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## Child Custody and Children with Disabilities



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### Divorce and Children with Special Needs

- Divorce proceedings can be particularly hard on children, especially children with disabilities.
- If the children have disabilities and need special education services, the situation can be even more complex.
- In that case, families need to see that the Individuals with Disabilities Education Improvement Act (IDEA 2004) rights of children with disabilities and their parents are protected, and the students make educational progress.



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### Custody

- **The Significance of Physical Custody, Legal Custody and Joint Legal Custody for families with children with special needs**
- Legal Custody: The decision making authority. Responsibility to make decisions regarding education, health care, and religion.
- Physical Custody: Where the child spends more overnights.



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### Special Education in a Nutshell

- The federal government has created some guidelines that all states must follow when educating children.
  - Free and Appropriate Education Act (FAPE)
  - Individuals with Disabilities Education Act (IDEA)
  - Article 7: Indiana's special education regulations that are found in the Indiana Administrative Code (IAC) at 511 IAC 7-32 through 7-47.

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### IDEA

- The Individuals with Disabilities Education Act (IDEA) is a four-part (A-D) piece of American legislation that ensures students with a disability are provided with a Free Appropriate Public Education (FAPE) that is tailored to the child's individual needs.
- The 13 disability categories are: autism, deaf-blindness, deafness, emotional disturbance, hearing impairment, intellectual disability, multiple disabilities, orthopedic impairment, other health impairment, specific learning disability, speech or language impairment, traumatic brain injury, or visual impairment (including blindness).

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### What is an IEP?

- Individualized Education Program/ Plan
- Every child with a disability that qualifies for special education services should have an IEP (To qualify the disability must affect the child's ability to function academically in school and falls under one of the 13 categories of IDEA)
- Schools are responsible to identify students with disabilities under Child Find
- The IEP, Individualized Education Program, is a written document that's developed for each public school child who is eligible for special education. The IEP is created through a team of qualified school personnel and the parents (or person with legal custody) and is reviewed at least once a year.

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### What is an IEP?

- The IEP serves as a blueprint for the child's special education and related services under IDEA, and the scope of activities and settings it covers.
- **The IEP has two general purposes:**
  - (1) to establish measurable annual goals for the child, and
  - (2) to state the special education and related services and supplementary aids and services that the public agency will provide to, or on behalf of, the child. When constructing an appropriate educational program for a child with a disability, the IEP team broadly considers the child's involvement and participation in three main areas of school life:
    - the general education curriculum,
    - extracurricular activities, and
    - nonacademic activities.

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### What an IEP must contain

- A statement of the child's **present levels of academic achievement and functional performance**, including how the child's disability affects his or her involvement and progress in the general education curriculum;
- A statement of measurable **annual goals**, including academic and functional goals;
- A description of how the **child's progress** toward meeting the annual goals will be measured, and when periodic progress reports will be provided;

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- A statement of the **special education and related services** and **supplementary aids and services** to be provided to the child, or on behalf of the child;
- A statement of the **program modifications or supports for school personnel** that will be provided to enable the child to advance appropriately toward attaining the annual goals; to be involved in and make progress in the general education curriculum and to participate in extracurricular and other nonacademic activities; and to be educated and participate with other children with disabilities and nondisabled children;
- An explanation of the **extent, if any, to which the child will not participate with nondisabled children** in the regular class and in extracurricular and nonacademic activities;

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- A statement of any **individual accommodations** that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments;
- Note: If the IEP team determines that the child must take an alternate assessment instead of a particular regular State or districtwide assessment of student achievement, the IEP must include a statement of why the child cannot participate in the regular assessment and why the particular alternate assessment selected is appropriate for the child; and
- The **projected date** for the beginning of the services and modifications, and the anticipated **frequency, location, and duration** of those services and modifications.

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### What is a 504 Plan?

- The Rehabilitation Act of 1973, Section 504, ensures that students with disabilities receive **accommodations** so that they may be successful in the classroom.
- Under Section 504, Indiana students with disabilities cannot be denied access to the academic and extracurricular activities of their nondisabled peers simply because of their disability. Children who do not have an IEPs may be eligible for certain accommodations under a 504 plan.
- Section 504 covers students whose disabilities significantly limit their daily lives and activities in one or more ways. These ways may include, but are not limited to:
  - Breathing
  - Hearing
  - Learning
  - Seeing
  - Caring for oneself
  - Walking
  - Functions related to the immune system, brain, respiratory system, and reproductive functions, among others

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In case you are interested...

	IEP	504 Plan
Law	federal educational benefit law Individuals with Disabilities Education Act (IDEA)	federal civil rights law Rehabilitation Act, Americans with Disabilities Act (ADA)
Purpose	to meet a child's specific educational needs provided under FAPE	protection from discrimination related to disability. More focus on access
Definition	disability definition very specific	definition of disability more subjective
Eligibility	must qualify under a designated disability category	must have a physical or mental impairment that substantially limits one or more major life activities; case by case determination
Consent Rights	Required by legal guardian	Not required
Discipline	even if child is removed from school, still has a right to an education in an alternate setting if behavior was a manifestation of the disability	child can be expelled without educational benefit even behavior is a manifestation of the disability

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	IEP	504 Plan
Services	tailored to child's unique needs; must result in educational benefit	accommodations based on disability and weaknesses; does not require educational improvement
Financial	provides additional funding to the school	does NOT provide additional funding to schools
Complaints	contact: DOE (Department of Education)	contact: OCR (Office for Civil Rights)
Longevity	ages 3-21 / preschool to graduation	whole life
Contesting	when contesting what is in a newly drafted IEP, the OLD IEP stays active until the matter is resolved	when contesting a newly drafted 504, the NEW 504 is in place until the matter is resolved

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### Why do I care?

