

STATE OF TENNESSEE

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Opinion No. 02-022

“Ward of the State” for the Purposes of the Individuals With Disabilities Education Act

QUESTIONS

1. Is a dependent or neglected child who is in the Department of Children’s Services’s custody without termination of parental rights a “ward of the State” under Tennessee law?
2. Does the Department of Children’s Services have the right to attend and participate in a multi-disciplinary team ¹ meeting for a dependent or neglected child who is in state custody when parental rights have not been terminated?
3. If the answer to question one is affirmative, does the federal Individuals with Disabilities Education Act, which prohibits an employee of the Department of Children’s Services or other state agencies from making educational decisions for a dependent or neglected child who is a ward of the State when parental rights have not been terminated, preempt or supersede contrary state law, including Tenn. Code Ann. § 37-1-140?

OPINIONS

1. A dependent or neglected child in the Department of Children’s Services’ custody without termination of parental rights is not a “ward of the State” under Tennessee law.
2. When the Juvenile Court has adjudicated a child dependent or neglected and has placed the child in the Department of Children’s Services’s custody but has not terminated parental rights, the Department of Children’s Services has the right and duty to be present at a multi-disciplinary (IEP) team meeting.
3. Because we answer the first question in the negative, we do not reach question three.

¹ The multi-disciplinary team is now called the IEP team. See Tenn. Admin. Rules, *State Board of Education*, 0520-1-9-.01(33).

ANALYSIS

Your questions arise in the context of the State’s obligation to provide for and to require local school systems to deliver special education services for children with disabilities. We understand that the answer to your first question will determine whether children in DCS’s custody are entitled to the appointment of a “surrogate parent” to protect their access to special education services under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. §§ 1400, *et seq.* You direct your questions to situations in which the Juvenile Court has adjudicated the child neglected or dependent and has placed the child in DCS’s custody but has not terminated the parents’ rights.

State and federal law govern the state’s educational responsibilities for children with disabilities.² The state’s special education statutes, Tenn. Code Ann. §§ 49-10-101, *et seq.*, express the legislative intent, in part, as follows:

It is the policy of the state to provide, and to require school districts to provide as an integral part of free public education, special education services sufficient to meet the needs and maximize the capabilities of children with disabilities.

Tenn. Code Ann. § 49-10-101(a)(1)(A).

The education of children with disabilities in Tennessee is financially assisted by the federal government as provided in the IDEA. 20 U.S.C. §§ 1400, *et seq.* Congress states in the IDEA that it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children with disabilities to improve education results for those children and to assure them equal protection of the law. 20 U.S.C. § 1400(c)(6). The child with a disability must receive a free appropriate public education.³ 20 U.S.C. §§ 1400(d)(1). To receive financial assistance from

² Examples of disabilities covered by the IDEA include autism, deafness, developmental delay, emotional disturbance, mental retardation, orthopedic/physical impairment. *See* Tenn. Admin. Rules, *State Board of Education*, 0520-1-9-.01(15).

³ A Free Appropriate Public Education (FAPE) means special education and related services that:

- (a) Are provided at public expense, under public supervision and direction, and without charge to the parents or student;
- (b) Meet the standards of the Department, including the requirements of the Rules, Regulations and Minimum Standards for the Governance of Tennessee Public Schools;
- (c) Include preschool, elementary school or secondary school education in Tennessee; and
- (d) Are provided in conformity with an IEP.

34 C.F.R. § 300.13; Tenn. Admin. Rules, *State Board of Education*, 0520-1-9-.01(25).

the federal government, states must meet eligibility requirements and must have a comprehensive plan for the delivery of special education services to children with disabilities. 20 U.S.C. § 1412; *see also* Tenn. Code Ann. §§ 49-10-301 and -302. Thus, special education is an area that is governed by both federal and state law. *Op. Tenn. Atty. Gen.* 96-116 (September 5, 1996).

