1984 WL 249947 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
July 27, 1984

***1** Mr. A. Baron Holmes IV
President
South Carolina School for the Deaf and the Blind
Cedar Spring Station
Spartanburg, South Carolina 29302

Dear Baron:
You have requested that this office review previous opinions regarding the provision of education to handicapped children during the summer. 1979 Ops. Atty. Gen. (No. 79-69); Ops. Atty. Gen. (February 17, 1983). The 1979 opinion held that the 'free appropriate public education' mandated by the Education of the Handicapped Act [1] (Act) is not required to be provided in excess of the regular school term set by State law. See Act 512, Part II, Subpart 4 § 1, Acts and Joint Resolutions of South Carolina, 1984. In other words, free summer school for the handicapped was found not to be required. The 1983 opinion relied on the earlier opinion to conclude that funds in a Governor's Office proviso for the payment of excess costs for the private placement of handicapped children should not be used to pay for the summer education of the handicapped; however, it also noted that the Third Circuit Court of Appeals had reached a conclusion contrary to the 1979 opinion. Battle v. Pa., 629 F.2d 269 (3rd Cir. 1980), cert. denied 452 U.S. 968, 76 L.Ed.2d 981, 101 SCT. 3123 (1981). At the time of the 1979 opinion, no federal court had considered this issue, and at the time of the 1983 opinion, Battle was the only circuit court decision to expressly address this issue. See infra note 3.

Battle ruled that an 'inflexible' policy of refusing to provide more than 180 days of education was incompatible with the Act's emphasis on the individual handicapped child. Since Battle and the 1983 opinion of this office, two other circuits have squarely considered the same issue and reached the same conclusion. Georgia Association of Retarded Citizens v. McDaniel, 716 F.2d 1565 (11th Cir. 1983), vacated and remanded 52 USLW 3937 (1984); [2] Crawford v. Pittman, 708 F.2d 1028 (5th Cir. 1983). Both McDaniel and Crawford relied, in part, on Battle and found additional support in a recent U.S. Supreme Court case which considered a factual issue different from summer education, Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). Rowley recognized the Act's emphasis on individual needs, including 'an individualized educational program reasonably calculated to enable a child to receive educational benefits.' 73 L.Ed.2d, 712. The '180 days' requirements in Mississippi and Georgia were found by the 5th and 11th circuits to be inconsistent with this emphasis. Districts courts which have considered the summer education issue have also reached similar conclusions about summer education although they may vary in the standards that they apply in their analysis of particular fact situations. See Yaris v. Special School District of St. Louis Co., 558 F.Supp. 545 (EDMo, 1983) aff'd., 728 F.2d 1055 (8th Cir. 1984); Phipps v. New Hanover Co. Board of Education, 551 F.Supp. 732 (ED NC, 1982); Rettig v. Kent City Schools 539 F.Supp. 768 (ND Ohio, 1981), aff'd. in part, vacated and remanded on other grounds, 720 F.2d 463 (6th Cir. 1983); see also Anderson v. Thompson, 495 F.Supp. 1256 (ED Wis 1980), aff'd., 658 F.2d 1205 (7th Cir. 1981); Bales v. Clarke, 523 F.Supp. 1366 (ED Va 1981). [3]

***2** The above cases and the apparent absence of contrary authority indicate that a federal court would not be likely to uphold any policy of limiting the education provided under the Act to the equivalent of a nine (9) month year for all handicapped children. Although the 1979 opinion continues to present an arguable but contrary position on this issue, and although this question has not yet been considered directly by the Supreme Court, the federal court opinions provide a good indication of how other courts would rule. Moreover, the Federal courts have the jurisdiction to consider questions arising under the Act. Thus, we recommend that summer education be provided under the Act when the procedures followed under that statute indicate that such

education should be provided for an individual. Of course, not all individuals will be entitled to such education. Accordingly, excess costs for private summer education should be paid, under the excess costs proviso, only when it is found to be needed under the Act's procedures. See Act 512, Part 1 § 10; Ops. Atty. Gen. (February 17, 1983).

In giving this advice, we do not set forth any particular standard of assessing the need for summer education in individual cases. As noted above, the courts have varied somewhat in those standards that they have applied.

We also confine our review here to the requirements of the Education for the Handicapped Act. Any authority for summer education under § 504 of the Rehabilitation Act of 1973 (29 USC § 794) or other provisions of law may be required to be reconsidered in light of the U.S. Supreme Court decisions in Smith and McDaniel, supra.

If we may be of other assistance, please let us know.
Yours very truly,

J. Emory Smith, Jr.
Assistant Attorney General

Footnotes

1 20 USC § 1401, et seq.—PL94-142.

2 Although this case was vacated, the stated basis for doing so was a U.S. Supreme Court case which considered a factual issue different from the provision of summer education, Smith v. Robinson, 52 USLW 5179. In Smith, the Court indicated that the Act may be the exclusive remedy for at least some claims falling within its scope.

3 The 6th and 7th circuits in Rettig and Anderson did not expressly consider the summer education issues in their opinions which addressed other questions. In an appeal by the plaintiff, the 8th circuit in Yaris considered the need for certain relief associated with the district court decision as to summer education and affirmed the lower court on the basis of its 'well reasoned opinion.' 728 F.2d at 1057

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