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5 **IN THE SUPREME COURT**  
6 **STATE OF ARIZONA**

7 In The Matter Of PETITION TO AMEND  
8 THE RULES OF PROCEDURE FOR THE  
9 JUVENILE COURT

R-20-0044

**COMMENT ON PETITION**

10 The Arizona Center for Disability Law (ACDL) is the designated protection and  
11 advocacy system for persons with disabilities in the State of Arizona. ACDL advocates for  
12 the legal rights of persons with disabilities to be free from abuse, neglect, and discrimination.  
13 ACDL does significant advocacy work in the area of special education. Much of ACDL's  
14 special education work focuses on underserved populations, including youth in foster care.  
15 Having worked at the intersection of special education and dependency, ACDL has identified  
16 ways the juvenile court rules might be altered to improve outcomes for dependent and  
17 delinquent children with disabilities. For these reasons, ACDL offers the following comments  
18 to the proposed amendments filed by the Task Force on the Rules of Procedure for the Juvenile  
19 Court. ACDL provided these comments via email to the Task Force in November 2020.

20 Pursuant to Rule 28(D), Rules of the Supreme Court, ACDL respectfully submits these  
21 comments to the Petition to Abrogate Current Rules of Procedure for the Juvenile Court  
22 (Petition) for the Court's consideration.  
23

1 **BACKGROUND**

2 The Individuals with Disabilities Education Act (IDEA) is a federal law from which  
3 special education rights are derived. 20 U.S.C. § 1400, *et. seq.* It is under the IDEA that students  
4 with disabilities may be identified as eligible for and provided special education and related  
5 services through an Individualized Education Program (IEP).

6 Determining who can make decisions for a child who needs special education begins with  
7 the IDEA’s complex definition of “parent.” A child cannot be evaluated or begin to receive special  
8 education services until an IDEA Parent has given written permission. In most cases it is the  
9 IDEA Parent who consents to the first evaluation. It is the IDEA Parent who consents to services  
10 beginning under the IEP or disagrees with the IEP that the school district is proposing and uses  
11 the special education hearing and appeal system to get the services the child needs. Making sure  
12 that each child in the care of a child welfare agency has an effective IDEA Parent is the best way  
13 to ensure that children with disabilities in out-of-home care get help to achieve their learning  
14 potential.

15 IDEA’s implementing regulations define “parent” as:

- 16 (1) A biological or adoptive parent of a child;
- 17 (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;
- 18 (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);
- 19 (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  
20 individual who is legally responsible for the child’s welfare; or
- 21 (5) A surrogate parent who has been appointed in accordance with §300.519 or  
section 639(a)(5) of the Act.

22 34 C.F.R. § 300.30(a).

23

1 In some cases, the IDEA Parent for a given child will be obvious. However, for some  
2 dependent children, there can be more than one adult at any given time who meet the definition  
3 of “parent” under IDEA. Determining which adult is the IDEA Parent in those situations is  
4 important to provide clarity to the child’s school system and to avoid conflicts and power  
5 struggles between adults to the detriment of the child.

6 IDEA provides some help in the situation when two or more adults fit the definition of  
7 “parent”:

8 (b) (1) Except as provided in paragraph (b)(2) of this section, the biological or  
9 adoptive parent, when attempting to act as the parent under this part and when  
10 more than one party is qualified under paragraph (a) of this section to act as a  
11 parent, must be presumed to be the parent for purposes of this section unless the  
12 biological or adoptive parent does not have legal authority to make educational  
13 decisions for the child.

14 (2) If a judicial decree or order identifies a specific person or persons under  
15 paragraphs (a)(1) through (4) of this section to act as the “parent” of a child or to  
16 make educational decisions on behalf of a child, then such person or persons shall  
17 be determined to be the “parent” for purposes of this section.

18 34 C.F.R. § 300.30(b). Thus, if there is more than one qualified adult who could be a child’s  
19 IDEA Parent, the biological or adoptive parent will always take precedent over other adults so  
20 long as that person is attempting to act as the parent and their rights have not been otherwise  
21 abrogated by a court. However, even if biological/adoptive parents retain their rights, a court  
22 order naming another person to act as the IDEA Parent will supersede any other claims.

23 The Arizona legislature attempted to wade into this issue in 2019, passing legislation that  
24 amended Arizona Revised Statutes relating to the Arizona Child Welfare System:

25 A. If a child in the custody of the department is in out-of-home care and is  
26 receiving or in need of services pursuant to title 15, chapter 7, article 4, the  
27 department shall promptly notify the child's public education agency of the name  
28 and contact information for the child's parent, as defined in 34 Code of Federal  
29 Regulations section 300.30, unless a court has ordered otherwise.

