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ATTORNEY GENERAL OPINION NO. 87- 156

The Honorable Duane A. Goossen
State Representative, Seventieth District
Box 97
Goessel, Kansas 67053

Re: Schools -- Special Education; Exceptional Children
-- Gifted Education

Synopsis: Special education services for gifted students must be provided at public expense. "Services" include transportation to and from educational classes and activities. Therefore, the parents or guardians of a gifted student cannot be required to pay any of the costs incurred in providing the special education program specified in the gifted student's individualized education program (IEP). Cited herein: K.S.A. 72-962; 72-966; 72-967; K.S.A. 72-968, as amended by L. 1987, ch. 269, §1; K.A.R. 1986 Supp. 91-12-22; K.A.R. 91-12-23; 91-12-41; K.A.R. 91-12-50; 20 U.S.C. §1401; §1412.

* * *

Dear Representative Goossen:

As State Representative for the Seventieth District, you ask our opinion on two questions concerning the Marion County Special Education Cooperative. Specifically, you ask whether the manner in which educational programs are selected for gifted students denies less affluent students an education and whether the school district must pay all the costs of gifted education programs.

Kansas law requires all school districts to provide special education services for gifted students:

"The Board of education of every school district shall provide special education services for all exceptional children in the school district" K.S.A. 72-966(a).

"Exceptional children" is defined to include gifted children. K.S.A. 72-962(f), (g); K.A.R 1986 Supp. 91-12-22 (j). School districts may enter into interlocal cooperative agreements to provide special education services. K.S.A. 72-967(a)(4); K.S.A. 72-968, as amended by L. 1987, ch. 269, §1; K.A.R 91-12-50. Special education services provided by a school district must meet the standards and criteria set in the state plan and are subject to approval by the State Board of Education. K.S.A. 72-967 (b); K.A.R 91-12-23. In Attorney General Opinion No. 81-99 we stated:

"If a local board of education refuses to provide special education services to a child who has been determined to be an exceptional child . . . , the State Board of Education may enforce a decision rendered by it under the provisions of K.S.A. 72-974 by suing the local school board and requesting the court to issue an order requiring the local board to comply with the decision of the State Board."

K.A.R. 1986 Supp. 91-12-41 (a) provides that "[a]n individualized education program (IEP) shall be developed for each child in need of special education services." The IEP must be written and reviewed annually at a meeting which is to include a representative of the local education agency, the child's teacher(s), one or both of the child's parents, and others who may be necessary to complete the IEP. K.A.R. 1986 Supp. 91-12-41(b). Each IEP must include the following:

- "(1) A statement of the child's present level of educational performance . . . ;
- "(2) a statement of annual goals . . . ;
- "(3) a statement of short-term objectives . . . ;

"(4) objective criteria, evaluation procedures, and data collection schedules for determining, at least every 12 weeks, whether the short-term objectives are being achieved;

"(5) a statement of the specific special education services and related services needed by the child, even if not all of these services currently are available in the local education agency preparing the IEP. Any unique instructional media not ordinarily available to all students, but needed by this particular child for learning, shall be listed;

"(6) a description of the extent to which the child will participate in regular classroom instruction . . . ;

"(7) the projected date for the initiation of the prescribed services and anticipated duration of the services; and

"(8) a listing of the names and positions of the individuals responsible for implementation of the IEP." K.A.R. 1986 Supp. 91-12-41(f).

See also K.A.R. 91-12-52 (provisions concerning intellectually gifted children). Transportation must be provided for special education students:

"(a) Each board, in order to comply with the requirements of [the Act] shall have the authority to:

. . . .

"(6) Provide transportation for exceptional children, whether such children are residents or nonresidents of such school district, to and from special education services attended. In lieu of paying for transportation, the board of the school district in which an exceptional child resides may pay all or part of the cost of room and board for

such exceptional child at the place where the special education services attended are located." K.S.A. 72-967.

We are informed that the Marion County Special Education Cooperative (Cooperative) provides programs for gifted students which include field trips, cultural events, and mentorships. As a result of these programs, costs are incurred for tickets, registrations, project materials, lodging, and transportation. Each child's IEP, which describes his or her particular program, states that the parents must bear these extra costs. Most transportation is provided by the local education agency. However, transportation for evening and weekend activities is often the parents' responsibility. In addition, it is stated in the IEPs that parents must bear the transportation costs of a trip to Washington, D.C. We understand that during the meeting at which the IEP is written, parents are informed as to the costs involved. If the parents can not, or choose not to be involved in any activity or project, other options are available for the gifted child's program.

The first question is whether the Cooperative's procedure in selecting a program for a gifted student is appropriate, i.e. whether the IEP may include alternatives depending on who can pay the costs. The interlocal agreement entered into by five school districts establishing the Cooperative provides that each school district is responsible for transporting students of that district. Your second question is whether the school district is responsible for transportation costs if the IEP provides that the parent must bear this cost.

