



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

August 19, 1977

ATTORNEY GENERAL OPINION NO. 77- 275

Mr. Erle W. Francis
Attorney for State Board of Education
Suite 719 Capitol Federal Building
700 Kansas Avenue
Topeka, Kansas 66603

Re: Schools--Special Education--Due Process

Synopsis: Upon 1977 amendments to K.S.A. 1976 Supp. 72-974 and -975, upon an appeal to the State Board of Education from a decision by a district board of education respecting eligibility of a child for special education services, no evidentiary hearing is required by said Board or its reviewing officer in the determination of such appeal. The parties must be permitted to present oral argument, if requested, but no evidentiary hearing is required.

* * *

Dear Mr. Francis:

You inquire concerning 1977 House Bill No. 2009, which amends, inter alia, K.S.A. 1976 Supp. 72-974 and -975, concerning due process procedures to be followed in the exclusion, reassignment or transfer of a child from regular school classes on the ground that such child is an exceptional child, and in the placement or denial of placement, or transfer of a child to or from special education services.

Formerly, the required hearing was to be conducted by a certificated employee of the local board of education. The decision of that employee could then be appealed by the child or his or her parent or guardian to the board of education of the district. The appeal was then heard by the board or a hearing officer appointed by it. K.S.A. 1976 Supp. 72-974 specified that the appeal

Mr. Erle W. Francis
Page Two
August 19, 1977

would be "heard" on appeal, that an "appeal hearing" was required, to be conducted by the local board or a "hearing officer."

The 1977 amendments to this section provide that the initial hearing shall be held by the district board of education or a hearing officer appointed by it, and that an appeal from that decision may be made to the State Board of Education. In specifying the procedures to be followed in such appeal, the 1977 legislature specified that the decision of the district board shall be "reviewed" by the State Board:

"Any such hearing and decision therein shall be reviewed by the state board, or by a reviewing officer appointed by the state board, not later than twenty (20) calendar days after such notice of appeal is filed. The state board of education shall: (1) Examine the record of the hearing; (2) determine whether the procedures at the hearing were in accordance with the requirements of due process; (3) afford the parties an opportunity for oral argument; and (4) render its decision on any such appeal not later than five (5) days after completion of the review."

In prescribing the appeal procedure to be followed by the State Board, subsection (b) of K.S.A. 1976 Supp. 72-974 was amended to delete references to hearing the appeal, and to substitute therefore references to reviewing the appeal. As this subsection appears in ch. 241, § 3(b), L. 1977, indicating in italics the added language and by strike-throughs the deleted language, it states thus:

"For the purpose of *reviewing* any hearing ~~any appeal~~ under this section, the state board of ~~education~~ may appoint one or more hearing reviewing officers. Any such hearing officer shall be a member of the board, an attorney or a certificated employee of the school district ~~but shall not be any person responsible for recommending the proposed action nor any person who conducted the hearing provided for in section 13 of this act.~~ Any such appointment shall apply to a review of a particular hearing or to reviewing a set

Mr. Erle W. Francis
Page Three
August 19, 1977

or class of hearings as specified by the state board in making such appointment. Whenever a hearing reviewing officer appointed under authority of this section hears any appeal conducts any review, he or she shall, after hearing conducting the same, prepare a written report thereon to the state board. After receiving any such report, the state board of education shall determine the appeal with or without additional hearing review. Any appeal determined decision made by the state board in accordance with this subsection (b) shall be valid to the same extent as if the matter were fully heard reviewed by the state board without a hearing reviewing officer."

Section 4 of the bill authorizes the taking of testimony, and the issuance of subpoenas both for the initial hearing by the district board or its hearing officer, and by any person conducting a "review." K.S.A. 1976 Supp. 72-975(a) provides that "[a]ny person conducting a . . . review under article 9 of chapter 72 of Kansas Statutes Annotated may administer oaths for the purpose of taking testimony therein." [Emphasis supplied.] In addition, under K.S.A. 1976 Supp. 72-975, as amended, any "person . . . conducting . . . a review . . . or any party to any such . . . review" may request the issuance of subpoenas for the attendance and testimony of witnesses and the production of all relevant records, tests, reports and evaluations.

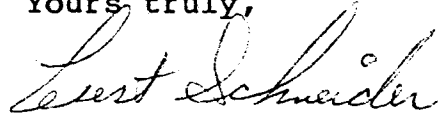
You inquire whether these provisions, as amended, require that upon an appeal to the State Board of Education under this act, the Board or its appointed reviewing officer is required to conduct an evidentiary hearing. In my judgment, the many references to review, rather than to hearing, on appeal in the revised procedure, obviates any requirement for an evidentiary hearing before the Board or its reviewing officer on such an appeal. Under K.S.A. 1976 Supp. 72-974(a), as amended, the Board or its reviewing officer is to examine the record, determine whether the procedures at the hearing were in accordance with the requirements of due process, and afford the parties to the appeal an opportunity for oral argument. The record must be examined, thus, to determine whether the hearing held by the local board or its hearing officer afforded the parties the rights guaranteed them under K.S.A. 1976 Supp. 72-973, as amended. The review must be based on the record of that hearing. The State Board, or its reviewing officer, is

Mr. Erle W. Francis
Page Four
August 22, 1977

required to permit the parties to present oral argument, of course. If, e.g., it is argued in behalf of the appellant that the procedures at the initial hearing were not in accordance with the requirements of due process in certain particulars, and the record of that hearing available for examination by the State Board or its reviewing officer does not provide any basis for determining that the claimed omissions or errors did not occur, the State Board or its reviewing officer is not authorized to conduct a hearing de novo. Although the act is silent on the disposition of the matter which the State Board may make, it may, presumptively, remand the matter to the local board for further proceedings, or set aside its decision entirely without remand, as the facts and circumstances warrant.

In my judgment, the language used in the 1977 amendments to these provisions clearly indicates that upon an appeal to the State Board, the decision of the local board shall be reviewed, but that no new hearing on appeal is required, save for the opportunity for the parties to present oral argument.

Yours truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj