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September 14, 2020

Eric John Nies
P.O. Box 759
109 Main Street
Spearfish, SD 57783

Official Opinion No. 20-01

Re: **Open Enrollment of Special Education Students**

Dear Mr. Nies,

In your capacity as counsel for the Meade County School District you have requested an official opinion from the Attorney General's Office on the following question:

QUESTION:

Can a nonresident school district deny an application for open enrollment if a member of the applicant's family is already enrolled in the district, but the district cannot provide an appropriate special education instructional program or appropriate special education related services?

ANSWER:

Pursuant to SDCL 13-28-44, a nonresident school district may deny an open enrollment application due to the nonresident district's inability to provide a student seeking to open enroll an appropriate program of special education instruction or related services.

FACTS:

The above question has arisen between the Meade County School District and a neighboring district and involves the potential open enrollment of a student requiring appropriate special education instruction or related services. Another member of the student's household has already open enrolled in the Meade County School District.

IN RE QUESTION:

SDCL 13-28-40 establishes an open enrollment option for students attending kindergarten through twelfth grade in South Dakota. Subject to the provisions of SDCL 13-28-40 through 13-28-47, any K-12 student has the option to attend any public school in any school district that serves the student's grade level. SDCL 13-28-40. An application for open enrollment must be submitted for any student wishing to enroll in a nonresident school district or wishing to attend a school other than the one to which the student has been assigned. SDCL 13-28-43. A school district must grant an open enrollment application unless doing so "would result in an inability to provide a quality educational program based on criteria established ... pursuant to [SDCL] 13-28-44."

SDCL 13-28-44 directs school boards to adopt standards for the acceptance and rejection of an application to open enroll in a district. Of specific relevance to your inquiry, SDCL 13-28-44 states in pertinent part:

If two or more children from a family residing in the same household must enroll in different school districts as the result of a board's denial of an application to transfer from a resident district or to enroll in a nonresident district under the provisions of §§ 13-28-40 to 13-28-47, inclusive, neither the resident board nor the nonresident board may deny the application. However, two or more children from a family residing in the same household who are eligible for kindergarten through twelfth grade may open enroll only if, pursuant to § 13-28-42.1, the nonresident district can provide an appropriate instructional program and facilities, including transportation, for the child in need of special education or special education and related services. **If the nonresident district cannot meet the provisions of § 13-28-42.1 for the child in need of special education or special education and related services, the nonresident district may deny that child's application for open enrollment.**

Your request concludes that two sentences emphasized above are inconsistent. You have asked which sentence takes priority over the other; whether a district must enroll all members of a household, even if it cannot comply with the requirements of SDCL 13-28-42.1, or whether the district has the right to deny

an open enrollment application based on an inability to comply with SDCL 13-28-42.1.

In reviewing a statute, “the language expressed in the statute is the paramount consideration.” *Olson v. Butte County Commission*, 2019 S.D. 13, ¶ 5, 925 N.W.2d 463, 464 (quoting *Goetz v. State*, 2001 S.D. 138, ¶ 5, 636 N.W.2d 675, 681).

When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court’s only function is to declare the meaning of the statute as clearly expressed. When we must, however, resort to statutory construction, the intent of the legislature is derived from the plain, ordinary and popular meaning of the statutory language.

In re Wintersteen Revocable Trust Agreement, 2018 S.D. 12, ¶ 12, 907 N.W.2d 785, 789 (citations omitted). The intent of a statute “must be determined from the statute as a whole, as well as enactments relating to the same subject.” *In re Taliaferro*, 2014 S.D. 82, ¶ 6, 856 N.W.2d 805, 807 (citations omitted).

The language of SDCL 13-28-44 is unambiguous, and as such, I must give it the meaning and intent that is clearly expressed.

The first sentence of SDCL 13-28-44 mandates that a nonresident school district may not deny an application for open enrollment if the denial would result in two or more students from the same household being enrolled in different school districts. The second sentence of SDCL 13-28-44 qualifies the first sentence to the extent that the nonresident school district must be able to provide an appropriate instructional program and facilities for a student seeking to open enroll who requires special education instruction or related services. The use of the word “however” to begin the second sentence of the statute clearly signals this qualification. The final sentence of SDCL 13-28-44 applies this qualification and unambiguously establishes that despite the language of the first sentence of the statute, if a nonresident school district cannot provide an appropriate special education instructional program or appropriate special education related services, the nonresident district may deny the open enrollment application for the student requiring special education or related services. To determine whether a school district can provide an appropriate special education instructional program or related services, the school district must follow the requirements and direction of SDCL 13-28-42.1.

CONCLUSION

I conclude, based on the plain language of SDCL 13-28-44, that a nonresident school district may deny an open enrollment application due to the nonresident district's inability to provide a student seeking to open enroll an appropriate program of special education instruction or related services.

Sincerely,

A handwritten signature in black ink, appearing to read "Jason R. Ravensborg". The signature is fluid and cursive, with a large, stylized initial "J".

Jason R. Ravensborg
ATTORNEY GENERAL

JRR/SRB/lde