

1978 S.C. Op. Atty. Gen. 161 (S.C.A.G.), 1978 S.C. Op. Atty. Gen. No. 78-129, 1978 WL 22597

Office of the Attorney General

State of South Carolina

Opinion No. 78-129

JUNE 30, 1978

**\*1 SUBJECT: Education, Mentally Retarded**

The State Department of Education has the legal responsibility to provide an appropriate education for all handicapped children and youth, outside the jurisdiction of the Department of Mental Retardation, who are enrolled and eligible for enrollment in public schools, including the so-called ‘profoundly’ mentally retarded.

TO: Dr. Cyril B. Busbee  
State Superintendent of Education  
Dr. Charles D. Barnett, Commissioner  
Department of Mental Retardation

QUESTION:

Which state agency has the legal responsibility to provide educational programs to children outside the jurisdiction of the Department of Mental Retardation who are duly determined to be ‘profoundly mentally retarded’?

STATUTES AND CASES:

[20 U.S.C.S. §§ 1401, et seq.](#);

Federal Register, Education of Handicapped Children, § 121 a. 600, [42 Fed. Reg. 4250 \(1977\)](#);

Pub. L. 94-142, 1975 U.S. Code Cong. and Admin, News, p. 1425;

[South Carolina Constitution, Article XI, §§ 2 and 3](#); Code of Laws of South Carolina, 1976, as amended, §§ 44-21-10, [et seq.](#), 59-1-30, 59-21-510, [et seq.](#), 59-33-10, [et seq.](#), 59-63-20, 59-63-30;

Act No. 437, [Acts and Joint Resolutions](#), 1978.

73 Am.Jur.2d [Statutes](#), §§ 277-282 (1974).

DISCUSSION:

There is no recognized legal definition of ‘profound’ mental retardation. While the term may possess significance to various professions, neither the pertinent Federal, ([20 U.S.C.S. §§ 1401, et seq.](#), the ‘Education of the Handicapped Act’) or state statutes involved create any distinction based upon severity of handicap. To qualify for federal funding pursuant to [20 U.S.C.S. §§ 1401, et seq.](#), the State must demonstrate that certain conditions have been met. As set forth in [§ 1401\(1\)](#), those conditions in part are that:

The State has in effect a policy that assures all handicapped children the right to a free appropriate public education. (Emphasis added).

Moreover, as further stated in [20 U.S.C.S. § 1414\(2\)\(6\)](#), the State must assure that: all children residing in the State who are handicapped, regardless of the severity of their handicap and who are in need of special education and related services are identified, located, and evaluated . . . (Emphasis added).

See also: [20 U.S.C.S. 1412\(3\)](#); [1414\(1\)\(A\)](#); [1401\(1\)](#); [1401\(16\)](#).

The Act, [20 U.S.C.S. 1412\(6\)](#) further requires that:

The State educational agency shall be responsible for assuring that the requirements of this part ([20 U.S.C.S. § 1411, et seq.](#)) are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet educational standards of the State educational agency.

\*2 It is clear that from the foregoing the drafters intended that the State educational agency be the agency ultimately responsible for supervision of those programs under the auspices of the Act. The legislative history (Pub. L. 94-142, 1975 U.S. Code Cong. and Adm. News, p. 1425), of the statute reveals at page 1440 that the Acts' purpose is to assure that: . . . a single line of responsibility with regard to the education of handicapped children, . . . the State educational agency shall be the responsible agency . . . The Committee considers the establishment of a single agency responsibility for assuring the right to education of all handicapped children of paramount importance. Without this requirement, there is an abdication of responsibility for the education of handicapped children . . . While the Committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children . . . (Emphasis added).

It is therefore clear that to qualify for and maintain federal funding pursuant to [20 U.S.C.S. 1401, et seq.](#), the 'State educational agency', i.e. the South Carolina Department of Education, must assure the Commissioner of Education, U.S.C.S. 1401(2), that all handicapped children in South Carolina are receiving a free and appropriate public education. Should the Department of Education fail to adequately provide for the 'profoundly' mentally retarded in its plan and program for education of handicapped children, the agency has jeopardized federal funding. Accord. Federal Register, Education of Handicapped Children, § 121 a. 600, 42 Fed. Reg. 4250 (1977).

State law is in agreement with this basic principle. [Section 59-33-10, Code of Laws of South Carolina](#), 1976, as amended, Special Education for Handicapped Children, states that:

The General Assembly finds that it is necessary and proper to provide an appropriate education for all handicapped children and youth enrolled in public schools and eligible for enrollment therein. (See §§ 59-63-20 and 59-63-30). The purpose of this chapter is to provide for the mandatory establishment of educational and training services and facilities for handicapped children in public schools . . . who cannot be trained adequately without special educational facilities and services. (Emphasis added).

