



POLICY BRIEF

State Educational and Health Care Consent Laws: Ensure that children in grandfamilies can access fundamental services

Ana Beltran, Special Advisor, Generations United's
National Center on Grandfamilies

Children across the United States are being denied access to education and health care solely because they are being raised by someone other than their parents. About 2.7 million children in the United States are being raised by kinship caregivers – grandparents, other extended family members, and close family friends.¹ These children are raised by kin because their parents may be addicted to substances, deployed in the military, incarcerated, in another state for a job or have severe psychological, cognitive or physical challenges that render them incapable of raising children.

Of these millions of children, many of these children are being raised by kinship caregivers with no legal relationship -- such as legal custody or guardianship.² Furthermore, only about 104,000 are living with kin in foster care. Although this number represents almost one-fourth of all children in foster care, it is less than one-twenty-sixth of children being raised by kinship caregivers.

Without the support of the foster care system or a legal relationship that is formalized by the courts, kin caregivers face enormous challenges enrolling children in school, advocating for educational services or consenting to health care.

To ensure that children in kinship families or “grandfamilies”³ can obtain health care and a tuition-free public education, many states have consent laws that allow kinship caregivers to access these services for the children they raise without the need for legal custody or guardianship. The May 2012, Annie E. Casey Foundation Kids Count essay, *Stepping Up for Kids*, recommends that states without these laws enact them to support kinship families. In this brief, we provide state policymakers and advocates with the tools to enact their own educational and health

care consent laws and to perhaps amend existing laws to make them more responsive.

This brief summarizes:

- I. Educational and health care access challenges and responses
- II. Essential elements of responsive consent laws, using language and examples from states with existing laws
- III. Certain elements to avoid in responsive consent laws
- IV. Reasons some states may lack consent laws
- V. Tools and strategies to enact consent laws

I. Educational and Health Care Access Challenges and Responses

Reasons kin caregivers do not have legal custody or guardianship

Being able to consent to health care or complete school enrollment forms can be impossible without a legal relationship, but many relative caregivers do not want or cannot afford a legal relationship with the children in their care. These kinship care-

Children Fare Well in Kinship Care

Research confirms that kinship care is the best option for children who cannot live with their parents. Kinship care helps children sustain extended family connections, community bonds, and cultural identity. It creates a sense of stability and belonging, especially important during times of crises.¹ In addition to the benefits to children, kinship caregivers also report benefiting from providing this care, and birth parents may value that their children remain connected to their family and friends.

“The [California] Legislature finds and declares that according to the latest federal decennial census, during the 1980’s there was a 40-percent increase in the number of children who had lived with a nonparent relative...The Legislature further finds and declares that [this law]... will help to ensure that minors living with nonparent caregivers will have unhindered access to public education and essential medical care.” 1994 Cal. Legis. Serv. Ch. 98 (S.B. 592)

givers often raise children without such relationships because, although they are deeply committed to the children, they hope that the parents will be able to overcome their own challenges and raise the children at some point in the future. Furthermore, to establish a legal relationship, the caregivers must bring a legal proceeding against the parents, one of whom is their relative. These proceedings are usually lengthy, expensive, and emotionally difficult for everyone involved. The court must reach conclusions about the fitness of the parents and the “best interests” of the child. These conclusions – and the entire process -- can strain family relationships and defeat the purpose of having kin caregivers step in to stabilize the situation for the child.

Inability to access health care

Malpractice, liability, and confidentiality issues often cause health care providers to refuse to treat a child without the consent of a parent, legal custodian or guardian even when the child has insurance to cover the cost of the health care. For the caregiver without a legal relationship, accessing health care for the children they are raising can be nearly impossible.

This challenge persists around the country, despite the fact that access to health care for children in kinship families is critical. The studies about the overall health of children in relative care show that these children exhibit a variety of physical, behavioral, and emotional problems to a greater degree than the general population of children, often due to the difficult situations that caused them to become separated from their parents. They have frequently been exposed to drugs or alcohol in utero and many of the children have special needs.⁴

Inability to enroll children in school

Many states do not require a caregiver to have legal custody or guardianship to enroll a child in school, but do have residency requirements that a child attend school based on where the parent lives. If the child is living with

a non-parent caregiver, some local school districts require documentation of legal custody or guardianship to enroll the child. The districts require this proof to prevent families from abusing the school system by shopping for a particular school and having their children live in that district during the school week or school year to attend that school. While requiring proof of legal custody or guardianship prevents abuses, it inadvertently and unjustly prevents children who are being raised by relative caregivers from attending school. These kinship families are then caught in a situation where they are violating truancy laws for not sending the children to school, but cannot enroll them in school due to residency requirements.

State responses

In response to these challenges, California seems to have started the consent law trend when it passed its combined educational and health care consent law in 1994. Throughout the last twenty years, 24 states have enacted health care consent and 15 have enacted educational consent. Two of the latest states to join the ranks are **Oregon** and **Virginia**, which enacted their laws in Spring 2013. To reference your state, please see the table in appendix 1.

