

Ratwik, Roszak & Maloney, P.A.

730 Second Avenue South, Suite 300
Minneapolis, Minnesota 55402

(612) 339-0060
Fax (612) 339-0038
www.ratwiklaw.com

**(WHEN) FAPE IS A BATTLEFIELD: NAVIGATING FAMILIAL DISPUTES
IN THE SPECIAL EDUCATION CONTEXT**

Elizabeth M. Meske
emm@ratwiklaw.com

2021 MASE Fall Leadership Conference
October 28, 2021

I. INDIVIDUALS WHO MAY EXERCISE PARENTAL RIGHTS

A. Who is a Parent? 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.

1. **Private educational data:** The Family Educational Rights and Privacy Act (“FERPA”) defines a “parent” to include “an individual acting as a parent in the absence of a parent or a guardian.” 34 C.F.R. § 99.3.

2. **Special education:** In the context of special education, the term

2. **Special education:** In the context of special education, the term “parent” also includes “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.” 34 C.F.R. § 300.30(a).

3. **Grandparents:** Grandparents generally are not considered

“parents” unless they have been appointed as a child’s legal guardian.

4. **Stepparents:** A stepparent has no parental rights unless the stepparent adopts the child or the child’s “parent” delegates parental authority. Minn. Stat. § 259.59.

5. **Parents of adult children:** Generally speaking, the right to make educational decisions about a child transfer from the parent to the child upon the age of majority. Parents of a student over 18 still may have the right to access the student’s data under FERPA if the student is a dependent on the parent’s tax return. In addition, parents of adult children may retain rights to participate in special education decision-making in specific circumstances and other educational decisions.

6. **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 the 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.

7. **Unmarried parents:** The biological mother of a child born to a mother who was not married to the child’s father when the child was born and was not married to the child’s father when the child was conceived 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. If paternity has been recognized, the father may petition for rights of parenting time or custody in an independent action. The proceeding must be treated as an initial determination of custody wherein the courts will assign legal and physical custody according to the best interests of the child. Minn. Stat. § 257.541, subd. 3.

B. Who is a Guardian? A guardian is an individual appointed by the court to act as a child’s “parent” if both parents’ parental rights have been terminated, or if both parents have died. A court may appoint the

Minnesota Commissioner of Human Services, a licensed child-placing agency, or an individual who is willing and capable of assuming the appropriate duties and responsibilities related to the child as the child’s

2

guardian. Minn. Stat. § 260C.325, subd. 1.

1. If the Commissioner of Human Services is appointed as the “guardian,” the child becomes a ward of the state.
2. 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. Minn. Stat. § 260C.325, subd. 4; *see also* Minn. Stat. § 524.5-207 (guardian has powers of a parent whose rights have not been terminated).
3. The termination of parental rights by court order “sever[s] and

terminate[s]” a parent’s “rights, powers, privileges, immunities, duties, and obligations, including any rights to custody, control, visitation, or support.” Minn. Stat § 260C.317, subd. 1.

C. Delegation of Parental Rights. Minnesota law allows “parents,” “legal custodians,” or “guardians” of minor children and legally incapacitated persons to delegate parental rights “by a properly executed power of attorney.” Minn. Stat. §524.5-211.

1. By law, the maximum time period that such a delegation can be effective is one year.
2. A “parent” who wishes to delegate parental authority must give or mail a copy of the delegation document to any other parent within 30 days of its execution unless: (1) the other parent does not have “parenting time” or has “supervised parenting time;” or (2) there is an Order for Protection (“OFP”) against the other parent to protect the parent who is delegating his or her power.
3. A parent cannot delegate his or her authority to consent to marriage or adoption of a minor child.
4. Parents also may delegate authority by designating a standby custodian or temporary custodian in accordance with Minnesota law.

II. CUSTODY: THE BASIS OF PARENTAL RIGHTS

A. What is Custody? There are two types of custody, legal and physical.

1. **Legal custody:** Legal custody is “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 all, parental rights.

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

B. Joint Custody. Depending on the custody arrangement or divorce decree, parents might share custody of minor children. In such cases, the parents are said to have “joint custody” of the child. Joint custody can be legal, physical, or both.