Similarly to the federal statute already discussed, the initial question is whether [§§ 59-33-10, et seq.](#), provides for the education of the 'profoundly' mentally retarded. The term 'handicapped children' is defined in § 59-33-20(a) to include those children that:

. . . deviate from the normal either psychologically or physiologically to such an extent that special classes, special facilities or special services are needed for their maximum development, including educable mentally handicapped, trainable mentally handicapped . . .

\*3 Obviously, the education of the so-called ‘profoundly’ mentally retarded child, if addressed at all by this statute, would fall within the ‘trainable mentally handicapped’ classification. ‘Trainable mentally handicapped’ is not defined within §§ 59–33–10, *et seq.* However, §§ 59–21–510, *et seq.*, Education of Physically and Mentally Handicapped Children, § 59–21–510(3) defines ‘trainable mentally handicapped pupils’ to mean those pupils that: [are] of legal school age whose mental capacity is below that of those considered educable, yet who may profit by a special type of training to the extent that they may become more nearly self-sufficient and also less burdensome to others.

It is important to note that the General Assembly in § 59–33–20(a) made no other classification of ‘mentally handicapped’ children except ‘educable mentally handicapped’ and ‘trainable mentally handicapped’. There is absolutely no indication that the General Assembly here intended to exclude any class of children. It would indeed be illogical for the General Assembly to make such exclusions based upon severity of handicap and then address the educational needs as to all other handicapped children except the mentally retarded, especially in light of the purpose expressed in § 59–33–10. Further, §§ 59–33–10, *et seq.*, employs the same language as the aforementioned federal statute, i.e. that there shall be provided an ‘appropriate’ education for ‘all handicapped children’. Significantly, in § 2 of Act No. 437, Acts and Joint Resolutions, 1978, the General Assembly recently declared that:

Whenever the term ‘handicapped person’ [similar to ‘handicapped children’] appears in the laws of this State, unless it is stated to the contrary, it shall mean a person who:

(2) meets any other definition prescribed by federal law or regulation for use by agencies of state government which serves handicapped persons.

Moreover, pursuant to the general rules of statutory construction, statutes which are remedial in nature are entitled to a liberal construction in favor of the remedy provided by law or in favor of those entitled to benefits of the statute. 73 Am.Jur.2d Statutes § 277–282 (1974). This construction is especially pertinent with respect to statutes which are regarded as progressive, humanitarian or beneficial to society.

Finally, Article XI, § 3 of the South Carolina Constitution mandates that:

The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State . . . (See section 2 of same, which places the administration under the State Superintendent of Education);

and § 59–1–30 of the Code of Laws provides that:

If any section or part of the South Carolina School Code is found to be ambiguous or otherwise subject to more than one interpretation, such section or part shall be liberally construed to the extent that the general purpose of the entire code and of public education may be advanced.

\*4 When read in light of the mandates of the ‘Education of the Handicapped Act’, the Constitution of South Carolina, the overall intent and purpose of the General Assembly, in providing an ‘appropriate’ education for ‘all handicapped children’ and the general principles of statutory construction, it is clear that the ‘profoundly’ mentally retarded are included within the mandates of § 59–33–10, *et seq.* See also: South Carolina Constitution, Article XI, § 2.

Similar to the federal ‘Education of the Handicapped Act’, it is not absolutely required by State law that the South Carolina Department of Education actually operate the particular educational program. Section 59–33–60 mandates that:

District and State educational agencies are required to cooperate with other agencies within the State, both public and private, interested in working toward the education training and alleviation of the handicaps of handicapped children . . .

Moreover, the authority to contract for services is clearly given in § 59-33-50. However, simply because operational responsibility may be delegated so as to achieve maximum technical expertise or more suitable facilities, it does not mean legal responsibility may likewise be delegated. It should be noted that pursuant to §§ 44-21-10, et seq., the Department of Mental Retardation must provide for the educational needs of those children within the jurisdiction of the Department. Once admitted or committed to the jurisdiction of the Department and until discharge pursuant to the procedures contained in the provisions of §§ 44-21-10, et seq., the Department of Mental Retardation maintains jurisdiction over the 'mentally retarded person' to provide 'mental retardation services', which by definition includes 'education'. See: § 44-21-30(5). Of course, any educational programs operated by the Department of Mental Retardation within its jurisdiction must remain under the supervision of the State Department of Education pursuant to both state and federal law; further, outside the jurisdiction of the Department of Mental Retardation, said Department is mandated to cooperate fully with the Department of Education pursuant to §§ 44-21-20 and 44-21-170.

In short, while 'education' of the mentally retarded, especially the 'profoundly' mentally retarded, may not coincide with traditional concepts of education, nevertheless, pursuant both to federal and state law, the South Carolina Department of Education possesses the primary legal responsibility for meeting the educational needs of all the children in this State, including the 'profoundly' mentally retarded.

CONCLUSION:

The State Department of Education has the legal responsibility to provide an 'appropriate' education for all the handicapped children and youth outside the jurisdiction of the Department of Mental Retardation who are enrolled and eligible for enrollment in the public schools, including the so-called 'profoundly' mentally retarded.

\*5 Daniel R. McLeod  
Attorney General

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