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Robert R. Corbin

March 12, 1984

Mr. James J. Brunstein
Associate Superintendent
Arizona Department of Education
1534 West Jefferson
Phoenix, Arizona 85007

Re: I84-036 (R83-173)

Dear Mr. Brunstein:

You have asked for an opinion addressing the following questions:

1. May a local education agency expel a handicapped student? If so, under what conditions? If expulsion of a handicapped student is indicated, may a local education agency cease special education services?

2. Does suspension or expulsion^{1/} of a handicapped student constitute a change of the student's special education placement as defined in the Education for All Handicapped Act? If so, must placement staffings be held by the local education agency prior to any suspension or expulsion action?

1. The difference between a suspension and an expulsion in the educational context is not always clear. Since Arizona has no statutory definition of either term, we must look to common law definitions which distinguish the two based upon the temporary nature of suspension as contrasted with expulsion. See Goss v. Lopez, 419 U.S. 565, 576 (1975); Board of Ed., etc. v. Illinois State Bd. of Ed., 531 F.Supp. 148, 151 (C.D. Ill. 1982). For purposes of this opinion, we will refer to suspension as a temporary exclusion from school which contemplates a child's return to school during the remaining school year.

3. May a handicapped student be suspended or expelled for behavior related to a handicapping condition other than the one for which the student's current special education placement was initiated?

The Education for All Handicapped Act ("EHA") as codified at 20 U.S.C. § 1401 et seq., corresponding federal regulations, Arizona statutes and regulations are all silent on the specific subject of discipline for handicapped students. The interpretation of the law as it relates to the discipline of handicapped students has been left to the courts which, in some cases, have reached inconsistent and irreconcilable conclusions. Nonetheless, we believe that certain general principles can be gleaned from several recent decisions which have addressed the particular issue raised in your letter.

The EHA was enacted in part to ensure the right to a free, appropriate education for all handicapped children. Many of the procedural protections provided in the EHA are also contained in Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794 which provides as follows:

No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

The case that has been most dispositive on the propriety of expulsion of handicapped students and the prerequisites for expulsion is S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981), cert. denied, 454 U.S. 1030 (1981). In Turlington, the court considered the requirements of the EHA and Section 504 as applied to discipline of handicapped students and announced these principles:

1. Expulsion is a proper disciplinary tool for handicapped students when proper procedures are utilized and under proper circumstances. 645 F.2d at 348;

2. The complete cessation of educational services during the expulsion period is not allowed under the EHA and Section 504. Id.;

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3. Before a disruptive handicapped child may be expelled, a trained and knowledgeable group of persons must determine whether the handicap is the cause of the child's propensity to disrupt. If it is determined that such is the case, the child may not be expelled. Id. at 350.

4. Expulsion is a change of placement which invokes all of the procedural protections of the EHA which include an evaluation by a multidisciplinary team. Id. at 348;

5. The issue of whether a student's misconduct is related to his handicap must be determined through the change of placement procedure. Id. at 348;

6. The school authorities have the burden of determining whether a student's misconduct is a manifestation of his handicap. Id. at 349;

See also Kaelin v. Grubbs, 682 F.2d 595 (6th Cir. 1982) which adopted the Turlington analysis.

Contrary to expulsion, a handicapped child may be suspended temporarily without employing the procedures of the EHA. Kaelin v. Grubbs, 682 F.2d at 602; Stuart v. Nappi, 443 F.Supp. at 1242, Sherry v. New York State Education Department, 479 F.Supp. 1328, 1337 (W.D.N.Y. 1979); Doe v. Koger, 480 F.Supp. 225, 229 (N.D. Ind. 1979). Handicapped students may be suspended temporarily as long as they receive the due process procedural protections of Goss v. Lopez, 419 U.S. 565 (1975). We note, however, that while suspension is not considered a change of placement so as to invoke the procedural requirements of the EHA, we nonetheless believe that Section 504 precludes suspension of a child for misconduct related to the student's handicap. Thus, at a minimum, a determination must be made that the suspension arises from behavior unrelated to the student's handicap before a student may be suspended.

In setting forth these principles, please note that we believe that both the EHA and Section 504 allow the district the authority to remove a handicapped child from a particular setting upon a proper finding that the child is endangering himself or others. S-1 v. Turlington, 635 F.2d at 348, 349. See also 45 C.F.R. § 121(A).

The EHA and Section 504 are remedial statutes which should be broadly applied and construed in favor of providing a free and appropriate education to all handicapped students. See S-1 v. Turlington, 635 F.2d at 347. Thus, in answer to your

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last question we conclude that the purpose and intent of the EHA and Section 504 make it clear that the aforementioned principles apply for any identified handicapping condition regardless of whether the particular handicapping condition related to the suspension or expulsion is a condition for which the child's current special education placement was initiated.

Very truly yours,

BOB CORBIN
Attorney General

BC:kmc:pd