1. **Joint legal custody:** When parents share joint legal custody, “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).

2. **Joint physical custody:** If parents have joint physical custody, “the routine daily care and control and the residence of the child is structured between [the parents].” Minn. Stat. § 518.003, subd. 3(d).

III. MARRIAGE, SEPARATION, AND DIVORCE: HOW MARITAL STATUS AFFECTS EDUCATIONAL DECISION-MAKING AUTHORITY

A. Married Parents. In the case of children born to a married couple, a school must assume that both parents have full parental rights and share custody and decision-making authority.

1. **“Separated” parents.** Unless the parents are *legally* separated, the parents are still married, even if they are not living together. If the parents are legally separated, the school should review a copy of the separation order, like with a divorce, to determine the effect of the separation order on custody.

2. Absent a legal separation decree or agreement or court order that provides otherwise, both separated parents have equal decision-making authority.

B. Divorced Parents. Most disputes between parents arise in the context of divorce. Often, one parent tries to prevent the other parent (or his or her new spouse or significant other) from accessing the student or making decisions about the student. In the case of divorce, the parents' rights are

entirely dictated by the scope of the custody and/or divorce order.

1. **Common rights of non-custodial 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 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 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 the 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.

- g. A court may adjust, limit, or waive these rights, if it determines that doing so is necessary to protect the welfare of a party or a child. Minn. Stat. § 518.17, subd. 3(b). Unless and until the school is satisfied that such an order terminates these rights, however, the school should assume that both parents have the rights described above.

- 2. **Joint custody and educational decision-making.** If one parent has sole legal custody, that parent has the final educational decision-

making authority. However, parents with joint legal custody generally have equal decision-making ability with respect to educational decisions, absent a court order to the contrary.

5

- a. If the parents have joint legal custody, the permission of only one parent is generally sufficient with respect to most educational decisions. However, with respect to an initial Individual Education Program (“IEP”) or initial special education evaluation, the written objection of either parent can prevent the school from proceeding with the initial evaluation or initial IEP. *See J.H. v. Northfield Pub. Sch. Dist. No. 659*, No. A08-1213, 2009 WL 1182199 (Minn. Ct. App. 2009) (unpublished).
- b. State and federal special education laws also grant parents certain rights independent of whether they have legal “custody.” For instance, a non-custodial parent has the right to object to an initial special education evaluation or IEP. Minn. Stat. § 125A.091, subd. 5.

- c. When parents with joint legal custody cannot agree on a major educational decision (e.g. which school the child should attend), that decision may need to be made by a court according to the best interests of the child. *Himley v. Himley*, No. A12-1876, 2013 WL 4504379 (Minn. Ct. App. 2013) (unpublished).
 - d. In situations where both parents have decision-making power in the child's life, either parent has the right to initiate a due process hearing to challenge a school's educational decision, regardless of whether the other parent agrees with that decision. *Letter to Arnold*, 211 IDELR 297 (OSEP 1983); *see also Westside v. Union Sch. Dist.*, 35 IDELR 88 (SEA Cal. 2001).
3. **Educational disputes between parents with joint legal custody.** Depending on the type of decision, the school may need permission from both parents to proceed with a particular action. In other cases, it may be appropriate to accept one parent's permission. In order to avoid the appearance of impropriety, schools are advised to develop and consistently implement a procedure addressing these types of situations.
 4. **Disputes between parents with joint legal custody or visitation rights – access to students at school.** A divorced parent can prohibit the other parent from accessing the student at school, but

only if the parent has sole legal and physical custody of the child and the court order regarding visitation sets out parenting time that does not include access during school hours; or in some instances if, an OFP precludes access.

- a. If the parent has sole legal and physical custody, the parent may also prohibit the other parent's spouse/significant other/parents from visiting the student or picking up the student.
- b. A separated parent may not limit the other parent's ability to access the student at school unless there is a legal separation agreement, custody order, OFP, or other document that restricts the other parent's ability to have contact with the student.
- c. Absent such a court order, a separated parent also has no authority to prevent an individual (whom the other parent has authorized) from visiting the student at school or picking up the student.
- d. Schools should consider adopting a policy, procedure or protocol for determining who is authorized to visit or pick up a child at school.

