SQUIRES, WALDSPURGER & MACE, P.A.

333 South Seventh Street, Suite 2800
Minneapolis, MN 55402
Office (612) 436-4300
Fax (612) 436-4340
www.raswlaw.com

THE PARENT PUZZLE: IDENTIFYING THE DECISION-MAKER AND NAVIGATING DIFFICULT DYNAMICS

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Liz J. Vieira
liz.vieira@raswlaw.com

I. CUSTODY AND PARENTAL CONSENT

A. Definitions

1. **"Legal custody"** means "the right to determine the child's upbringing including education, health care, and religious training." Minn. Stat. § 518.003, subd. 3(a). The parent who has "legal custody" has most, but not necessarily all, parental rights.

2. **"Physical custody"** means "the routine daily care and control of the residence of the child." Minn. Stat. § 518.003, subd. 3(c).

3. **Joint Custody.** Depending on the custody arrangement or divorce decree, parents may share custody of their minor children. In such cases, the parents are said to have "joint custody" of the children. There are two types of joint custody: joint legal custody and joint physical custody.

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a. **"Joint legal custody"** means "both parents have equal rights and responsibilities, including the right to participate in major decisions determining the child's upbringing, including education, health care, and religious training." Minn. Stat. § 518.003, subd. 3(b).

b. **"Joint physical custody"** means "the routine daily care and control and the residence of the child is structured between [the parents]." Minn. Stat. § 518.003, subd. 3(d).

4. **Guardian.** A court may appoint a person as a guardian upon the termination of parental rights, or upon the death of both parents.

a. If a child has a court-appointed guardian, the guardian has "legal custody" of the child, unless a court order specifically grants legal custody to another person. Minn. Stat. § 524.5-207 (guardian has powers of a parent whose rights have not been terminated).

b. A "guardian" is different from a "guardian ad litem" or "GAL," which is a court-appointed person who advocates for a child's interests in legal proceedings. A GAL has no legal authority in connection with schools.

5. **Foster Care Placement.** Placement in foster care may be either voluntary or involuntary.

a. **Voluntary Placement.** A parent who voluntarily places their child in foster care does not automatically give up or lose legal custody of the child. Minn. Stat. § 260D.01(e)(3).

b. **Involuntary Placement.** If a child is found to be in need of protective services and is placed in foster care without the parents' consent, "legal custody" of the child may transfer to the local foster care agency. Minn. Stat. §§ 260C.301, subd. 4; 260C.515. Involuntary foster care placements may occur if:

i. A court terminates parental rights;

ii. A permanent transfer of care, custody, and control occurs, in which case the court order will typically outline the parents' remaining rights, if any; or

iii. A temporary transfer of care, custody, and control occurs, in which case the parent's right to access information about the child is typically unaffected.

6. **Stepparent.** Unless a stepparent legally adopts a stepchild, the stepparent has no parental rights regarding the child. *See* Minn. Stat. § 259.59.

7. **Parent.** The meaning of the term "parent" varies depending on the legal context in which it is used. Generally, the term "parent" refers to a biological parent, adoptive parent, or legal guardian. *See, e.g.*, Minn. Stat. § 120A.22, subd. 3; Minn. Stat. § 121A.41, subd. 6. As further discussed below, there is a specific definition for special education purposes.

B. General Parental Rights

1. **Married Parents.** In the case of children born to a married couple, both parents have physical and legal custody of their children, and all parental rights are enjoyed equally by both parents.

2. **Divorced Parents.** Unless a court determines otherwise and makes specific findings to that effect, each parent has the following rights upon divorce regardless of which parent is awarded physical custody of the child:

   a. Each party has the right to access and receive copies of school, medical, dental, religious training, and other important records and information about the minor child.

   b. Each party has the right to access information regarding health or dental insurance that is available to the minor children.

   c. Each party must keep the other party informed about the name and the address of the school that the minor children are attending.

   d. Each party has the right to be informed by school officials about the children's welfare, educational progress and status, and to attend parent-teacher conferences.

   e. In case of an accident or serious illness of a minor child, each party must notify the other party of the accident or illness, the

name of the health care provider, and the place of treatment.

f. Each party has a right to reasonable access and telephone contact with the minor children.

