

OPINION NO. 78-053**Syllabus:**

1. The Ohio Youth Commission must, pursuant to R.C. 3323.05 and R.C. 3323.091, appoint parent surrogates for any handicapped child under its care and custody when the child's legal guardian or parent is unknown or unavailable and the child is placed in a special education program. The person so appointed may not be an employee of the Youth Commission.
2. A child who is committed to the Ohio Youth Commission under R.C. Chapter 5139 is not a "ward of the state" for purposes of R.C. 3323.05, unless the child's parent or legal guardian is unknown or unavailable. If the parent or guardian is unknown or unavailable the Youth Commission must appoint a parent surrogate if the child is handicapped and is to be placed in a special education program.

To: William K. Willis, Director, Ohio Youth Commission, Columbus, Ohio
By: William J. Brown, Attorney General, October 2, 1978

I have before me your request for my opinion which concerns R.C. 3323.05. That section was enacted as a part of Am. Sub. H.B. 455, effective August 27, 1976, relating to the identification, evaluation, educational placement and education of handicapped children. R.C. 3323.05 requires the establishment of procedural safeguards in decisions relating the education of handicapped children, in part, as follows:

The state board of education shall establish procedures to assure that handicapped children and their parents are guaranteed procedural safeguards in decisions under this chapter relating to the identification, evaluation, or educational placement of a handicapped child or the provision of education or related services under this chapter.

The procedures shall include, but need not be limited to:

. . . .

(B) Procedures to protect the rights of the child when the parents of the child are unknown or unavailable, or when the child is a ward of the state, including the assignment of an individual, who shall not be an employee of any agency involved in the education or care of the child, to act as a surrogate for the parents.

This section relates to the Ohio Youth Commission by virtue of R.C. 3323.091, since it states that:

The Department of Mental Health and Mental Retardation and the Ohio Youth Commission shall establish and maintain special education programs for handicapped children in institutions under their jurisdiction according to standards adopted by the Ohio State Board of Education . . .

The questions you raise involve the status of the Ohio Youth Commission with respect to handicapped children under commitment to institutions within its jurisdiction. Specifically you ask:

1. Do the applicable law and standards require the Ohio Youth Commission (which operates the special education programs in its institutions) to appoint an individual to act as a parent surrogate in those cases where the natural parents or guardian is unknown or unavailable, or may the Commission serve as the "parent" for those children, considering the fact that the Commission is the legal custodian of all children committed to it by virtue of Section 5139.01(A)(3) of the Ohio Revised Code of Ohio, and by virtue of the fact that Section 3323.01 of the Revised Code of Ohio defines "parent" to include the child's custodian.

2. Does the fact that a child is committed to the Ohio Youth Commission make that child a "ward of the state" within the meaning of Section 3323.05(B) of the Revised Code of Ohio, and if so, would the Commission then be required to appoint a parent surrogate for all children which it places, evaluates, or identifies in the special education program? If the Commission is required to appoint a parent surrogate for all of these children, as the result of their being "wards of the state," would there be any reason why the natural parents could not be so appointed where that would be desirable?

As set forth in R.C. 3323.02, the purpose of R.C. Chapter 3323 is:

[T]o assure that all handicapped children of compulsory school age in this state shall be provided with an appropriate public education.

Accordingly, no educational program operated for the benefit of handicapped children shall receive state or federal funds unless it complies "with all procedures, standards and guidelines . ." promulgated by the State Board of Education.

As indicated in R.C. 3323.05(B), *supra*, one of necessary prerequisites of any special education program is the requirement that procedural safeguards be maintained. Pursuant to that section, the State Board of Education has adopted specific rules relating to the appointment of parent surrogates and State Board of Education Standard, 3301-51-16(C) provides as follows:

(C) Parent Surrogates

Due process and procedural safeguard policies and procedures shall include procedures to protect the rights of the child when the parents of the child are unknown or unavailable, or when the child is a ward of the state or when the child is without a formally

declared legal representative. These policies and procedures shall include provisions to insure that:

(1) When written permission is not forthcoming from the child's parent or legal guardian to begin any of the evaluation processes, a written inquiry shall be sent to the adult in charge of the child's place of residence, as well as to the parents or legal guardian at their last known address. If these efforts find that the child is without a parent or guardian, or if it is otherwise known that they are unavailable, then a request for a parent surrogate shall be filed with the superintendent of the school district.

(2) Upon receipt of a request for a parent surrogate, the superintendent or his designated representative shall, within thirty days, utilize all available information to determine if the child is in need of a surrogate and shall assign one if such study so indicates.

(3) The parent surrogate will be responsible for protecting the rights of the child through the complete decision making process including the appeals process, if that occurs, and the first review of the placement.

(4) The parent surrogate shall not be an employee of the school district, state or local educational agency involved in the education or care of the child.

