

1981 WL 157959 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

September 9, 1981

*1 The Honorable Harry A. Chapman, Jr.
Chairman
Education Finance Review Committee
Room 313
Gressette Office Building
Columbia, South Carolina

Dear Senator Chapman:

You have requested the opinion of this office as to two matters concerning the administration of the Education for the Handicapped Act (EHA-20 U.S.C. § 1401, *et seq.*). You wish to know what body in South Carolina is the state educational agency (SEA) under the EHA (*see* 20 U.S.C. § 1401(7)) and what authority that agency has to require other state agencies to provide children with an appropriate education.

The responsibility for ensuring that EHA requirements are carried out is placed upon the state educational agencies which are defined as being ‘. . . the state board of education or other agency or officer primarily responsible for the state supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or state law (§ 1401(7)).’ *See* §§ 1412(b) and 34 C.F.R. 300.600; *Kruelle v. Biggs*, 489 F.Supp. 169 (D.C. Del. 1980). This definition looks to state law for the determination of which is the appropriate educational agency to serve as the SEA. Under South Carolina law, the State Board of Education is given broad powers to prescribe rules for education in this state. § 59-5-60. The State Superintendent of Education has the power to administer all policies and procedures adopted by the State Board through the State Department of Education (the Department) which is organized and staffed by him. § 59-3-30. *See also* art. 1 § 2 of the Constitution of South Carolina, 1895, as amended. Because this administrative authority of the Superintendent and the Department must be exercised pursuant to the rules adopted by the State Board, the Board should be the agency primarily responsible for the state supervision of public elementary and secondary schools under the EHA's definition of SEA. *See* 1965-66 Op.'s Atty Gen., No. 2210, p. 355.

This conclusion that the State Board is the SEA differs from the assumption in a previous opinion of this office (March 24, 1981 by J. Emory Smith, Jr., Assistant Attorney General) that the Department was the SEA; however, because of the administrative authority of the Superintendent and the Department, the management of the EHA program may be properly conducted by them so long as it is consistent with federal and state laws and the rules of the State Board which remains responsible as the SEA.

The authority of the State Board to require other agencies to provide education for handicapped children under the EHA is dependent initially upon the responsibilities imposed upon those agencies. The March 24, 1981 opinion of this office (*see supra*) concluded that the duties of those agencies to provide such education are to be determined by their existing authority under state law and any existing interagency agreements or other provisions for the sharing of responsibilities. In the absence of authority or an agreement requiring an agency to provide education coming within the scope of the EHA, the State Board would have no authority to force it to provide such education or to punish it for not doing so.

*2 Assuming that an agency was required to provide education for a child under the terms of the EHA and was failing to do so, no provision of the EHA grants any enforcement powers to the State Board or the SEA other than withholding funds¹ and state law offers none except for, perhaps, legal action. The authority of the State Board to sue another agency over such a matter

is questionable when it is not given the express power to do so. Possibly, such a power could be implied under § 59-5-60(10) which allows the Board to exercise such powers as it may find necessary to aid in carrying out the purpose and objectives of the constitution of the state.

Because of the absence of any clear state authority delineating the duties of the various state agencies for educating handicapped children and the enforcement powers of the State Board with respect to these matters, legislation addressing this subject would be helpful. If I may be of further assistance to you, please let me know.

Very truly yours,

J. Emory Smith, Jr.
Assistant Attorney General

Footnotes

- 1 Even the withholding authority is not completely certain when the statutory and regulatory provisions for it mention its use against only local educational agencies and intermediate educational units, neither of which expressly include state agencies such as those you've described. See §§ 1401(8), 1401(22), 1414(b) and 34 C.F.R. 300.194; however, such authority probably can be implied by construing the provisions for withholding in conjunction with those which make clear that EHA applies to all state agencies involved in the education of the handicapped. See 34 C.F.R. 300.2 and the March 24, 1981 opinion of this office, supra.

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