

Exceptional Family Member Program (EFMP)



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The information provided in this document is meant for the sole use of Active Duty service members, retirees, their families, and other personnel eligible for legal assistance from the Space Base Delta 1 Legal Office. The information is general in nature and meant only to provide a brief overview of various legal matters. Rights and responsibilities vary widely according to the particular set of circumstances in each case. Laws can vary across states, services, and civilian jurisdictions and laws change from time to time. Do not rely upon the general restatements of background information presented here without discussing your specific situation with a legal professional.

EFMP

Introduction

This pamphlet is not designed to be comprehensive, but rather provide you with a brief overview of some of the options available to your family. With a subject as significant as planning for the future of your child, it is important you invest time to speak to an attorney to decide the best path forward. The Legal Office is ready to assist you as you begin this journey forward.

Military families with special needs children face a variety of challenges. At the Space Base Delta 1 Legal Office, it is our mission to help navigate you and your family through your legal options. As special needs children grow older, you, as a parent or guardian, will have to make important decisions regarding the future of your child. You likely have many questions—what rights to an education does my child have? What is the best way to leave assets to my child? Will my child’s government benefits be jeopardized if he or she inherits under the terms of my will? Am I automatically considered the guardian of an adult special needs child?

Educational Rights for Children Age 3-21

Children between the ages of 3 and 21 with a disability who need specially designed instruction have the right to a Free Appropriate Public Education (FAPE) under the *Individuals with Disabilities Education Improvement Act of 2004* (“IDEA”). A child with a disability means one with mental retardation; hearing impairments to include deafness, speech or language impairments; visual impairments including blindness; serious emotional disturbance; orthopedic impairments; autism; traumatic brain injury; other health impairments; or specific learning disabilities who needs special education and related services. These children are, to the maximum extent appropriate, to be educated with children who are not disabled (i.e. in the least restrictive environment). Qualifying children also must receive an individually tailored educational program, called an Individual Education Program (IEP) that lists a program and the services needed for the child to progress at school. In determining the IEP goals, placement of the child in school, and related services, parents have the right to “meaningful participation” in the decision-making process. The rights of these children are protected by federal law.

Children with a disability who do not need specially designed instruction, or special education, but do need accommodations to progress or attend public schools are covered by *Section 504 of the Rehabilitation Act of 1973*. Section 504 plans for these children usually outline accommodations like extra time between classes to get from one class to another class or additional time on tests. Children with a disability covered under this Act but not covered under IDEA are still entitled to a Free Appropriate Public Education (FAPE) in the Least Restrictive Environment (LRE). Like children covered under IDEA, the rights of these children are also protected by federal law.

Educational Rights for Children under the Age of 3

Children under age 3 with a disability can be provided services as part of an early intervention program. This program is called “Child Find” and exists throughout CONUS. Overseas, parents with concerns should address them with their medical professional and with the DoDDS school in their area. Child Find-like services overseas, called Educational and Developmental Intervention Service (EDIS),

can include early childhood special education, occupational therapy, and physical therapy. See <https://www.afspecialneeds.af.mil>.

This right to assistance before age 3 is covered by IDEA, Part C. However, many of the details on who qualifies for this program and who pays for this program vary from state to state. The first step for most parents is to request a free evaluation of their child through the local Child Find office. If the child is found to be eligible for services, then an Individual Family Support Plan (IFSP) will be created to outline goals and services to be provided to the child.

Please note, states are given a lot of flexibility in how they run Part C programs for children under the age of 3. You will find differences in what it takes to qualify for services, what services are available, and who pays for services. For example, a child under age 3 in Maryland may receive services for free while the same child moving to Arizona may not qualify for services or qualify for services but with a cost-share to be paid by his or her parents.

Guardianships

Parents of a teenage special needs child should seriously consider obtaining a guardianship if they believe their child cannot or will not be able to act responsibly himself or herself after turning 18 years of age. In most states, the child will acquire substantial rights on their 18th birthday. At this age, children gain the right to marry, refuse medical treatment, enter into contracts, move out of the home, and a variety of other rights. If you are the parent of a teenage special needs child, it is a good time to start considering if a guardianship would be appropriate.

Please note, a guardianship obtained in one state does not automatically transfer to another state. You may have to re-file for guardianship each time you move.

Supplemental Needs Trusts

A Supplemental Needs Trust (SNT) can be created to preserve a special needs child's government benefits. Many special needs people receive government benefits such as Supplemental Security Income and Medicaid. Oftentimes, Medicaid is an essential benefit, and the influx of funds from a will or insurance policies can dramatically, and negatively, affect the benefits your child will receive from government agencies. The primary benefit of an SNT is that none of the funds in the trust are considered the assets of your special needs child. These funds can be used to supplement government benefits to create a more positive environment for your child.

