
ASFA ARGUMENT FOR HEALTH AND EDUCATIONAL RECORDS

FEDERAL LAW REQUIRES THAT THE GAL HAVE ACCESS TO THE REQUESTED RECORDS.

An elementary principal of constitutional law teaches that federal law preempts state law when the latter frustrates the objectives of federal law. *See, e.g., California Federal Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 281 107 S.Ct. 683, 689 (1987) (state law preempted where compliance with both federal and state regulations is a physical impossibility or because the state law obstructs accomplishment of Congressional objective). This fundamental principle governs the outcome here, for federal law not only bore the concept of guardians ad litem in dependency proceedings, 42 U.S.C. § 5106a(b)(2)(A)(ix), but also clearly and specifically permits the guardian ad litem to access the child's records and requires collection of the records encompassed within the existing order.

Florida takes millions of federal dollars every year to defray the expense of operating its foster care system. *See, e.g., U.S. Dept. of Health & Human Serv., Administration for Children & Fam., Children's Bureau, Federal Child Welfare Programs Today* (available at <http://www.acf.hhs.gov/programs/cb/dis/tables/sec11gb/federal.htm>). To become eligible for these federal dollars, Florida is required by federal law to implement a "plan" approved by the Secretary of the United States Department of Health and Human Services. 42 U.S.C. § 671. One requirement for the state plan is that it ". . . contain provision for development of a case plan and a case review system." 42 U.S.C. § 671(a)(16).

"Case plan" is defined as including:

[T]he health and education records of the child, including –

- (i) the names and addresses of the child's health and educational providers;
- (ii) the child's grade level performance;
- (iii) the child's school record;
- (iv) assurances that the child's placement in foster care takes into account proximity to the school in which the child is enrolled at the time of placement;
- (v) a record of the child's immunizations;
- (vi) the child's known medical problems;
- (vii) the child's medications; and
- (viii) any other relevant health and education information concerning the child determined to be appropriate by the State agency.

42 U.S.C. § 675(1)(C); *see also* 42 U.S.C. § 675(5)(D) (defining "case review system"). Finally, federal law specifically permits state agencies such as the guardian ad litem to access this information:

... reports and records made and maintained pursuant to the purposes of this subchapter and subchapter III of this chapter shall only be made available to –

...

(II) Federal, State, or local government entities, or any agent of such entities, having a need for such information in order to carry out its responsibilities under law to protect children from abuse and neglect;

...

(VI) other entities or classes of individuals statutorily authorized by the State to receive such information pursuant to a legitimate State purpose. . . .

42 U.S.C. 5106a(b)(2)(A)(v)(II), (VI).

Pursuant to these federal mandates, the Florida legislature directed the Department of Children and Families to obtain all available medical information relating to children placed in the department's care, § 409.145(6), Fla. Stat. (2003), and to reveal to the foster parents as soon as practicable ". . . all relevant information concerning the child's demographic, social, and medical history." § 409.145(7), Fla. Stat. (2003). The legislature further granted the guardian ad litem access to these records via § 39.202(2)(k), Fla. Stat. (2003), which expressly permits the guardian ad litem to have whatever the Department of Children and Families may have:

(2) [A]ccess to such records [those held by the department] . . . shall be granted only to the following persons, officials, and agencies:

...

(k) . . . the guardian ad litem for the child.

See also § 39.407(5), Fla. Stat. (2003) (requiring disclosure of mental health evaluations, plans of treatment, and progress reports to the guardian ad litem when children are placed in residential treatment).

On the basis of this federal and state statutory authority, the Department of Children and Families promulgated regulations reiterating that the records to be available to the parties and the court in every case are the child's "cumulative health records," as well as "all psychological and psychiatric reports," "educational records and reports," and the family's social assessment. Fla. Admin. Code R. 65C-15.031(1)(e), (f), (i); *see also* Fla. Admin. Code R. 65C-15.032(1)(b) (requiring that records of "[t]he social history, including any psychological or psychiatric reports and medical histories" be maintained); Fla. Admin. Code R. 65C-12.001(3), (18) and Fla. Admin. Code R. 65C-12.007(5), (7) (requiring that a written health history be maintained for each child and provided to and discussed with the child's caregivers).

As this lineage of authority attests, the guardian ad litem's genesis and authority rests in federal law. State statutes, regulations, judicial rules, and standards simply give effect to federal law by providing for the appointment of the guardian ad litem, imposing duties upon the guardian ad litem, and permitting access to the records. Thus, any order denying or taking away the guardian ad litem's ability to access the child's records runs afoul not only of state statutory and regulatory law but also of the federal law upon which the state laws are based. Accordingly, the court should deny the attorney ad litem's motion. Without timely access to information concerning the child's history, the guardian ad litem's effectiveness is thwarted and the child's best interests, safety, and welfare are jeopardized.