BEFORE THE
IOWA DEPARTMENT OF EDUCATION

In re: J.H., a child, S.K., Complainant, vs. The Iowa Department of Education; the West Liberty Community School District & Mississippi Bend Area Education Agency; the Waterloo Community School District & Area Education Agency 267; the Keokuk Community School District & Great Prairie Area Education Agency; the Wilton Community School District; the Glenwood Community School District & Green Hills Area Education Agency; Education Respondents, and The Iowa Department of Human Service; Black Hawk County & the Black Hawk County Jail; Muscatine County & Muscatine County Community Services; and the Glenwood Resource Center; Other Respondents.	)	Dept. Ed. Docket No. SE-385 (DIA No. 13DOESE001) **Order Granting Motion to Dismiss** (Redacted for Publication)

Background Proceedings

On April 23, 2013, [S.K.] filed a Due Process Complaint with the Iowa Department of Education, pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1420, et seq. A preliminary conference call was held on May 17, 2013, with all parties represented. Several pleadings, including Answers – with affirmative defenses, Objections to the Sufficiency of the Complaint, and a Motion to Dismiss were filed prior to May 17th. These responsive pleadings raised questions concerning the sufficiency of the complaint and the Complainant's standing to maintain this action.

The parties agreed to preliminary proceedings which allowed for the filing of an amended complaint and responsive pleadings or objections and scheduled a hearing for June 21, 2013, for the limited purpose of submitting the question of the Complainant's standing. An Order was issued May 20, 2013, memorializing the agreed upon schedule of proceedings.

An *Amended Due Process Complaint* was filed on May 20, 2013. A *Motion to Dismiss* the amended complaint was filed by Muscatine County on May 22nd, alleging that Complainant [S.K.] lacks legal standing to pursue this action because she is not a "parent" under the terms of the IDEA. Many of the other Respondents joined this motion or independently filed motions to dismiss or answers challenging the Complainant's standing to maintain this action. Various parties filed witness lists and proposed exhibits, prior to the hearing to address standing, and an Order establishing protocol for the hearing was issued on June 20, 2013.

Hearing regarding the Complainant's standing was held on June 21, 2013 at the Grimes State Office Building. Counsel of record was present for each party. Prior to the submission of testimony, the Complainant dismissed any and all claims involving Lee County and the Lee County Correctional Facility.

Testimony was offered by two employees of the Muscatine County Community Services, Kathleen Anderson-Noel and Laura Porter-Soukup. The following exhibits were offered and admitted into evidence without objection: Complainant's exhibits C-1 through C-7, and C-28; Respondent Muscatine County exhibits A and B; and Respondent Iowa Department of Education exhibits DE-1 through DE-6. Two Respondents objected to Complainant's exhibit C-9 on relevancy grounds. The objections were overruled and exhibit C-9 was admitted for the limited purpose of showing the Complainant's advocacy on her son's behalf. (Tr. p. 123) The same Respondents and the Department of Education raised a relevancy objection to Complainant's exhibit C-10. These objections were sustained and exhibit C-10 was not admitted into the record. (Tr. p. 124)

At the close of evidence, the parties agreed to a schedule for the submission of briefs in lieu of closing statements, with the final brief filed on August 5, 2013. (Tr. p. 135) The findings and conclusions that follow are issued after careful consideration of the evidence in the record and the arguments advanced by all parties.

Findings of Fact

Complainant [S.K.] is the biological mother of [J.H]. [J.H.] was born [in the fall of] 1992. He was 20 years old when [S.K.] filed the complaint initiating this action. [J.H.] suffers from moderate mental retardation (IQ of 45) and multiple mental illnesses, including: autism or pervasive developmental disorder; bipolar mood disorder; conduct disorder; and disruptive behavior disorder. (Exhibit A) [J.H.] had an individualized educational program (IEP) in effect in the spring of 2011. (Tr. pp. 129-130)

[J.H.] is a dependent adult. Due to his cognitive limitations and mental illness, he is unable to care for his personal safety or attend to and provide for his own basic needs, such as food, shelter, clothing and medical care. He is not capable of making his own educational decisions. [J.H.] has a guardian appointed by the district court, acting under the authority of the Iowa Probate Code. The guardian is vested with all of the powers and responsibilities set forth in Iowa Code section 633.635(1), including the duty to provide for the ward to receive appropriate training and education. (Tr. pp. 84, 91; Exhibits C-1 to C-2)

[J.H.] also has a court appointed attorney, acting as a *guardian ad litem,* to ensure that he is properly advised of the nature of his rights in the guardianship proceeding and to represent his interests in that proceeding. The authority of the *guardian ad litem* does not extend to educational decision-making. *See* Iowa Code §§ 232.2(22); 633.561.