Consent laws

Education and health care consent laws allow relative caregivers who do not have a legal relationship to the children in their care to access health care on behalf of the children and enroll them in public school tuition-free without going to court. Generally, both types of consent laws allow a caregiver to complete an affidavit under penalty of perjury that they are the primary caregiver of the child; then, by presenting the form, can consent to treatment or enrollment. These laws typically protect parents’ rights by explicitly stating that the parents can rescind the affidavits at any time and that the affidavits do not give the caregiver legal custody. They laws further shield the school districts and health care providers from liability from relying on the affidavit.

Educational consent laws are less common than health care consent laws because they are typically more controversial to enact. State educational agencies, districts, and school boards often have concerns that their residency requirements will be circumvented by families who want to send their children to schools they perceive as better. States have developed ways to balance the legitimate concerns of school systems and families by enacting consent laws that provide for strict penalties, such as repayment of school tuition and other fines, if a caregiver is committing perjury about his or her care of a child. If a child is only using the caregiver’s address for purposes of attending a particular school, the state can penalize the family for this behavior. But, a child who is legitimately being raised by a relative caregiver other than a parent can enroll tuition-free in public school.

Because both types of consent laws are cost-neutral and do not create state “programs”, there is generally no monitoring of their use. But, from countless focus groups and other input from kinship families over the years, we know that these laws are essential for those caregivers who do not have a legal relationship to the children in their care.

Power of attorney laws

Some states may think they do not need consent laws because they have power of attorney laws. Consent laws, however, are notably different than power of attorney laws, which require the parent, rather than the caregiver, to take action. Under power of attorney laws, the parent must designate the caregiver and convey consent authority. This requirement can pose a significant obstacle to kinship families. Consent laws, on the other hand, are designed with the challenges faced by many kinship families in mind, since these caregivers often cannot locate the parents to ask them to complete a legal document. These laws make it possible for caregivers to consent to the necessary health care and education for the children without denying the parents any of their legal rights or responsibilities.

Some states call their laws “consent” laws, but if they work like a power of attorney law in that they require the parent, guardian or legal custodian to convey the consent authority to a caregiver, they are not classified as “consent”

laws for purposes of this brief. Consequently, the **District of Columbia, Massachusetts, North Carolina, and Pennsylvania** “consent” laws are categorized here as power of attorney laws.

II. ESSENTIAL ELEMENTS OF RESPONSIVE CONSENT LAWS

States should be responsive to kinship families’ strengths and challenges, and work towards enacting both educational and health care consent laws. Based on a review of the existing laws and the needs of kinship families, consent laws should include certain basic provisions.

Elements to include in consent laws:

- *put the form for the affidavit in the law itself, so that caregivers can easily complete it without needing to consult an attorney*
- *cover comprehensive health care and educational services*
- *allow the caregiver to complete the form without the parents’ signatures*
- *address parents’ rights in the notice section of the affidavit*
- *shield providers from criminal and civil liability, and professional discipline*
- *specify the penalties for giving a fraudulent consent in the notice section of the affidavit*
- *allow for the consent to be valid until rescinded by the parent or caregiver*
- *permit all full time caregivers to complete consent affidavits, and do not restrict them to relatives by blood, marriage or adoption*

Include the affidavit in the law

Many of the state health care consent laws have the form for the affidavit in the law itself. This facilitates usage by caregivers without requiring the help of a legal professional. **Louisiana’s** affidavit, which covers both health care and educational consent, is included in appendix 2 as a representative example that contains the elements that are important in these laws.

Only four other states combine their educational and health care consent into one affidavit: **California, New Mexico, Ohio** and **Oregon**. Because school enrollment typically requires proof of immunization and other health care information, having a joint consent form can be efficient.

On the other hand, whether the consent is combined is not as important as whether the forms are readily available and easy to complete without the need for legal help. Some states may want to separate their laws based on how their codes of law are structured, and that can work just as well for the children.

Cover comprehensive health care and educational services

Health care

Comprehensive health care must be covered under these laws in order to be responsive to kinship families' needs.

The consent authority should include:

- immunizations
- physical, dental, and mental health care
- developmental screenings, and
- occupational, speech and physical therapies

Many of the children in these families have special needs due to the circumstances leading to the formation of their new grandfamily. Consequently, screenings, treatment for developmental delays, and therapies are often particularly important.

Some existing laws only include immunizations or physical health care, whereas others, like the laws in **Delaware, Ohio, Texas,** and **Washington** include mental health care. The inclusion of mental health care consent is critical and is a hurdle that many caregivers have faced. Anecdotally, the omission of mental health seems to be nothing more than an oversight and some legislators have expressed interest in amending their laws to include that coverage.

Delaware also includes developmental screening in its consent law. Its lack of inclusion in other laws is most probably also an unintentional omission.

Educational

Educational enrollment is the primary hurdle that kinship caregivers can overcome using educational consent laws, but access to other educational services and requirements is also important so the child can fully participate in school and the school can hold the child and family accountable for discipline issues.

Using a combination of provisions in various states laws, states should consider including language in their laws that the caregiver agrees to act in the place of a parent for:

- making education decisions, including but not limited to special education decisions (**Delaware**)
- discussing with an educator the educational progress of the child (**Montana**)
- consenting to medical care related to an educational service for the child (**Montana**)
- serving as the contact for the school regarding truancy, discipline and school-based medical care (**Delaware**)
- consenting to full participation in curricular and co-curricular school activities (**Hawaii**)
- granting permission for athletic activities, field trips, and other activities as required (**South Carolina**)

Delaware further clarifies that once a Caregivers School Authorization is submitted and approved, and for as long as it is valid, school districts are no longer responsible for communicating with the parent, custodian or guardian who has signed the Authorization or is listed as unable to be found.

