



STATE OF KANSAS

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ATTORNEY GENERAL

December 19, 1978

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ATTORNEY GENERAL OPINION NO. 78- 389

Mr. David W. Kester, Director
Legal Services Section
Kansas State Department of Education
Kansas State Education Building
120 East 10th Street
Topeka, Kansas 66612

Re: Schools--Special Education--Evaluation

Synopsis: A proceeding seeking an order directing a comprehensive evaluation of a child who has been proposed for referral to and placement in a special education program should be brought under the general jurisdiction of the district courts, and does not lie under the Kansas Juvenile Code.

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Dear Mr. Kester:

A portion of the State Plan for Special Education for Fiscal Year 1979, on page 77 thereof, states in pertinent part thus:

"If the parents or guardians refuse permission for evaluation, the local education agency shall attempt to seek resolution through individual conference(s). If the parents still refuse to allow the proposed evaluation, the local education agency shall either accept the decision or apply to a court of competent jurisdiction for an order directing such an evaluation. To this end, records of contacts and consultations with parents shall be maintained. [Emphasis applied.]

You inquire whether, when parental or legal custodian consent is withheld from a proposed comprehensive evaluation of a child for referral to a special education program, and the school district wishes to proceed with the evaluation, whether the district should seek an order directing such an evaluation under the Kansas Juvenile Code, K.S.A. 1977 Supp. 38-801 *et seq.*, or whether its remedy for such an order lies in the general jurisdiction of the district court.

It is pointed out that K.S.A. 1977 Supp. 38-802 was amended by the 1978 legislature to create a category of "deprived children" who are subject to the juvenile code, defined in a part to include a child who "is without proper . . . education as required by law." ch. 158 § 1(g), L. 1978. In view of the amendment, the question is thus raised whether the district should proceed under K.S.A. 1977 Supp. 38-816(a), as amended by ch. 158, §14(a), L. 1978.

In my judgment, the remedy of the district seeking an evaluation order does not lie under the Juvenile Code. The sole relief sought by the district is an order directing an evaluation of a child proposed to be referred to a special education program. Part IV, subsection B, (1), of the State Plan, on page 68, states that "[s]teps to initiate a comprehensive evaluation shall be made whenever screening, referral, or lack of progress indicates that a child may be exceptional as defined by K.S.A. 1974 Supp. 72-962." Ordinarily, a proceeding for an evaluation order will have been preceded, first, by referral of the child for special education placement based upon limited evaluation, screening or other review of the progress of the child, and a determination by the district that there are reasonable grounds to believe that the child is exceptional, as defined by statute. If parental or legal custodian consent is requested for a comprehensive evaluation, and such consent is refused, then a district which seeks a judicial order for a comprehensive evaluation will presumptively be required to demonstrate to the court that it does indeed have reasonable grounds for believing the child to be an exceptional child, that its determination has not been unreasonable, arbitrary or totally without a reasonable foundation, and that, for these reasons, a comprehensive evaluation is needed to determine, as conclusively as circumstances will permit, whether the child is indeed an exceptional child. The court is not called upon to make any finding regarding the status of the child itself, i.e., that it is in fact a "deprived child," on the ground that it has not been furnished education as required by law. Indeed, it is the purpose of the proposed comprehensive evaluation to determine that fact, i.e., whether the child is an "exceptional child" as defined by K.S.A. 1977 Supp. 72-962, for whom the

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district is required to furnish special education services. In a proceeding for such an evaluation order, the court is called upon to determine only whether there is a reasonable basis for the district's referral of the child for special education placement, and that a comprehensive evaluation is needed to determine if the child is indeed "exceptional," as defined by the referenced statute.

For these reasons, it is my view that the purpose of proceeding for an order directing a comprehensive evaluation is entirely foreign to the purpose for which a judicial proceeding is begun under the Juvenile Code, and the determination which the court is called upon to make in the former proceeding is not one which is required to be made in the latter. Accordingly, it is my opinion that a proceeding for an evaluation order should be asserted by invoking the general jurisdiction of the district court, and that it is not a proceeding which properly lies under the Juvenile Code.

Yours truly,



CURT T. SCHNEIDER
Attorney General

CTS:SDT:jm