Education Law Issues

1. Does a child with a disability have a right to go to public school?

Yes. A "Free Appropriate Public Education" (FAPE) is available to all children with disabilities between the ages of 3 and 21, inclusive. This has not always been true. Congress first addressed the education of children with disabilities in the 1960s by establishing grants to help improve education efforts. In the 1970s, parents in the District of Columbia and Pennsylvania filed lawsuits against practices that systematically excluded children with disabilities from attending public schools. These cases caught the attention of Congress, leading to the *Education of All Handicapped Children Act of*

1975 which provided a right to a public school education for children with disabilities (now IDEA).

2. Can a child in a wheelchair be excluded from school trips?

No. Section 504 of the *Rehabilitation Act of 1973* prohibits the exclusion of an individual with a disability from participation in any program or activity that receives federal funds, including public schools. Further, children with a disability cannot be asked to pay more for school events than other students who do not have a disability. This principle is found in the right to a “Free Appropriate Public Education” (FAPE) in both *IDEA*, 20 USC § 1412(a)(1), and in Section 504 of the *Rehabilitation Act of 1973* (also see 34 CFR 104.33).

3. Can the school use physical restraints to tie a child to a chair?

Yes. Physical restraints can be part of a behavior improvement plan or an Individual Education Program (IEP) for a child with a disability. In general, and subject to state law, such restraints should only be used in emergency situations. However, a recent case should give parents pause before allowing restraints to be part of an IEP. In *C.N. v. Willmar Public Schools*, 591 F.3d 624 (8th Cir. 2010), restraints and seclusion were used on a primary school student excessively and used to demean, hurt, and belittle the student. The court of appeals held that the use of these methods, even if overzealous, could not be held to be unreasonable because they were in the IEP.

4. If a new school district cut special education services to a child in half, can the parents appeal?

Parents can appeal a reduction in services. When moving to a new school, federal law states the new school should provide “comparable” services to those of the transferring IEP. This language is also in the *Interstate Compact on Educational Opportunity for Military Children*. When the school cuts services, parents should request a letter from the school called “Prior Written Notice” about the denial. Then, they can appeal, requesting mediation or a due process hearing. If services were being provided at the higher level and are now proposed to be changed, the parents may be able to request a “stay put” in writing while awaiting a hearing. This will allow the child to continue to receive services at the current level and in the current placement while awaiting a hearing. See IDEA, 20 U.S.C. § 1414(d)(2)(c)(i), 20 U.S.C. § 1415(j) and 34 CFR 300.518, and the Art. V, para. C of the *Military Compact* (model at <http://www.mic3.net/>).

Guardianship Issues

5. How do I obtain guardianship over my mentally impaired 18 year old child?

Each state has its own process for guardianship. In general, the member will have to file a petition for guardianship in the state he or she and their 18 year old child live in. The child will be notified and may have a guardian ad litem or an attorney appointed to look after his or her interests. Depending on your state, there may be additional medical reports, investigations, or evaluations that will have to be accomplished. The child will have the right to contest the petition or even request that it be limited to a partial guardianship (called different things in different states). Ultimately, a judge will decide whether to grant guardianship, to whom, and with what authority and powers. Guardianships are not permanent and most states will review them periodically or on request. Guardianships are also not generally transferable when a family moves.

6. What happens to a guardianship when you move to another state?

When a military family with a guardianship moves the entire family to another state, it is often necessary to re-file for guardianship. While theoretically you may want to argue “full faith and credit,” guardianships are a known exception to the general rule that the court orders of one state are recognized in another. In fact, the state law and required oversight of a guardianship may vary greatly from state to state. There is hope for a more uniform practice in this area. Both the National College of Probate Judges and the American Bar Association have endorsed the state-by-state passage of an act, called the *Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act* to help people deal with the transfer and out of state recognition of guardianship. So far, 45 states have enacted the *Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act*.

7. Is there a legal reason to charge an 18 year-old disabled child rent?

Maybe. Many young adults with a disability receive a government benefit called Supplemental Security Income or SSI. This program provides a small monthly payment to the disabled young adult and often serves as a gateway to receive other federal benefits. The young adult with a disability may be eligible for health insurance, job placement, the opportunity to live in a group home, etc. – all benefits that may help the young adult be as independent as his or her disabilities will allow. However, programs like SSI have very strict financial caps, and free room and board even if provided by parents can exceed these caps. One solution may be to charge the young adult room and board.

Advanced Estate Planning Issues

8. If a member’s SGLI goes to a child with a disability, will he or she be disqualified from living in a group home? Receiving Social Security? Receiving Medicare?