*NOTE: A court may waive any of the above rights if it determines that doing so is necessary to protect the welfare of a party or a child. *See* Minn. Stat. § 518.17, subd. 3(c).

3. **Unmarried Parents.** If a child's parents were never married, under the law, the mother has sole custody of the child until paternity has been established or until custody is determined in a separate proceeding. Minn. Stat. § 257.541, subd. 1. This means the mother has both legal and physical custody. With respect to the father, the following considerations apply:

   a. An unmarried father has no legal rights to the child. Being listed on the birth certificate does not change this analysis, as a birth certificate does not establish paternity.

   b. A Recognition of Parentage (ROP) would establish the legal father, but it does not give the father custody or parenting time rights, just the right to seek these things in a court action. *See* Minn. Stat. § 257.75. The ROP states and acknowledges under oath that the mother and father are the biological parents of the child and wish to be recognized as the biological parents. *See* Minn. Stat. § 257.75, subd. 1. Even after a Recognition of Parentage has been signed, unless a custody order is entered granting sole or joint custody to the father, the mother has sole custody of the child. *See* Minn. Stat. § 257.75, subd. 3**. Absent a court order establishing the father's custody or parenting time, the mother retains sole legal and physical custody**.

4. **Termination of Parental Rights.** Upon terminating a natural parent's rights, the court may place guardianship of the child with the Minnesota Commissioner of the Department of Children, Youth & Families ("DCYF"), with a licensed child-placing agency, or with an individual who is willing and capable of assuming the appropriate duties and responsibilities related to the child. *See* Minn. Stat. § 260C.325.

   a. If the Commissioner of DCYF is appointed as the "guardian," the child becomes a ward of the state.

b. Generally, upon appointment by a court, a guardian receives legal custody of the child, including the right to make educational decisions on behalf of the child. *See* Minn. Stat. § 260C.325, subd. 4.

5. **Adoption.** Adoption generally removes "parental responsibilities" from a child's biological parents and prevents the biological parents from exercising any legal rights over the child. Minn. Stat. § 259.59, subd. 1. Adoption by a stepparent does *not* terminate legal rights or responsibilities of the parent to whom the stepparent is married. *Id.* subd. 1a. Adoptive parents are "legal parents of the child with all the rights and duties" associated with being a legal parent. *Id.* subd. 1.

C. Who has the right to access educational data as the parent of a child?

1. **Legal Presumption – Equal Access to Records.** School officials must presume that both parents have an equal right to access educational data on a student, unless the school official is aware of a legally binding document to the contrary.

a. Under FERPA, school officials are required to provide a full right of access to records to *both parents* unless the school has been provided with evidence that there is a court order, state statute, or legally binding document relating to such matters as divorce, separation, or custody "that specifically revokes these rights." 34 C.F.R. § 99.4.

b. Minnesota Statutes section 120A.22, subdivision 1a, states:

> Upon request, a noncustodial parent has the right of access to, and to receive copies of, school records and information, to attend conferences, and to be informed about the child's welfare, educational progress, and status, as authorized under section 518.17, subdivision 3. The school is not required to hold a separate conference for each parent.

c. Minnesota Statues section 518.17, subdivision 3(b), generally states:

> Absent a court order with specific findings to the contrary, each parent is legally granted the right to access

records and information about the child and to be kept informed by school officials about the child's welfare, educational progress and status.

d. Minnesota Rule 1205.0500, subpart 2(B), generally states:

> A school district shall presume the parent has authority to exercise the rights inherent in the MGDPA unless the school district has been provided with evidence that there is a state law or court order governing such matters as divorce, separation, or custody, or a legally binding instrument which provides to the contrary.

