



STATE OF KANSAS

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February 14, 1980

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ATTORNEY GENERAL OPINION NO. 80- 46

Mr. Erle W. Francis
Francis & Francis
Attorneys at Law
Suite 719, Capitol Federal Building
700 Kansas Avenue
Topeka, Kansas 66603

Re: Schools--Special Education--Due Process
Hearing; Appeal and Review

Synopsis: 1) Entrance into either the State School for the Deaf (K.S.A. 76-1001 et seq.) or the State School for the Visually Handicapped (K.S.A. 76-1101 et seq.) is through a voluntary admission process and not by involuntary placement. As this is the case, the need for a due process hearing at this stage would appear to be minimal.

2) Pursuant to K.S.A. 1979 Supp. 72-974(b), the State Board of Education may appoint a reviewing officer, whose power is limited to reviewing the results of a due process hearing held by a school district and then reporting his findings to the Board for their action. Accordingly, such a reviewing officer does not render a judgment or issue an order from which an appeal may be taken to a district court.

* * *

Dear Mr. Francis:

On behalf of the State Board of Education you have requested the opinion of this office regarding due process hearing procedures for children who have been placed at either the Kansas State School for the Deaf or the Kansas State School for the Visually Handicapped. Specifically, you inquire:

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"(1) May the State Board of Education through guidelines as outlined, appoint a hearing officer and authorize him to hold a due process hearing?

"(2) Would a hearing officer appointed by the State Board of Education, under Policy providing for a Due Process hearing, in your opinion, be an officer within the meaning of K.S.A. 60-2101(c) from whose decision either the child or the State Board of Education could appeal directly to the District Court?"

We would initially note that the statutes of Kansas authorize the establishment of a State School for the Deaf (K.S.A. 76-1001 et seq.) and a State School for the Visually Handicapped (K.S.A. 76-1101 et seq.). As language regarding admission to either school is almost identical, that dealing with the former, K.S.A. 76-1001b, may be cited as being representative:

"(a) The state board of education may adopt rules and regulations for the admission of students to the Kansas state school for the deaf. Such students may be admitted as day students or as resident students.

"(b) Every resident of the state who is within the age of eligibility for admission as determined by the state board of education, and who is unable to materially benefit from attendance in the public schools because of a hearing impairment, as determined under article 9 of chapter 72 of Kansas Statutes Annotated, shall be entitled to admission to the Kansas state school for the deaf." (Emphasis added.)

It is clearly the intent of the above that a child enter the state schools by a process of eligibility and admission, not involuntary placement. Nothing contained in the provisions of this statute (or of K.S.A. 76-1101b, relating to visually handicapped children) directs or even intimates that the State Board of Education can order the placement of any child to either school. Accordingly, it does not appear feasible that a child would wish a due process hearing in this respect, for if he or she does not desire to attend such a school, they

need not apply. Likewise, the statutes indicate that such children are entitled to admission, so that there appears to be no possibility of an eligible child wishing a due process hearing because he or she was denied an opportunity to attend.

Therefore, it would appear that, in the case of a child with a visual or auditory handicap, the crucial determination is that made under K.S.A. 1979 Supp. 72-972(a), wherein a child is "[e]xcluded, reassigned or transferred from regular school classes on the ground that he or she is an exceptional child and cannot materially benefit therefrom." A child could conceivably be aggrieved by such a determination in one of two ways, for he or she might wish to attend one of the state schools and so would first have to be deemed "exceptional." Conversely, the child could object to being so classified. K.S.A. 1979 Supp. 72-972 and 72-973 would appear to give adequate due process protections at the school district level in such situations, and it is only after such procedures have been completed that the State Board enters the picture for the purposes of appeal and review.

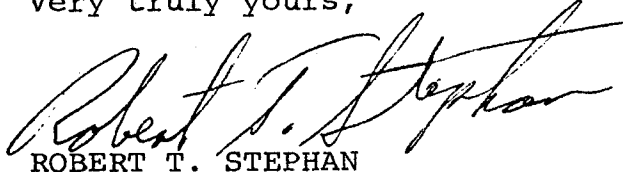
K.S.A. 1979 Supp. 72-974 establishes the procedures for such further action, and gives the State Board [at (b)] the option of appointing a reviewing officer to examine the results of the earlier hearing and, if necessary, to conduct further hearings pursuant to K.S.A. 1979 Supp. 72-975. Such a reviewing officer is not a hearing officer of the type who makes a determination at the school district level. The decisions of the latter are clearly binding upon the parties, subject to review by the State Board under 72-974. A reviewing officer, on the other hand, must report back to the Board, which then makes a final determination of the matter. It is the decision of the State Board alone which is capable of then being appealed to a district court pursuant to K.S.A. 1979 Supp. 72-975(e). Accordingly, the power of the Board is limited to the appointment of a reviewing officer, who cannot issue a decision from which an appeal to the district court may be taken.

In conclusion, entrance into either the State School for the Deaf (K.S.A. 76-1001 et seq.) or the State School for the Visually Handicapped (K.S.A. 76-1101 et seq.) is through a voluntary admission process and not by involuntary placement.

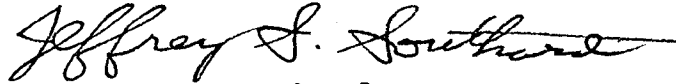
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As this is the case, the need for a due process hearing at this stage would appear to be minimal. However, pursuant to K.S.A. 1979 Supp. 72-974(b), the State Board of Education may appoint a reviewing officer, whose power is limited to reviewing the results of a due process hearing held by a school district and then reporting his findings to the Board for their action. Accordingly, such a reviewing officer does not render a judgment or issue an order from which an appeal may be taken to a district court.

Very truly yours,

A handwritten signature in cursive script, reading "Robert T. Stephan".

ROBERT T. STEPHAN
Attorney General of Kansas

A handwritten signature in cursive script, reading "Jeffrey S. Southard".

Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:gk