1981 WL 158203 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
March 25, 1981

***1 Re: Requested Opinion Concerning Special Education Services**

Honorable John D. Bradley, III
House of Representatives
326-D Blatt Building
Columbia, South Carolina 29211

Dear Mr. Bradley:
You have requested an opinion from this office, resulting from a request made to you by a member of the Charleston County Department of Social Services Board, relating to provisions for special education services for children in foster care settings. Essentially, Mr. Worley, the DSS board member, relates in his letter to you that Charleston County DSS is '. . . having a great deal of difficulty with the school districts . . .', because school districts will not accept the approval of an employee of the Department of Social Services prior to providing special education services to a child within a foster care program. I shall assume, for the purposes of this opinion, that the children which are subject to Mr. Worley's letter have been made wards of DSS as a result of action taken by the Family Court.

The resolution to this question is controlled by Federal Law, in the Education for all Handicapped Children's Act, commonly known as Public Law 94-142. (20 U.S.C. §§ 1401, et seq.). Public Law 94-142 is applicable to all public secondary and elementary schools in South Carolina. 20 U.S.C. § 1415 provides in relevant part:
(a) Any state educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this sub-chapter shall establish and maintain procedures in accordance with subsection (b) through sub-section (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provisions of Free Appropriate Public Education by such agencies or units.

(b) (1) The procedures required by this section shall include, but shall not be limited to—
(B) procedures to protect the rights of the child whenever the parents or guardian of the or the child is a ward of the state, including the assignment of an individual (who shall not be an employee of the state educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as surrogate for the parents or guardian;

(C) written prior notice to the parents or guardians of the child whenever such agency or unit—
(i) proposes to initiate or change, or

(ii) refused to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a Free Appropriate Public Education of the child;

Federal regulators have construed the above provision and have moved to implement it through promulgation of regulations set forth herein below:

REG. 121a.10 PARENT

As used in this part, the term 'parent' means a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with § 121a.514. The term does not include the State if the child is a ward of the State.

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REG. 121a.514 SURROGATE PARENTS

***2** (a) General. Each public agency shall insure that the rights of a child are protected when:
(1) No parent (as defined in Reg. 121a.10) can be identified;

(2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or

(3) The Child is a ward of the State under the laws of that State.

(b) Duty of public agency. The duty of a public agency under paragraph (a) of this section includes the assignment of an individual to act as a surrogate for the parents. This must include a method (1) for determining whether a child needs a surrogate parent, and (2) for assigning a surrogate parent to the child.

(c) Criteria for selection of surrogates. (1) The public agency may select a surrogate parent in any way permitted under State law. (2) Public agencies shall insure that a person selected as a surrogate;
(i) Has no interest that conflicts with the interest of the child he or she represents; and

(ii) Has knowledge and skills, that insure adequate representation of the child.

(d) Non-employee requirement; compensation.
(1) A person assigned as a surrogate may not be an employee of a public agency which is involved in the education or care of the child.

(2) A person who otherwise qualifies to be a surrogate parent under paragraph (c) and (d)(1) of this section, is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.

(e) Responsibilities. The surrogate parent may represent the child in all matters relating to:
(1) The identification, evaluation, and educational placement of the child, and

(2) The provision of a free appropriate public education to the child.

For the purposes of this opinion the validity of the cited Federal Regulations will be presumed. The above regulations, published at 45 CFR §§ 121a.10, 121a.514, are reasonably clear in stating that no employee of a public agency is eligible to serve as a surrogate parent if the employing public agency is involved with caring for the child. The proposition seems beyond question that DSS would be a public agency caring for a child once a family court has place custody of a child to any degree with DSS. As defined by the Federal Regulations, the 'public agency' assigned the responsibility for appointing a surrogate parent would

be the public education agency, which is required by law to provide special education services to a handicapped child. See 45 CFR § 121a.11.

Enclosed you will please find copies of United States Department of Education Bureau for Education of the Handicapped Bulletins, addressing the federal surrogate parent requirements. Bulletin number 62 seems to indicate that no employee of the state or a state agency, who assumes responsibility for the care or education of a child as a part of his official duties, may qualify as a surrogate parent. The second enclosure, a BEH policy letter would seem to provide individual states wider discretion than appears in the BEH bulletin number 62. In any event, the BEH letter does not provide much of a clear-cut answer, whereas the BEH bulletin number 62 states specifically that a state or state agency may not serve as a surrogate parent. This matter is further complicated by the apparent federal position that natural parents, even though not having actual custody of their children, are still eligible to serve as surrogate parents for their children.

***3** Finally, I call your attention to the case of Mattie T. v. Holladay, 3 EHLR 551:109 (U.S. Dist. Ct., ND Miss. 1979), in which the Federal District Court expressly approved a consent decree in a class action on behalf of all handicapped school age children in the State of Mississippi. The Consent Order provided that the term 'parent', which would include surrogate parent, could not include a person employed by a Mississippi agency for purposes of care and protection of a child. I am presently unaware of any further judicial opinions, delineating the scope of the term 'surrogate parent'.

Based upon the foregoing discussion, the opinion of this office is that an employee of DSS would not be eligible to perform the duties of a parent or surrogate parent, pursuant to Public Law 94-142, on behalf of children in need of special education services that are within the care or custody of DSS.

With kindest regards,
Sincerely,

Paul S. League
Assistant Attorney General

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