

OFFICIAL OPINION NO. 73-09, Obligation of a school district in relation to special education for exceptional children.

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

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Dr. Don Barnhart
State Superintendent of Public Instruction
Pierre, South Dakota 57501

OFFICIAL OPINION NO. 73-09

Obligation of a school district in relation to special education for exceptional children.

Dear Dr. Barnhart:

You state that a school district is considering broadening its special education program and based on the current statutes you have requested an opinion on the following questions:

1. What is the youngest age that a school district is obligated under current statutes to provide an appropriate educational program for an exceptional child?
2. If a school district does have an obligation below the age limit set forth in SDCL 13-28-1, is such obligation optional or mandatory?
3. With reference to SDCL 13-37-2, what constitutes "school instruction"?
4. With reference to SDCL 13-37-2 and SDCL 13-37-5.1, what constitutes "specialized instruction"?
5. If an exceptional child is eligible for placement at a state owned institution, but the parents prefer to keep the child at home, is the school district responsible for such child's education?

SDCL 13-28-1 reads as follows:

Every child who, before the first day of November in any year, shall have attained the age of five years and who has not attained the age of nineteen years, shall be deemed to be of legal school age.

SDCL 13-28-2 reads as follows:

No child shall be enrolled in kindergarten who is not of legal school age and said child shall first become eligible for enrollment in the first grade one year thereafter.

Any child under the age of five shall be eligible for admittance to a nursery school.

SDCL 13-37-1 reads as follows:

As used in this chapter, unless the context otherwise requires, "exceptional children" means all children under the age of twenty-one years who are residents of the state of South Dakota and who, because of their physical or mental conditions, are not adequately provided for through the usual facilities and services of the public school.

SDCL 13-8-1 reads as follows:

The school board is an elected or appointed body which has been created according to the laws of the state for the purpose of organizing, maintaining, and conveniently locating schools for the education of all children of school age within a school district.

The above statutes do set forth a minimum age for a child to be enrolled in kindergarten and a minimum age for a child to be enrolled in the first grade (SDCL 13-28-1 and 13-28-2). The statute dealing with exceptional children sets forth a maximum age but does not set forth a minimum age (SDCL 13-37-1). Prior to the rewrite of school laws in 1955, the statute providing for free education was worded in part as follows:

"The privileges of the public schools of any district shall be free to all children *of legal age* who are residents within the district." (emphasis supplied).

SDCL 13-28-5 reads as follows:

The privileges of the public schools of any district shall be free to all persons with school residence within the district until they complete the secondary school program or until they reach the age of twenty-one.

It is noted that the present statute does not restrict the privileges of the public schools to children who are only of legal school age.

SDCL 13-37-14.1 reads as follows:

It shall be the responsibility of the governing board of a school district to provide all of its resident exceptional children with an appropriate educational program. The placement of an exceptional child in an appropriate educational program which operated jointly with other school districts shall constitute the provision of an appropriate educational program. The placement of an exceptional child with the approval of the department into an appropriate educational program in cases where it is unreasonable for the resident school district to provide the program shall constitute the provision of an appropriate educational program for that exceptional child.

In answer to your question number 1, it is my opinion that the current statutes do not provide a minimum age for which a school district is obligated to provide an appropriate educational program for an exceptional child.

In answer to your question number 2, it is my opinion that based on the provisions of SDCL 13-37-14.1 it is mandatory that a school district provide an appropriate educational program for exceptional children.

With reference to your question number 3, SDCL 13-37-2 reads as follows:

As used in this chapter, unless the context otherwise requires, "special education" means classroom services and auxiliary services provided exceptional children pursuant to the provisions of the chapter and shall include *school instruction* conforming as nearly as possible to the established state course of study under duly qualified education teachers or other necessary services, or both, to the extent that the exceptional child is capable of profiting by specialized instruction. (emphasis supplied)

It is my opinion that the term "school instruction" as used in the above statutes means instruction that is comparable to the type of instruction that takes place in a regular school classroom for regular school students.

With reference to your question number 4, SDCL 13-37-5.1 reads as follows:

After a period of two years and each subsequent year thereafter, the division shall determine whether or not an exceptional child is capable of profiting by *specialized instruction*. An exceptional child shall be regarded as eligible for the benefits of this chapter only so long as the child's progress under this program can be determined to exist; such determination to be in accordance with standards and regulations promulgated by the division with the consent of the superintendent and approval of the board. (emphasis supplied).

It is my opinion that the term "specialized instruction" as used in SDCL 13-37-2 and 13-37-5.1 means the type of instruction that does not take place in a regular classroom, but is confined to instruction dealing specifically with exceptional children.

With reference to your question number 5, SDCL 13-37-6 reads as follows:

For the purposes of this chapter, all exceptional children who are receiving state institutional care *shall be excluded from the benefits provided herein during the time that they are actually in such institutions*. (emphasis supplied)

Based on the above statute it is my opinion that if the parents elect not to have the child placed at a state owned institution, that the school district then has the responsibility for such exceptional child's education.

Respectfully submitted,

Kermit A. Sande
Attorney General