stat. § 48.235\(2\)](#). Parents may be asked to sign a release authorizing the GAL to review relevant records, such as school, medical, or mental health records.

8) Does state law grant educational decision-making authority to Public Defenders or Court Appointed Special Advocates (CASA)?

No. A Public Defender is an attorney appointed through the Wisconsin State Public Defender's Office for a child 12 years or older. This attorney advocates on behalf of the child and represents the child in court proceedings. Public defenders may ask parents or guardians to provide written authorization allowing them to access pupil records. They may also seek a court order for this purpose.

A CASA is a volunteer or employee of a court-appointed special advocate program who has been selected and trained and who may be appointed by a court in certain proceedings to advocate in the best interest of the child. [Wis. Stat. § 48.236\(2\)](#). The court may issue a court order granting access by a CASA to specific records, including pupil records. [Wis. Stat. § 48.236\(4\)](#).

9) Who has the authority to make decisions related to special education evaluations and services?

Parents retain the right to make decisions related to special education evaluation and services except for when specifically denied this right by a court. *Note:* Circumstances such as incarceration do not in and of themselves indicate that a parent has been denied this right.

Additional considerations related to the authority of parents, guardians, and custodians to make decisions for purposes of special education may be found in the following DPI resources: [Frequently Asked Questions \(FAQ\) Related to the Definitions, Roles, and Responsibilities of Parents, Persons Acting as the Parent of a Child, and Surrogate Parents](#), and [Parent Consent Requirements When Parents Who Share Legal Custody Do Not Agree Bulletin](#).



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10) Who, other than a parent or guardian, has the authority to authorize field trips and other age or developmentally appropriate extracurricular, enrichment, cultural, and social activities?

- a) Out-of-Home Care Providers - An out-of-home care provider, under the [Reasonable and Prudent Parent Standard](#), may “. . . make decisions concerning a child’s participation in age or developmentally appropriate extracurricular, enrichment, cultural, and social activities. . .” [Wis. Stat. § 48.383\(1\)](#). This may include, but is not limited to, granting permission for field trips and participating in sports. If reasonably possible to do so, a child’s parents will be consulted and advised that the child’s cultural, religious, and tribal values will be considered but that these values will not necessarily be the determining factor in making decisions concerning the child’s participation in those activities. [Wis. Stat. § 48.383\(2\)\(a\)\(1\)](#).
- b) Unaccompanied Homeless Youth - Because the [McKinney-Vento Homeless Assistance Act](#) defines enrollment as “attending classes and participating fully in school activities,” school districts must develop policies not only related to enrolling unaccompanied youth but also related to determining who can sign for activities as part of a student’s ongoing school participation.

11) Who has the ability to authorize medical care in schools?

Generally, a parent or guardian retains the right to consent; however, a parent or guardian may sign a consent form authorizing the out-of-home care provider to consent to routine and/or emergency medical care, or in some cases, a court order may provide other authority to consent to medical care. This may include the administration of over-the-counter drugs and some or all prescription drugs. School districts should consult the child welfare agency regarding the authority of the out-of-home care provider to consent to routine and/or emergency medical care.

Full legal guardianship allows the caregiver to make legal decisions and sign paperwork for a child, such as school and medical documents. For other levels of guardianship, the court must specify authority to authorize and access information related to medical care in the court order.

For more information regarding the administration of medication, please see the DPI document entitled [Administration of Medications in WI Schools](#).

12) When a student has been removed from the home, should parents be involved in the student’s educational experience?

Yes, unless there are compelling safety or legal reasons to specifically exclude parents from school involvement. These decisions should be made in light of any court order and in consultation with child welfare professionals.

When children are removed from the home for child welfare concerns, parents often retain many educational rights, including the right to access pupil records school information and to attend conferences and events. Parents may even be required by the court to show their interest and involvement with their child’s education as part of their conditions for regaining placement or custody. Most children removed from their homes have reunification as a goal, which means they will return home to live with one or both parents, legal guardian, or Indian Custodian in the future.



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Best practice often means that both the parents and other adult caregivers (with appropriate authorizations) should be included in the student's educational experience to the extent possible in the best interest of the student. Schools are encouraged to review their policies and practices relating to engaging parents and other caregivers in a way that prioritizes the student's best interests.

13) Who has the authority to access pupil records?

Information related to access and disclosure authority of pupil records in Wisconsin can be found in the DPI publication, [Student Records and Confidentiality](#).

References

Kids Matter Inc. n.d. "Types of Guardianships in Wisconsin." Accessed January 26, 2022. <https://kidsmatterinc.org/legal-help/guardianship/>.

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