The IDEA has several purposes. First, the IDEA guarantees children with disabilities "a free appropriate public education which emphasizes special education and related services designed to meet [each child's] unique needs." 20 U.S.C. § 1400(d)(1)(A). Second, the IDEA assures that in providing education and services "the rights of children with disabilities and their parents or guardians are protected." 20 U.S.C. § 1400(d)(1)(B). Third, the IDEA is intended "to assist States and localities to provide for the education of all children with disabilities." 20 U.S.C. § 1400(d)(1)(c). The IDEA's final purpose is "to assess and assure the effectiveness of efforts to educate children with disabilities." 20 U.S.C. § 1400(d)(4); *see* 74 Or. L. Rev. 1339, 1340 (1995).

States receive IDEA federal funds after they have developed a comprehensive plan ensuring children with disabilities access to a free appropriate public education. 20 U.S.C. § 1412. The most important part of this comprehensive plan is the process for the development of an individualized education program (IEP)⁴ for each child. The IEP is essential to create a specially designed education for each child with disabilities. The United States Supreme Court has identified the IEP as the major decision making vehicle under the Act⁵ because school district officials and the parents of a child with disabilities interact to create an appropriate educational placement. *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 597 (1988).

Federal and state law anticipate parental⁶ involvement in the process by which a child is assessed for and provided special education services.⁷ For example, parental consent is required prior to a child's

⁴ The Individualized Education Program (IEP) is a written statement for a child eligible for special education that is developed, reviewed, and/or revised in an IEP team meeting. The IEP must contain certain information and explanations, for example, a statement of how the child's progress toward the annual goals will be measured. 34 C.F.R. §§ 300.340-350; Tenn. Admin. Rules, *State Board of Education*, 0520-1-9-01(31) and 0520-1-9-.11.

⁵ Then, the Education for All Handicapped Children Act, renamed the IDEA in 1990.

⁶ *See* 20 U.S.C. § 1415(b)(1)(B); 34 C.F.R. § 300.514. Under the IDEA a parent is defined as "[a] parent, a guardian, a person acting as a parent of the child, or a surrogate parent who has been appointed in accordance with [the regulations]." 34 C.F.R. § 300.13; Tenn. Admin. Rules, *State Board of Education*, 0520-1-9-.01(39).

⁷ *See, e.g., Bd. of Educ. v. Dienelt*, 843 F.2d 813, 814 (4th Cir. 1988) (The court found that the failure to involve parents in the IEP process meant that the education agency failed to provide a disabled student with a free appropriate education).

assessment. 34 C.F.R. § 300.505; Tenn. Admin Rules, *State Board of Education*, 0520-1-9-.05(2). Parents have the right to request an independent evaluation of the child. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502; Tenn. Admin Rules, *State Board of Education*, 0520-1-9-.14(6). The parents participate in the development of their child's IEP. 20 U.S.C. § 1414(d)(1)(B), 34 C.F.R. § 300.501; Tenn. Admin Rules, *State Board of Education*, 0520-1-9-.14(3). Parents may challenge the IEP through mediation or in an impartial due process hearing, or in court. 20 U.S.C. § 1415(e)(1); 20 U.S.C. § 1439(a)(1); 34 C.F.R. §§ 300.506, -.507 and -.512.; Tenn. Admin Rules, *State Board of Education*, 0520-1-9-.14(9), (10). Thus, parental consent is critical to begin the assessment process.

A brief look at how a child with disabilities gets special education services will help to understand the roles of those involved with the education of the child. Each Local Education Agency (LEA or school board) is responsible for educating the public on the availability of special education services and for identifying children suspected of having a disability. 34 C.F.R. § 300.242; Tenn. Admin Rules, *State Board of Education*, 0520-1-9-.04 and -.05. After the completion of the evaluation process, the IEP team⁸ must determine whether the child is eligible for and needs special education services. 34 C.F.R. § 300.634; Tenn. Admin. Rules, *State Board of Education*, 0520-1-9-.06. If yes, the IEP team meets and determines what services the child needs to have a “free appropriate public education.” 34 C.F.R. § 300.346; Tenn. Admin. Rules, *State Board of Education*, 0520-1-9-.10. An IEP must be implemented as soon as possible after completion. 34 C.F.R. § 300.342; Tenn. Admin Rules, *State Board of Education*, 0520-1-9-.10(4).