[S.K.] was appointed as [J.H.]'s initial guardian through an Order issued [in the fall of] 2010, shortly before his 18th birthday. The guardianship over [J.H.] continued after he turned 18 and remains in place until further order of the Court. (Exhibit C-1 to C-2) [S.K.] served as guardian for [J.H.] until June 2, 2011, when the Court removed [S.K.] and temporarily appointed Michael Johannsen, Director of Muscatine County Community Services (MCCS), to serve as [J.H.]'s guardian. (Exhibits B & DE-1) A contested trial was held in the fall of 2011 and [S.K.] was reinstated as guardian by Order issued on November 1, 2011. (Exhibits C-3 to C-6)

[S.K.]'s second appointment as [J.H.]'s guardian was short lived. In January of 2012, Mr. Johannsen again petitioned the court seeking removal of [S.K.] as guardian. On February 24, 2012, [S.K.] was removed and Johannsen – as Director of MCCS – was appointed as successor guardian. (Exhibits DE-1 & C-7) The most recent Order concerning [J.H.]'s guardianship was issued on September 13, 2012, following a contested hearing. The Court found continued removal of [S.K.] as guardian appropriate and directed MCCS to continue to serve as guardian for [J.H.]. (Exhibit A) [S.K.] is pursuing appeal of the September 13, 2012, Order removing her as guardian. The Order remains in effect during the pendency of the appeal.

MCCS is a department of Muscatine County government charged with administering general assistance. MCCS manages the county mental health plan and provides a variety of services to assist county residents suffering from mental illness, intellectual disabilities (mental retardation), and developmental disabilities. Michael Johannsen, the Director of MCCS, serves as the Central Point of Coordination (CPC). He is responsible for management of the county mental health budget and ensuring access to mental health services. MCCS has a program for trusts and public guardianships. The agency is often appointed to serve as the guardian "of last resort" for incompetent adults when no appropriate individual is available to act as guardian. The agency is currently the court appointed guardian for approximately 55 people. MCCS also serves as a provider of case management services for children on Medicaid waiver programs and administers veterans affairs. (Tr. at pp. 16-17, 58)

Michael Johannsen, in his capacity as Director of MCCS, is [J.H.]'s current court-appointed guardian. (Tr. p. 63; Exhibits A & C-7) Attorney Mark Neary serves as [J.H.]'s *guardian ad litem*. (Tr. pp. 52-53, 59; & Exhibits C-1 to C-2) Mr. Johannsen is aware of the amended due process complaint. He is satisfied that [J.H.]'s educational needs have been and are being appropriately met and did not authorize filing of the complaint. (Exhibit B)

Since March of 2012, [J.H.] has been residing at the Glenwood Resource Center (GRC), a state-owned intermediate care facility serving the intellectually disabled (ICF/ID). The GRC is a residential facility managed and operated by the Iowa Department of Human Services. *See* Iowa Code §§ 218.1, 222.1. The GRC placement is paid for with a combination of Medicaid funding and client participation. All but $50.00 of [J.H.]'s income including monthly social security benefits and his earnings from part-time work for the GRC maintenance department is contributed to the cost of his care. (Tr. pp. 60, 92-93)

During the 14 months prior to his placement at GRC, [J.H.] spent time in the Black Hawk County Jail; in the Lee County Correctional Facility; in Allen Memorial Hospital in Waterloo, under involuntary commitment; and in a community-based private facility in Keokuk. (Exhibits A & C-3 to C-6) [S.K.] believes that [J.H.] remains entitled to and in need of educational services under the IDEA. Through the IDEA Due Process Complaint filed on April 23, 2013, and Amended Due Process Complaint filed on May 20, 2013, [S.K.] seeks to challenge the sufficiency of educational services provided to [J.H.] since January of 2011.