1 B. If a public education agency notifies the department that the child requires an  
2 initial evaluation for special education and related services and the parent  
3 identified pursuant to subsection A of this section cannot be located or does not  
4 attempt to participate, the department shall promptly notify the public education  
5 agency of a parent, as defined in 34 Code of Federal Regulations section 300.30,  
6 who can consent to or refuse the initial evaluation in accordance with 20 United  
7 States Code section 1414.

8 C. When the biological or adoptive parent of the child attempts to act as the parent,  
9 the biological or adoptive parent is presumed to be the parent for the purposes of  
10 this section.

11 A.R.S. § 8-514.08. This state law mirrors what is already enshrined in the federal IDEA  
12 regulations, and places some responsibility on the Department of Child Safety (DCS) to provide  
13 a child's public education agency (school) with the name of someone able to act as the child's  
14 IDEA Parent.

### 15 **THE PROBLEM**

16 Students in foster care are 2 to 3 times more likely than their peers not in care to have  
17 disabilities that should qualify them for special education. Although they are entitled to services  
18 and supports, Arizona foster youth with disabilities are routinely denied those necessary  
19 accommodations and end up in inferior learning environments because they lack consistent  
20 educational advocates. The result is that foster youth with disabilities are more likely than their  
21 peers to face poor educational and employment outcomes.

22 The IDEA is built on the premise that all parents play an active role in their child's  
23 education and are equipped to advocate to the school for their child's needs. For many populations,  
but especially for children in foster care, this premise does not hold. Without a consistent special  
education "parent," these students have no one to push back against schools that are not acting in  
a child's best interests, and many foster children go unidentified as eligible for services or are  
short-changed when it comes to having their disability-related needs met.

1           One way to help improve educational outcomes for foster youth is to ensure, from the  
2 moment a child enters the child welfare system, that all parties know who the IDEA Parent is.  
3 The IDEA itself and A.R.S. § 8-514.08 provide some help in determining who that person is, but  
4 there are situations that present ambiguity and undermine advocacy efforts. Having clarity on  
5 who the IDEA Parent is for a given foster child is valuable for the child, the IDEA Parent, school  
6 districts, and DCS. Without knowing who the IDEA Parent is, schools are unable to know who  
7 to invite to IEP meetings, who to request informed written consent from before conducting special  
8 education evaluations, and who will have standing when it comes to disputing school decisions.  
9 Without knowing who the IDEA Parent is, DCS will not know whose information to share with  
10 the child's school, as required by A.R.S. § 8-514.08. The practice now appears to be that the  
11 dependency court will not weigh in on who the IDEA Parent is unless a conflict arises and a party  
12 petitions the court for an order. However, to avoid delay and confusion, we recommend that rules  
13 be adopted that will require dependency courts to proactively make these determinations, rather  
14 than waiting until a conflict arises.

15           Further, it is our understanding that some dependency courts do issue findings related to  
16 educational decision-making authority, but are routinely finding that that authority is shared  
17 between the biological/adoptive parent, the out-of-home placement, and DCS. This type of  
18 finding violates IDEA. The IDEA specifically prohibits employees of the State Education Agency,  
19 the child's school, or employees of any agency involved in the child's education or care from  
20 serving as the child's surrogate parent. 34 C.F.R. §300.519(d). Therefore, a finding that DCS, an  
21 agency involved the child's care, has special education decision-making authority, contravenes  
22 federal law.

1 Furthermore, finding shared decision making authority between a biological/adoptive  
2 parent and the out-of-home placement may result in conflicting interests and ambiguity around  
3 standing for purposes of challenging a school decision. Therefore, we recommend that any rule  
4 change specifically require the court to identify one person to serve as the child’s IDEA Parent,  
5 and that the rules make clear that DCS cannot serve as the IDEA Parent.

## 6 RECOMMENDED CHANGES

7 Below are our recommended changes to the proposed rules. Additions are in red.

### 8 **Rule 332. Preliminary Protective Hearing**

9 ...

10 (d) **Findings.** At the conclusion of the hearing, the court must make findings that include the  
11 following:

12 ...

13 (7) if applicable, the reasons why siblings have not been placed together;

14 (8) identification of the adult who has special education decision-making authority as to this  
15 child at this time in accordance with federal regulations at 34 C.F.R. § 300.30; and

16 (9) other findings as appropriate or required by law.

### 17 18 **Rule 334. Initial Dependency Hearing**

19 ...

20 (f) **Findings.** All findings must be contained in a signed minute entry or order. At the conclusion  
21 of the hearing the court must make findings that include:

22 ...

