



Statewide Parent  
Advocacy Network

Empowering families,  
professionals, and others  
interested in the well-being  
and education of children  
and youth

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*Divorce affects everyone involved, but there are special issues that must be considered in the case of a divorce involving a child or children with disabilities.*

## **What Happens When We Disagree?**

### **Making Special Education Decisions in the Case of Divorce**

Under the Individuals with Disabilities Education Act (IDEA) and the New Jersey State Special Education Code (the Code), the parents of a child with disabilities are partners with their child's school in making decisions about their child's evaluation, eligibility, Individualized Education Program, transition to adult life, and other aspects of special education. When the district is dealing with parents who are not divorced, or single parents, the consent of one parent is all the district needs to move forward with special education decision-making. When the parents of a child with disabilities separate or divorce, special education decision-making can be more difficult both for the district and for the parents. It is critical that everyone focus on the *child's* needs in this process.

#### **Considerations for Districts:**

Districts must consider whether both parents share custody and/or decision-making authority, or if one parent has been granted the right to make decisions by either an agreement between the parents or a court order. Do they send notices about meetings or changes to both parents, or to one parent? Do they invite both parents, or just one parent, to the IEP meeting? Do they need to get consent for evaluation or the initial IEP from both parents, or just one parent?

#### **Considerations for Parents:**

Parents must consider issues about special education decision-making in the separation or divorce proceedings. Must both parents consent to special education decisions? Will one parent have the right to make those decisions, and if so, must they consult with the other parent? What must that consultation consist of? And if both parents retain the rights to make special education decisions, what happens if they disagree? What happens if one divorced parent wants to bring their boyfriend/girlfriend/new spouse to the special education meeting?

#### **Importance of Specifying Decision-Making Rights in Agreements/Court Orders:**

Both parents of a child with disabilities have the legal right to make special education decisions for their child unless that right is revoked by a court order or a settlement agreement. That is why it is so important for the divorce decree/settlement agreement/custody agreement to be very specific about special education decision-making.

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If these documents are not specific, then both parents will continue to have the right to attend, participate in, and make decisions about their child's special education services.

### Joint Legal Custody:

Even if one parent has sole physical custody, if the parents have joint legal custody (which is the typical arrangement), both parents have the right to attend meetings, receive the same reports, have the same procedural safeguards to request mediation or due process, and agree or disagree with IEP services or placements. In these cases, both parents also have the right to bring someone with them to the IEP meeting, even if the other parent objects to that person attending the IEP meeting, unless the other parent has obtained a court order prohibiting that person from attending the meeting. If the parents disagree, then the district can move forward with consent from one parent, but the other parent has the right to challenge that decision in mediation or a hearing.

### Sole Legal Custody:

However, if one parent has sole legal custody (not just physical custody), or has a settlement agreement or court order explicitly giving them the right to make special education decisions, then they are the only ones who can consent to or withhold consent for special education services. The district has the right to ask to see that settlement agreement or court order so that they can be sure that they are acting properly under the law and providing both parents with their rights to make decisions on behalf of their child.

Separation and divorce is difficult both for parents and for children, especially children with disabilities. It is critical for separated or divorced parents to do their best to work together to minimize disputes and to come to agreement over their child's special education services. For assistance with your child's special education services, contact SPAN at 800-654-SPAN (7726) or go to [www.spanadvocacy.org](http://www.spanadvocacy.org).

### The Role of the Student:

Regardless of who has custody or the right to make educational/special education decisions, a child with a disability must be invited to any meeting in which transition to adult life will be discussed. Both parents must work together to encourage and support the active development of self-advocacy skills. Early participation in the IEP process prepares students for the transition of decision-making rights to them once they turn age 18.

### How does IDEA define "parent"?

Section 300.30 of the IDEA regulations define parent as "(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 parents, 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 Section 300.519 or section 639(a)(5) of the Act." The regulations further provide that "(b)(1)...the biological or adoptive parent, when attempting to act as the parent under this part and when more than one party is qualified...to act as a parent, must be presumed to be the parent...unless the biological or adoptive parent does not have authority to make educational decisions for the child." It continues, "(d)92) if a judicial decree or order identifies a specific person or persons...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..." (Authority: IDEA. 20 USC 1401 (23))

### Learn more:

Federal regulations defining "parent" can be found at 34 CFR 300.30.

NJ State regulations defining "parent" can be found at NJAC 6A:14-1.3.

When Parents of Children with Disabilities Divorce:

[http://www.americanbar.org/content/newsletter/publications/gp\\_solo\\_magazine\\_home/gp\\_solo\\_magazine\\_index/parentsdivorce.html](http://www.americanbar.org/content/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/parentsdivorce.html)

Who is the Parent? Guidance From Case Law on Parental Participation in the IEP Process, Teaching Exceptional Children, Vol. 38, No. 3, pp.144-150 (2015):

<http://journals.sagepub.com/doi/pdf/10.1177/0040059915605800>



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