Conclusions of Law

[S.K.] bases this action solely upon the federal Individuals with Disabilities Education Act (IDEA) and the Iowa Department of Educaton rules implementing the federal Act. 20 U.S.C. §§ 1400 *et seq*.; 281 Iowa Administrative Code (IAC) ch. 41. The purpose of the IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); *see Board of Education of Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, 102 S.Ct. 3034, 73 L.E.2d 690 (1982).

In exchange for accepting federal money to assist in educating children with disabilities, state and local education agencies must agree to make a free appropriate public education (FAPE) available to all qualifying children in their jurisdiction and must ensure that children with disabilities and their parents are provided with guaranteed procedural safeguards with respect to the provision of FAPE. 20 U.S.C. §§ 1412(a)(1); 1415(a). "[T]he federal law represents minimum requirements, and states are free to impose additional requirements for special education services." *Independent School District No. 281 v. Minnesota Dept. of Education*, 743 N.W.2d 315, 324 (Minn. App. 2008).

At age 20, [J.H.] is still a "child" entitled to special education and related services. With limited exceptions, the IDEA requires FAPE to be available "to all children with disabilities residing in the State between the ages of 3 and 21, inclusive." 20 U.S.C. § 1412(a)(1)(A). A state is not required to provide FAPE to children aged 3 through 5 and 18 through 21 if inconsistent with state law or practice with regard to the provision of public education of children in those age ranges. 20 U.S.C. § 1412(a)(1)(B)(i). Under Iowa law, the definition of children requiring special education includes only persons "under twenty-one years of age . . ., [but if] a child requiring special education reaches the age of twenty-one during an academic year, the child may elect to receive special education services until the end of the academic year." Iowa Code § 256B.2(1) (2013).

The procedural safeguards mandated by the IDEA include the ability to file a complaint requesting an administrative due process hearing. 20 U.S.C. § 1415(b)(6). As implemented through federal regulations and state rules, the right to file a due process complaint extends to parents and public agencies.

> § 300.507 Filing a Due Process Complaint.
> (a) General. (1) A parent or a public agency may file a due process complaint on any of the matters described in § 300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).

34 C.F.R. § 300.507; *see also* 281 Iowa Admin. Code (IAC) 41.507(1)(a) ("A parent or a public agency may file a due process complaint . . ."); *see Fort Osage R-1 Sch. Dist. v. Sims,* 641 F.3d 268, 1002 (8th Cir. 2011) ("Parents and guardians of a disabled child may challenge the procedural and substantive reasonableness of an IEP by requesting an administrative due process hearing, ...").

[S.K.] seeks to challenge the sufficiency of educational services provided to [J.H.] since January of 2011. The Respondents have moved for dismissal of the Amended Due Process Complaint, challenging [S.K.]'s standing and authority to maintain this action on behalf of her adult son. They argue that because [J.H.] has attained the age of majority and [S.K.] is not his guardian, she lacks statutory authority to maintain this action. In the Respondents' view, MCCS – as [J.H.]'s guardian – has sole authority to act as [J.H.]'s parent and exercise his rights under the IDEA.

[S.K.] contends that, as [J.H.]'s biological mother, she is a parent under the IDEA and that, because [J.H.] is a ward of the state and MCCS is acting as an agent of the state, she is the only party to the proceeding who is qualified to act as a parent. Alternatively, [S.K.] asserts that in the event that she does not have standing to pursue this action as a parent she should be recognized as an acting, or *de facto,* surrogate parent or another qualified surrogate parent should be appointed. The various arguments advanced by the parties require a detailed examination of several provisions of the IDEA and the implementing regulations and rules.

Although [J.H.] is an adult, under the IDEA he is still a disabled child entitled to receive a free appropriate public education. He has been found incompetent through a guardianship proceeding. [S.K.] is [J.H.]'s biological mother. The MCCS agency is [J.H.]'s court-appointed guardian and was his guardian when the complaint and amended complaint initiating this action were filed. MCCS, as guardian, is empowered to exercise all of the powers and duties set forth in Iowa Code section 633.635(1), including the authority to provide "for the care, comfort and maintenance of the ward, including the appropriate training and education to maximize the ward's potential." [S.K.] and MCCS each assert authority to act as [J.H.]'s parent.

