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ATTORNEY GENERAL OPINION NO. 90-19

Mr. Daniel M. Metz
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116 South Fourth
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Re: Schools--Special Education; Exceptional
Children--Enrollment by Parent or Guardian;
Compulsory Attendance; Duties of Boards of
Education, Secretary of Social and Rehabilitation
Services, County and District Attorneys

Minors--Kansas Code for Care of Children; General
Provisions--Duty to Investigate and File Petition

Synopsis: Exceptional children, except for those exceptional children determined to be gifted children, are required to enroll for and attend the special education services which are indicated by the individualized education programs of the exceptional children. These special education services may be provided by the public school system or a private source. K.S.A. 1989 Supp. 72-1113 establishes the duties of the local board of education, the secretary of social and rehabilitation services, and the county attorney when it is alleged that the exceptional child is not receiving the necessary special education services. The designated employee of the school district shall report to the appropriate official, based on the age of the child, all cases of exceptional children not receiving special education services. The appropriate official is then required to conduct an investigation to

determine if the exceptional child may be designated a child in need of care. Cited herein: K.S.A. 1989 Supp. 38-1502; K.S.A. 38-1510; 38-1521; K.S.A. 1989 Supp. 38-1523; K.S.A. 38-1529; 72-961; 72-963; 72-972; 72-975; 72-977; 72-1066; 72-1111; K.S.A. 1989 Supp. 72-1113.

* * *

Dear Mr. Metz:

As attorney for Unified School District No. 298, Lincoln County, Kansas, you request our opinion regarding the compulsory attendance of exceptional children, as determined under K.S.A. 72-972 to 72-975, in programs offering special education services. Specifically, you inquire as to the responsibilities of the local board of education and school administrators, the department of social and rehabilitation services, and the county attorney when it appears that a 13 year old child, determined to be in need of special education services, is withheld from attending public schools and is receiving home instruction.

Exceptional children, except for those exceptional children determined to be gifted children, are exempt from the compulsory attendance requirements of K.S.A. 72-1111. Rather, these children must meet the attendance requirements of the special education for exceptional children act, K.S.A. 72-961 et seq. Under authority of K.S.A. 72-963, the Kansas state department of education has mandated that the school term and school day of exceptional children is the equivalent of the period of time prescribed in K.S.A. 72-1106 unless the individualized education program of an exceptional child prescribes otherwise. K.A.R. 91-12-22. K.S.A. 72-977 states that:

"(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."

It should be noted that K.S.A. 72-977 does not unconstitutionally interfere with the liberty of parents and guardians to direct the upbringing and education of their children as the statute "requires exceptional children to attend special education services but does not state that exceptional children must attend public schools," permitting for the possibility of special education services being provided through private sources. Attorney General Opinion No. 87-113.

The duty of a board of education as to violations of the compulsory attendance statutes is established in K.S.A. 1989 Supp. 72-1113.

"(a) Each board of education shall designate one or more employees who shall report to the secretary of social and rehabilitation services, or a designee thereof, all cases of children who are seven or more years of age but less than 13 years of age and are not attending school as required by law, and to the appropriate county or district attorney, or a designee thereof, all cases of children who are 13 or more years of age but less than 16 years of age and are not attending school as required by law."

The designated employee of the board of education shall make the reports only after written notice of the child's failure to comply with compulsory attendance statutes is served upon the parent of the child and the child continues to be absent from school without a valid excuse.

A school district has only such power and authority as is granted by the legislature. NEA-Wichita v. U.S.D. No. 259, 234 Kan. 512, 517 (1983). As indicated in Attorney General Opinion No. 85-159, no statutory authority exists granting a local school board the power to investigate home instruction to determine compliance with the compulsory attendance statutes. Despite a strong feeling of moral obligation on the part of the local board of education and school administrators to ensure that an exceptional child is receiving the special education services deemed necessary for the exceptional child, the school district has reached the

extent of its authority by designating the employees who report to the proper officials instances of children not attending school as required by law.

The obligations of the secretary of social and rehabilitation services and the county attorney are also set forth in K.S.A. 1989 Supp. 72-1113. The pertinent subsections state:

"(e) Whenever the secretary of social and rehabilitation services receives a report required under this section, the secretary shall investigate the matter. If, during the investigation, the secretary determines that the reported child is not attending school as required by law, the secretary shall institute proceedings under the code for care of children. If, during the investigation, the secretary determines that a criminal prosecution should be considered, the secretary shall make a report of the case to the appropriate law enforcement agency.

