



# Attorney General

1275 WEST WASHINGTON

Phoenix, Arizona 85007

Robert R. Corbin

March 27, 1987

The Honorable Roy A. Mendoza  
Pinal County Attorney  
P.O. Box 887  
Florence, Arizona 85232

Re: I87-044 (R87-026)

Dear Mr. Mendoza:

Pursuant to A.R.S. § 15-253(B) this office has reviewed the opinions expressed in your January 12, 1987 letter to Lawrence E. Mazin, Associate Superintendent of the Pinal County Schools. We concur with your opinion, which came to the following conclusions:

1. The Education of All Handicapped Children Act ("EAHCA"), 20 U.S.C. § 1400 to 1454, prohibits a school district from expelling a handicapped student until the individualized educational program ("IEP") team has met.<sup>1/</sup> Doe by Gonzales v. Maher, 793 F.2d 1470, 1489 (9th Cir. 1986), cert. granted sub nom Honig v. Doe, No. 86-728, 47 CCH S.Ct. Bull. (Feb. 23, 1987).

2. If the IEP team determines that the student's misconduct is a result of the handicap, the student cannot be expelled. If the IEP team determines that the student's misconduct was not caused by the handicapping condition, a handicapped student may be suspended as any other student could be, or may be expelled and the district may cease all educational services.<sup>2/</sup> 793 F.2d at 1482.

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<sup>1/</sup>An IEP is required since expulsion constitutes a change of placement under the EAHCA.

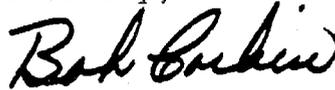
<sup>2/</sup>We note, however, that A.R.S. § 15-843(B) requires that a student receive notice and an opportunity for a hearing prior to suspension for more than 10 days or for an expulsion. Also see Goss v. Lopez, 419 U.S. 565, 572-576, 95 S.Ct. 729, 735-737, 42 L.Ed.2d 725, 734-736 (1975).

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3. A handicapped student may be suspended for a fixed period of time without a determination as to whether the misconduct is related to the handicap. In Doe by Gonzales v. Maher, the court stated that a suspension specifically limited by statute to 20 days plus detailed procedural protections would be valid. Whether a longer suspension or lesser procedural protections would be upheld is questionable.<sup>3/</sup>

Additionally, based upon the decision of the Ninth Circuit in Maher, we reject any opinions contrary to those just stated, such as those opinions which appear in Ariz. Atty. Gen. Op. 184-036. We specifically reject the portion of that Attorney General opinion which relied upon Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which is a general prohibition of discrimination against the handicapped in any program receiving Federal assistance. The court in Maher held that the specific remedies, rights and procedures Congress set out in the EAHCA control whenever any claims cognizable under the EAHCA purport to be based upon Section 504.

Sincerely,



BOB CORBIN  
Attorney General

BC:TLM:CRJ:pnw

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<sup>3/</sup>Promulgation by the school district governing board of rules for suspension which require procedural protections and set a fixed period for suspension absent an IEP team evaluation would support the validity of any suspension. A rule using a fixed period of 20 days or less and which adopted comparable procedural protection to those of California would be upheld with certainty in light of the Maher decision. See A.R.S. § 15-843(B) and California Education Code §§ 48903, 48910 to 48913, West's Ann. Cal. Educ. Code §§ 48903, 48910 to 48913.

ROY A. MENDOZA  
PINAL COUNTY ATTORNEY

BOYD T. JOHNSON  
CHIEF DEPUTY

CRIMINAL DIVISION  
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CATHERINE M. HUGHES  
MICHAEL L. FREEMAN  
JEANNE M. BENDA  
CAROL D. VASFARET  
GARY A. HUSK  
DEPUTIES

OFFICE OF THE  
**County Attorney**

PINAL COUNTY  
P.O. BOX 887  
FLORENCE, ARIZONA 85232

602-868-5801, ext. 271

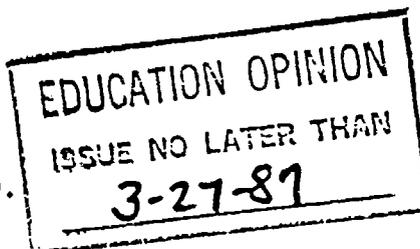
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DEFERRED PROSECUTION  
JOHN C. FELIX