2. Designating a Third Person to Access Educational Data. With increasing frequency, parents are seeking to designate a third person to access educational data on their child and to participate in educational decision-making.

a. Minnesota Statutes section 13.32, subdivision 10a, states:

> A parent or guardian of a student may designate an individual, defined under paragraph (c), to participate in a school conference involving the child of the parent or guardian. The parent or guardian must provide the school with prior written consent allowing the significant individual to participate in the conference and to receive any data on the child of the consenting parent or guardian that are necessary and relevant to the conference discussions. The consenting parent or guardian may withdraw consent, in writing, at any time.
>
> For purposed of this section, "an individual" means one additional adult designated by a child's parent or guardian to attend school-related activities and conferences.

b. The MGDPA includes a model form to meet these requirements.

D. **Delegation of Parental Authority.** Minnesota Statutes Section 524.5-211 allows a parent or guardian to temporarily delegate "any powers regarding care, custody, or property" of a minor to another person via properly executed power of attorney.

1. A DOPA cannot exceed one calendar year.

2. A parent who signs a DOPA must mail or give a copy to the other parent within 30 days of its execution, unless the other parent does not have parenting time or there is an existing order for protection.

3. A DOPA may delegate all or only limited powers of a parent, including educational rights.

II. EDUCATIONAL DECISION-MAKING

A. Which parent has the final say when divorced parents disagree on an education decision for their child? If one parent has sole legal custody, that parent has the final decision-making authority. However, parents with joint legal custody have equal decision-making ability with respect to educational decisions, absent anything in the order to the contrary.

B. Which parent has the final say when separated parents disagree on an educational decision for their child? Neither. Absent a legal separation decree or agreement or court order that provides otherwise, both parents have equal decision-making authority.

C. Does the school district need permission from both parents when joint custody is involved? Generally speaking, the answer is no. Similar to parents who are married, the permission of only one parent is generally sufficient. However, as discussed later, with respect to an initial IEP, an initial special education evaluation, or a reevaluation, the written objection of either parent can prevent the school district from proceeding. *See In the Matter of J.H. v. Northfield Public Sch. Dist. No. 659*, 2009 WL 1182199 (Minn. App. May 5, 2009).

D. What should a school district do if parents with joint legal custody disagree on an educational decision for their child? The district's response will depend on the type of educational decision that is being made and the language of any applicable school district policies, procedures, or protocols.

1. **Types of Decisions.** The following are examples of the types of decisions over which parents may disagree.

a. **Special education evaluation/reevaluation, services, or placement.** Decisions related to special education are discussed later in this outline.

b. **Field Trip Permission/Waiver.** What is the nature of the objection? If joint physical custody, who is child with at the time of the field trip?

c. **Administration of medication.** Does the district have a doctor's order?

d. **Initial Section 504 Plan.** Can the district implement the Section 504 plan and provide both parents with notice of their rights?

2. **Policy Considerations.** In developing a policy, procedure, or protocol, a school district should consider the following:

a. Social, political, financial, and educational factors. Considering these factors may afford immunity to a school official who acts in compliance with the policy, procedure, or protocol.

b. The potential consequences of proceeding based on the consent of only one parent, and the potential consequences of refusing to proceed based on the objection of only one parent.

i. As a general rule, should school districts err on the side of providing educational services pursuant to one parent's consent rather than denying them pursuant to one parent's objection?

ii. Will the student suffer any educational harm if the school district proceeds or does not proceed?

iii. Will the student's health or safety be jeopardized if the school district proceeds or does not proceed?

III. SPECIAL EDUCATION DECISIONMAKING

A. Definition of "Parent." School districts are obligated to make reasonable efforts to locate a "parent" for each special education student. In the special education context, the term "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 34 C.F.R. § 300.519 or section 639(a)(5) of the Act.

34 C.F.R. § 300.30.

B. Court Order Identifying a Parent. A court may issue an order identifying a specific person or persons to act as the "parent" of a child with a disability for purposes of IDEA. 34 C.F.R. § 300.30(b)(2).

C. County Social Workers. A county social worker does not meet the definition of "parent" under the IDEA. Although they are a "guardian generally authorized to make educational decisions for the child," the language excludes "the state" when a child is a "ward of the state."

1. When parental rights of both parents or the last living parent are terminated, a court can award guardianship to the commissioner of DCYF, a licensed child-placing agency (tribe or private adoption agency) or an individual willing and capable of undertaking the duties. Minn. Stat. § 260C.325, subd. 1.

