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ATTORNEY GENERAL OPINION NO. 87- 113

The Honorable Eric Yost
State Senator, 30th District
3015 Longfellow Court
Wichita, Kansas 67226

Re: Schools -- Special Education; Exceptional Children
-- Compulsory Public School Attendance of
Exceptional Children

Synopsis: K.S.A. 72-977 is not unconstitutional as it does not mandate exceptional children to attend public schools. This compulsory attendance statute requires children attending public schools who have been determined to be exceptional children to attend special education services. To clarify this matter, K.S.A. 72-977 could be amended to provide, similar to K.S.A. 72-1111(a), that exceptional children attending private schools will be in compliance with the compulsory attendance requirements. Cited herein: K.S.A. 72-977; 72-1111; K.A.R. 1986 Supp. 91-12-39; 91-12-41; K.A.R. 91-12-49; K.A.R. 1986 Supp. 91-12-70.

Dear Senator Yost:

As Senator for the Thirtieth District, you request our opinion concerning the constitutionality of K.S.A. 72-977. Specifically, you inquire whether the statutory compulsory attendance requirements for exceptional children discriminate against parents wishing to provide a private or religious education for their exceptional child.

The right to an education arises not from the Constitution, but through legislation. Jackson v. Franklin County School Bd., 806 F.2d 623 (5th Cir. 1986). The courts, however, have recognized that parents have a fundamental liberty interest in the care, custody, and companionship of their children. Stanley v. Illinois, 405 U.S. 645, 651, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972); Franz v. United States, 707 F.2d 582, 594-95 (D.C. Cir. 1983). Therefore, the courts have held that statutes requiring the compulsory attendance of all children at the public schools unconstitutionally interfere with the liberty of parents and guardians to direct the upbringing and education of their children. Pierce v. Society of Sisters, 268 U.S. 510, 69 L. Ed. 1070, 45 S. Ct. 571 (1925). See Meyer v. State of Nebraska, 262 U.S. 390, 67 L. Ed. 1042, 43 S. Ct. 625 (1923); DOE "A" v. Special Sch. District of St. Louis County, 637 F. Supp. 1138, 1146 (E.D. Mo. 1986).

The Kansas compulsory school attendance statute, K.S.A. 72-1111, is not unconstitutional as it provides that a child may attend a public or private school. There is also a compulsory attendance statute among the statutes concerning exceptional children and special education:

"(a) Except as otherwise provided in this section, when a school district or a state institution provides special education services for exceptional children as required by this act, and a determination has been made . . . that a child is an exceptional child and special education services are necessary for such child, it shall be the duty of the lawful custodian of such exceptional child to require such child to enroll for and attend the special education services which are indicated by such determination." K.S.A. 72-977 (Emphasis added).

The above statute requires exceptional children to attend special education services but does not state that exceptional children must attend public schools. Special education services, then, could be provided by private sources. However, the first sentence of the statute indicates that the compulsory special education requirement is triggered when "a school district or a state institution provides special education services . . . , and a determination has been

made. . . ." This language may give the impression that the exceptional child can only attend the special education services provided by the school district or state institution.

Several administrative regulations must be considered in determining the compulsory attendance requirements for exceptional children. K.A.R. 1986 Supp. 91-12-70 provides:

"(a) When a determination has been made under K.S.A. 72-972 to 72-975, inclusive, and any amendments to those statutes, that a person is an exceptional child, other than a gifted child, it shall be the duty of the lawful custodian of the child to require the child to attend the special education services provided for the child, until the child reaches age 18 or completes the special education curriculum for that child, whichever comes first." (Emphasis added).

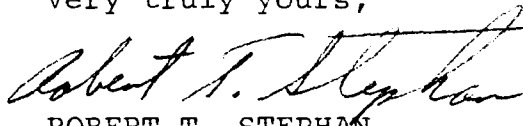
This regulation appears to require parents to send their exceptional children to public schools to receive special education. However, other regulations provide that an exceptional child may attend private school and receive special education services from the school district. K.A.R. 1986 Supp. 91-12-39; 91-12-41(i). In addition, K.A.R. 91-12-49 reads as follows:

"If any exceptional child is offered free and appropriate special education services by the local education agency responsible for providing these services to the child, but the child's parent places the child in a private school, the parent shall assume full financial responsibility for the child's education. If a parent contends that the parent has been forced to seek and bear the cost of private schooling for any exceptional child because the responsible local education agency does not offer an appropriate special education service, and the local education agency disagrees with this contention, due process procedures may be implemented to resolve the disagreement and the question of fiscal responsibility." (Emphasis added).

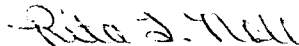
Thus, an exceptional child is not required to attend public school to receive special education.

In summary, it is our opinion that K.S.A. 72-977 is not unconstitutional as it does not mandate exceptional children to attend public schools. This compulsory attendance statute requires children attending public schools who have been determined to be exceptional children to attend special education services. To clarify this matter, K.S.A. 72-977 could be amended to provide, similar to K.S.A. 72-1111(a), that exceptional children attending private schools will be in compliance with the compulsory attendance requirements.

Very truly yours,



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