



Student Support Services

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MEMO: Kansas clarification of the term “parent” after IDEA 2004

Recently, I have been asked to address a couple of questions regarding who may make educational decisions for a child with an exceptionality. In consultation with the general counsel of this agency, I am including my response to those questions, below:

(1) May foster parents make educational decisions on behalf of their foster children?

Some confusion on this issue appears to have developed as a result of a change to the definition of the term “parent” in IDEA 2004. At section 602(23), IDEA 2004 defines the term “parent,” in part, by stating that the term “parent” means a natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent). Accordingly, some have interpreted this section to mean that a foster parent now meets the definition of the term “parent” and may make educational decisions for his/her foster child.

It is important to notice, however, that after including foster parents in the definition of the term “parent,” the statute adds the words “unless a foster parent is prohibited by State law from serving as a parent.” Kansas law addresses a foster parent’s authority regarding educational decision making in two separate statutes. First, K.S.A. 38-1513a, states that whenever a child with a disability is in the custody of S.R.S. and the child’s parents are unknown or unavailable, the Secretary of S.R.S. must immediately notify the state board of education and the school district where the child is attending that the child is in need of an education advocate. Second, K.S.A. 72-962(m) defines the term “parent” to include a foster parent “if the foster parent has been appointed the education advocate of an exceptional child.” This second statute effectively prohibits a foster parent from exercising the authority of a parent unless the foster parent is appointed the education advocate for a particular child.

It is, therefore, clear under Kansas law that all exceptional children in the custody of S.R.S., whose parents are unknown or unavailable, require an education advocate to make educational decisions on their behalf. It is also clear that a foster parent may be appointed the education advocate for a foster child. Without such appointment as an education advocate for a particular foster child by the state board of education through Families Together, however, a foster parent does not have authority to make educational decisions for a foster child in their care.

(2) May a child’s parent execute a signed and notarized statement (power of attorney) authorizing another person to make educational decisions regarding the parent’s child?

I believe the answer is that a parent may do so, but only under very limited circumstances. A parent, of course, may make educational decisions for his/her child. However, the term “parent” is specifically defined in the Kansas special education

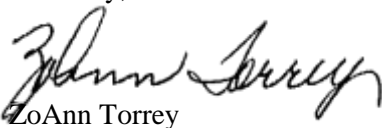
statutes, at K.S.A. 72-962(m). This statutory definition of the term “parent” does not include a person who receives a power of attorney from a parent to make educational decisions. The intent of this statute (as well as other statutes such as K.S.A. 38-1513a – referred to above in question no. 1) is that if there is no person (who meets the statutory definition of the term “parent”) available and willing to make educational decisions for an exceptional child, an education advocate must be appointed. A power of attorney may not be used by a parent to undermine the intent of this statute.

There are, as I stated previously, very limited circumstances in which a parent may effectively execute a power of attorney vesting educational decision making authority in another person. The statute cited above, K.S.A. 72-962(m), includes, in its definition of the term “parent,” the term “person acting as a parent.” The term “person acting as a parent” is defined in K.S.A. 72-962(n) and includes a person, “such as a grandparent, stepparent or other relative with whom the child lives or a person other than a parent who is legally responsible for the welfare of a child.” K.S.A. 72-962(n). Interestingly, however, Kansas regular education statutes, at K.S.A. 72-1046(d)(2), define the term “person acting as a parent” somewhat differently. This regular education statute includes, as part of its definition of the term “person acting as a parent,” the following: “(B) a person, other than a parent, who is liable by law to maintain, care for, or support the child, or who has actual care and control of the child and is contributing the major portion of the cost of support of the child, or who has actual care and control of the child with the written consent of a person who has legal custody of the child, or who has been granted custody of the child by a court of competent jurisdiction.” This definition, as I indicated earlier, is found in a regular education statute rather than a special education statute. However, I believe a parent might successfully argue that it is not contrary to these statutes, as a whole, to use a power of attorney to authorize a person, who meets the definition of a “person acting as a parent” under K.S.A. 72-1046, to make educational decisions for their exceptional child

Therefore, I believe that, as a general rule, a parent may not use a power of attorney to authorize other persons to make educational decisions for their exceptional children. However, in the limited circumstances specified in K.S.A. 72-1046(d)(2), I believe a parent may effectively use a power of attorney to authorize another person to make educational decisions for the parent’s exceptional children. Those circumstances include only situations in which the person receiving the power of attorney is: (1) a person who is liable by law to maintain, care for, or support the child; (2) a person who has actual care and control of the child and is contributing the major portion of the cost of support of the child; (3) a person who has actual care and control of the child with the written consent of a person who has legal custody of the child; or (4) a person who has been granted custody of the child by a court of competent jurisdiction.

I hope this explanation has been helpful in clarifying these two educational decision making issues.

Sincerely,



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