IV. RESIDENCY

A. General Rule.

1. Generally, the right to a free public education depends upon residency. Minnesota Statutes, section 120A.20 gives students *who reside in a school district* the right to a free education. The statute provides:

Admission to a public school is free to any person who: (1) resides within the district that operates the school; (2) is under 21 years of age or who meets the requirements of paragraph (c); and (3) satisfies the minimum age requirements imposed by this section.

Minn. Stat. § 120A.20, Subd. 1.

2. Determining Residency Based on the Circumstances of the Student

- a. Minor student residing with one or both parents. In traditional situations, because a student is to attend school in the school district in which the student resides, the residence of the parent(s) will determine where a minor student should be enrolled. See Minn. Stat. § 120A.20, Subd. 1; Minn. R. 3525.0210, subp. 39 (residency of students with a disability). For purposes of residency, a "parent" means a parent, guardian, or other person having legal custody of a child. Minn. Stat. §120A.22, subd. 3(a).
- b. Adult student. The residence of an adult student is the school district in which the student resides. Minn. Stat. § 120A.20, subd. 1.
- c. Students with a disability. For students under age 18, the school district of residence is the district where the parent, guardian, or other person having legal custody of a child resides. For an unmarried student age 18 or over, the district of residence is where the student resides unless a guardian or conservator has been appointed, in which case the district of residence is where the guardian or conservator. For an unmarried student age 18 or over who is a parent and who is placed in a center for care and treatment, the school district of residence is the district in which the student's biological or adoptive parent or designated guardian resides. . Minn. Stat. § 120A.22, subd. 3.
- d. Students with a surrogate parent. A special education student who has a surrogate parent is a resident of the school district in which the student's parent resides, not the district in which a surrogate parent resides. If the student's parents are separated or divorced and both maintain legal rights to determine the student's education but are living in different

determine the student's education, but are living in different districts, the students' district of residence is the district in which the student primarily resides for the greater part of the school year.

- e. Students placed for care and treatment. A student placed for care and treatment or foster care by an agency other than the school district, is a resident of the school district in which the student's parent resides or the district designated by the commissioner. If the parents of the student are separated or

8

divorced and both maintain legal rights to determine the student's education, but are living in different districts, the district of residence is the district last responsible for education services when the student resided with either parent.

- e. Married students. For a married students age 18 or over, the school district of residence is the school district in which the married student resides.
- f. Homeless students. The school district of residence for a homeless student is the school district in which the parent or legal guardian resides, unless: (1) parental rights have been terminated by court order; (2) the parent or guardian is not living within the state; or (3) the parent or guardian having legal custody of the child is an inmate of a Minnesota correctional facility or is a resident of a halfway house under the supervision of the commissioner of corrections. Minn. Stat. § 120A.20. If any of clauses (1) to (3) apply, the school district of residence shall be the school district in which the student resided when the qualifying event occurred or the school district in which the student pupil currently resides. If there is a dispute between school districts regarding

there is a dispute between school districts regarding residency, the district of residence is the district designated by the commissioner of education.

- f. Minor students of divorced parents. In those instances when a student's parents are divorced or legally separated or are residing separately but parents share joint physical custody of the student, the student's residence is the school district, as indicated by the child's parents. Minn. Stat. § 127A.47, subd. 3.

B. Residence of Students Sent to Live with a Friend, Relative, Etc.

1. While the statutes and rules do not generally define "residence," "reside," or "resident," Minnesota courts and the Minnesota Attorney General have adopted the "purpose" test to determine a student's residence for education purposes. Under this test, something more than temporary physical presence within a school district is necessary.
2. **The "purpose" test.** Under the "purpose test, a determination is made by first looking at whether the student living in a school

9

district for the general purpose of receiving personal care and support.

- a. This test is a fact-specific inquiry that depends on the circumstances of each individual case. *See State v. Bd. of Educ. of Ind. Sch. Dist. No. 40, Morris County*, 97 N.W. 885 (Minn. 1904). The determination of residency pursuant to the "purpose" test is a fact question that should be left to each school board to decide on an individual basis. *See Minn. Op. Atty. Gen. 169p* (Feb. 6, 1985).