Allow the caregiver to complete the form without the parents' signatures

No state requires parents' signatures on their health care or educational consent affidavits, and we support this approach. As with power of attorney laws, requiring parents to take action and sign a legal document can pose an insurmountable hurdle for those kinship families where the parents are either completely out of the children's lives or are hard to locate because, for example, the parents are addicted to substances, have mental health or other challenges.

Another approach is taken by a few states, and this approach can facilitate passage of educational and health care consent laws if there is opposition from parents' rights advocates. A couple of state laws – **Delaware** and **Hawaii** -- ask for parental signatures on the educational and health care consent forms, but do not require them if the parent cannot be located. Under **North Carolina's** educational consent law, if the student's parent is “unable, refuses, or is otherwise unavailable to sign the affidavit”, then the caregiver adult shall attest to that fact in the affidavit. The law goes on to provide that:

*the caregiver... must make educational decisions... and has the same legal authority and responsibility regarding the student as a parent even if they do not sign the affidavit. The minor student's parent, legal guardian, or legal custodian retains liability for the student's acts.*⁵

Address parents' rights

In order to protect parents' rights, several states include language protecting the parents in the “notices” section of their affidavit forms. A representative example can be found in the affidavit forms for **Montana's** educational and health care consent laws: “completion of this affidavit does not affect the rights of the child's parent or legal guardian regarding the care, custody, and control of the child and does not mean that the caretaker relative has legal custody of the child.”⁶ **Hawaii** has similar language in its separate educational and health care consent laws; **California, Louisiana** and **New Mexico** have similar language in their combined educational and health care consent laws; and **Maryland** and **Ohio** have similar language in their health care consent laws.

In addition to providing notice concerning parental rights in the affidavit, **California** and **Montana's** educational and health care consent laws also clarify the issue of conflicting decisions between a parent and a caregiver. **Montana's** law reads:

a decision by a parent ... communicated to a school official, a health care provider, or both, ...supersedes a conflicting decision by a caretaker relative made pursuant to an affidavit... However, a decision by a parent does not supersede a decision by a

caretaker relative...if the decision by the parent endangers the life of the child. A school official or health care provider may require reasonable proof of authenticity of a decision by a parent...⁷

Shield providers from liability

Health care

Many of the existing state health care consent laws have provisions that protect health care providers from liability from relying on the affidavits. Some of the laws protect providers from both civil liability and criminal prosecution, whereas a few address civil liability only. One state specifies that providers can still be held accountable for negligence. Some state laws have language clarifying that the affidavit in no way confers dependency for purposes of private health care insurance.

To protect providers from liability, states can:

- clarify that providers have no duty of further inquiry into the relationship between the caregiver and child
- protect providers from civil liability, criminal prosecution, and professional disciplinary action because they relied on the form, and
- clarify that providers can still be held accountable for negligence

Hawaii and **Delaware** when read together take this approach. In **Hawaii**:

*A person who relies in good faith on this affidavit of caregiver consent for a minor's health care has no obligation to conduct any further inquiry or investigation and shall not be subject to civil or criminal liability or to professional disciplinary action because of that reliance.*⁸

Delaware's law clarifies that providers can still be held accountable for negligence:

Liability of persons responsible for medical care.-- Nothing contained in this section shall be construed to relieve any practitioner, hospital, clinic or their agents or employees from liability for negligence in diagnosis, care and treatment or for the performance of any procedure not rea-

*sonably required for the preservation of life or health.*⁹

Some states, such as **California**, **New Mexico** and **Louisiana**, make clear that the consent affidavit “does not confer dependency for health care coverage purposes.”¹⁰ In consultation with the private insurance carriers in your state, you may want to assess whether such language is necessary for your community.

Some states have dominant private insurance providers who may insist on such language, so it is clear that the affidavit does not confer a legal relationship that might entitle the child to be included on the caregiver’s private policy. Private insurance companies span the spectrum from only allowing the covered adult to include children by birth or adoption, others allow the adult to include children with whom they have legal custody or guardianship, and some allow all “dependents” to be covered. Whether to include language concerning dependency in your law and affidavit will depend on the private insurance providers in your state.

Educational

Similarly, to protect schools and school officials, liability language should also be included in the notice section of educational consent laws. As with its health care consent law, **Hawaii** has thoughtful language in its educational consent notice section:

- (d) Any person who relies in good faith on the affidavit has no obligation to conduct any further inquiry or investigation.
- (e) No person who relies in good faith on the affidavit for caregiver consent shall be subject to civil or criminal liability, or to professional disciplinary action because of the reliance.¹¹

Louisiana further clarifies that protection is extended in situations where the parents would have made an opposite decision to that of the caregiver, but that decision was unknown to the school official.

Specify penalties for providing fraudulent consent **Health care**

Most states contain language specifying that caregivers

can be penalized for perjury if they provide false information when giving health care consent. Although the penalties for perjury vary by state, and it is not common to prosecute for perjury, the statement itself seems to be enough to deter people from providing false information.