23 (7) if applicable, the reasons why siblings have not been placed together;

- 1 (8) identification of the adult who has special education decision-making authority as to this  
2 child at this time in accordance with federal regulations at 34 C.F.R. § 300.30; and  
3 (9) other findings as appropriate or required by law.  
4

5 **Rule 341. Review Hearing**

6 ...

7 **(f) Findings and Orders.** All findings and orders must be in a signed minute entry or order.

8 ...

9 **(G)** if there is reason to know child is an Indian child, make findings pursuant to the standards  
10 and burdens of proof required under ICWA, including whether placement of the Indian child is  
11 in accordance with ICWA § 1915, 25 C.F.R. § 23.131, and Rule 50.2;

12 **(H)** identify the adult who has special education decision-making authority as to this child at this  
13 time in accordance with federal regulations at 34 C.F.R. § 300.30; and

14 **(I)** make other findings as appropriate or required by law.  
15

16 **Rule 342. Motion for Return of the Child**

17 ...

18 **(f) Findings and Orders.** The court must make factual findings even when no party objects to  
19 the motion. All findings and orders must be in a signed minute entry or order. The court must:

20 ...

21 (4) if ICWA applies, and the court has not yet done so, make findings pursuant to the standards  
22 and burdens of proof required under ICWA and the Regulations, including whether placement  
23

1 of the Indian child is in accordance with ICWA § 1915 and 25 C.F.R. § 23.131, or whether  
2 there is good cause to deviate from the preferences;

3 (5) identify the adult who has special education decision-making authority as to this child at this  
4 time in accordance with federal regulations at 34 C.F.R. § 300.30; and

5 (6) make any other findings and enter any other orders appropriate or required by law.

6  
7 **Rule 343. Permanency Hearing**

8 ...

9 (d) **Findings and Orders.** All findings and orders must be in a signed minute entry or order.

10 The court must make findings and:

11 ...

12 (6) if the child is in an out-of-home placement, the court must make a finding as to whether the  
13 placement continues to be appropriate and in the child's best interests;

14 (7) identify the adult who has special education decision-making authority as to this child at this  
15 time in accordance with federal regulations at 34 C.F.R. § 300.30; and

16 (8) make other findings as appropriate or required by law.

17  
18 **Rule 345. Initial Guardianship Hearing**

19 ...

20 (d) **Findings and Orders.** At the conclusion of the hearing, the court must:

21 ...

22 (5) if the child is an Indian child, make findings pursuant to the standards and burdens of proof  
23 required under ICWA;

1 (6) identify the adult who has special education decision-making authority as to this child at this  
2 time in accordance with federal regulations at 34 C.F.R. § 300.30; and

3 (7) make findings and enter other orders that may be appropriate or required by law.  
4

5 **Rule 346. Guardianship Adjudication Hearing**

6 ...

7 (g) **Findings and Orders.** At the conclusion of the hearing, the court must:  
8

9 ...

10 (3) if the child is an Indian child, the court must make findings pursuant to the standards and  
11 burdens of proof as required under ICWA;

12 (4) identify the adult who has special education decision-making authority as to this child at this  
13 time in accordance with federal regulations at 34 C.F.R. § 300.30;

14 (5) if the moving party fails to meet the burden of proof, the court must deny the guardianship  
15 motion, establish a revised permanency plan, and set a review hearing; and

16 **Rule 350. Initial Termination Hearing**

17 ...

18 (d) **Findings and Orders.** At the conclusion of the hearing, the court must:  
19

20 ...

21 (5) if the child is an Indian child, the court must make findings pursuant to the standards and  
22 burdens of proof required under ICWA;

23 (6) identify the adult who has special education decision-making authority as to this child at this  
time in accordance with federal regulations at 34 C.F.R. § 300.30; and

1 (7) make findings and enter other orders that are appropriate or required by law.

2  
3 **Rule 351. Termination Adjudication Hearing**

4 ...  
5 **(h) Findings and Orders.** At the conclusion of the hearing, the court must:

6 ...  
7 **(D)** if the child is an Indian child, make findings pursuant to the standards required under  
8 ICWA, including whether placement of the child is in accordance with ICWA §1915 and 25  
9 C.F.R §§ 23.130 through 23.131, or whether there is good cause under 25 C.F.R. § 23.132 to  
10 deviate from the placement preferences;

11 **(E)** identify the adult who has special education decision-making authority as to this child at  
12 this time in accordance with federal regulations at 34 C.F.R. § 300.30; and

13 **(F)** set or reaffirm the dependency review hearing.  
14

15 RESPECTFULLY SUBMITTED this 23 day of July, 2021.

16  
17 /s/ Amanda Glass  
Amanda Glass  
Staff Attorney  
18 ARIZONA CENTER FOR DISABILITY LAW  
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