(5) The school district or other educational agency, shall individually or in cooperation with other districts provide an information program for parent surrogates regarding their role and responsibilities.

(6) A child who has reached the age of majority may request a parent surrogate when no parent is available.

(7) To the extent possible, parent surrogates should match the child's cultural and linguistic background.

Your first question turns upon the fact that, for the purposes of R.C. Chapters 3321 and 3323, R.C. 3323.01 defines the term "parents" to include a child's guardian or custodian. As you have observed, under the terms of R.C. 5139.01(A)(3), upon permanent commitment, a child is in the legal custody of the Youth Commission. However, under the terms of R.C. 5139.01(A)(4), legal custody encompasses the following rights and responsibilities:

"Legal custody," insofar as it pertains to the status which is created when a child is permanently committed to the youth commission, means a legal status wherein the commission has the following rights and responsibilities: the right to have physical possession of the child; the right and duty to train, protect, and control him; the responsibility to provide him with food, clothing, shelter, education, and medical care; and the right to determine where and with whom he shall live; provided, that these rights and responsibilities are exercised subject to the powers,

rights, duties, and responsibilities of the guardian of the person of the child, and subject to any residual parental rights and responsibilities.

The rights and responsibilities vested in the Commission as custodian thus are only as specified statutorily. An argument relying on the provisions of R.C. 3323.01 and 5139.01 that the Youth Commission is the "parent" of a handicapped child for the purposes of R.C. 3323.05 would emphasize the letter rather than the spirit of R.C. Chapter 3323. Such an argument would further ignore the purpose of the Chapter, as set forth by R.C. 3323.02. The procedural safeguards required by R.C. 3323.05(B) and the standards developed by the State Board of Education pursuant thereto contemplate an adversarial situation as the best method of protecting the rights and interests of the child.

To determine the intent of the General Assembly is, of course, the object of statutory construction; in this instance, the legislative intent is clear. R.C. 3323.05(B) requires the appointment of an individual to act as a parent surrogate when a child's parents are unknown or unavailable. This requirement is mandatory, not discretionary. As set forth above, the standards developed by the State Board of Education pursuant to R.C. 3323.05(B) require a child's superintendent to determine within thirty days after commitment if a child is in need of a surrogate. Under the provisions of R.C. 3323.091, the Director of the Ohio Youth Commission is a child's superintendent for the purposes of this requirement. R.C. 3323.05(B) specifically provides that the parent surrogate may not be an employee of any agency involved in the education or care of the child. I am, therefore, of the opinion that any argument under the terms of R.C. 5139.01 that the agency, as a limited custodian, may act as the surrogate parent must fail in light of the legislative intent manifest in the express terms of R.C. 3323.05 and the administrative standards promulgated thereunder.

Your second question requires an interpretation of the phrase "ward of the state" as used in R.C. 3323.05(B) and in the standards of the State Board of Education. Again, determination of the intent of the legislature is of paramount concern. Your question thus centers upon whether the legal custody devolved upon the Commission under the terms of R.C. 5139.01 operates to make a child committed thereto a ward of the state for the purposes of R.C. 3323.05(B). As set forth above, the provisions of R.C. 5139.01(A)(4) confer upon the Commission rights to be exercised subject to the powers, rights, duties and responsibilities of the guardian of the person of the child and subject to any residual parental rights and responsibilities. I am, therefore, of the opinion that the terms of R.C. 5139.01(A)(3) and (4) prevent the conclusion that all children committed to the Commission are wards of the state for the purposes of R.C. 3323.05(B). Under the terms of R.C. 1.51, in enacting a statute, it is presumed that a result both reasonable and feasible of execution is intended. To interpret the phrase "ward of the state" as used in R.C. 3323.05(B) to include all children committed to the Ohio Youth Commission would compel the appointment of parent surrogates for each such child, even where a child's parents are known, available and very much concerned with the child's interests. For this reason, I am of the opinion that the Commission's duty to appoint a parent surrogate arises only where a child's parent or legal guardian is unknown or unavailable.

In specific answer to your question, it is my opinion, and you are so advised that:

1. The Ohio Youth Commission must, pursuant to R.C. 3323.05 and R.C. 3323.091, appoint parent surrogates for any handicapped child under its care and custody when the child's legal guardian or parent is unknown or unavailable and the child is placed in a special education program. The person so appointed may not be an employee of the Youth Commission.

2. A child who is committed to the Ohio Youth Commission under R.C. Chapter 5139 is not a "ward of the state" for purposes of R.C. 3323.05, unless the child's parent or legal guardian is unknown or unavailable. If the parent or guardian is unknown or unavailable the Youth Commission must appoint a parent surrogate if the child is handicapped and is to be placed in a special education program.