

Divorce and Special Education

Every year the parents of a million American children are newly divorced. While divorce is difficult for all parties involved, children are often the most affected. If the children have disabilities and are involved with the special education system, the situation can be even more complex. Families will need to see that

- the students make educational progress and
- the rights of the children and parents are protected.

The federal Individuals with Disabilities Education Act (IDEA) applies to all states, but individual states also make laws to implement special education.* Like education laws, divorce laws vary from state to state.

If you are involved in a divorce proceeding, it is in your best interest to consult an attorney who practices in your state and is familiar with all the state laws involving divorce, child custody, etc. Consulting an informed lawyer is essential when children with disabilities are involved.

Divorce may prompt questions about a parent's rights regarding special education. IDEA and state special education laws and regulations clearly describe parental rights and the school district's duty to meet them. Most rights are unchanged by divorce. The divorce decree, the legal document describing the individual parent's obligations after the marriage ends, should clearly define the relationship among the parents, their child, and the education system.

The following information may help parents think about how divorce and its settlement can interact with the special education system. With differences in both personal situations and state laws, this information is not a substitute for sound legal advice.

Who can make special education decisions?

IDEA and state laws stress that parents are the decision makers for their children. Parents retain these rights unless they are specifically revoked by a court order, state statute, or legally binding instrument. In other words, each parent remains a decision maker in special education after divorce unless the divorce decree or other court action specifically removes that right.

How do legal and physical custody impact decision-making and school?

In a divorce decree both legal and physical custody must be decided for children. In most states, courts have the option to grant parents joint legal custody. In some states, including Minnesota, the trend is to give parents who are divorcing joint legal custody unless there is a very strong reason why it should be taken from one parent.

Joint legal custody means that both parents keep the right to make important decisions about their children's education, health care, and religious training. Under joint legal custody, unless the decree is written differently, both parents have the right to:

- Be members of their child's Individual Education Program (IEP) team
- Be given notice of team meetings
- Exercise their due process rights
- Receive progress reports
- Have the chance to agree or disagree with plans for initial evaluation and placement in special education.

The school must provide written notice of special education meetings to each parent who has legal custody of the child and has provided the school with an address.

Physical custody can be decided separately from legal custody in the divorce decree. Physical custody means the routine daily care, control, and residence of the child. The court can give sole physical custody to just one parent or joint physical custody, where the child's home and daily decisions about the child are shared by both parents. If parents have joint physical and joint legal custody, an agreement is drawn up that can include how the child's time is divided between the two parents, what school would be attended, etc. If the parents have joint legal custody but only one parent has physical custody, both parents would keep the rights to receive information, see records, and make decisions regarding special education.

What happens when a parent has sole legal custody?

Only a parent with legal custody has the right to participate in special education decisions. If the court grants sole legal custody, the school should be informed, preferably in writing. Schools may request to see the divorce decree. The parent without legal custody will no longer be part of the special education process.

What happens when divorced parents have joint physical custody and live in different school districts?

State law must be consulted. Different states respond to this question differently. Some jurisdictions allow the custody agreement reached by the parents and approved by the court to determine which district the child will attend. Others assign the district based on how the child's time in residence is divided through the year. It is important for parents to be aware of the law in their state and not rely just on the opinion of the school district's registration clerk or on hiding the child's true living situation. Failure to abide by the state law could cause the school district to force a child to change school mid-year. The disruption can be difficult for any child, but it can provide extra challenges for a child in special education.

Who can give consent when a child receives special education?

If the parents share joint legal custody and parental consent is needed for special education, under federal

law the school district can proceed with the signature of only one parent. Since the signature of only one parent is needed, conflict can happen between ex-spouses. For example, if one parent has sole physical custody, but shares joint legal custody, the school could proceed with the signature of *either* parent and begin the proposed action. The parent who has physical custody has no greater legal rights than the other parent in special education decision making.

What happens when parents with joint legal custody can't agree about special education?

It is most helpful if parents work in a cooperative manner despite their divorce.