- Educational decisions are determined by who the Court awards custody of the child.
- Different school districts may have better or worse reputations/resources for providing specific services
- Disputes between parents can cause issues with services for the child in school
- Disabilities can effect the ability of the child to reasonably handle certain parenting time schedules

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### Legal Custody

- Legal custody decisions for children with special needs on education are more frequent, need to be decided on a quicker timeline, and have great affect on children with special needs
  - May want to consider:
    - which parent has been involved with the school;
    - has familiarity with the child's providers;
    - has attended therapy or training specific to the child's needs;
    - and which parent has historically attended the child's case conferences (IEP meetings)

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**IEPs and 504 Plans**

- IEPS and 504 Plans can clue in the practitioners and the Court to the child's areas of disability, and the child's specific strengths and weakness.
  - For example, if the child struggles with transitions, the parenting time schedule may need to consider a more structured schedule, with one primary parent versus frequent transitions.
  - Use of color coded calendars and preparation for transitions from one parent to another could be beneficial
- IEPs and 504 Plans can advise the Court if there is any sort of physical disabilities or special medical treatment
  - such as child having a feeding tube, seizure disorder, wheel chair, etc.
  - May require special training/skills/equipment needed by both parents during parenting time

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**Determining Which Parent has Rights to Access Student Information**

- Under Indiana law, both parents are entitled to direct access to their child's school records, Indiana Code § 20-33-7-2 unless a Court orders otherwise.
- Pursuant to the INPTG, a parent shall not interfere with the right of the other parent to communicate directly with school personnel concerning a child. The noncustodial parent shall be listed as an emergency contact unless there are special circumstances concerning child endangerment.
- Notably, while both parents are entitled to access, only the parent or guardian with legal custody has the right to make the educational decisions more discussed herein

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**Figuring Out Which Parent can Make Educational Decisions**

- When parents live in different school districts, state laws often allow divorced or separated parents to choose between those districts by filing an election. Indiana Code § 20-26-11
- The parent with legal custody has the responsibility to make the decision
- Note: At least 1 Indiana Court of Appeals decision found that failure of children to progress academically constituted a substantial change in circumstances that warranted modification of custody from joint to sole physical and legal custody to father. Both children had been receiving failing grades and were in significant danger of not completing high school, and, while father sought educational testing for children, mother was opposed to such testing. I.C. 31-17-2-21. *Webb v. Webb*, 868 N.E.2d 589 (Ind. Ct. App. 2007)

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**Resolving Disputes**

- Only a parent with legal custody has the right to make special education decisions. If the court grants sole legal custody, the school should be informed, preferably in writing by the parents. Schools may request to see the divorce decree.
- Both parents with legal custody may bring an action, such as a due process matter.
- Of note, if parents share joint legal custody and parental consent is needed for special education, the school district can proceed with the signature of only one parent.

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**Child Support**

- Consideration should be taken as to any extraordinary expenses required for child with disability so the costs can be shared
- A parent's obligation to pay child support typically terminates upon the child reaching the age of emancipation, 19 years of age, (see *Ind. Code § 31-16-6-6*), but there is an exception for children whom are incapacitated. *Ind. Code § 31-16-6-6(a)(2)*
- *However, commencing July 1, 2019 the child support law in Indiana will change under House Bill 1520.*

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**Child Support**  
**House Bill 1520 – Going into Effect July 1, 2019**

- -Child support. Provides that the duty to support a child ceases when the child becomes 19 years of age unless the child is a full-time student in a secondary school. Provides that in order for child support to continue for a child who is:
  - (1) 19 years of age or older;
  - and (2) a full-time student in a secondary school;
- a parent or guardian of the child must file notice advising the court that the child continues or will continue to be enrolled in secondary school. Specifies requirements for the content and filing of the notice. Provides that if a party to the child support proceeding does not file an objection or request for a hearing within thirty (30) days after the party receives the notice, the court may, without holding a hearing, issue an order continuing child support through the date on which the child is expected to graduate. Provides that senior prosecuting attorneys include persons employed for at least eight years as a part-time deputy prosecuting attorney. Provides that senior prosecuting attorneys may prosecute criminal nonsupport cases.”
- *This will be particularly helpful for children with special needs, who can attend high school up until age 21*

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**Other considerations with a child with a disability**

- Ensuring child receives any regularly prescribed medication consistently while with both parents
- One parent is typically responsible for applying for Medicaid waiver for child (if applicable) - parental income and resources are disregarded for children under 18 years for all of Indiana's Medicaid Waivers although assets and income in the child's names are counted
- Frequent medical care, doctor appointments, and therapy appointments can impact ability for joint legal custody to be feasible if conflict between the parties
- Parenting coordinators could be beneficial in cases with conflict to gather information from all of the child's providers (education and medical)
- Some counties provide separate bus services for special needs children which can only be utilized from one parent's home, which can impact parenting time
- Impact on siblings of special needs children as it relates to their parenting time with each parent / possibly having separate, individual parenting time on certain occasions

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**Questions?**

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