in conflict with applicable Federal law and regulations.

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12 March 1986

Subject: Education; Handicapped Children; Authority of County Department of Social Services to Consent to Educational Services for Children in its Custody.

Requested by: Johnnie Ellerbe, Consultant
Division for Exceptional Children
State Department of Public Instruction

Question: Do directors of county departments of social services have authority to consent to educational services for exceptional children?

Conclusion: No.

A question has arisen which concerns the Departments of Public Instruction and Human Resources as well as local government agencies regarding the authority of directors of county departments of social services to sign consent forms for educational purposes for handicapped children in the legal custody of such departments. Resolution of this question requires a careful examination of both state and federal law.

States receiving federal funding for support of educational programs are required by federal law to adopt and enforce "procedures to protect the rights of the child whenever the parents of the child are not known, unavailable, or a child is a ward of the state, including the assignment of an individual ... to act as surrogate for the parents or guardians." 20 U.S.C. §1415(b)(1)(B). Federal regulations make it clear that a surrogate parent's obligation to protect "the rights" of a handicapped child extends to all aspects of the educational process for a handicapped child. 34 CFR 300.514. North Carolina receives federal funding for the education of handicapped children and thus is bound to comply with these requirements. In fact, our law specifically requires the appointment of a surrogate parent under the same circumstances as 20 U.S.C. §1415(b)(1)(B). G.S. §115C-116(a). Our statutes, however, are not as all-encompassing as the federal statutes in regard to the scope of the obligation of a surrogate parent. Chapter 115C does not expressly require that surrogate parents be appointed to protect "the rights" of handicapped children. Instead, surrogate parents are only given express duties or rights in connection with access to records, G.S. §115C-114, and in connection with administrative appeals from the placement of handicapped children. G.S. §115C-116(a). Nevertheless, it seems clear that the General Assembly intended that the obligations of a surrogate parent have the scope specified by federal law. G.S. §115C-106(b) provides that the purpose of Article 9, Chapter 115C, which includes the specific references to surrogate parents, is to "bring state law, regulations and practice into conformity with relevant federal law." In this connection, regulations adopted by the State Board of Education, like the federal regulations, specifically provide that the duties of surrogate parents extend to all aspects of the educational process for handicapped children. 16 NCAC 2E .1520.

In those circumstances where a surrogate parent must be appointed, federal law prohibits any "employee of the state educational agency, local educational agency or intermediate educational agency involved in the

education or care of the child" from acting as a surrogate parent. 20 U.S.C. §1415(b)(1)(B). Federal regulations extend this prohibition to any employee of a "public agency which is involved in the education or care of the child." 34 C.F.R. 300.514(d). Similarly, state law prohibits any "employee of the state or any local government educational or human resource agency responsible for or involved in the education or care of the child" from acting as a surrogate parent. G.S. §115C-116(c). The manifest purpose of these statutes is to assure that educational decisions for handicapped children whose parents are unknown or unavailable or who are wards of the State will be made by persons whose sole interest is the welfare of the child.

A handicapped child who is placed in the custody of a county director of social services would appear to be a ward of the state. Therefore, under the federal and state laws and regulations cited above a surrogate parent must be appointed to represent the interests of that handicapped child if his parents are unknown or unavailable. Since a county department of social services given custody of a handicapped child would clearly be involved in the education or care of that handicapped child, these laws and regulations would prohibit the county director of social services, or other department employees, from serving as a surrogate parent.

Other statutes, however, indicate a contrary result. G.S. §7A-647(2)(c) was amended by Chapter 777 of the 1985 Session Laws to provide the following in regard to juveniles in the custody of a county department of social services:

> In the case where the parent is unknown, unavailable or unable to act on behalf of their child or children, the director may, unless otherwise ordered by the judge, arrange for, provide or consent to any psychiatric, psychological, educational, or other remedial evaluations or treatment for the juvenile placed

> by a judge or his designee in the custody or physical custody of a county department of social services under the authority of this or any other chapter of the General Statutes.

G.S. §7A-647(2)(c) as amended appears on its face to be in conflict with 20 U.S.C. §1415 and the other state laws cited above to the extent that G.S. §7A-647(c)(2) authorizes the county director of social services to make educational decisions for a handicapped child in the custody of a department of social services. In our opinion, this apparent conflict should be resolved by giving full effect to 20 U.S.C. §1415.

We are of this opinion for two reasons. First, where there is a conflict between state and federal law the federal law takes precedence under the Supremacy Clauses of the United States and North Carolina Constitutions. Constantian v. Anson County, 244 N.C. 221, 93 S.E. 2d 163 (1956). Under federal law a surrogate parent must be appointed to represent the interests of a handicapped child who is a ward of the state and an employee or agency involved in the education or care of that child may not serve as a surrogate parent. 20 U.S.C. 1415. Since G.S. §7A-647(2)(c) conflicts with federal law, it must give way to the extent of the conflict. Second, when two statutes are in conflict, a statute dealing specifically with certain subject matter will be construed as an exception to a statute dealing generally with the same subject matter. National Food Stores v. Board of Alcoholic Control, 268 N.C. 654, 151 S.E. 2d 582 (1966). In this case, Article 9, Chapter 115C of the General Statutes identifies the surrogate parent as the person responsible for making educational decisions for a handicapped child who is a ward of the state and whose parents are unavailable or unknown. G.S. §7A-647(2)(c) deals generally with the authority to make various kinds of decisions for juveniles placed in the custody of the Department of Social Services, whether the child is handicapped or not. Therefore, the provisions of Article 9, Chapter 115C should be

considered as an exception to the provision of G.S. 7A-647(2)(c) to the extent those statutes are in conflict.

In sum, it is the opinion of this Office that in those situations where the parents of a handicapped child are unavailable or unknown and the child is a ward of the state the responsibility and authority for representing that child's educational interests rests with a surrogate parent and not with the county director of social services. Further, G.S. §115C-116(c) and 20 U.S.C. §1415(b)(1)(B) prohibit the county director of social services or any employee of a department of social services involved in the education or care of such child from serving as a surrogate parent in such circumstances.

This opinion applies to Willie M. children. The orders in the Willie M. case did not, and could not, repeal the provisions of state and federal law and those orders in fact provide that Willie M. children have no greater rights to an education than provided by state and federal law.

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12 March 1986

Subject: Courts; Application of Prosecution Bonds Under G.S. 1-109 in Small Claims Actions.

Requested by: Jane M. Eason

Civil Magistrate
New Hanover County

Question: Do the provisions of G.S. 1-109, which require a $200.00 plaintiff's bond for costs when moved by defendant, apply to actions pending in Small Claims Court?

Conclusion: No.

G.S. 1-109 is as follows:

> At any time after the issuance of summons, the clerk or judge, upon motion of the defendant, shall require the plaintiff to do one of the following things and the failure to comply with such order within 30 days from the date thereof shall constitute grounds for dismissal of such civil action or special proceeding:
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> (1) Give an undertaking with sufficient surety in the sum of two hundred dollars, with the condition that it will be void if the plaintiff pays the defendant all costs which the latter recovers of him in the action.
>
> (2) Deposit two hundred dollars ($200.00) with him as security to the defendant for these costs, in which event the clerk must give to the plaintiff and defendant all costs which the latter recovers of him in the action.
>
> (3) File with him a written authority from a superior or district court judge or clerk of a superior court authorizing the plaintiff to sue as