

# Special Education Considerations

## A Court Reference Guide for Tennessee Child and Parent Attorneys, Multidisciplinary Professionals, Court Staff and Volunteers

Children and youth in foster care are 2.5 to 3.5 times more likely to receive special education services than their peers (Cheatham et al., 2020; Smithgallet et al., 2004). The vast majority of youth in care with disabilities demonstrate emotional or mental health challenges (Cheatham et al., 2020) around which they require support to be successful.

### THE LAW

20 U.S.C. § 1400; 42 U.S.C. § 5101 et seq. (specifically Sec. 5106a(b)(2)(B)(xxi)); TCA § 37-2-404; TCA § 37-2-409; TCA § 49-10-601; TRPP Rules 402, 403, 404; DCS Admin Policy and Procedure 21.14; CPS 14.7; TN State Board of Education, 0520-01-09

**Birth through age two (2):** To meet the guidelines of the Child Abuse Prevention and Treatment Act (CAPTA), referrals must be made to Tennessee Early Intervention Services (TEIS) for any child through their second year whose CPS investigation results are “indicated”. This requirement is detailed in DCS policy. If screening indicates the child is suspected of having a disability, TEIS will undertake special education evaluation pursuant to the Individuals with Disabilities Education Act (IDEA), Part C.

**Children three (3) years of age & older:** Pre-school and school age children suspected of having a disability should be referred to their local school system for assessment and evaluation under IDEA Part B.

**Educational Decision Maker:** Once in DCS custody, the parent usually retains educational rights. For children with disabilities, the IDEA and Tennessee policy provide a process to appoint a “surrogate parent” when a child’s parent/kin caregiver is unable to exercise their parental special education rights under the IDEA. A surrogate parent can be appointed by the schools or by the judicial officer supervising the child’s custodial episode. The surrogate parent should be knowledgeable about special education, but cannot be an employee of DCS or the school system and should not have a conflict of interest.

### WHAT TO CONSIDER

At Permanency Plan Ratification, Periodic Progress Review/Foster Care Review Board, and Permanency Hearings, the court should address the adequacy of educational services to support child/youth well-being.

- Is the child’s well-being addressed adequately in his/her early childhood or school-aged educational program? If not, why not?
- Does the child have an Individualized Family Service Plan (IFSP; birth through 2; generally) or an Individualized Education Program (IEP; age 3+, generally)?

#### **If the child has an IFSP or an IEP:**

- Is the child making progress socially and academically? If not, why not? Does the child demonstrate poor grades, poor focus, poor coping skills and/or have suspected secondary area of disability?
- Consider recommending/requesting that the court order DCS to request an IEP meeting to address these specific concerns. Public school systems are required to provide “an IEP that is reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (Endrew F. v. Douglas County School District Re-1, 137 S. Ct. 988, 2015).

#### **If the child does not have an IFSP or an IEP:**

When the child is struggling at school, and an adult who knows the child (court, attorney, etc.) suspects the child has a disability, consider recommending or requesting that the court order DCS refer the child for a special education evaluation. A GAL or parent attorney can make the referral as well. The referral should be in writing to the school leadership (principal, assistant principal, etc.).\**Special education referral just gets the ball rolling. It does not automatically trigger evaluation (which requires parental consent).*

- Per Tennessee State Board of Education Policy, in order for a willing foster parent of less than one year to serve as surrogate parent, the foster parent must be appointed by the court or the school system. After one year, the foster parent can be considered parent for special educational if there is no parent/relative able to serve in this capacity. No general education responsibility is conferred to the surrogate parent under the IDEA or by Tennessee policy.
- A parent or surrogate parent must sign consent for evaluation and for the provision of special education services if the child is determined to be eligible for special education.
- Encourage the parents to engage in special education and request DCS’s efforts to support parental involvement. If the parents cannot be located, and there is no kin caregiver to serve as a special education parent, consider recommending/requesting a surrogate parent appointment. The surrogate parent can be appointed even for a child without an IEP to initiate special education referral and sign for evaluation if the child is suspected of having a disability.