- Some parents choose to come to an agreement or at least agree on a course of action before meeting with the other members of the IEP team.
- If the parents cannot agree, most school personnel use informal means such as school meetings to try to resolve the conflict.
- If agreement is still not reached either, parent or the school may be able to use the alternative dispute resolution processes available in that particular state.
- If agreement cannot be reached then, either parent can request a due process hearing. When the issue of the hearing involves a change in educational placement, the child will in most cases "stay put" in the current school program until the matter is decided.
- If the failure to reach agreement regarding special education reflects deeper conflict and communication issues between the parents, counseling or private mediation may allow the parents to work together at the IEP table on the child's behalf.
- If parents are in so much conflict that they are unable to work on behalf of the child in the special education process, either parent has the option of consulting an attorney about returning to court to ask that the divorce decree be altered.

Some Questions from Parents

My ex-spouse and I have joint physical and legal custody. When my child is with the other parent, homework isn't done and there is no follow-up on special education or therapy? What can the school and I do?

This is a very difficult situation for all parties involved. It is most helpful if the focus can be put on the needs of the child rather than on the conflict between the parents. Can accommodations be made to help the child to complete work no matter which household is home for the night? For example, would extra sets of material or books be helpful? Can the parents and the school staff clarify which therapy and homework are essential and then draw up a written agreement as to which adult will accept responsibility for follow up? Conflict resolution approaches listed above may need to be used. Inability to resolve conflict may lead one parent to consider a return to court.

Our divorce is not yet final. There is an Order of Protection filed against my spouse because of abuse. Is my spouse allowed to come to the IEP meeting?

Unless the judge's order specifically bars your spouse from school property, the school district would still be legally obligated to invite both parents to the IEP meeting. In order to provide protection to you, the school could work to keep the two of you apart, for example, by allowing your spouse to attend the IEP meeting through a speakerphone or by providing a security guard. The school is not required to provide two separate meetings under these circumstances.

I am remarried. Can I bring my new spouse to the IEP meeting?

Yes. IDEA allows parents to bring other people of their choosing to IEP meetings. Unless your new spouse has adopted your child, he or she will not have the rights of a parent, such as signing special education consents and viewing school records. In interest of good working relationships, it is wise to inform your ex-spouse that you have invited your new partner to the team meeting.

If an ex-spouse has fallen behind on support payments; can he or she still attend the IEP meeting?

If a parent still has legal custody, the school is obligated to invite that parent to the IEP meeting, unless your divorce decree specifically states otherwise.

After a divorce can I still see my child's school records?

Parents' rights to school records are spelled out in state and federal law as well as in the Family Educational Rights and Privacy Act (FERPA). In general a parent keeps these rights unless the divorce decree or other state law specifically cancels them. The custodial parent should provide the school with written notice (a copy of the court decree) if the other parent has lost rights to see the records.

If I don't have physical custody, does the school have to send me information about regular events?

It is best to check state law and district policy in this situation. Usually, schools do not have to provide parents without physical custody with their own copies of general information such as lunch menus, general notices, PTA information, etc. The school usually doesn't have to invite a parent who doesn't have physical custody to regular teacher conferences. If a written record of the conference is made, it should be included with the other school records where it can be reviewed.

A parent without physical custody who wishes to remain involved with a child's school may want to make a written request and provide a current address for information to be sent. If the divorce decree does not prevent the parent's involvement and the parent is willing to cover mailing costs, etc., schools are likely to welcome participation of both parents.

When children have disabilities and are involved with the special education system, special care needs to be taken so that those students can make educational progress and that the rights of the children and both parents are protected. Whether divorced or still married, parents are still the best advocates for their children.

Remember, when dealing with complex issues of divorce and children with disabilities, parents need to consult with an attorney knowledgeable about the law in their state and familiar with family law and special education.

* Information about your state special education laws and regulations is available through the Parent Training and Information Center (PTI) in your state (<http://www.taalliance.org/Centers/index.htm>) or through your state department of education.

Resources

Parent Training and Information Centers
www.taalliance.org/Centers/index.htm

State Departments of Education http://wdcrobcolp01.ed.gov/Programs/EROD/org_list.cfm?category_ID=SEA
