Schools-Districts
Special Education
Facilities

STATE OF KANSAS

Office of the Attorney General

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Attorney General

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Opinion No. 74-380

Dr. C. Taylor Whittier
Commissioner of Education
Department of Education
120 East 10th Street
Topeka, Kansas 66612

Dear Commissioner Whittier:

K.S.A. 72-933, as amended by ch. 290, § 7, L. 1974, provides thus in pertinent part:

> "The board of education of every school district shall establish approvable special education services for *all developmentally disabled children*, as such are defined in the state plan, in the school district..." [Emphasis supplied.]

This term was formerly defined by K.S.A. 72-932(f) thus:

> "'Developmentally disabled children' means persons who are under twenty-one (21) years of age and who, in accordance with rules and regulations which shall be adopted by the state board of education, are in the opinion of the director best educated in a special class rather than in a school classroom."

This provision was repealed by ch. 290, § 22, L. 1974, leaving the definition of the class of "all developmentally disabled children" to be furnished and developed in the state plan.

The question posed in your letter is whether

> "the phrase, 'as defined in the State Plan, allow[s] the State Plan to be restrictive in its definition and to charge Kansas public schools with the educational programming for educable and trainable retarded and not those who may be profoundly retarded, and indeed, have little or no capacity to learn."

This question surely reflects but the surface of what are doubtless a number of potent questions among educators and those in allied fields. The question is doubtless debated, for example, whether certain severely retarded persons have any functional educable capacity. Clearly, the Legislature did not attempt to resolve this and similar questions. Rather, it clearly left the definition of the class of "developmentally disabled persons" to be served by special education services mandated by this section to be defined in the state plan. The statutory definition above, which was repealed, itself left the identification of developmentally disabled children, to a substantial extent, to the exercise of informed judgment and discretion of the director, being such person as designated by the state board. The new section leaves intact the exercise of discretion and judgment in the definition of the class of developmentally disabled children to be served by the mandated services, this judgment to be reflected in the definition formulated for and included in the state plan.

When developmental disabilities are defined in the state plan, this definition should, of course, reflect the most current and informed professional judgment regarding those children able to benefit from mandated special education services. The statute does not direct that special education services be extended to all developmentally disabled children, but to all such children "as such children are defined in the state plan." If it is determined that certain developmentally disabled children cannot in fact benefit from the mandated services, the statute leaves those responsible for formulating the state plan definition free to define those to be served accordingly.

Such an assumption, of course, may be one of some controversy in the pertinent professional fields. Purely as a matter of statutory construction, however, we cannot but conclude that the definition of developmentally disabled children to be served by mandated special education services is left to the exercise of informed professsional judgment of those responsible for formulating the state plan.

As further questions arise in this important area, please feel free to call upon us.

Yours very truly,

VERN MILLER
Attorney General

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