Montana’s health care and educational consent forms have such language in its statute and affidavit forms:

5. WARNING: DO NOT SIGN THIS FORM IF ANY OF THE STATEMENTS ABOVE ARE INCORRECT OR YOU WILL BE COMMITTING A CRIME PUNISHABLE BY A FINE, IMPRISONMENT, OR BOTH.

6. I declare under penalty of false swearing under the laws of Montana that the foregoing is true and correct.¹²

Educational

Typically, the penalties for making false statements as part of educational consent are more stringent than under health care consent laws. The caregiver is often subject to significant monetary penalties, and school tuition costs, in addition to criminal charges. This approach can help assuage concern that people will take advantage of these laws to shop for a school with the best academics or sports.

Examples of existing penalties include:

- “Persons who knowingly make false statements in the Caregivers School Authorization shall be subject to a minimum civil penalty of \$1000 and maximum of the average annual per student expenditure and may be required to reimburse the school district tuition costs. Further, such persons may be subject to criminal prosecution...”¹³ (**Delaware**)
- “[...]ny person who willfully makes a material misrepresentation in the affidavit shall be subject to a penalty payable to the county for three times the pro rata share of tuition for the time the child fraudulently attends a public school in the county.”¹⁴ (**Maryland**)

- “The maker of the false affidavit is guilty of a misdemeanor and, upon conviction, must be fined an amount not to exceed two hundred dollars or imprisoned for not more than thirty days and also must be required to pay to the school district an amount equal to the cost to the district of educating the child during the period of enrollment. Repayment does not include funds paid by the State.”¹⁵ (South Carolina)

Furthermore, in **New Jersey** and **North Carolina**, the local school board has the explicit authority under the law to remove the student from school if statements in the affidavit are found to be false. These states also authorize the school board to impose penalties, rather than relying on the criminal justice system, which can take a long time to act on such challenges. In both states, there are opportunities to appeal the decision.

New Jersey’s law includes significant detail about how the appeals are handled. In **New Jersey**, if the superintendent or principal thinks the affidavit is false, he or she may ask the board of education to remove the child from school. If the board decides the child should be removed, the parent (who in **New Jersey** must submit a sworn statement that the caregiver’s assertions are true, see below) can contest the board’s decision before a commissioner. The parent has to prove that the child is eligible for a free education under the criteria listed in the law. If the commissioner decides against the parent, the child is then removed from school and the parent must pay tuition for all the days the child attended school under the affidavit.

Allow consent authority to be valid until rescinded

Like **Hawaii**, states should not put automatic time limits on their educational or health care consent affidavits. They should be valid until rescinded by the parent or the caregiver is no longer raising the child.

When time limits exist, the most common ones are one year from the date the affidavit was signed.

Permit all full time caregivers to complete consent affidavits

The vast majority of states allow all full time caregivers or caregivers acting *in loco parentis* (in the place of the parent) to complete both health care and/or educational consent affidavits, rather than limiting consent to only certain relatives. Although data is lacking on the number of children being raised by family friends, godparents and other adults who have family like relationships to the children, we know anecdotally that these caregivers are particularly prevalent in Latino, African American, and Native American cultures. Consequently, states enacting these laws should take this approach.

Only four states – **California**, **Delaware**, **Maryland**, and **Montana** -- limit both their educational and health care consent authority to relatives by blood, marriage or adoption. **Florida** limits its health care consent to these relatives only. One additional state – **Ohio** – limits its educational and health care consent authority to just grandparents.

III. Certain Elements to Avoid in Responsive Consent Laws

To facilitate use of these consent laws, and ensure children can access educational and health care services, it is important not to require certain elements.

State laws should:

- *not allow local school districts to decide whether to accept affidavits to enroll children in school*
- *not require sworn statements from the parents*
- *minimize onerous documentation requirements*
- *not require that the affidavit be filed with a court*

Do not allow local school districts to decide whether to accept affidavits

Educational consent laws should cover the entire state, and discretion should not be left to the local school districts as it is under **Oklahoma’s** consent law. Otherwise, children can be denied public education simply because of where their caregivers live.

Do not require sworn statements from the parents

New Jersey is the only state among the fourteen with educational consent laws that requires a sworn statement from a parent. Under the law, the parent or guardian makes “a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district.”¹⁶ States considering a provision similar to this should also ensure there is an exception to the need for a sworn statement if the parent cannot be located.

Because the statement does not convey authority like a power of attorney law, but rather only documents the caregivers’ assertions, **New Jersey** is categorized as a consent law, despite the fact that this statement may present a significant hurdle for kinship families.

In its new law, **Virginia** also allows local school divisions to require sworn statements from the parents, as well as a power of attorney authorizing the caregiver to make educational decisions. Unlike **New Jersey**, these are not requirements, but they are left to the discretion of the school division. Only time will tell how these provisions are implemented and whether caregivers can enroll the children in school tuition-free.

Do not have onerous documentation requirements

States should avoid including onerous documentation requirements in consent laws, such as requirements documenting why the parents are unable to parent. These requirements can be intrusive, and can also be impossible to obtain, given federal health care privacy protections. Try to make the law as straightforward as possible and follow affidavit forms, such as **Louisiana’s** in the appendix.

