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The State of South Carolina



Office of the Attorney General

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November 15, 1990

The Honorable Charlie G. Williams
State Superintendent of Education
Rutledge Building, Room 1006
1429 Senate Street
Columbia, SC 29201

Dear Dr. Williams:

You have requested the Opinion of this Office as to whether the United States Department of Education may properly require South Carolina's State Plan, under the Education for All Handicapped Children Act (Act - 20 U.S.C. § 1401, et seq.), to provide for education to handicapped children who have been expelled from school for reasons not related to their handicap. In addition, you have asked whether, if the U.S. Department may impose this requirement, the State has the authority to enforce the provision of education to such students absent legislative change in State law.

At least four circuits of the United States Court of Appeals have noted or addressed the question of the duty of state or local education authorities to provide an education to a handicapped child who was suspended or expelled for reasons unrelated to his or her handicap. The Fourth Circuit Court of Appeals has ruled that a child may be expelled if his behavior was not caused by his handicap, but the court declined to discuss whether some level of educational services must continue to be provided to such a child, and if so, to what extent. School Board of Prince William County Virginia v. Malone, 762 F.2d 1210,1218. In Doe v. Maher, 793 F.2d 1470,1482 (9th Cir. 1986), the Court held as follows:

"...when a handicapped child is properly expelled [for behavior unrelated to a handicap], the school district may cease providing all educational servic-

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es - just as it could do in any other case. To do otherwise would amount to asserting that all acts of a handicapped child, both good and bad, are fairly attributable to his handicap. We know that that is not so."

Doe was affirmed with modification by the U.S. Supreme Court, but the Court's opinion did not address this aspect of the Doe decision. Honig v. Doe, 484 U.S. 305, 98 L.Ed.2d 686, 108 S.Ct. 592 (1988). In contrast to Doe, two other circuits have indicated that education must be provided to the handicapped child even when the child was expelled for reasons unrelated to the handicap. Kaelin v. Grubbs, 682 F.2d 595, 602 (6th Cir. 1982); S-1 v. Turlington, 635 F.2d 342,348 (5th Cir., Unit B, 1981).

To qualify for federal funds for the education of the handicapped, states must have in effect a policy "...that assures a free appropriate public education for all handicapped children". 20 U.S.C. § 1412(1); 34 C.F.R. § 300.121(a). The U.S. Secretary of Education has the authority to approve state plans for the education of the handicapped and to promulgate regulations concerning the Act. See sections 1413 and 1417. Given the Secretary's authority, and that his Department has already determined that states must provide education to handicapped children who were expelled for reasons unrelated to their handicap, this Office declines to express an opinion concerning laws interpreted by the federal agency charged with their enforcement. Education of the Handicapped Law Report, EHLR 213,258 (September 15, 1989). This conclusion does not mean that this Office agrees or disagrees with the interpretation of the Act given by the U.S. Department of Education. Instead, the determination as to whether the U.S. Department has properly interpreted this law should be made by the State Department of Education and its lawyers in the context of whether administrative or judicial review of the Secretary's determination would be available and advisable. This Office makes no recommendation as to whether the Department should seek administrative or judicial review or not do so, but merely notes that the question that you have posed is most appropriately considered in the context of evaluating those review options and their likelihood of success.

As noted, you have also asked whether, absent legislative change in State law, the State would have the authority under South Carolina law to comply with the U.S. Department's request to fund education for handicapped students who were expelled due to behavior unrelated to their handicaps. Section 59-63-210 would not permit the education of such children on the school grounds, in that this statute "...prohibit[s] a pupil [expelled] from entering

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the school, or school grounds, except for a prearranged conference with an administrator...."

A previous Opinion of this Office addressed options for the education of expelled students generally regardless of whether the students were handicapped. Ops. Atty. Gen. November 2, 1984. The Opinion noted that S.C. Code Ann. § 59-63-210 (1990) concerning the expulsion of students stated that this statute did not "preclude enrollment and attendance in any adult or night school." The Opinion further found that R43-237 of the Rules of the State Board of Education (Vol. 24 of the Code) permitted school district boards of trustees to assign students under age 18 to classes in adult education programs when they "...exhibit unusual educational need or exhibit physical, social or economic problems which can be more effectively served by the...program." The Opinion noted that some education may be available for handicapped students and suggested that parents or guardians check with their local school districts or the Department of Education's Office of Programs for the Handicapped; however, the Opinion did not determine whether any such education was available or required to be made available. Finally, the Opinion found that the Department of Youth Services was not an available option for expelled students unless they were under the jurisdiction of that agency. Sections 20-7-3230 and 20-7-3240 of the Code. Clearly, under the authority set forth in the above Opinion, the education of handicapped children in adult or night school under R43-237 and section 59-63-210 would be permissible.

The remaining question would therefore be whether the State law has the authority to require the education of expelled handicapped students in settings other than adult or night school or the school grounds. Section 59-33-30 of the Code directs the State Board of Education to establish a program of education for "all handicapped children" in this State and authorizes the Board to promulgate the necessary and proper rules and regulations. None of those regulations promulgated by the Board expressly provide for education for expelled, handicapped students. See e. g. R43-241 and R43-243.1, Vol. 24 of the Code. Nevertheless, because section 59-33-30 gives the State Board rule-making authority with respect to handicapped children and because section 59-63-210 expresses its restrictions upon expelled students in terms of their entering school grounds and notes that adult school and night school are not precluded, the State Board may have the discretion to provide by regulation, if it so chooses, for the education of expelled handicapped students at home or in some other setting other than school grounds. Although section 59-63-30(e) authorizes free school attendance in a school district for children who have

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"not been guilty of infraction of the rules of conduct" of the district, reading this section together with sections 59-33-30 and 59-63-210 (Sutherland Statutory Construction, Vol. 2A §51.02) indicates that the Board may still have the authority by regulation to require that education be provided, free of charge, to expelled handicapped children.

In conclusion, this Office respectfully declines to issue an Opinion as to whether the Education for all Handicapped Children Act (20 U.S.C. § 1401, et seq.) requires state plans to provide education to handicapped children who have been expelled from school for reasons unrelated to their handicaps; however, State law does not appear to prohibit the State Board from requiring, by regulation, that education be provided for such students if that education is undertaken in an adult school, night school, or in some setting other than school grounds. Again, as noted above, such would be a matter of policy to be determined by the Board and we make no comment concerning such policy considerations.

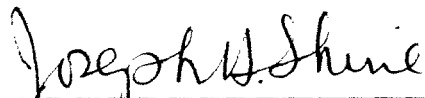
Yours very truly,



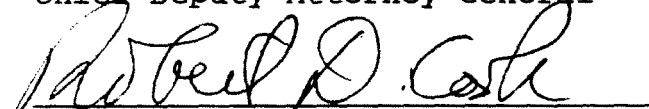
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