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SURROGATE PARENTS

**A Review of Legal
Requirements, Roles,
and Responsibilities
of Surrogate Parents
in the Public School
System**

2 Surrogate Parents

Who exactly is a surrogate parent?

A surrogate parent is an individual appointed by the school district to represent the interests of a child when another parent cannot be identified.

So who qualifies as a “parent” for purposes determining if a “parent” cannot be identified?

Under federal law, a “parent” is defined as:

- A biological, adoptive, or foster parent of a child;
- A guardian authorized to act as the child’s parent, or authorized to make educational decisions
- 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 is legally responsible for the child’s welfare
- A surrogate parent

-34 C.F.R. § 300.30

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That’s a broad definition!

That is is a broad definition, and extends far beyond the scope of what most people would otherwise consider to be a “parent.” Any person who qualifies as a parent (including a surrogate parent) has the procedural rights and protections of a parent under the IDEA, including the right to request a due process hearing.

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Who qualifies to be a surrogate parent?

- **To be a surrogate parent, the individual must not be an employee of the SEA, the school district that is appointing the surrogate, or any other agency that is involved in the education or care of the child.**
- **The individual must also have no personal or professional interest that conflicts with the interests of the child, and must have knowledge and skills to ensure adequate representation of the child.**

-34 C.F.R. § 300.519 (d).

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Wait, does that mean that a school district cannot compensate a surrogate in any way?

No, if a school district decides to compensate a person for serving as a surrogate, then the surrogate parent is not considered to be an employee of the district just for that reason. If, however, the proposed surrogate was employed by the district prior to the surrogacy, then that person does not qualify to act as a surrogate. -34 C.F.R. § 300.519(e)

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When should a surrogate parent be appointed?

A surrogate parent should be appointed if:

- (a) No parent can be identified;**
- (b) The public agency, even after reasonable efforts, cannot locate a parent;**
- (c) The child is a ward of the State; or**
- (d) The child is an unaccompanied homeless youth.**

-34 C.F.R. § 300.519(a)

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What is a "Ward of the State"?

A ward of the state is a child who is in the custody of the State or county.

However, when the child has a foster parent, the student is not considered to be a "ward of the state," even though the child is in the custody of the State or county. Similarly, if the biological parents maintain the rights to make educational decisions of the child, the child is likewise not a ward of the state. -S.D. Admin. Rules § 24:05:13:01

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Is there anything different about surrogates for homeless youth?

In the short term, yes. In the case of homeless youth, appropriate staff of emergency shelters, transitional shelters, independent living programs, and street outreach programs may be appointed as temporary surrogate parents (regardless of whether or not the temporary surrogate is an employee of the state, the school district, or any other agency that is involved in the care or education of a child). Once a permanent surrogate can be identified that meets all of the surrogate parent requirements, that surrogate will assume responsibility. -34 C.F.R. § 300.519 (f)

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Who appoints a surrogate parent?

The school district appoints a surrogate parent--- specifically for South Dakota, the superintendent or his designee shall appoint surrogate parents. Alternatively, the court handling the child's case may also appoint a surrogate. However, the district must not rely on this to delay appointing a surrogate on its own.

**-34 C.F.R. § 300.519(b)
-S.D. Admin Rules § 24:05:30:15**

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When must a surrogate parent be appointed?

A surrogate parent should be appointed within 30 days of the date that the school district determined that a surrogate parent was needed. However, if a surrogate parent is needed to represent the student before that 30 days, then a surrogate should be assigned more quickly.

-34 C.F.R. § 300.519(h); S.D. Admin Rules 24:05:30:15

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Once the surrogate parent is appointed, are there training requirements?

Yes, there are. The newly assigned surrogate has to complete a training program in accordance with the South Dakota Department of Education guidelines.

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Who provides the training?

The school district is responsible for the training and certification of surrogate parents and must maintain a list of people who may serve as surrogate parents.

-S.D. Admin. Rule §24:05:30:15

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What are the responsibilities of the surrogate parent?

A surrogate parent is responsible for representing the child, including:

- 1. Representing the student with disabilities in educational decision making;**
- 2. Granting or denying permission for initial evaluation or placement based upon the child's individual needs;**
- 3. Identification of the need for the child to receive special education services;**

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Responsibilities, continued

4. **Participate in the design of the child's individualized education program, including placement;**
5. **Ongoing reviews of educational progress;**
6. **When necessary, initiate mediation, complaints, resolution session, and due process hearings**

-South Dakota Department of Education
Surrogate Parent Manual, January 2008

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What rights do surrogate parents have?

Once appointed, a surrogate parent has all of the rights under the IDEA as any other person who qualifies as a "parent." This includes the right to represent the child in all matters relating to identification, evaluation, and educational placement of the child and the provision of a Free Appropriate Public Education (FAPE). It also includes the right to request a special education due process hearing. -34 C.F.R. § 300.509(g)

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If a surrogate parent requests a due process hearing, could they recover their attorney's fees if they prevail?

