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Office of the Attorney General

State of South Carolina
Opinion No. 79-69
May 22, 1979

***1 Subject: Education, Students—Handicapped**

The 'Education of the Handicapped Act', 20 U.S.C.S., § 1401 et seq., (P. L. 94–142) does not require that the 'free appropriate public education' mandated by said Act be in excess of the regular school year, or one hundred eighty (180) days, as provided by State law and regulations of the State Board of Education.

To: Dr. Charlie G. Williams
State Superintendent of Education

Question:

Does the 'Education of the Handicapped Act', 20 U.S.C.S. § 1401, et seq., require a 'local education agency' to provide a twelve month program for handicapped students, rather than the usual 180 day program specified under State law?

Statutes and Cases:

20 U.S.C.S., §§ 1401 et seq., (P. L. 94–142); 45 C.F.R., §§ 121a.4, 121a.110, 121a.340–121a.349; Constitution of South Carolina, Article X, §§ 1, 2, 3 (as amended); §§ 59–1–40, 59–5–60, 59–33–30, et seq., Code of Laws of South Carolina, 1976, as amended; R43–142 and R43–144, Code of Laws of South Carolina, 1976, as amended; Moore vs. Board of Trustees of Charleston County Consolidated School District, 344 F. Supp. 682 (D.S.C., 1972); San Antonio Independent School District vs. Rodriguez, 411 U. S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973); and Lora vs. Board of Education, City of New York, 456 F. Supp. 1211 (E.D.N.Y., 1978).

Discussion:

Congress, in enacting the Education of the Handicapped Act, (P.L. 94–142), sought to provide a comprehensive scheme to induce states to provide educational services to handicapped children in no less a degree than provided to non-handicapped children. Congressional intention is clearly expressed in P. L. 94–142, § 3(c), 89 Stat. 774, quoting in part:
(8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children; and

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

The purpose of the Act is to ensure that all handicapped children have available to them, within the time period specified in § 612(2)(B), a free appropriate public education which emphasizes special education and related services designed to meet their unique needs; to assure that the rights of handicapped children and their parents or guardians are protected; to assist states and localities to provide for the education of all handicapped children; and to assess and assure the effectiveness of the efforts to educate handicapped children. Additionally, the South Carolina General Assembly has

enacted a comprehensive statute, providing special education for handicapped children. § 59–33–10, et seq., Code of Laws of South Carolina, 1976. The State Act, as well as P. L. 94–142, are to be implemented and administered principally by the State Board of Education through the South Carolina Department of Education.

***2** Education in South Carolina is addressed in the Constitution of South Carolina, 1895 (as amended in 1973). Article 11, § 1, Constitution of South Carolina, creates the State Board of Education; § 2 provides a State Superintendent of Education; and § 3 dictates a system of free public schools for all children in the State. § 59–1–40, Code of Laws of South Carolina, 1976, provides, 'the State system of public education shall consist of such school systems, schools, institutions, agencies, services, and types of instruction as may be provided and authorized by law, or by rules and regulations of the State Board of Education within limits prescribed by law.' § 59–5–60 enumerates the general powers of the State Board of Education, which includes the promulgation of rules and regulations not inconsistent with the laws of the State concerning free public schools.

P. L. 94–142 contains the following pertinent definitions:
(1) The term 'handicapped children' means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services. * * *

(16) The term 'special education' means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction and instruction in hospitals and institutions. * * *

(18) The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under supervision and direction, without charge, (B) meet the standards of the State educational agency, (C) include an appropriate pre-school, elementary, or secondary school education in the state involved, and (D) are provided in conformity with the individualized education program required under § 614(a)(5).

(19) The term 'individualized education program' means a written statement for each handicapped child developed in a meeting by any representative of the local educational agency or an intermediate educational unit, who shall be qualified to provide, or supervise the provision of specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) The projected date of initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures, for determining, on at least an annual basis, whether instructional objectives are being achieved.

***3** Neither the above quoted definitions, nor any other provision of P. L. 94–142 expressly require that a State educational agency or local educational agency provide 'special education' for a specified number of months during a calendar or school year. Obviously, the goal of the Federal Act is to provide a program of special education in conformity with an 'individualized education program' (I.E.P.), which is defined herein above. P. L. 94–142 is silent as to whether an I.E.P. must conform to a time limitation; that is, no irrebuttable conclusion may be drawn from the face of the Federal Act that an I.E.P. was intended by Congress to provide special education for either a twelve or a nine month period.

Aid in the interpretation of P.L. 94–142 is provided in the definition of 'free appropriate public education'. The pertinent part of that definition for the purposes of the question herein states, 'the term 'free appropriate public education' means special education and related services which . . . (B) meet the standards of the State Educational Agency . . .' Thus, the Federal Act requires reference to the standards of the South Carolina State Board of Education. Regulations

promulgated by the Office of Education, Department of Health, Education and Welfare, while not expressly answering the question herein, provide some guidance by virtue of comments following certain regulations. See 45 C.F.R. §§ 121a.1 et seq. 45 C.F.R. § 121a.4 concerns free appropriate public education, and generally, § 121a.4 mimics the statute in requiring that special education and related services, 'meet the standards of the State Educational Agency, including the requirements of this part . . .' Regulations concerning the State Educational Agency responsibility and individualized educational programs are contained in 45 C.F.R., §§ 121a.341–121a.349. § 121a.342 requires that individualized education programs will be in effect 'at the beginning of each school year' on and after October 1, 1977. This section further requires that the individualized education program be in effect before special education is provided and that special education be implemented as soon as possible following certain required meetings. Of particular interest, however, is the printed comment following § 121a.342, which states:

Under paragraph (b), (2), it is expected that a handicapped child's individualized education program (IEP) will be implemented immediately following the meetings under § 121a.343. An exception to this would be (1) when the meeting occurred during the summer or vacation period, or (2) where there are circumstances which require a short delay (e.g., working out transportation arrangements). However, there can be no undue delay in providing special education and related services to the child. (Emphasis added).