For purposes of the IDEA,

> The term "parent" means –
> (A) a natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent);
> (B) a guardian (but not the State if the child is a ward of the State);
> (C) an individual acting in the place of a natural 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
> (D) except as used in sections 615(b)(2) and 639(a)(5) [20 USCS §§ 1415(b)(2) and 1439(a)(5)], an individual assigned under either of those sections to be a surrogate parent.

20 U.S.C. § 1401(23). The federal regulation defining parent for purposes of the IDEA elaborates on the listing of who can be a parent and provides two rules addressing who may act as the parent under specific circumstances.

> § 300.30 Parent.
> (a) *Parent* means—
> (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 parent, 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 § 300.519 or section 639(a)(5) of the Act.
>
> (b) (1) Except as provided in paragraph (b)(2) of this section, the biological or adoptive parent, when attempting to act as the parent

> under this part and when more than one party is qualified under paragraph (a) of this section to act as a parent, must be presumed to be the parent for purposes of this section unless the biological or adoptive parent does not have legal authority to make educational decisions for the child.
>
> (2) If a judicial decree or order identifies a specific person or persons under paragraphs (a)(1) through (4) of this section 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" for purposes of this section.

34 CFR 300.30. The first special rule is applicable when "more than one party is qualified under paragraph (a) of this section to act as a parent." The second special rule is applicable only when a court order "identifies a specific person or persons under paragraphs (a)(1) through (4)" to act as the parent or make educational decision on behalf of the child.

[S.K.] asserts that she should be allowed to pursue this action because she is the only qualified IDEA parent. In her view, [J.H.] is a ward of the state and MCCS is acting as an agency of the state when serving as his guardian. If these premises are true, MCCS is explicitly disqualified from serving as his IDEA parent. The Respondents counter by arguing that [J.H.] is not a ward of the state and that, even if [J.H.] is found to be a "ward of the state," MCCS is not "the state" and is not disqualified from assuming the role of IDEA parent.

The phrase "ward of the state" is defined within the IDEA as follows:

> Ward of the State.
>
> (a) *General.* Subject to paragraph (b) of this section, *ward of the State* means a child who, as determined by the State where the child resides, is—
>
> (1) A foster child;
>
> (2) A ward of the State; or
>
> (3) In the custody of a public child welfare agency.
>
> (b) *Exception.* Ward of the State does not include a foster child who has a foster parent who meets the definition of a *parent* in § 300.30.

34 CFR 300.45, based on 20 U.S.C. § 1401(36). The Iowa special education rules include a definition that mirrors the federal regulation, with the following "interpretive note" added: "'Ward of the state' is a term rarely used in Iowa law. It would be an extremely rare occurrence for a child to be a ward of the state while not being either a foster child or in the custody of a public child welfare agency." 281 IAC 41.45(3). Unfortunately, this note does nothing to identify the circumstances in which a child can become a ward of the state outside of the child welfare system.

The IDEA and state rule definitions both define a "ward of the state" to mean a "ward of the state," as determined by the state. This circular definition does little to aid in determination of the circumstances that render a person a ward of the state.

Iowa statutes provide no general definition of a "ward of the state" and the phrase seldom appears in current Iowa statutes. The few existing statutory references to wards of the state each apply to minors or unemancipated persons under the age of eighteen. *See* Iowa Code §§ 125.2(12)(b)-(d) (determining residence for purposes of payment for substance abuse treatment); 233A.14 (the administrator of the state training school may "transfer to the schools minor wards of the state from any institution under the administrator's charge . . ."); 233B.1(2) (children committed to the Iowa juvenile home "shall be wards of the state").

Formal judicial proceedings appear to be a prerequisite to a person becoming a ward of the state. S*ee Murphy v. Lacey,* 237 Iowa 318, 21 N.W.2d 897 (1946) and *Stephens v. Treat, Superintendent of Iowa Soldiers' Orphans' Home,* 202 Iowa 1077, 209 N.W. 282 (1926) (both discussing adjudication required for child to become a ward of the state). Those proceedings may occur before the juvenile court, when the proposed ward is a child in need of assistance or a delinquent juvenile, and there are several circumstances in which the legal custody or guardianship of a child may be transferred to the Department of Human Services for placement in foster care or a state facility.