- b. A school district should determine the purpose of the student's presence within the school district. If a student is not within the geographic boundaries of a school district for the purpose of receiving personal care and support, there is an argument that the student is not a "resident" of the school district, meaning he or she is not entitled to a free public education in that district.

For example, a student sent to live with relatives or friends for the sole purpose of attending a school in that school district does not "reside" in that district. *See Minn. Op. Atty. Gen. 169p* (Feb. 6, 1985).

V. PARENTAL REQUESTS TO ACCESS STUDENT RECORDS

A. Equal Access to Student Data. Under the 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.

1. Minnesota Statutes, section 120A.22, subdivision 1a, provides that 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, subd. 3](#).
2. Minnesota Statutes, section 518.17, subdivision 3(b), dictates that 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.

3. Pursuant to Minnesota Rule 1205.0500, subpart 2(B), a school must presume the parent has the authority to exercise the rights inherent with the Minnesota Government Data Practices Act (“MGDPA”) unless the school 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.

B. Responding to Parent Requests to Limit Access to Data. If a parent requests that the school no longer provide information to the other parent, the school should request that the parent produce a copy of the court order (typically a divorce decree or custody order) that limits the other parent’s rights. If no such document exists, or if the document does not terminate the parent’s right to access data, then the school cannot grant the parent’s request.

C. Responding to Student Requests to Limit Parental Access to Data.

1. Parents are entitled, under state and federal law, to request access their minor or dependent students’ educational records, and, for the most part, schools have to allow parents to inspect and review records pertaining to their minor or dependent child.
2. Schools do not necessarily have an affirmative obligation to volunteer information regarding confidences a student has shared or the school has discovered about a student but should consider potential liability for not doing so in specific cases.
3. Minnesota Rule Part 1205.0500, subpart 3, also allow a school to deny parental access to private data when the minor, who is the subject of that data, requests in writing that the school deny such access and the school determines that denying parental access would be in the best interest of the minor. This determination is to be guided based at least the following factors:
 - a. whether the minor is of sufficient age and maturity to be able to explain the reasons for and to understand the consequences of the request to deny access;

- b. whether the personal situation of the minor is such that denying parental access may protect the minor data subject from physical or emotional harm;

- c. whether there is ground for believing that the minor data subject's reasons for precluding parental access are reasonably accurate;

- d. whether the data in question is of such a nature that disclosure of it to the parent could lead to physical or emotional harm to the minor data subject; and

- e. whether the data concerns medical, dental, or other health services provided pursuant to Minnesota Statutes, sections 144.341 to 144.347. If so, the data may be released only if failure to inform the parent would seriously jeopardize the health of the minor.

Schools should use caution in relying upon this provision, however, as parents or the United States Department of Education may assert that their rights under the federal FERPA trump state rules related to data privacy.

D. Participation in a Custody Proceeding. If a school employee is issued a subpoena to testify in a divorce or custody proceeding, contact your legal counsel. Arguments can be made to avoid having school officials appear in family law matters and, if school officials are required to respond to a subpoena or testify, steps must be taken to protect the school from potential data practices claims.

In custody disputes, parents and their attorneys occasionally ask teachers and counselors to provide written statements in support of one parent, with the understanding that the statement will be submitted in the custody proceeding. These statements generally are opinions of the educators, which then lead to employees being called as witnesses in the custody proceedings. There is no requirement under the law for schools or their employees to provide such statements and preparing such a document may give rise to an appearance of favoritism as well as the improper release of private educational data.

E. Parents May Authorize Other Individuals to Receive Student Data and Attend Parent Conferences. Pursuant to the MGDPA, parents or legal guardians may designate, in writing, an “additional adult” to attend school

conferences. If such a designation is made, school officials can release student data that is “necessary and relevant to the conference discussions” to that individual. Minn. Stat. § 13.32, subd. 10a.