"(f) Whenever a county or district attorney receives a report required under this section, the county or district attorney shall investigate the matter. If, during the investigation, the county or district attorney determines that the reported child is not attending school as required by law, the county or district attorney shall prepare and file a petition alleging that the child is a child in need of care. If, during the investigation, the county or district attorney determines that a criminal prosecution is necessary, the county or district attorney shall commence the same."

Because the situation you present involves a 13 year old child, the designated employee of the school district would be required to notify the county attorney of the child's failure to attend school. This opinion, therefore, will concentrate on the obligation of the county attorney upon receipt of a report that a child is not attending school as required by law. However, the obligations of the secretary of social and rehabilitation services will closely parallel the obligations of the county attorney.

In order to establish the extent of the duties of the county attorney, it will be necessary to determine whether the provisions of the statute are mandatory or directory. The criterion as to whether such a requirement is mandatory or directory is whether such requirement is essential to preserve the rights of the parties. Griffin v. Rogers, 232 Kan. 168, 174 (1982).

"[A] statute is regarded as directory where no substantial rights depend on it, no injury can result from ignoring it, and the purpose of the legislature can be accomplished in a manner other than that prescribed, with substantially the same results. . . . [W]hen a fair interpretation of a statute, which directs acts or proceedings to be done in a certain way, shows that the legislature intended a compliance with such provision to be essential to the validity of the act or proceeding, or when some antecedent and prerequisite conditions must exist prior to the exercise of power or must be performed before certain other powers can be exercised, the statute must be regarded as mandatory." Wilcox v. Billings, 200 Kan. 654, 657 (1968).

K.S.A. 38-1521 states:

"It is the policy of this state to provide for the protection of children who have been subject to physical, mental or emotional abuse or neglect or sexual abuse by encouraging the reporting of suspected child abuse and neglect, insuring the prompt and thorough investigation of these reports and providing preventive and rehabilitative services when appropriate to the abused and neglected children and their families. . . ." (Emphasis added.)

The duty to investigate a report of child abuse or neglect has been placed with the state department of social and rehabilitation services, the county attorney, or the state secretary of health and environment, depending on the specific circumstances of the situation. See K.S.A. 1989 Supp. 38-1523. K.S.A. 38-1529 states that:

"(a) Whenever the state department of social and rehabilitation services or any other person refers a case to the county or district attorney for the purpose of filing a petition alleging that a child is a child in need of care, the county or district attorney shall review the facts and recommendations of the department and any other evidence available and make a determination whether or not the circumstances warrant the filing of the petition." (Emphasis added.)

Further, K.S.A. 38-1520 states:

"It shall be the duty of the county or district attorney to prepare and file the petition alleging a child to be a child in need of care and to appear at the hearing on the petition, and to present evidence that will aid the court in making an appropriate adjudication at the conclusion of the hearing." (Emphasis added.)


Taking into consideration the policy of the state and the accompanying statutes, it can reasonably be concluded that the legislature intended that an investigation be conducted, be it by the secretary of social and rehabilitation services or the county attorney. The provisions of K.S.A. 1989 Supp. 72-1113 add no further obligations on the secretary of social and rehabilitation services or the county attorney; it mandates who will be responsible for conducting the investigation based on the age of the child.

K.S.A. 1989 Supp. 72-1113, despite being mandatory, continues to recognize the discretionary authority afforded the county attorney. Upon receipt of the report that a 13 year old child is not attending school as required by law, the county attorney is required to conduct an investigation. If during the investigation the county attorney determines that the exceptional child is receiving the special education services outlined in the child's individualized education programs, be they provided through the public school system or a private source, the county attorney is not required to undertake any further action. If, however, the county attorney determines that the exceptional child is not receiving the necessary special education services, then the exceptional child would meet the definition of a "child in need of care" under K.S.A.

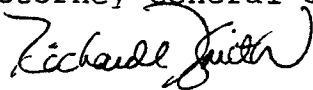
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1989 Supp. 38-1502(a)(6), and the county attorney would be required to prepare and file a petition alleging that the exceptional child is a child in need of care.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Richard D. Smith
Assistant Attorney General

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