Do not require that the affidavit be filed with a court

Ohio’s consent law, which is only for grandparents, requires grandparents to file their affidavits with the juvenile courts where the grandparents reside or where there are court orders involving the children. Furthermore, if a court has reason to believe that the affidavit is not in the best interest of the child, the court may report that information to the child welfare agency. No other state has similar provisions.

Court filings and the threat of child welfare involvement could cause grandparents to avoid use of this law and consequently the children not to gain access to fundamental services. Caregivers who use these consent laws typically want to avoid court and the adversarial elements that can change family dynamics. Otherwise, they might obtain legal custody or guardianship to gain consent authority.

Two other states have filing requirements, but not with a court, rather with a relevant state agency. In **Maryland**, the caregiver must file the health care affidavit with the state Department of Human Resources, Social Services Administration for each year the child continues to live with the relative. In **New Jersey**, the parent’s sworn statement must be filed with the secretary of the board of education.

IV. Reasons Some States May Lack Consent Laws

There are many reasons states lack consent laws.

Some of the most common reasons:

- *alternative methods to enroll children in school*
 - (1) *child’s residency is where caregiver lives*
 - (2) *consent for military families*
 - (3) *power of attorney laws*
 - (4) *open enrollment laws*
- *parents’ rights*
- *school objections*

Alternative methods for kinship caregivers to enroll children

(1) Child’s residency is where caregiver lives

At least two states have residency requirements based on where the caregivers live, not where the parents live. For example, in **Rhode Island**, the residency of the child’s primary caregiver determines the child’s residency for purposes of attending public school tuition-free:

...[I]n cases where a child has no living parents, has been abandoned by his or her parents, or when parents are unable to care for their child on account of parental illness or family break-up, the child shall be

*deemed to be a resident of the city or town where the child lives with his or her legal guardian, natural guardian, or other person acting in loco parentis [in place of a parent] to the child.*¹⁷

A similar approach to access school enrollment is used in **Indiana**. That state has had a law for several years that the “legal settlement” of a student being supported, cared for, and living with another person, is the school attendance area of that person. In Indiana, local school districts cannot require guardianship or legal custody unless facts are in dispute and the school district believes that (1) the child is living with another person primarily to attend a particular school, and (2) the students’ parents are able to support the student. If the facts are disputed and the school therefore requires guardianship or legal custody, the child may be enrolled on the day that papers are filed with the court to obtain guardianship or legal custody.¹⁸

(2) Consent for military families

Fortunately, great progress has been made for children of military families seeking educational services, and this includes those children in kinship care because their parents are active duty members of the uniformed services.¹⁹ However, these laws do not cover all children in kinship care. States with these laws may also need a broader consent law for the children being raised by relatives for reasons other than their parents are in the military.

The Interstate Compact on Educational Opportunity for Military Children provides for the uniform treatment of military children transferring between school districts and states. It was developed in 2006 by The Council of State Governments’ National Center for Interstate Compacts, the U.S. Department of Defense, and a number of other stakeholders, to facilitate educational services for these children.

The Interstate Compact has a Commission headquartered in Kentucky that is managed by an Executive Director. They coordinate the passage of these laws. To help states enact the Compact, the Commission devel-

ops rules, videos, guides, fact sheets, and presentations, which are posted online at <http://mic3.net/>. Their efforts have led to 46 states and the District of Columbia enacting the compact as of October 2013. This compact goes beyond educational enrollment and other educational services under consent laws, and provides that requirements of the state or school district from which the child came apply to kindergarten entrance age, testing, and graduation requirements.

(3) Power of attorney laws

Some states may think they do not need consent laws because they have power of attorney laws that specifically allow a parent to convey authority for health care and education decisions to a caregiver. These laws are useful where the parents can be located by the caregivers and do not have mental health or other issues that would prevent them from signing such a legal document. However, many kinship families do not know where the parents are and cannot obtain their cooperation. For those families, a consent law that does not require legal action by the parent is of paramount importance.

It is very likely that states with these power of attorney laws may think they do not need consent laws. Of the 26 states²⁰ and the District of Columbia with these power of attorney laws, half (13) lack both educational and health care consent laws, and eight have health care consent laws only.

(4) Open enrollment laws

Like power of attorney laws, some states may think they do not need educational consent laws because they have open enrollment. Open enrollment laws, however, also require action by the parents. Generally, these laws allow a parent or guardian to enroll his or her child in a public school not located in the district where the parent lives. If the parent is still involved in the child’s life, this may be a way to enroll a child near the home of the relative who is raising him or her. But, for those kinship families where the parent is uninvolved, these laws are not a solution to enrolling the children in school.

Parents' rights

A significant obstacle to enacting these consent laws can be concern over parents' rights. The U.S. Supreme Court has long found that parents have a fundamental right to make decisions concerning their children's care, custody, and control. Some advocates may argue that consent laws, which do not require parents to convey their authority, are contrary to the fundamental rights of parents.

School objections

School boards, districts, and schools themselves can be vocal opponents to educational consent laws because of legitimate concerns that parents will use them contrary to their purpose to circumvent residency requirements and enroll their children in the schools they want. Some states may fear mass exodus from poor performing schools to others that are more attractive options for children.