INVESTIGATOR  
RAY R. VASQUEZ

January 12, 1987

Lawrence E. Mazin, Ed. D.  
Associate Superintendent  
Pinal County Schools  
Administration Building #2  
Florence, Arizona 85232



887- 025

Martin  
1/28/87

Dear Dr. Mazin:

You requested a County Attorney's Opinion concerning the following issues:

- ISSUES:
- (A) What are the legal considerations and procedures for disciplining handicapped students by expulsion?
  - (B) What are the legal considerations and procedures for disciplining handicapped students by suspension?
  - (C) Whether the current Arizona Attorney General's Opinions regarding suspension/expulsion of handicapped students adequately reflect the present law?

OPINION: Legal issues arising out of the discipline of handicapped students have often been difficult to resolve. Federal law has lacked the clarity necessary for easy application of statutory provisions; thereby, placing the burden of construing convoluted federal statutory provisions upon the federal courts. These courts have used a case-by-case method of adjudication. Slowly, judicial guidance has been developing that enables school administrators to better understand the procedural aspects of the provisions contained in the Education for All Handicapped Children Act (EAHCA) when implementing disciplinary measures against handicapped students.

The EAHCA was enacted by Congress to assure "all handicapped children the right to a free appropriate public education." See 20 U.S.C. §1212 (1982). The Act

defined a "free appropriate public education" as:

Special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with [an] individualized education program.  
ID. §1401(18).

The underlying element of an "appropriate" public education is a written individualized educational program (IEP) tailored "to meet the unique needs" of the handicapped child. See Burlington School Committee v. Department of Education, \_\_\_\_\_ U.S. \_\_\_\_\_, 105 S. Ct. 1996, 1002, 85 L.Ed.2d 385 (1985); Board of Education v. Rowley, 458 U.S. 176, 181-82, 102 Ct. 3034, 3037-38, 74 L.Ed.2d 690 (1982); 20 U.S.C. §1401(19).

Several procedural safeguards ensure parental involvement in the administrative process. Parents may allege agency action was "inappropriate or inadequate" and challenge such determination. Doe by Gonzales v. Maher, 793 F.2d 1470 (9th Cir.1986); Burlington School Committee, 105 S. Ct. at 2002.

Recently, the U.S. Court of Appeals directly addressed the considerations and procedures of disciplining a handicap student in Doe by Gonzales v. Maher, 793 F.2d 1470 (9th Cir. 1986). This case involved an appeal and cross-appeal from the U.S. District Court action where certain handicapped students brought suit against their school district and others contending that violations of the Education for All Handicapped Children Act (EAHCA) and other legislation occurred in connection with the discipline of handicapped students. This lengthy federal opinion is the first to both narrowly and clearly define the requisite due process considerations and procedures to be utilized by school authorities in situations where disciplinary measures are to be implemented against a handicapped student.

A discussion regarding expulsion and suspension of handicapped students under the Doe v. Maher case follows. These disciplinary measures must be separated into the categories of "handicap-related" and "non-handicap related" misbehavior. The type of misbehavior dictates the school administrator's authority to discipline.

A. Disciplining Handicapped Students With Expulsion

"Expulsion" occurs when a school district takes action to permanently cease providing services to students. A.R.S. §15-840(1).

1) Handicap-Related Misbehavior

The expulsion of a handicapped student for behavior related to or arising out of a handicap is prohibited by the EAHCA. Although not expressly stated in the EAHCA, this prohibition can be inferred from the underlying legislative purpose and intent of the Act to provide education to handicapped children, as set forth in its accompanying regulations. See Doe By Gonzales v. Maher, 793 F.2d 1470, 1481 (9th Cir. 1986); Kaelin v. Grubbs, 682 F.2d 595, 602 (6th Cir. 1982); S-1 v. Turlington, 635 F.2d 342, 348, cert. denied, 454 U.S. 1030, 102 S. Ct. 566.

Under the EAHCA, expulsion constitutes a "change in educational placement" of a child. See Kaelin, 682 F.2d at 598-602; S-1, 635 F.2d at 348.