12

F. Schools May Not Release Data About a Parent to the Parent’s Ex-Spouse.

1. Data on parents is “private data,” but may be treated as directory information if the same procedures that are used by a school to designate student data as directory information are followed. Minn. Stat. § 13.32, subd. 2(c).

2. Department of Administration Advisory Opinion 05-006 involved Parent A’s data request to view invoices that contained private data about the child of Parent A and B, as well as Parent B. The Minnesota Department of Administration opined that “[w]hen a government entity is faced with redacting a document containing private data on multiple data subjects, it is important for the entity to

private data on multiple data subjects, it is important for the entity to review the document carefully to determine whether the release of private data to one data subject will result in the inappropriate release of private data about another data subject.” The Department of Administration also opined that “parent A is entitled to gain access to any data in the invoices of which s/he is the subject [and] ... parent A also is entitled to gain access to data of which his/her child is the subject,” and held that “Parent A is entitled to gain access to any data of which A or A's child is the subject.”

3. In *Burks v. Metro. Council*, 884 N.W.2d 338 (Minn. 2016), the Minnesota Supreme Court held that the MGDPA “confers a right of access to stored private or public data on an individual if he or she ‘is or can be identified as the subject of th[e] data,’ ... even if the data in question identifies other individuals.” Therefore, the Court concluded that the subject of the data who made the request was “entitled to access the recording regardless of whether it is private personnel data under Minn. Stat. § 13.43.” (Note: This opinion was decided in the context of personnel data under the MGDPA and did not address the application of educational data pursuant to the MGDPA or FERPA.

VI. FAMILY DISPUTES IN THE SPECIAL EDUCATION CONTEXT

- A. **Legal Obligations to Both Parents.** Schools have a legal obligation to provide parents an adequate opportunity to meaningfully participate in the IEP process. Despite the right to make educational decisions, one parent does not necessarily have a greater right over another to make educational decisions. The Individuals with Disabilities Education Act (“IDEA”)

requires that all significant decisions regarding a disabled child’s program of education must be made, in the first instance, by the IEP team, including the parents. Thus, when requests for additional services or some other sort

the parents. Thus, when requests for additional services or some other sort of revision of a student's special education program should be referred to the student's IEP team for consideration. Parents have the right to participate, not to dictate the IEP team decisions. *Slama v. Independent Sch. Dist. No. 2580*, 259 F.Supp.2d. 880, 885 (D. Minn. 2003).

B. Legal Obligations to the Student. An IEP team owes one duty to a child with a disability and a different duty to the child's parents. The team has a substantive obligation to provide the child with FAPE, and it has a procedural obligation to provide the parents an opportunity to be equal participants in the IEP decision-making process. These obligations can come into conflict when parents demand services the other team members believe to be inappropriate for the child. The student's right to FAPE trumps the parents' procedural rights and the school must refuse to provide the service it believes would be inappropriate for the child. The school's obligation to provide FAPE cannot be delegated to the parent

C. Participation by Divorced Parents.

1. **Parent rights.** Individuals who have the right to make educational decisions for a child are "parents" under the IDEA and are entitled to participate in the IEP process. *See* 34 C.F.R. 300.30(a); 34 C.F.R. 300.321(a)(1).
2. **Rights of divorced/separated parents.** When the parents of a child with a disability are divorced, the parental rights under the IDEA apply to both parents, unless a court order or other state law specifies otherwise. 71 Fed. Reg. 46,568 (2006); *see also Cape Henlopen Sch. Dist.*, 114 LRP 35279 (SEA DE 2014) (because a state court order expressly granted educational decision-making power to the mother only, the school district wasn't required to consider the father's input in the development of student's IEP and placement).
3. **Tactics for addressing parental disputes during IEP meetings.**
 - a. Identify and analyze the parents' issues as far in advance of the meeting as possible.
 - b. Review facts gathered and applicable legal standards to determine the validity of claims.

- c. Educate and prepare the team about relevant law.
- d. Draft an agenda for the meeting.
- e. Consider “drafting” a potential IEP before the meeting to use as a starting point/guide for discussions.
- f. Create a parent-friendly environment.
- g. Do not allow intimidating or hostile conduct.
- h. Focus the discussion on the student, not the parent.