V. Tools and Strategies to Enact Consent Laws

Based on conversations with advocates who have enacted educational and health care consent laws, and a review of the laws, there are certain tools and strategies that are helpful to pursuing these laws:

Tools and Strategies :

- *educate that existing alternatives are not sufficient*
- *protect parents' rights*
- *involve educational stakeholders and respond to their concerns*
- *make clear that these laws are cost neutral*
- *protect against liability for all concerned*
- *use community partners to help advocate*
- *separate educational from health care consent laws*
- *share personal stories*

Educate that existing alternatives are not sufficient

Advocates must make the case that power of attorney and open enrollment laws, which require actions on the part of the parents, are not responsive to many kinship families who cannot locate parents. Consent laws are needed. The Military Interstate Children's Compact Commission's materials and approach to advocacy may serve as a

model for working in your state. If your state has enacted the Compact, you may also consider reaching out to the State Council in your state, which is created as part of the process of enacting that law, and consulting with them on strategies for enacting a consent law that covers a broader population of children. Outreach to the National Commission may also be an approach for national advocates to consider.

Protect parents' rights

An effective response to concerns that parents' rights are being usurped is ensuring that these laws contain notice provisions explicitly protecting parents' rights and stating that the affidavit does not confer legal custody to the caregiver.

Furthermore, if concerns persist, asking for parents' signatures can be a compromise, provided that there is an alternative for those situations where parents cannot be found.

Involve educational stakeholders and respond to their concerns

Prior to introducing the legislation, reach out to one or two school leaders who are receptive to the idea of educational consent. They can help identify potential challenges with implementation and ways to address those challenges in the language of the bill. Involve the school stakeholders throughout the process, educate them about the families' needs, and nurture relationships with them.

Respond to school concerns with strict penalties, including payment of tuition, for falsely representing on an affidavit that a caregiver is raising a child. Furthermore, as in [Hawaii](#), the affidavit form can include explicit statements, which the caregiver is swearing are true, that:

The minor's residency with the caregiver is not for the purpose of:

- (A) Attending a particular school;
 - (B) Circumventing the department of education's district exemption process;
 - (C) Participating in athletics at a particular school;
- or

SENATE EDUCATION COMMITTEE STATEMENT
New Jersey Senate, No. 1464--L.1977, c. 373

.....

Background and problems addressed:

Parents sometimes attempt to send their children to schools in districts other than their own without actually changing their residences. It is a very simple matter for a parent to request a relative or friend who resides within the district to provide the child with an official address within the district for purposes of school attendance.

Further, if the friend or relative agrees to sign an affidavit, the school district must accept the child as a student within the system. The affidavit represents proof to the school district that the child is living with the relative or friend and that the relative or friend is assuming all personnel [sic] obligations for the child for a period longer than the school term. Currently, the school system must accept this affidavit unless it is willing to ask the county prosecutor to prosecute the party who signed the affidavit under false pretenses. This offers no practical solution to school boards since settlement through the courts is a long and difficult process. In fact, it is likely that the child will have left the school system before the case is heard.

Senate Bill No. 1464 offers a procedure for contesting the validity of the affidavit without instituting long and costly criminal proceedings through the courts. By permitting the boards of education to go before the commissioner and contesting the validity of the sworn statement, it is anticipated that the threat of such a proceeding will act as a deterrent to individuals who falsely and casually sign such statements.

(D) Taking advantage of special services or programs offered at a particular school²¹

Finally, like **New Jersey**, consider whether including a process to challenge the statements made in an affidavit, rather than relying on the criminal justice system, would be a compromise that would respond to schools' concerns.

Make clear that these laws are cost neutral

Neither a health care nor education consent law requires a program to be implemented, salaries to be paid or administrative costs to be borne by the state. These consent laws are completely cost neutral.

The only expense is possibly a redistributed expense from one school district to another. Provisions can be made that the school district where the parents' reside reimburse the caregiver's school district for the costs of educating that child.

Protect against liability for all concerned

With liability provisions in the notice sections of the affidavits, advocates can make clear that health care providers and schools are shielded from liability for relying on the affidavits.

Use community partners to help advocate

Unify the community partners to advocate for these laws. The aging and children's communities can work effectively together to make these laws a reality. Reach out to schools, pediatricians, Area Agencies on Aging, kinship navigators, caregiver support groups, and any other groups working in your communities to help kinship families.

Separate educational from health care consent laws

If you are trying to enact both laws and educational consent is posing a particular hurdle in your state, separate it from the health care consent legislation and enact that first. Continue to work with the school stakeholders to pursue the educational consent.

One Grandfamily's Story

Grandma Smith raised Johnny since childhood. He attended the elementary and middle schools in her rural Maryland school district, even though she lacked any kind of legal relationship to him. Still raising him when it came time for high school, the high school in the same district refused to admit him without a legal custody order. For weeks, Johnny was prevented from attending school.

Fortunately, while Johnny was out of school, an educational consent bill passed in Maryland. Armed with the new law, one of the bill's tireless advocates drove to the county and accompanied grandma and grandson to the high school to get him enrolled. Johnny started high school the very next day.