The Respondents are correct in observing that the designation "ward of the state" is most often used in reference to children in the context of child welfare or juvenile proceedings. However, I find no legal authority supporting the view that only a minor may be classified as a ward of the state. In common usage, the phrase "ward of the state" is broad enough to encompass both minors and incompetent adults. To infer, from the fact that the federal definition makes foster children and children in the custody of child welfare agencies categorically wards of the state, that only minor children can be wards of the state would be contrary to the purpose and intent of the IDEA to ensure the educational rights of disabled individuals through the age of 21.

In the absence of a meaningful legislative definition, "[w]ords and phrases shall be construed according to the context and the approved usage of the language." *Lockhart v. Cedar Rapids School Dist.,* 577 N.W.2d 845, 847 (Iowa 1998), citing Iowa Code § 4.1(38). "The dictionary is an acceptable source for the common meaning." *State v. White*, 545 N.W.2d 552, 555 (Iowa 1996).

Black's Law Dictionary defines "ward of the state" as a "person who is housed by, and receives protection and necessities from, the government." *Black's Law Dictionary*, 1577 (7th Ed. 1999) (the definition of ward of the state is unchanged in the 9th edition of the dictionary, which is accessable through Westlaw). This definition is consistent with Iowa case law recognizing that an incompetent adult committed to the care of a state or county institution is a ward of the state. *Polk County v. Clarke County,* 171 Iowa 558, 151 N.W. 489 (1915) (discussing the legal settlement of a married adult woman). In arriving at this conclusion, the court observed:

> The insane wife, while in name still a member of the husband's family, is no longer a member of his dependent family. She is a ward of the state. The husband has no control over her and is powerless to direct the manner

> or place of her restraint. She has neither intelligent volition nor liberty of action.

Id., 151 N.W. at 490.

The Respondents' argument that a person cannot be a ward of the state unless an agency or person acting at the state-level of government is the designated guardian is equally unconvincing. Although the IDEA separately defines the term "State" as "each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas" (20 U.S.C. § 1401(31)); this definition is not logically incorporated into the definition of "ward of the state." Rather, IDEA definition of "ward of the state" instructs that the state determines who is a "ward of the state." Nothing in Iowa statutes or common law dictates against application of the dictionary definition of "ward of the state," in which the word "state" is used to generally denote "the government." Logically, in this context, both state agencies and political subdivisions are the government. The ward of a county social services agency has no less need, or greater right to self-determination, than a ward of the state department of human services.

MCCS was appointed through proper judicial proceedings to serve as [J.H.]'s guardian. MCCS is a department of Muscatine County government. This government agency has a duty to provide for "the care, comfort and maintenance of the ward, including the appropriate training and education to maximize the ward's potential." Iowa Code § 633.635(1)(a). MCCS must also take reasonable care of the ward's property; ensure "the ward receives necessary emergency medical services;" assist "the ward in developing maximum self-reliance and independence;" and ensure "the ward receives professional care, counseling, treatment, or services as needed." Iowa Code § 633.635(1)(b)-(e).

The Complainant does not argue that [J.H.] is a ward of the state solely because he receives assistance under the Medicaid program. Nor could such an argument succeed. Determination of whether a person is a ward of the state requires consideration of where the person resides and who is responsible for the person's protection and care. In this case, [J.H.] resides at the Glenwood Resource Center, a state-owned and operated facility. He is deemed incompetent to care for himself and is reliant upon a public guardian as his decision-maker. He is housed by the state and is dependent upon government programs and funding for housing, medical care, and all other necessities. These circumstances dictate a finding that [J.H.] is a "ward of the state." The government agency that serves as his guardian cannot serve as his parent under the IDEA.

Further, a separate basis for disqualifying MCCS from serving as [J.H.]'s parent arises under the Iowa special education rules. While the definition of parent in the Iowa rules largely mirrors the federal regulation, the Iowa rule includes an exclusion from the definition of parent not found in the federal definition.

> "Parent" does not include a public or private agency involved in the education or care of a child or an employee or contractor with any public

> or private agency involved in the education or care of a child in that employee's or contractor's official capacity.

281 IAC 41.30(2)(c). Keeping in mind that a disabled person under the age of 21 is a child in this context, MCCS is clearly "a public … agency involved in the … care of a child." 281 IAC 41.30(2)(c). Even if I accepted the Respondents' argument that [J.H.] is not a "ward of the state," the Iowa rule prohibits MCCS from being recognized as an IDEA parent.