2. Other than a few identified exceptions, "[a]ll duties, obligations, and consents not specifically reserved to the commissioner in this section are delegated to the responsible social services agency, subject to supervision by the commissioner under section 393.07." Minn. Stat. § 260C.615, subd. 2.

3. The "State" is acting through county social services agencies; in the absence of the state's authority, the county has no independent authority to act on behalf of the child. Therefore, the state, acting through the county, cannot be a "parent" for IDEA purposes.

D. Surrogate Parent. A "surrogate parent" is a person who is appointed by a school district to represent a special education student and to help ensure that the student's right to a free appropriate public education is protected.

1. **Required Efforts to Locate the "Parent."** "Reasonable efforts shall be made to locate the parent. These may be made through documented phone calls, letters, certified letters with return receipts, and visits to the parent's last known address." Minn. Rule 3525.2435.

2. **When Appointment of a Surrogate Parent is Required.** A school district is required to appoint a surrogate parent within thirty calendar days if:

   a. a parent, guardian, or conservator cannot be identified or located, or is "unavailable"

   b. the student is a ward of the Commissioner of DCYF;

   c. the parent requests in writing that the district appoint a surrogate parent; or

   d. the child is an unaccompanied homeless youth.

   See 34 C.F.R. § 300.519; *see also* Minn. Rule 3525.2440.

3. **Selection of Surrogate Parent.** Under Minnesota Rule 3525.2455, a school district must either make the information and training available to the surrogate parent or appoint a surrogate parent who has all of the following:

   a. a knowledge of state and federal requirements;

   b. a knowledge of district structure and procedures;

   c. an understanding of the nature of the pupil's disability and needs; and

d. an ability to effectively advocate for an appropriate educational program for the pupil.

4. **Removal of Surrogate Parent.** Under Minnesota Rule 3525.2450, a surrogate parent may be removed by *majority vote of the school board.* The surrogate parent must be notified of the time and place of the meeting at which a vote is to be taken and of the reasons for the proposed removal. The surrogate parent shall be given the opportunity to be heard. Removal may be for any of the following reasons:

   a. failure to perform the duties required in the team meeting and IEP process or those cited in 34 C.F. R. pt. 300;

   b. conflict of interest as referenced in 34 C.F.R. § 300.515(c)(2);

   c. actions that threaten the well-being of the assigned pupil;

   d. failure to appear to represent the pupil; or

   e. the pupil no longer needs special education and related services.

E. Initial Evaluation or Reevaluation. If either parent objects to a school district's proposal to conduct an initial evaluation or reevaluation, the school district may not proceed. Minnesota Statutes section 125A.091, subdivision 5, states:

> The district must not proceed with the initial evaluation of a child, the initial placement of a child in a special education program, or the initial provision of special education services for a child without the prior written consent of the child's parent. A district may not override the written refusal of **a parent** to consent to an initial evaluation or reevaluation.

F. Parental consent for annual IEP. Minnesota Statues section 125A.091, subdivision 3a, also uses the term parent in the singular rather than the plural. The statutes states:

> [Prior written notice must] inform the parent that except for the initial placement of a child in special education, the school district will proceed with its proposal for the child's placement or for providing special education services unless the child's **parent** notifies the district of an objection within 14 days of

when the district sends the prior written notice to the parent.

F. **Due Process Hearings.** Minnesota law states that a parent or a district is entitled to an impartial due process hearing conducted by the state when a dispute arises over the identification, evaluation, educational placement, manifestation determination, interim alternative educational placement, or the provision of a free appropriate public education to a child with a disability. *See* Minn. Stat. § 125A.091, subd. 12. It is well-established that *either* parent has the right to request a due process hearing to challenge a school district's proposed actions. *See Letter to Arnold,* 35 IDELR 297 (OSEP 1983); *See also Westside Union School District,* 35 IDELR 88 (SEA Ca. 2001). This is the case even though only one parent seeks a hearing. *See Westside Union*, 35 IDELR 88 (SEA Cal. 2001).