Share personal stories

Finally, never underestimate the power of sharing personal stories of children being kept out of school and denied health care.

Call to Action

Children like Johnny should not be denied education or health care. This brief is designed to give you tools to pursue health care and educational consent for your state or to amend existing laws to make them more responsive. Using the ideas summarized here, policymakers, advocates, and all stakeholders can determine the provisions to include in your state's draft bill or amendments. With the draft in hand, collect personal stories, keep your stakeholders engaged, and make the case for the importance of these consent laws. These laws may be the only vehicle through which children can be enrolled in school and access health care. Remind all who will listen that these laws are about the children -- children who should not be denied basic services solely because of who is raising them. All children need an education and health care.

Appendix 1 • State Educational and Health Care Consent Laws

Generations United will keep this chart up to date at www.grandfamilies.org.

If your state passes a consent law, please let us know at abeltran@gu.org

State	Educational consent	Health care consent	Combined citation	Educational citation	Health care citation
Alabama					
Alaska					
Arizona					
Arkansas		X			Ark. Code Ann. § 20-9-602
California	X	X	Cal. [Fam.] Code §§ 6550 & 6552		
Colorado					
Connecticut	X			Conn. Gen. Stat. Ann. § 10-253(d)	
Delaware	X	X		14 Del. Code Ann. § 202	13 Del. Code Ann. §§ 707 & 708
District of Columbia					
Florida		X			Fla. Stat. Ann § 743.0645
Georgia		X			Ga. Code Ann. § 31-9-2.
Hawaii	X	X		Haw. Rev. Stat. § 302A-482	Haw. Rev. Stat. § 577-28
Idaho		X			Idaho Code Ann. § 39-4504
Illinois					
Indiana		X			Ind. Code Ann. § 16-36-1-5(b)
Iowa					
Kansas					
Kentucky					
Louisiana	X	X	La. Rev. Stat. Ann. § 9:975		
Maine					
Maryland	X	X		Md. Code Ann., Education § 7-101	Md. Code Ann., Health-General §20-105
Massachusetts					
Michigan					
Minnesota					
Mississippi		X			Miss. Code Ann. § 41-41-3
Missouri		X			Mo. Ann. Stat. § 431.061

Appendix 1 • State Educational and Health Care Consent Laws

State	Educational consent	Health care consent	Combined citation	Educational citation	Health care citation
Montana	X	X		Mont. Code Ann. § 20-5-503	Mont. Code Ann. § 40-6-502
Nebraska					
Nevada					
New Hampshire					
New Jersey	X			N.J. Stat. Ann. § 18A:38-1	
New Mexico	X	X	N.M. Stat. Ann § 40-10B-15		
New York		X			N.Y. [Pub. Health] § 2504
North Carolina	X			N.C. Gen. Stat. Ann. § 115C-366(a3)	
North Dakota		X			N.D. Cent. Code § 23-12-13
Ohio	X	X	Ohio Rev. Code Ann. § 3109.65		
Oklahoma	X			70 Okla. Stat. Ann § 1-113(A)(1)	
Oregon	X	X	OR Laws 2013 CH. 231, §4		
Pennsylvania					
Rhode Island					
South Carolina	X	X		S.C. Code Ann. § 59-63-32	S.C. Code Ann. § 44-26-60
South Dakota		X			S.D. Codified Laws § 34-12C-3
Tennessee					
Texas		X			Tex. [Fam.] Code Ann. § 32.001
Utah		X			Utah Code Ann. § 78B-3-406(6)
Vermont					
Virginia	X	X		Va. Code Ann. § 22.1-3(A)(4)	Va. Code Ann. § 54.1-2969(A)(6)
Washington		X			Wash. Rev. Code Ann. § 7.70.065(2)(a)(v)
West Virginia					
Wisconsin					
Wyoming					
TOTALS	15	24			

LOUISIANA NON-LEGAL CUSTODIAN'S AFFIDAVIT

Use of this affidavit is authorized by R.S. 9:975.

INSTRUCTIONS: Completion of items 1 through 4 and the signing of the affidavit are sufficient to authorize educational services and school-related medical services for the named child. Completion of items 5 through 8 is additionally required to authorize any other medical services.

Please print clearly.

The child named below lives in my home and I am 18 years of age or older.

1. Name of child:

2. Child's date of birth:

3. My name (adult giving authorization):

4. My home address:

5. I am a non-legal custodian.

6. Check one or both (for example, if one parent was advised and the other cannot be located):

I have advised the parent(s) or legal custodian(s) of the child of my intent to authorize the rendering of educational or medical services, and have received no objection.

I am unable to contact the parent(s) or legal custodian(s) of the child at this time, to notify them of my intended authorization.

7. Affiant's date of birth:

8. Affiant's Louisiana driver's license number or identification card number:

WARNING: Do not sign this form if any of the statements above are incorrect, or you will be committing a crime punishable by a fine, imprisonment, or both.

I declare under penalty of perjury under the laws of Louisiana that the foregoing is true and correct.

Signed:

Date:

NOTICES:

1. This declaration does not affect the rights of the child's parent or legal guardian regarding the care, custody, and control of the child, and does not mean that the non-legal custodian has legal custody of the child.

