

STATE OF TENNESSEE
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Opinion No. 05-167

Proper Method for Funding Local Education Agencies' (LEAs') Services for Three (3) and Four (4) Year-Olds with Disabilities Pursuant to BEP and Tenn. Code Ann. § 49-10-113(c)(1).

QUESTION

Whether, for purposes of calculating BEP funding for LEAs under Tenn. Code Ann. § 49-10-113(c)(1), children with disabilities who are three (3) or four (4) years of age and who are served by the LEAs should be counted in the average daily membership (ADM) of each Local Education Agency (LEA), rather than being funded only under the “special option” component of the BEP.

OPINION

The language employed by the legislature in Tenn. Code Ann. § 49-10-113(c)(1), as well as other portions of Tennessee education statutes and State Board of Education rules, indicate that LEAs' services for children with disabilities who are three (3) or four (4) years of age should be funded by counting such children as part of the ADM, as well as under the “special option” component of the BEP.

ANALYSIS

Under both Tennessee¹ and federal² law, state and local education officials are required to provide a “free appropriate public education” to children with disabilities. Both State and federal law define “child with disabilities” as a child or a youth with disabilities who is between three (3) and twenty-one (21) years of age.³ Consequently, LEAs are legally obligated to provide educational services to children with disabilities two (2) years before those children reach the age to attend

¹See, e.g., Tenn. Code Ann. §§ 49-10-101 — 49-10-1203.

²See 20 U.S.C. §§ 1400 — 1482; “The Individuals with Disabilities Education Act” (IDEA); 34 C.F.R. Part 300.

³IDEA, 20 U.S.C. 1412(2); Tenn. Code Ann. § 49-10-102 (1)(A).

kindergarten.⁴

The BEP (Basic Education Program) is the funding vehicle through which the Tennessee Department of Education (the Department) calculates the level of funding for each local school system, which in turn provides educational services to children with disabilities. It is our understanding that the Department's practice in the past has been to provide funds for educational services for children with disabilities aged three (3) and four (4) by including a separate category within the BEP for a "special option" for funding these services. In contrast, for disabled children who are five (5) or more years old, educational funding is calculated through both the "special option" component of the BEP and according to Average Daily Membership (ADM);⁵ that is, the total number of days enrolled divided by the number of days school is in session.

We are now asked whether, in light of the wording of Tenn. Code Ann. § 49-10-113(c)(1), funds for three (3) and four (4) year old children with disabilities should be provided by counting these children as part of an LEA's ADM calculation, rather than solely under a "special option" within the BEP. The question is significant because, under the special option alone, the funding for LEAs to provide educational services for such children is lower than the corresponding funding resulting from counting these children as part of an LEA's ADM in addition to their "special option" funding.

Tenn. Code Ann. § 49-10-113(c)(1) states:

"For the purposes of entitlement to state aid, children with disabilities shall be counted **in the same manner as other children.**" (Emphasis added).

As already noted, Tenn. Code Ann. § 49-10-102(1)(A) defines "child with disabilities" as "children with disabilities and youth between three (3) and twenty-one (21) years of age, inclusive," These statutes therefore make no distinction, for funding purposes, between children with disabilities aged five (5) years and up, who, to the extent possible, attend regular K through 12

⁴While not provided in a traditional classroom setting, these services are extensive in scope, and include transportation services, developmental, corrective, and supportive services that may be required to assist children with disabilities in benefitting from special education. Examples of such services include speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Such services are also defined to include school health services, social work services, and parent counseling and training. *See, e.g.*, 34 C.F.R. §300.24(a).

⁵Tenn. Code Ann. §49-3-302(2).

classes,⁶ and those three (3) and four (4) year old children with disabilities who do not attend classes.

Consequently, the wording of these statutes reflects the legislative intent that children with disabilities aged three (3) and four (4) years be counted as part of an LEA's ADM for BEP funding purposes.

Another portion of the above-cited statute calls upon the State Board of Education to promulgate rules and regulations prescribing the manner in which state funds are to be provided to LEAs for special education:

[49-10-113. State Financial Aid]

(a)(1) The state shall provide financial aid in each school year to school districts and other entities entitled by the laws of this state to receive school aid for educational and related services provided by them for children with disabilities.

(2) **Such aid shall be determined and paid in accordance with this section and rules and regulations as set forth by the state board of education.** (Emphasis added).

In turn, the State Board of Education's rules on Special Education Programs and Services, Tenn. Admin. Rules, State Board of Education, Ch. 0520-1-9-.01 — .16, appear to support our conclusion regarding how funding for educational services for children with disabilities is to be calculated in the BEP.⁷ State Board of Education Rule 0520-1-9-.03(3) states, in pertinent part:

(3) Specific funding requirements:

(a) **For the purposes of entitlement to academic program funds from the Basic Education Program (BEP), children eligible for special education shall be counted in the same manner as children without disabilities.** To supplement the academic program funds earned and paid from the BEP, special education funds from the BEP shall be paid to local school systems for the purpose of providing special education and related services to

⁶See Tenn. Code Ann. §49-10-103(c)(1).

⁷Rules and regulations promulgated pursuant to the Tennessee Administrative Procedures Act are a proper subject of judicial notice. *Tennessee State Board v. Cobb*, 557 S.W.2d 276, 279 (Tenn. 1977); *Acuff v. Commissioner of Tennessee Dept. of Labor*, 554 S.W.2d 627, 631 (Tenn. 1977). Further, duly-promulgated rules and regulations of administrative agencies have the force and effect of law. See Tenn. Code Ann. § 4-5-221(c).

children eligible for special education. (Emphasis added).

Accordingly, the language employed by the legislature in Tenn. Code Ann. § 49-10-113(c)(1), as well as other portions of Tennessee education statutes, and State Board of Education rules, indicate that LEAs' services for children with disabilities who are three (3) or four (4) years of age should be funded by counting such children as part of the ADM for BEP purposes, as well as pursuant to the "special option" portion of the BEP.

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