



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

APR 16 2001

Linda L. Harant
Deputy County Attorney
Office of the Pinal County Attorney
Civil Division
P.O. Box 887
Florence, Arizona 85232

Dear Ms. Harant:

This is in response to your letter to Kenneth R. Warlick, former Director of the Office of Special Education Programs (OSEP), written on behalf of school districts and schools in the Pinal County Special Education Consortium and other schools in Pinal County serving Indian children residing on reservations. Your specific inquiry concerns whether the regulations implementing Part B of the Individuals with Disabilities Education Act (Part B), at 34 CFR §300.515 governing the appointment of surrogate parents are applicable to public agencies responsible for ensuring the provision of a free appropriate public education (FAPE) to these children. Under Part B, a public agency must ensure that the rights of a child with a disability are protected if (1) no parent, as defined at 34 CFR §300.20, can be identified; (2) the public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or (3) the child is a ward of the State under the laws of that State. 34 CFR §300.515(a). If any of these situations is present, the "duty" of the public agency includes the assignment of an individual to act as a surrogate for the parents. The public agency must have a method for determining whether a child needs a surrogate parent and for assigning a surrogate parent to the child. 34 CFR §300.515(b).

As we understand your specific inquiry, since a tribal government is not included in the definition of *State* applicable to Part B of IDEA as defined by the regulation at 34 CFR §300.27, you question whether a surrogate parent would need to be appointed if a child is made a ward of a tribal court. As you point out, because of the absence of a reference to tribal government in the definition of the term *State* in the Part B regulations, a child who is a ward of a tribal court is not considered a ward of the State under 34 CFR §300.515(a)(3). However, this is not a sufficient basis for relieving the public agency of its responsibility of ensuring that the rights of the children described in your inquiry are protected through the appointment of a surrogate parent if the appointment is deemed appropriate. As noted above, under 34 CFR §300.515(a), a public agency must also ensure that the rights of a child are protected if no parent can be identified or the public agency, after reasonable efforts, cannot discover the whereabouts of a parent. In cases where the child is a ward of the tribal court and the parent's right to make educational decisions has been terminated or transferred by the tribal court to another individual, the public agency must determine whether a parent as defined at 34 CFR §300.20 can be identified.

According to your letter, a child's wardship status results in the child's being in the custody, care and control of a tribal social services agency. Physical custody may be given to an individual, often a relative of the child. The courts usually give authority to make medical and educational decisions either to the individual into whose physical care the child is given, or for those students who are placed in a facility operated by the social services agency, to an identified agency caseworker. In both these situations, it appears that the parent's right to make educational decisions has been terminated. If no parent can be identified, it is Pinal County's responsibility to ensure that the surrogate parent requirements at 34 CFR §300.515 are met. Nothing in Part B prevents Pinal County from assigning the individual selected by the tribal court to make educational decisions for the child to act as a surrogate parent assuming that individual meets the criteria in 34 CFR §300.515. In addition, nothing in Part B prevents the public agency from appointing an individual who is a member of the child's Indian tribe as a surrogate parent assuming that person meets the criteria set out in 34 CFR §300.515(c).

For those children in the physical custody of an individual such as a relative, who has authority to make medical and educational decisions for the child, the public agency may determine that a surrogate parent is not needed. In determining whether the surrogate provisions of Part B are applicable, a public agency must ascertain, as a threshold matter, whether a parent, as defined at 34 CFR §300.20, can be identified. Under the Part B definition of parent, *parent* means:

- (1) A natural or adoptive parent of a child;
 - (2) A guardian but not the State if the child is a ward of the State;
 - (3) A person acting in the place of a parent (such as a grandparent or stepparent with whom the child lives, or a person who is legally responsible for the child's welfare); or
 - (4) A surrogate parent who has been appointed in accordance with §300.515.
- 34 CFR §300.20(a).

Paragraph (b) explains further that a State may allow foster parents to act as parents under Part B, unless State law prohibits them from doing so, but the following conditions must be satisfied. The natural parent's authority to make educational decisions on the child's behalf must be extinguished under State law. 34 CFR §300.20(b)(1). The foster parent must have an ongoing, long-term parental relationship with the child, must be willing to make educational decisions required under Part B, and must have no interest that would conflict with the interests of the child. 34 CFR §300.20(b)(2). As explained in the comments and responses on the proposed regulations in the Analysis of Comments and Changes to the final Part B regulations, published as Attachment 1, at 64 Fed. Reg. at 12616:

In situations where a child who is a ward of the State has a foster parent who meets the definition of parent in §300.20 and the foster parent is acting as the parent, the public agency should determine if there is a need for a surrogate parent, and whether further steps are necessary to ensure that the rights of the child are protected. In most cases where the foster parent meets the definition of a parent and is acting as the parent, there would be no need to appoint a surrogate, unless the agency determined that in the particular circumstances of the case a surrogate was necessary to ensure that the rights of the child were protected.

If the child is a ward of the tribal court and the individual with whom the child is living does not fit within the definition of a “parent”, the public agency then would need to appoint a surrogate parent. If the child is a ward of the tribal court and placed in a facility operated by the social services agency, the public agency would need to determine whether the child needs a surrogate parent and to assign an individual to act as a surrogate if one is needed.

Section 300.515(c) of the Part B regulations sets out the criteria for selection of surrogates. In general, paragraph (c)(2)(i) provides that, except under paragraph (c)(3), the person selected as surrogate may not be an employee of the SEA, the LEA, or any other agency that is involved in the education or care of the child. 34 CFR §300.515(c)(2)(i). However, under paragraph (c)(3), a public agency may select as surrogate “a person who is an employee of a nonpublic agency that only provides non-educational care for the child and who meets the standards in paragraphs (c)(2)(ii) and (c)(2)(iii) of this section.” Under these criteria, the person selected as surrogate must have “no interest that conflicts with the interests of the child he or she represents” and “knowledge and skills that ensure adequate representation of the child.” 34 CFR §300.515(c)(2)(ii)-(iii). Therefore, it may be possible for a designated employee at the social service agency, if that social service agency is a nonpublic agency that only provides non-educational care for the child, to be appointed as the child’s surrogate parent if that individual meets the criteria in 34 CFR §300.515(c)(3).

We hope that you find this explanation helpful. If we can be of further assistance, please contact Dr. JoLeta Reynolds of OSEP at (202) 205-5507 or Sarah Willis, the BIA Part B State contact in the Monitoring and State Improvement Planning Division, at (202) 205-8658.

Sincerely,



Patricia J. Guard
Acting Director
Office of Special Education Programs

cc: Dr. Angelita Felix, Director
Bureau of Exceptional Education, BIA
Lisa Graham Keegan, Superintendent of Public Instruction
Arizona Department of Education