

# Divorce and Special Education Law: A Primer for Family Law Attorneys and Divorced Parents of a Child with a Disability

*Although the United States divorce rate is falling,<sup>1</sup> divorce rates run much higher for couples that have a child with special needs.<sup>2</sup> Family law practitioners and their clients need to be aware of what parental rights are under the Individuals with Disabilities Education Act (IDEA) and under Section 504 of the Rehabilitation Act (Section 504) when drafting a divorce decree to ensure a child's special education interests are appropriately addressed.<sup>3</sup>*

**By Jeffrey L. Forte**

## **Which Parent Has the Right to Make Educational Decisions for Their Child with Special Needs?**

Generally speaking, unless otherwise provided by court order or state law, both parents have rights under the IDEA to address parental concerns and advocate for the needs of their disabled child's special education and related services. "When the parents of a child with a disability are divorced, both parents are entitled to exercise their IDEA rights, unless a court order or state law provides otherwise."<sup>4</sup>

Issues inevitably arise when there is a disagreement between divorced parents relating to their child's special educational needs and related services. This often leads to further confusion and difficulty regarding how the school district should proceed, thereby causing a three-way dispute between parent, parent, and school district.<sup>5</sup> Divorced parents should also be mindful of districts' efforts to "divide and conquer" the parents. For this reason, as a matter of best practice, it is critical that family law attorneys and divorced parents craft a final divorce decree clearly specifying which parent has "educational decision-making authority" over their child's special education.

## **Which Parent Has Educational Decision-making Authority When Not Specifically Addressed in the Divorce Decree?**

It cannot be underscored enough that the divorce decree contains an educational decision-making authority clause when a divorced couple has a child with special needs. The family law practitioner or concerned divorced parent of a child with special needs should seek to modify or amend an existing divorce decree so that such a clause is contained.

In the absence of such a clause, family law courts and/or administrative impartial due process hearing officers examine which parent has legal custody, physical custody, and/or medical decision-making authority over the disabled child.<sup>6</sup> Under state laws, a divorced parent that neither possesses legal nor physical custody of the child may lack standing to participate in the child's special educational process under the IDEA.

## **Preventing a Child's Special Education Needs from Being Interrupted during and after a Divorce**

In the practice of special education law, there are many scenarios



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involving divorced parents challenging the special education services of their child. Here are a few examples:

*Benjamin is a child that is outplaced at a specialized school. Mom and dad are divorcing. Dad cannot accept that Benjamin requires a specialized school. Dad wants Benjamin back in district. Mom wants Benjamin to stay in his current outplacement. The school district would be happy to agree with dad because it is cheaper. Dad signs the IEP first, allowing the school district to take Benjamin back into district.*

*Rob is a student that successfully is secured a private outplacement at mediation paid for by the district based on violations of Free Appropriate Public Education (FAPE). In exchange for Rob's private outplacement, the district requires both mom and dad sign a confidential settlement agreement. Mom and dad are divorced. Mom refuses to sign the agree-*

*ment, thereby delaying and possibly preventing Rob's private outplacement.*

*Tim is a student with disabilities that is not receiving a special education. Mom and dad are divorced. Mom and dad share joint legal and physical custody of Tim, but mom handles medical decisions. Mom wants the school district to initially evaluate Tim for special education services, but dad says no and refuses to provide consent to the district.*

In each of these examples, all of the issues can be avoided if the divorce decree contained an educational decision-making authority clause. Thousands of dollars, family court appearances, court-appointed guardians, and the emotional toll both on the parents and child can arguably all be avoided if the family law attorney proactively protects parental educational decision-making rights over the child's special education.

### Had I Only Known: Special Education Questions to Ask While Crafting a Divorce Decree

As a special education lawyer and certified child advocate, I have represented dozens of divorced parents relating to the educational rights of their child with special needs, oftentimes in concert with my client's family law attorney. Here are some questions for you and your client to consider when handling a divorce case:

- ▶ Which parent will have educational decision-making authority over the child's special education? Specify it in the divorce decree.
- ▶ Which parent will attend and advocate at IEP or Section 504 meetings on behalf of the child? Note that under the IDEA, both parents have the right to bring anyone they wish to an IEP or Section 504 meeting and school districts do not have any authority to prevent it.
- ▶ In so much as there is physical abuse or domestic violence between ex-spouses, a protective or restraining order can strategically allow a school district to prevent the abusive spouse's personal attendance at an IEP meeting and instead participate by phone.
- ▶ If the school district of your client's child is not fulfilling the IEP or Section 504 obligations and you need to hire an advocate or special education lawyer, which parent will pay for such representation? Which parent gets to decide if such representation is allowed and by whom?
- ▶ If your client's child requires private evaluations, which parent will fund these costs? Which parent selects the evaluator?
- ▶ If your client decides to unilaterally place his or her child in a private special education school because the school district is not providing FAPE, which parent will fund the private unilateral placement?
- ▶ Which parent has the right to obtain all of the child's educational records under the Family Educational Rights Privacy Act (FERPA) with the school district?
- ▶ Will your client and his or her divorced spouse live in different towns? If so, this can affect costs pertaining to the child's private outplacement. Residency requirements are included in private settlement agreements with districts.