The Kansas Special Education for Exceptional Children Act, K.S.A. 72-961 et seq., was adopted pursuant to, and in accordance with, the Education of the Handicapped Act (EHA), 20 U.S.C. §1400 et seq. This federal legislation provides federal funding for state and local school systems to assist them in educating handicapped children. The Act requires recipients of its money to "[have] in effect a policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. §1412. The EHA applies only to handicapped children, gifted children are not included. 20 U.S.C. §1401(1). Twenty states, including Kansas, have adopted legislation mandating special education for gifted students. The laws of twenty-four other states are permissive in that funds are available for gifted programs if such programs are established. Comment, Legal Rights of

Gifted Students: Special Education Law at the "Other End", 19 Conn. L. Rev. 143, 152-53 (1986).

Kansas has limited case law concerning its special education laws. Other states which have statutes similar to Kansas mandating gifted education also have not addressed the questions presented to us in this opinion. However, the language in Kansas' special education statutes is very similar to the language in the EHA. "[T]he analysis under the Kansas special education laws is virtually identical to that under the [EHA]" Akers v. Bolton, 531 F. Supp. 300, 314 (D.Kan. 1981). Kansas law mandates special education for gifted students in the same manner as for handicapped students. It follows, then, that the requirements under the EHA which must be met for special education for the handicapped are helpful in determining the requirements applicable to gifted education.

Under the EHA, "free appropriate public education" is defined as follows:

"The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program" 20 U.S.C. §1401(18). (Emphasis added).

"Special education" means, "pecially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child" 20 U.S.C. §1401(16). (Emphasis added). "Related services" are defined as "transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a handicapped child to benefit from special education." 20 U.S.C. §1401(17). (Emphasis added).

The seminal case interpreting the EHA is Board of Educ., Etc. v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). The United States Supreme Court examined congressional intent in enacting the legislation:

"[I]n seeking to provide . . . access to public education, congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful. . . . Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." Board of Educ., Etc., v. Rowley, 102 S.Ct. at 3043.

The court reasoned that Congress did not intend to require "the furnishing of every special service necessary to maximize each handicapped child's potential" Id. at 3047. Therefore, the court concluded that "the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Id. The Supreme Court held that the requirements of the EHA are as follows:

"Insofar as a State is required to provide a handicapped child with a 'free appropriate public education,' we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP." Id. at 3049.
(Emphasis added.)

Several courts since the Rowley decision have commented on the cost factor involved in providing special education services:

"Whatever the precise definition of 'free appropriate public education' is, the term certainly does not mean the best education possible." Colin K. v. Schmidt, 536 F. Supp. 1375, 1386,

aff'd. 715 F.2d 1 (1982). (Emphasis in original).

"Cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children." Roncker on Behalf of Roncker v. Walter, 700 F.2d 1058, cert. denied 464 U.S. 864, 104 S.Ct. 196, 78 L. Ed.2d. 171 (1983).

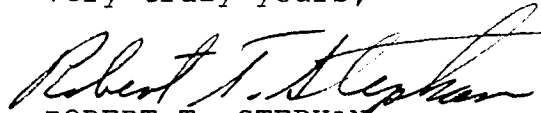
"[C]ost can be a legitimate consideration when devising an appropriate program for individual students. Nevertheless, cost considerations are only relevant when choosing between several options, all of which offer an 'appropriate' education. When only one is appropriate, then there is no choice." Clevenger v. Oak Ridge School Board, 744 F.2d 514 (1984).

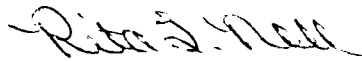
As part of "special education services," K.S.A. 72-967 requires school districts to provide transportation for students in special education programs. Case law makes it clear that transportation to classes and events listed in the IEP is a service which must be provided at no cost to the students and parents. Alamo Hgts. Ind. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153 (5th Cir. 1983) (reasonable to require school district to provide one mile out-of-district transportation to accommodate working mother); Pinkerton v. Moye, 509 F. Supp. 107 (W.D. Va. 1981) (school district required to reimburse parents for transporting child to neighboring school for special education program not provided by the home district); Woodland Hills School v. Com., Dept. of Educ., 516 A.2d 875 (Pa. Cmwlth. 1986) (school district required to furnish free transportation to nonpublic students participating in its gifted education program); Pires By Pires v. Com., Dept. of Educ., 467 A.2d 79 (Pa. Cmwlth. 1983) (school district must reimburse parents for child's transportation expense to a private school which provided the child's special education).

Under Kansas law, the requirements school districts must meet to provide special education services for gifted students are the same as the requirements for special education for handicapped students. Given the language of the Kansas statutes and cases interpreting the federal law, we think it

is clear that special education services for gifted students must be provided at public expense. "Services" include transportation to and from the educational classes and activities. School districts are not required to provide the best possible education. Rather, the IEP for each gifted student must be individually designed to provide educational benefit to meet the needs of that student within means of the school district. Therefore, the parents or guardians of a gifted student cannot be required to pay any of the costs incurred in providing the special education program specified in the student's IEP.

Very truly yours,


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