The rule 41.40(2)(c) exclusion mirrors one of the limitations the federal Act places on who can serve as a surrogate parent. *See* 34 CFR § 300.519(d)(2) and 441 IAC 41.519(4)(b). The strong public policy reasons for disqualifying a public agency involved in the care of a child from serving as a surrogate equally support extending the exclusion to the definition of parent.

> The IDEA allows a public agency to select surrogate parents by any method permitted under State law, except that it must make certain the individual selected (1) is not an employee of any agency involved in the education or care of the child; (2) has no interest that conflicts with the interest of the child he or she represents; and (3) has the knowledge and skills that ensure adequate representation of the child [*see* 34 CFR 300.519(d)(2)]. It is very important that the surrogate parent adequately represents the educational interest of the child, and not the interests of a particular agency.
>
> In the case of other governmental agencies, even those agencies that are not involved in the education of the child may have a conflict between the interest of the child and those of the employee of the agency because some educational decisions will have an impact on whether an educational agency or some other governmental agency will be responsible for paying for or providing services for the child.

Letter to Yudien, 38 IDELR 245, 103 LRP 11620 (OSEP 3/11/2003).[1]

Indeed, the facts of this case demonstrate precisely the type of conflict discussed in *Letter to Yudien*. At the time of [J.H.]'s placement at the Glenwood Resource Center in March of 2012, MCCS was serving as his guardian. In that role, MCCS was obligated to protect [J.H.]'s interests and to make educational decisions to maximize his potential. The director of MCCS, Michael Johannsen, was simultaneously serving the Administrator of the Central Point of Coordination (CPC) plan for Muscatine County.

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[1] This is a policy letter issued by the federal Department of Education, Office of Special Education Policy (OSEP). While interpretations of statutes and regulations set forth in OSEP policy letters "are not binding on recipients of IDEA funds, courts give substantial deference to an agency's interpretation of the statutes and regulations it must administer." *Yankton School Dist. v. Schramm,* 900 F.Supp. 1182, 1190 (D. S.D. 1995), citing *Board of Regents of the Univ. of Minnesota v. Shalala*, 53 F.3d 940, 943 (8th Cir. 1995).

The process for voluntary admission of an adult person to the state resource center required a request to be made by that person's guardian through the central point of coordination process and the county could be required to fund a portion of the expenses arising from the placement. *See* Iowa Code § 222.13(1), (3).

The conclusion that [J.H.] is a ward of the state and MCCS is disqualified from acting as [J.H.]'s IDEA parent does not restore [S.K.]'s authority to act as [J.H.]'s IDEA parent. Rather, the conclusion triggers consideration of whether a surrogate parent is needed.

The IDEA procedural safeguards require each public agency to have procedures in place to protect the rights of a child with disabilities through appointment of an individual to act as a surrogate for the parents when no parent can be identified or located or the child is a ward of the state. 20 U.S.C. § 1415(b)(2)(A); 34 CFR § 300.519(a)-(b). The procedures must include a method for determining whether a child needs a surrogate parent and a method for assigning a surrogate parent to the child, if needed. 34 CFR § 300.519(b). The surrogate "shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child." 20 U.S.C. § 1415(b)(2)(A).

> Public agencies must ensure that a person selected as a surrogate parent –
> (i) Is not an employee of the SEA, the AEA, or any other agency that is involved in the education or care of the child;
> (ii) Has no personal or professional interest that conflicts with the interest of the child the surrogate parent represents; and
> (iii) Has knowledge and skills that ensure adequate representation of the child.

34 CFR § 300.519(d)(2); 281 IAC 41.519(4)(b).

Not every child who is in foster care, in the custody of a welfare agency, or otherwise deemed a ward of the state is in need of a surrogate parent. The federal Office of Special Education and Rehabilitation Policy has examined the circumstances under which a surrogate parent must be appointed and concluded that 34 CFR § 300.519(b) does not "require the automatic appointment of a surrogate parent for every child who is a ward of the State, if the public agency determines that the child's rights are otherwise protected." *Letter to Caplan*, 58 IDELR 139 (OSEP 9/6/11).