Under the IDEA, states must establish and maintain procedural safeguards to assure children with disabilities and their parents or guardians the right to a free appropriate public education. 20 U.S.C. § 1415(a). Sometimes a child does not have parents or a person acting as a parent in the IEP process (*e.g.*, parents cannot be located). For this reason, the procedural safeguards include a mechanism for the appointment of a “surrogate parent” by the LEA when the child's parent or guardian is not known or is unavailable or the child is a “ward of the State.” 20 U.S.C. § 1415(b)(2); 34 C.F.R. § 300.515; Tenn. Admin Rules, *State Board of Education*, 0520-1-9-.14(1)(6).

A “surrogate parent” acts as surrogate for the parent to ensure that the rights of a child eligible for special education services under the IDEA are protected. 34 C.F.R. § 300.515(e); Tenn. Admin Rules, *State Board of Education*, 0520-1-9-.01(53). In acting on behalf of the child, the surrogate parent may give permission for the child to be evaluated and may participate in the forming of the child's IEP. As noted before, state or local education agencies must obtain parental consent to evaluate the child and its need for

⁸ The IEP team is a group of individuals responsible for determining a child's eligibility and for developing an IEP for a child eligible for special education. The team includes one or both parents, at least one of the child's general education teachers, a representative of the local school system, an individual who can interpret the instructional implications of evaluation and assessment results, other individuals as needed and the child when appropriate. 34 C.F.R. § 300.344; Tenn. Admin. Rules, *State Board of Education*, 0520-1-9-.09(1).

special education services. Without parental consent, the LEA must pursue permission to evaluate through mediation or a due process hearing. 34 C.F.R. § 300.505(b), 506-509; Tenn. Admin. Rules, *State Board of Education*, 0520-1-9-.05(4). Thus, the appointment of a surrogate parent may facilitate the entire process, which could otherwise be stalled, leaving the child with inadequate educational services or no services at all.⁹

1. “Ward of the State”

You ask who is a “ward of the State” for these special education purposes. As we have seen, one instance in which a surrogate parent must be appointed is when the child is a “ward of the State.” Applicable federal statutes and regulations do not define the term “ward of the State.” Instead, federal law turns to state law for the definition. 34 C.F.R. § 300.515.¹⁰ Tennessee’s guardianship statutes do not define or use the term “ward.” In fact, we found no Tennessee statute that defines the term, and although the term is found in the State Board of Education regulations, the term is not defined there.¹¹ The definition of who is a ward of the state differs from state to state. In some states, any child in state custody is a ward of the State. *See, e.g., Op. NC Atty. Gen.* 94 (March 12, 1986), 1986 WL 219256. Another state may determine that the state’s legal custody of the child is not *per se* a determination that the child is a ward of the state. *See Op. GA Atty. Gen.* 112 (May 9, 1980), 1980 WL 26337.

In the past, the term “ward” implied that there was a legal guardian. *See Op. Tenn. Atty. Gen.* 79-295 (June 15, 1979). Current case law continues to use the term although the guardianship and conservatorship statutes do not. *E.g., McCormick v. Burson*, 894 S.W.2d 739 (Tenn. App. 1995) (conservatorship); Tenn. Code Ann. §§ 34-1-101, *et seq.* The Juvenile Court may award DCS custody of a child adjudicated neglected or dependent. Tenn. Code Ann. § 37-1-130(a)(2)(B). The type of custody depends on the situation.¹² DCS becomes a child’s guardian, however, only when the court terminates the parents’ rights.¹³ Tenn. Code Ann. § 36-1-113(m), -114 and § 37-1-147.