Yes. Since a surrogate parent meets the legal requirements to be considered a "parent" under the IDEA (assuming they met all the training requirements), they also would have a right to reasonable attorneys fees, just as any other parent would.

-Letter to Copenhaver, 29 IDELR 1091 (OSEP 1997).

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Don't surrogate parents have a conflict of interest if they get paid by a state agency involved in the care and education of the child?

Excellent question! There is a specific exception for foster parents under S.D. Admin. Rules 24:05:30:15 that states that a foster parent is not deemed to have a financial conflict of interest by virtue of serving as a foster parent in that home. This serves as an exception to the general rules related to conflict. School districts do have a responsibility to develop procedures to analyze whether a foster parent has an interest that conflicts with the child's interest.

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What kind of compensation may be provided to a surrogate parent?

A surrogate parent may receive reimbursement for in-state travel to attend meetings regarding the student. The compensation is subject to the school district's fiscal rules.

-South Dakota Department of Education
Surrogate Parent Manual, January 2008

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Do all children in foster care automatically require a surrogate parent?

Not necessarily. The answer is dependent on the court order related to placement in foster care. If the court order specifies that the biological or adoptive parent has no authority to make educational decisions for the child, then a surrogate parent must be appointed. If, however, the parent has retained legal authority to make educational decisions despite a (generally temporary) foster care status, then there is no need to appoint a surrogate. -Letter to Caplan, 58 IDELR 139 (OSEP 2011)

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How long do surrogate parents serve?

A surrogate parent may fill the role as long as he or she meets the qualifications and represents the student in legal matters. If the student moves, is dismissed from special education, or assigned a legal guardian, then a surrogate parent is no longer required.

A surrogate parent may also terminate serves by writing a letter to the superintendent of the school district in which the student receives special education services.

-South Dakota Department of Education
Surrogate Parent Manual, January 2008

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Is a surrogate parent liable if something goes wrong while performing surrogate duties?

A surrogate parent is immune from suit when acting in the capacity of a surrogate, except for acts and omissions that are grossly negligent, wanton, reckless, or malicious.

-SDCL 13-37-27

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Examples

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Question:

We are having a meeting of Paula's IEP Team this afternoon and just discovered that she will need to have a surrogate parent at the meeting. We haven't yet appointed a surrogate—could we ask the school counselor to serve in that role so we don't have to delay the meeting?

Answer:

No. Remember that to be a surrogate parent, the individual must not be an employee of the SEA, the school district that is appointing the surrogate, or any other agency that is involved in the education or care of the child.

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Question:

Same question—but could we ask the private therapist/counselor to serve in that role so we don't have to delay the meeting?

Answer:

It depends. Remember that to be a surrogate parent, the individual must not be an employee of the SEA, the school district that is appointing the surrogate, or any other agency that is involved in the education or care of the child. This may also be an ethical conflict of interest.

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Question:

The social worker assigned to the child's case wants to serve as the child's surrogate parent. She says that she has authority by court order to make medical decisions. Won't that apply to educational decisions, as well?

Answer:

No. The social worker cannot serve as the surrogate parent. To be a surrogate parent, the individual must not be an employee of the SEA, the school district that is appointing the surrogate, or any other agency that is involved in the education or care of the child.

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Question:

Sally Student lives with Frank Foster Parent. Can Frank be appointed as the surrogate for Sally? Can Frank sign consent to allow for a special education evaluation and initial placement in special education?

Answer:

It depends. Does Frank have a conflict of interest? Have you made that decision in conformity with the school district's procedures? There is a specific exception for foster parents under S.D. Admin. Rules 24:05:30:15 that states that a foster parent is not deemed to have a financial conflict of interest by virtue of serving as a foster parent in that home. If a proper surrogate, Frank can sign consent for evaluation and placement.

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Question:

Even though Sally Student lives with Frank Foster Parent, her biological parent lives in the community. Do we have an obligation to track down the biological parent instead of appointing Frank as a surrogate?

Answer:

Again, it depends. Have the rights of the biological parent been terminated by a court order? Is Sally a Ward of the State? Remember that a surrogate is to be appointed when no parent can be identified; the public agency, even after reasonable efforts, cannot locate a parent; the child is a ward of the State; or the child is an unaccompanied homeless youth.

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Question:

Does Frank Foster Parent get a right of first refusal as a surrogate parent? In other words, do we have to offer him the opportunity to be the surrogate before looking at other options?

Answer:

Although there is no specific right of refusal, the superintendent or designee should consider the special knowledge that the foster parent already has about the child's educational needs when making the surrogate parent selection.

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Question:

Why can't we just ask Frank to sign the IEP Team paperwork? Do we have to appoint him as a surrogate? Why can't we just call him the parent and be finished with it?

Answer:

The answer is dependent on the court orders and whether the foster parent meets the definition of a "parent" under the federal regulations. If the foster parent does not meet the definition of a "parent" and there is no other "parent" available, then a surrogate must be appointed despite the child's status in foster care.

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Questions & Answers

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