2. A person who relies on this affidavit has no obligation to make any further inquiry or investigation.

3. This affidavit is not valid for more than one year after the date on which it is executed.

ADDITIONAL INFORMATION:

TO NON-LEGAL CUSTODIANS:

1. If the child stops living with you, you are required to notify anyone to whom you have given this affidavit as well as anyone of whom you have actual knowledge who received the affidavit from a third party.

2. If you do not have the information in item 8 (Louisiana driver's license or identification card), you must provide another form of identification such as your social security card number.

TO SCHOOL OFFICIALS:

The school district may require additional reasonable evidence that the non-legal custodian lives at the address provided in Item 4.

TO HEALTH CARE PROVIDERS AND HEALTH CARE SERVICE PLANS:

1. No person who acts in good faith reliance upon a non-legal custodian's affidavit to render educational or medical services, without actual knowledge of facts contrary to those stated in the affidavit, is subject to criminal prosecution or civil liability to any person, or subject to any professional disciplinary action, for such reliance if the applicable portions of the form are completed.

2. This affidavit does not confer dependency for health care coverage purposes.

Generations United gratefully acknowledges the Annie E. Casey Foundation for their support of this publication.

Some available Internet resources:

www.gu.org – The Generations United website contains free fact sheets and publications concerning grandfamilies, and the latest federal public policy activity impacting the families.

www.grandfamilies.org – The Grandfamilies State Law and Policy Resource Center contains a database of laws and legislation impacting grandfamilies both inside and outside the foster care system for all 50 states and the District of Columbia, in addition to analyses of these laws and legislation.

www.grandfactsheets.org – This website contains fact sheets for each state and the District of Columbia with state-specific data, services, and programs for grandfamilies.

www.aecf.org – The Annie E. Casey Foundation website contains publications and resources concerning grandfamilies, including the May 2012 Kids County essay, *Stepping Up for Kids: what government and communities should do to support kinship families*.



Generations United is the national membership organization focused solely on improving the lives of children, youth, and older people through intergenerational strategies, programs, and public policies. Generations United represents more than 100 national, state, and local organizations and individuals representing more than 70 million Americans. Since 1986, Generations United has served as a resource for educating policymakers and the public about the economic, social, and personal imperatives of intergenerational cooperation. Generations United acts as a catalyst for stimulating collaboration between again, children, and youth organizations providing a forum to explore areas of common ground while celebrating the richness of each generation.

For further information, please contact:

Generations United
1331 H Street, NW, Suite 900
Washington, DC 20005
Phone: (202) 289-3979; fax: (202) 289-3952
email: gu@gu.org
www.gu.org

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- ¹ Annie E. Casey Foundation. (2012). *Stepping Up For Kids: what government and communities should do to support kinship families*. Retrieved from <http://www.aecf.org/KnowledgeCenter/Publications.aspx?pub-guid={642BF3F2-9A85-4C6B-83C8-A30F5D928E4D}>
- ² There is a lack of data on the number of children being raised by caregivers without a legal relationship, but anecdotally we know it is a significant population.
- ³ Kinship families and grandfamilies both refer to families in which grandparents and other relatives are raising children instead of parents. Grandfamilies is a term popularized by Generations United based on extensive public opinion research.
- ⁴ Altshuler, S.J. (1998). Child Well-Being in Kinship Foster Care: similar to, or different from, non-related foster care. *Children and Youth Services Review* 20, 369-88; and Pruchno, R. (1999). Raising Grandchildren: the experiences of black and white grandmothers. *The Gerontologist* 39, 209-31.
- ⁵ N. C. Gen. Stat. Ann. § 115C-366.
- ⁶ Mont. Code Ann. §§ 20-5-503 and 40-6-502.
- ⁷ Mont. Code Ann. § 20-5-503.
- ⁸ Haw. Rev. Stat. § 577-28.
- ⁹ Del. Code Ann. tit. 13, § 707(d).
- ¹⁰ Cal. Fam. Code § 6552; La. Rev. Stat. Ann. § 9-975; and N.M. Stat. Ann. § 40-10B-15.
- ¹¹ Haw. Rev. Stat. § 302A-482.
- ¹² Mont. Code Ann. §§ 20-5-503 and 40-6-502.
- ¹³ 14 Del. Code. Ann. § 202.
- ¹⁴ Md. Code Ann. [Educ.] § 7-101.
- ¹⁵ S.C. Code Ann. § 59-63-32.
- ¹⁶ N.J. Stat. Ann. § 18A:38-1.
- ¹⁷ R.I. Gen.Laws § 16-64-1.
- ¹⁸ Ind. Code § 20-26-11-2.
- ¹⁹ Also applies to the children of members or veterans of the uniformed services who are severely injured and medically discharged or retired for a period of one year after medical discharge or retirement; and members of the uniformed services who die on active duty for a period of one year after death. See <http://mic3.net/pages/resources/documents/InterstateCompactonEducationalOpportunityforMilitaryChildren-ModelLanguage.pdf>
- ²⁰ Alabama, Alaska, Arizona, Colorado, Georgia, Hawaii, Idaho, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania (health care only), Tennessee, Utah, and Washington.
- ²¹ Haw. Rev. Stat. § 302A-482(10).