> Part B of the IDEA requires States and their public agencies to determine whether a surrogate parent must be appointed for a child with a disability who is a ward of the State under the laws of that State. In general, we believe that consistent with its duty under 34 CFR § 300.519(b), a public agency would be required to appoint a surrogate parent for a child who is a ward of the State – even if the child's biological or adoptive parent is available – if State law or a court order specifies that the biological or adoptive parent has no authority to make educational decisions for the child.

Id.; *see also Letter to Ford*, 41 IDELR 10, 104 LRP 1269 (OSEP 7/10/2003) (finding nothing in the criteria of the former version of the federal regulation regarding surrogate parents "requiring that the natural parents' rights to make educational decisions be terminated in order for a foster parent to be appointed as a surrogate").

The district court, in its September 3, 2012 Order, carefully considered and rejected [S.K.]'s argument that it would be in [J.H.]'s best interest for her to be reinstated as his guardian. The court specifically found that, although she was a strong advocate for her son, she had been "unable to satisfy the heavy burden that is placed upon a guardian to act in a proper and timely manner to ensure the ward's well-being." (Exhibit A at pp. 5-6) MCCS was appointed to continue serving as guardian for [J.H.]. In light of this Order, [S.K.] lacks authority to make educational decisions for [J.H.]. Her willingness to do so does not negate the need for appointment of a surrogate parent.

I have also considered the transfer of rights provision of the IDEA. The Act allows a state to "provide that, when a child with a disability reaches the age of majority under State law (except a child with a disability who has been determined to be incompetent under State law) – "all rights accorded to parents under [Part B of the IDEA] transfer to the child." 20 U.S.C. § 1415(m); 34 CFR § 300.520(a). Iowa has exercised this transfer of rights option through state statue and rule.

> When a child requiring special education attains the age of majority … all rights accorded to the parent or guardian under this chapter transfer to the child except as provided in this subsection. … If rights under this chapter have transferred to the child and the child has been determined to be incompetent by a court or determined unable to provide informed educational consent by a court or other competent authority, then rights under this chapter shall be exercised by the person who has been appointed to represent the educational interest of the child. …

Iowa Code § 256B.6(3); *see also* 281 IAC 41.520. Absent marriage or incarceration, the age of majority in Iowa is 18. Iowa Code § 599.1.

[J.H.] is beyond the age of majority in Iowa. He has been determined incompetent and has a court-appointed guardian who holds the authority to make educational decisions on his behalf. During the time [S.K.] served as [J.H.]'s guardian she could have exercised his right to initiate a due process proceeding. The September 13, 2012, Order of the district court permanently removed [S.K.] and appointed MCCS to serve as [J.H.]'s guardian. Unless the September 13, 2012, Order is reversed through appeal or superseded by a subsequent order, [S.K.] has no legal authority to represent [J.H.]'s educational interest or to enforce [J.H.]'s rights under the IDEA.

Finally, [S.K.] argues that someone must be authorized to pursue IDEA remedies on [J.H.]'s behalf. The allegations in [S.K.]'s complaint raise significant questions about the adequacy of the educational services provided to [J.H.]. The IDEA is structured to ensure that every child with a disability has a "parent" with legal authority to represent the child's interest. A surrogate parent should be appointed to fulfill the role of IDEA

parent for [J.H.]. However, because [S.K.] lacks authority to represent [J.H.]'s interest and does not have standing to maintain this due process proceeding, I have no jurisdiction or authority to order the appointment of a surrogate parent.

Due Process proceedings are not the only avenue that that may be used to seek correction of a perceived violation of the IDEA. The alternate "State Complaint" procedure allows any individual or organization to seek correction of a violation of Part B of the IDEA. 281 IAC 41.151 – 41.153; *see also* 34 CFR 300.151 – 300.153. As the Department of Education suggests, this is the appropriate forum for an interested person who lacks legal authority to pursue due process on a child's behalf to seek enforcement of the requirements of the IDEA. *E.g., Baltimore City Public Schools,* 112 LRP 39019 (Md. SEA 2012) (State Complaint decision finding violations of IDEA, including failure to timely appoint surrogate parent for student, and ordering remedies). Therefore, despite dismissal of this action, a mechanism exists through which [S.K.] may seek relief.

Order

The Complainant was not a real party in interest when the Due Process Complaint and Amended Due Process Complaint were filed. She lacks standing to pursue this action and the proceeding is DISMISSED in its entirety.

Issued on August 30th, 2013.

Christie J. Scase
Administrative Law Judge
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