⁹ Special provisions are made for emergency situations and the court may order DCS to make an assessment of the child. Tenn. Code Ann. § 37-1-128.

¹⁰ “Each public agency shall ensure that the rights of a child are protected [and a surrogate parent appointed] if - . . . (3) The child is a ward of the State under the laws of that State.” 34 C.F.R. § 300.515(a); Tenn. Admin. Rules, *State Board of Education*, 0520-1-9-.14.

¹¹ Tenn. Admin. Rules, *State Board of Education*, 0520-1-9-.14(1)(b)(3) (“If the child is a ward of the State (including a ward of the court or a state agency). . . .”

¹² Tenn. Code Ann. § 37-1-128 (emergency temporary care and custody); § 37-1-128 (pre-disposition custody); § 37-1-129 (custody after adjudication); § 37-1-130 (temporary legal custody); § 37-1-147 (guardianship).

¹³ In a statutory scheme that presumes the child will return to its home, termination of parental rights is a final and drastic remedy, even as removal is. A petition to terminate can occur outside the context of an adoption. Tenn.

The statutes give a guardian and a custodian similar rights and duties. It is only the guardian, however, that has the authority to place the child for adoption. *See* Tenn. Code Ann. § 36-1-102(25)(C). In other words, a legal demarcation line is drawn at the point DCS becomes a court-appointed guardian. *Compare* Tenn. Code Ann. § 36-1-102(25)(C) with § 37-1-140. Thus, DCS's legal status vis-a-vis the child shifts from a temporary responsibility to a permanent one. Therefore we have concluded that a child becomes a "ward of the State" after termination of parental rights and the appointment of DCS as guardian.

2. Multi-Disciplinary Meetings/Development of the IEP

Federal and state laws anticipate many people being involved in the development of a child's IEP. *See generally*, 20 U.S.C. §§ 1400, *et seq.*; 34 C.F.R. §§ 300.1, Tenn. Admin. Rules, *State Board of Education*, 0520-1-9. From these laws, one can infer that the goal is to have all parties who may be helpful in developing an educational plan for the child present at the IEP meeting. Ultimately, the development and implementation of the IEP is the LEA's responsibility. *See* Tenn. Admin. Rules, *State Board of Education*, 0520-1-9-.10(1) and (4).

Tenn. Code Ann. § 37-1-130(a)(2)(B)(iii) states that a DCS representative must be present at the multi-disciplinary (IEP) team meeting under the circumstances you have described. In addition, Tenn. Code Ann. § 37-1-140 states that the custodian with court-awarded legal custody of the child, in this instance, the Department, has to "provide for the care, protection, training and education . . . of the child subject to the conditions and limitations of the court order and to the remaining rights and duties of the child's parents or guardian."

When the two statutes are read in harmony, they give DCS, the neglected or dependent child's legal custodian, the right and duty to be present at the multi-disciplinary (IEP) team meeting. The statute gives no further guidance regarding DCS's role¹⁴ in the IEP meeting, but presumably, the DCS representative may have information that would be helpful to the decision making. These duties and this interpretation of the statute are consistent with the goals of the IDEA and special education statutes and regulations to assure that a child with disabilities receives a free appropriate public education.

Code Ann. § 37-1-147. When the court terminates parental rights, it has the authority to make DCS the child's legal guardian, and, as legal guardian, DCS does have more powers with respect to the child's education than does DCS as a custodian. Tenn. Code Ann. § 36-1-113(m) and §§ 36-1-102(22) and (23). The courts may award temporary legal custody to someone other than the parents, without terminating parental rights. Tenn. Code Ann. § 37-1-130.

¹⁴ According to DCS, unless the parent's rights have been terminated and DCS is the child's guardian, DCS will not sign the IEP as a parent but will sign as having attended the IEP meeting.

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