

1983 WL 181767 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

February 24, 1983

*1 James B. Ellisor
Executive Director
South Carolina Election Commission
Post Office Box 5987
Columbia, South Carolina 29250

Dear Mr. Ellisor:

Mr. Medlock has referred your letter to me for reply. You have requested an opinion on behalf of the Chesterfield County Board of Registration on whether or not persons who have not been declared mentally incompetent but are mentally handicapped and who reside at the Chesco Development Center in Chesterfield County could be properly registered.

Article II, Section 7 of the South Constitution provides in part that '[t]he General Assembly shall establish disqualifications for voting by reason of mental incompetence . . .'. SOUTH CAROLINA CODE OF LAWS, 1976, Section 7-5-120(5)(a) provides that '[p]ersons who are mentally incompetent . . .' shall not be registered to vote. However, Section 7-5-170(2) which sets out the official application for registration provides at Section 3 that the person must indicate that he is '. . . not now under a court order declaring . . . [him] incompetent . . .' (Emphasis added).

Section 44-23-1040 which is a chapter containing provisions applicable to both mentally ill and mentally retarded persons, provides that 'no person shall be denied the right to . . . register and vote . . . unless the individual has been adjudicated incompetent . . . and has not been restored to legal capacity.'

It would, therefore, appear under both the provisions of Sections 7-5-170 and 44-23-1040, that only a judicial order declaring a person to be incompetent would disenfranchise a person.

I have not found a South Carolina case on this question but a very similar situation arose in the case of [Carroll v. Cobb, 139 N.J. Super 439, 354 A. 2d 355 \(1976\)](#) where persons in a state school for the mentally retarded requested to be allowed to register to vote. The Court found that residence in one of these schools without a judicial finding of incompetence, would not disqualify a person from registering and voting. Further, the Court, citing a statute similar to South Carolina's Section 44-23-1040, stated that under the New Jersey statutory provisions these persons retained all civil rights unless there had been a finding of incompetence by the courts. See also, [Voting Rights of Mentally Incapacitated, 80 A.L.R. 3d 1116](#); 41 AM. JUR. 2d, [Incompetent Person](#) § 129; 1969 Opinion of Daniel R. McLeod to Alfred W. Wellner (copy enclosed).

Therefore, assuming the applicant met all other statutory requirements for registration, only a finding of incompetence by a court would disenfranchise a person under the provisions of Section 7-5-120(5)(a).

Sincerely,

Treva G. Ashworth
Senior Assistant Attorney General

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