The above quoted comment is indication that the Office of Education envisioned implementation of 'special education' only after the usual three month summer school break.

***4** What, then, is the standard in South Carolina Concerning operation of public schools for particular period during a year? Neither the Constitution of South Carolina, nor the Code of Laws of South Carolina, 1976, as amended, contain any provision delineating a minimum or maximum length for the school year. However, pursuant to expressed statutory authority, the State Board of Education has promulgated R43–142, Code of Laws of South Carolina, 1976, as amended which states in pertinent part:

Accredited elementary, middle and high schools shall operate a minimum of 180 days for all students. A minimum of 174 days shall not be less than 5 hours, exclusive of recesses, lunch periods, and other activities not regarded as regular high school instruction.

Further, R43–144 establishes minimum length for the school day for elementary, middle and secondary schools. Finally, R43–240 constitutes the State Board of Education's regulations concerning 'summer programs'; however, there exists no constitutional, statutory or regulatory mandate that either the State Department of Education or local school districts provide a summer school program. Moore vs. Board of Trustees of Charleston County Consolidated School District, 344 F. Supp. 682 (D.S.C., 1972). Apparently, R43–240 applies to summer programs operated by individual local school districts on a voluntary basis.

Pursuant to § 59–5–60, the State Board of Education has directed the State Superintendent of Education, through the State Department of Education, to develop a 'Defined Minimum Program' for all public secondary schools in South Carolina. The current 'Defined Minimum Program', in effect since 1977, prescribes and evolves upon the 180 day school year established in R43–142. Further, the current Annual Program Plan, adopted by the State Department of Education and approved by the United States Commissioner of Education, as required by 45 C.F.R. §§ 121a.110 et seq., incorporates the 'Defined Minimum Program' into the Annual Program Plan, implementing P. L. 94–142. Therefore, South Carolina's approved Annual Program Plan contemplates and requires that 'special education' services be provided to the handicapped for a minimum of 180 days.

Scant authority exists concerning the express question or the general area with which this Opinion is concerned. The precise question herein, at least within the context of state programs in other states, is currently in litigation in several states, but as of this date, no decisions of courts of record have been issued. While education of all children within the state is one of, if not the foremost, interest concerning state government, the Constitution of the United States does

not create or insure a fundamental right to education. The following excerpt from San Antonio School District vs. Rodriguez, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16, 44 (1973), points out the position of education within the Federal Constitutional scheme:

Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation. It is Appellee's contention, however that education is distinguishable from other services and benefits provided by the state because it bears a peculiarly close relationship to other rights and liberties afforded protection under the Constitution. Specifically, they insist that education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote. * * * We need not dispute any of these propositions. The Court has long afforded zealous protection against unjustifiable governmental interference with individual's rights to speak and vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech, the most informed electoral choice. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. These are, indeed, goals to be pursued by people whose thoughts and beliefs are free from governmental interference. But they are not values to be implemented by judicial intrusion into otherwise legitimate State activities.

***5** Also of interest, is the case of Lora vs. Board of Education of the City of New York, 456 F. Supp. 1211 (E.D.N.Y., 1978). This voluminous opinion, approximately 85 pages in length, considered whether rights of children with emotional handicaps had been discriminated against in assignment to special day schools. The Court considered at length the Education of All Handicapped Children Act; yet, in the course of this treatise on the rights of handicapped students, no assertion was made that 'special education' must be provided on a year round basis. While Lora vs. Board of Education of the City of New York, does not answer the question herein, it affirms the position that P. L. 94–142 merely requires that educational services for handicapped children must be of no less quality than those provided to non-handicapped children.

Keeping in mind the apparent voluntary nature of R43–240, the case of Moore vs. Board of Trustees of Charleston County Consolidated School District, supra, is helpful though not fully dispositive of the question herein. In the Moore case, United States District Judge Hemphill ruled that the school district's summer school program was voluntary, not required by state law or regulation. In such a posture, no constitutional prohibition existed, either under Federal or State law, to prevent the school district from charging tuition to support the summer program. That case generally held that the summer program was not part of a free public education guaranteed by the Constitution of South Carolina and implemented by State statute. Therefore, the free public education provided by law in South Carolina provides only for a minimum of 180 days of instruction. This 180 day school year, then, constitutes a standard of the State educational agency as defined in 20 U.S.C.S. § 1401(18), 'free appropriate public education'. Based upon the foregoing discussion and authorities, it is the opinion of this office that P. L. 94–142 does not mandate a twelve month 'special education' program for handicapped children in South Carolina, in that the Federal Act requires only that 'special education' be provided to handicapped children for a period coextensive with the minimum school year dictated by R43–142, Code of Laws of South Carolina, 1976, as amended.

Conclusion:

P. L. 94–142 requires participating state and local educational agencies to provide 'special education' for handicapped children in consonance with standards required for the regular school program of the state and local educational agencies. In South Carolina, the school year, established by law, requires that all elementary, middle and high schools, operate a minimum of 180 days.

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