### Do You and Your Client Need to Speak with a Special Education Law Attorney?

As with any legal fact pattern, it depends on the situation. Divorced and divorcing parents, as well as family law practitioners who have concerns about the child's special education, should always connect with an experienced special education attorney to ensure the child's educational rights are ambitiously appropriate and that the child's IEP, school placement, and related services are being delivered with fidelity.

As a matter of best practice, I require any potential clients that are divorced to provide me with a copy of their divorce decree prior to entering into an attorney-client relationship in order to determine what parent has standing to pursue the special educational interests of their child. Regardless of the disputes among former spouses, divorced parents are encouraged to set their differences aside for the benefit of their child's special education during and after the divorce and continue to be empowered as their child's best advocate. ■



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### Notes

1. Steverman, Ben. (2018, September 25). *Millennials Are Causing the U.S. Divorce Rate to Plummet*. Retrieved from Bloomberg, <https://www.bloomberg.com/news/articles/2018-09-25/millennials-are-causing-the-u-s-divorce-rate-to-plummet>; see also Wood, John. (2018, October 5). *The United States Divorce Rate is Dropping, Thanks to Millennials*. Retrieved from World Economic Forum, <https://www.weforum.org/agenda/2018/10/divorce-united-states-dropping-because-millennials> and DePaulo, Bella Ph.D. (2017, February 2). *What Is the Divorce Rate, Really?* Retrieved from Psychology Today, <https://www.psychologytoday.com/us/blog/living-single/201702/what-is-the-divorce-rate-really>.
2. Wiscarson, Diane. (2018, January 1). *Divorce and What It Means for a Child's Special Education*. Retrieved from American Academy of Matrimonial Lawyers, <http://aaml.org/library/newsletter/divorce-and-what-it-means-child%E2%80%99s-special-education>.
3. Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (2004); Section 504 of the Rehabilitation Act of 1973 as amended, 29 U.S.C. § 794.
4. Weber, Mark. *Special Education Law and Litigation Treatise*, § 14.5 (4th ed. 2017) LRP Publications; see also IDEA 2004 Regulations, 34 CFR 300.30(b) (2) (stating that a person qualified as a parent if any judicial decree or order authorizes the person to act as a parent or to make educational decisions on behalf of the child).
5. *Id.*
6. *Fuentes v. Board of Educ. of the City of New York*, 52 IDELR 152 (2d Cir. 2009). (Neither IDEA nor Part B regulations address how divorce affects parent's right to make decisions about student's special education services. Rights of noncustodial parent will turn on state law and terms of divorce agreement. Because neither divorce decree nor custody order gave father right to make educational decisions, he lacked standing to challenge child's IDEA services); *Taylor v. Vermont Dep't of Educ.*, 38 IDELR 32 (2d Cir. 2002) (2d Circuit held both FERPA and IDEA left intact state's authority to determine who may make educational decisions on behalf of child, so long as state does so in manner consistent with federal statutes. Under custody decree, student's mother, as noncustodial parent, lacked right to make educational decisions); *Navin v. Park Ridge Sch. Dist.*, 64 IDELR 235 (N.D. Ill. 2002), *aff'd*, 104 LRP 18051, 49 F. App'x 69 (7th Cir. 2002) (Parent of student with dyslexia could not challenge child's IEP because divorce decree allocated authority of student's education to former wife. However, District Court allowed impartial hearing officer to hear father's claims of IDEA procedural violations, since he retained certain rights under decree); *Sheils v. Pennsbury Sch. Dist.*, 64 IDELR 127 (3d Cir. 2014, unpublished) (Remanding case back to District Court, 3d Circuit instructed lower court to determine whether school district could properly implement student's IEP with consent of one parent with joint custody notwithstanding other parent's objection); *W.S. v. Wilmington Area Sch. Dist.*, 66 IDELR 249 (W.D. Pa. 2015) (Family court proceedings can limit parent's right to pursue FAPE claim. Mother filed petition in Pennsylvania court to challenge Ohio court's award of "sole legal custody" to father. That statement prevented her from arguing she had right to challenge perceived flaws in her son's special education program).