Possibly. SSI is a benefit that can be paid to individuals with a disability who have limited income and assets. These limits are very low – only allowing \$2,000 in assets. Please visit www.ssa.gov/ssi for more specific information about income and assets limits. If the child qualified for SSI and then received money that exceeded the income/asset limitations, he or she will lose the SSI benefit. The child also could lose any other derivative benefits such as Medicaid, job placement services, group home, etc. One option is to have the SGLI beneficiary be a special needs or supplemental needs trust. A special needs or supplemental needs trust allows money to be put away to provide for the disabled child without jeopardizing the child’s access to federal and state assistance programs. Money placed in the trust could be used to provide the disabled child/adult with services and items beyond the basic necessities of life.

9. Can Survivor Plan Benefits Payments go into a Special Needs or Supplemental Trust?

Federal law requires Survivor Benefit Plan (SBP) payments be made to a “natural person” and does not allow for payment to a trust. According to DFAS, “the option is not available for a SBP beneficiary to be a special needs trust or supplemental needs trust . . . SBP is an irrevocable election made by the retiree at the time of retirement to cover a spouse, child, spouse and child, former spouse, or natural interest person.” This matters because if a child with a disability is already receiving federal benefits, receiving SBP payments may be enough to disqualify him or her from receiving certain financial, medical, assisted living, and job placement benefits while also being financially inadequate to

substitute for the loss of these services and benefits. Until this issue is addressed in the law, military members with a disabled family member will need to consider this issue in their long term estate planning. For more information, see 10 U.S.C. § 1448(b)(1)(A) on SBP and 42 U.S.C. § 1396p(d)(4)(A) or (C) on special needs trust.

10. What are the benefits of a “group trust” for people with disabilities?

A group trust allows individuals who are disabled to pool their assets and avoid having these assets held against them with regard to access to federal and state assistance programs. Before entering a group or pooled trust arrangement, an individual should ask how and when assets are distributed and understand what happens to any funds not used upon the death of the individual with a disability.

Unique Deployment Issues

11. What kind of power of attorney is used to represent a deployed parent during a child’s annual school individualized education plan (IEP) meeting?

If a parent is deployed when an IEP meeting is scheduled, the parent can request that the meeting be postponed until they are available. At IEP meetings, the school and the parents set goals for the child with a disability and determine what educational and other services will be provided to the child during the year. However, if postponing this meeting is not in the best interests of the child, there are two other options: (1) the parent can be represented by someone else, or (2) the parent can request to attend the IEP meeting by phone or VTC. According to federal law, a parent is entitled to attend the IEP meetings. The broad definition of “parent” in the law does allow for another person to attend for a parent. Any individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or relative) with whom the child lives or an individual who is legally responsible for the child’s welfare can attend for the parent. *See* 20 U.S.C. § 1401(23). If the parent will be sending a representative, he or she should alert the school in advance and give a special power of attorney to the representative for this purpose. Alternatively, the parent, with school concurrence, can attend the meeting via telephone or VTC. *See* 20 U.S.C. § 1414(f).

12. Does a parent have a right to record an IEP meeting so the deployed spouse can hear it?

This is not a settled area of the law. According to federal law and case law, parents have the right to meaningful participation in the development of their child’s IEP. Arguably, this would include recording the meeting, so a deployed parent could review it later and, thereby, meaningfully participate in decisions. States and local school districts may have restrictions on recording a hearing. Military parents often can make a sympathetic argument for recording the meeting; pointing out the desire for the military parent who is away to be able to listen to the meeting later, so he or she can still be a meaningful participant. If the request is still refused, the attending parent can always bring someone to the meeting to take notes or request that the deployed parent be allowed to participate over the telephone (if possible). For more information on the use of telephone conferences or VTC in meetings, *see* 20 U.S.C. § 1414(f).

13. Will services at the disabled child’s current school be provided at the new school?

According to federal law, when a child transfers from one school to another, the Individualized Education Plan (IEP) from the sending school transfers to the new school. The new school “shall provide such child with a free appropriate public education, including service comparable to those described in the previously held IEP.” Similarly, the *Interstate Compact on Educational Opportunities for Military Children* states “the receiving state shall initially provide comparable services to a student with disabilities based on his or her current IEP.” While this language sounds encouraging, schools often seek to alter services to children with a disability after a PCS move. If a parent objects to these changes in placement or services, the parent should do so in writing and, if necessary, file for a mediation hearing or request a “stay put” (if applicable) and file for a due process hearing. While JAGs cannot represent parents at hearings like these, they can help in educating parents on their basic rights under the law. For more information, see Art. V, para. C of the *Military Compact*, 20 U.S.C. § 1414(d)(2)(C)(i) on IEP transfer and 20 U.S.C. § 1415(j) on “stay put” rights.