

1983 WL 181836 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

April 7, 1983

***1** A. Baron Holmes, IV

President

South Carolina School for Deaf and Blind

Spartanburg, South Carolina 29302

Dear Baron:

You have requested the advice of this office as to whether the School for the Deaf and the Blind (School) must hold due process hearings for mentally handicapped children who are excluded from initial or continued enrollment at the School. Your question is specifically concerned with children classified as profoundly retarded.

State law does not appear to require enrollment of mentally handicapped children at the School. [Section 59-47-70 of the Code of Laws of South Carolina \(1976\)](#) provides for the admission of '[a]ll deaf mutes and blind persons to the School who are of proper age and mental capacity . . .' and gives the School's Board of Commissioners the power to decide each case. The Board of Commissioners is also empowered to establish 'conditions, forms and regulations' for the admission of students. § 59-47-30. These provisions clearly allow the School the discretion to exclude profoundly mentally retarded and other children on the basis of mental capacity. No provisions limit this authority as applied to children enrolled in the multihandicapped portion of your school. See Act 466 § 32, Acts and Joint Resolutions of South Carolina, 1982.

Federal law does not alter these conclusions. As you know, the Education for the Handicapped Act (EHA-200 USC § 1401, et seq.) imposes requirements for the education of handicapped children on states receiving funds under this Act. Regulation 34 CFR 300.506 (EHA) provides that, at the request of a parent or public agency, a due process hearing must be conducted on the subject of the initial placement or a change in the educational placement of a child. The dismissal of children would constitute a change in their educational placement so that a due process hearing would have to be held if requested. Under the above regulation, the hearing would have to be conducted by the ' . . . state educational agency or the public agency directly responsible for the education of the child as determined under state statute, state regulation or a written policy of the state educational agency'. Here, the above discussed South Carolina authority demonstrates that the School for the Deaf and Blind has no direct responsibility for the education of the mentally handicapped. Therefore, it would not be the public agency required to hold a due process hearing. Cf. Ops. Atty. Gen. (March 24, 1983, by J. Emory Smith, Jr., Assistant Attorney General).

State regulations implementing EHA programs do not alter this conclusion. Rule 43-243(J)(V)(A), Vol. 24, Code of Laws of South Carolina, 1976, provides that '[w]hen a handicapped child is placed in a public agency not having educational responsibility and a due process hearing becomes necessary, the hearing should be the responsibility of the pupil's home district . . .' The phrase 'not having educational responsibility' appears to refer to a similar phrase in the preceding paragraph which states that the ' . . . hearing [is] to be conducted by the public agency responsible for the child's education. . . ' [emphasis added] This conclusion is supported by the above interpretation of the federal regulations which the state regulations are designed to implement. Thus, the School for the Deaf and Blind is not required to hold a due process hearing as to the exclusion of the profoundly retarded and other mentally handicapped children because it has no direct responsibility to educate them under South Carolina law.

***2** This office expresses no opinion now as to which public body would be required to hold a due process hearing for these children. We also express no opinion as to whether hearings by the Children's Case Resolution Committee (CCRC) would satisfy State and federal requirements for an EHA due process hearing.

If we may be of further assistance, please contact us.

Yours very truly,

J., Emory Smith, Jr.

Assistant Attorney General

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