Therefore, school administrators attempting to expel a handicapped student must follow the procedures prescribed by the EAHCA and its regulations for a "change in placement" in a handicapped student's individualized educational program (IEP).

The Doe v. Maher Court outlined the following procedures to be used by school authorities to "properly determine" whether a handicapped child can subsequently be expelled:

- (1) notifying the parents in writing of the educational agency's intention to seek expulsion, see 20 U.S.C. §1414(b)(1)(C)(i) (1982);
- (2) convening an IEP team meeting to assess the reason for the misconduct and the appropriateness of the child's current educational placement, see id. §1401(18); 34 C.R.F. §300342-.343(1985);
- (3) conducting an independent evaluation of the pupil's educational needs (because expulsion constitutes a significant change in placement), see 20 U.S.C. §1415(b)(1)(A) (1982); 34 C.F.R. §104.35 (1985);
- (4) informing the parents of their right to demand both impartial administrative review of any IEP team decisions and judicial review of the state's final administrative determination, see 20 U.S.C. §1415(b)(1)(D)

(1982); and (5) allowing the child to remain in his then-current educational placement pending resolution of any previously mentioned review proceedings, unless the parents otherwise agree, see id. §1415(e)(3).  
Id., 793 F.2d at 1482.

A distinction must be made in accordance with the above procedures, between two types of misbehavior, handicap-related and non-handicap related, before a handicapped child can be expelled. Even though the two types of behavior are difficult to distinguish in practice, the state, through its acceptance of federal funding, assumes the burden of identifying the type of misbehavior using the procedures and safeguards provided by the EAHCA. See Doe v. Maher, 793 F.2d at 1482, 1483.

The Doe v. Maher Court, including in its discussion of handicapped students emotionally disturbed children, further supported its prohibition of expulsion for "handicap-related" misbehavior by concluding, "[a] handicapped child's unique needs and his corresponding handicap-related problems cannot form the basis for denying the educational services that the EAHCA was designed to foster." Id. at 1481.

## 2) Non-handicap Related Misbehavior

A handicapped child can be expelled if the child's misbehavior is "properly determined" to not "be a manifestation of his handicap." See Doe v. Maher, 793 F.2d 1470, 1482, (9th Cir. 1986). See also Kaelin v. Grubbs, 682 F.2d 595, 602 (6th Cir. 1982); S-1 v. Turlington, 635 F.2d 342, 348, cert. denied, 454 U.S. 1030 Doe v. Kroger, 480 F. Supp. 225, 228 (N.D. Ind. 1979).

A "proper determination" of the type of behavior is established by an IEP team, or if applicable a hearing officer or court on review, through the use of the previously discussed EAHCA "change in placement" procedures. Doe v. Maher, 793 F.2d at 1482.

Moreover, the Doe v. Maher Court clearly maintained that a handicapped student can be expelled, by strongly stating:

When a child's misbehavior does not result from his handicapping condition, there is simply no justification for exempting him from the rules, including those regarding expulsion, applicable to other children. Therefore, when a handicapped child is properly expelled, the

school district may cease providing all educational services-just as it could in any other case. To do otherwise would amount to asserting that all acts of a handicapped child, both good and bad, are fairly attributable to his handicap. We know that that is not so.  
Id. at 1482

Once the handicapped child's misconduct is "properly determined" to be non-handicap related, the child is subject to suspension pending the ensuing expulsion proceedings. Doe v. Maher, 793 F.2d at 1484; 20 U.S.C. §1415(e)(3) (1982).

B. Disciplining a Handicapped Student With Suspension

The Doe v. Maher Court concluded that handicapped students are not immunized from all discipline and stated:

School officials dealing with misbehaving handicapped children may freely employ reasonable disciplinary measures that neither work a deprivation of an appropriate public education nor are substantial enough to constitute "changes in placement" within the meaning of the Act.  
793 F.2d at 1484.

Reasonable disciplinary measures that are permissible under the EAHCA include "the sort that teachers and principals have traditionally used to maintain order in the classroom." Id.

"Suspension" has traditionally been used as a disciplinary measure. Depending upon the fixed length of the suspension period, this type of discipline for conduct that is a manifestation of a student's handicap is "inoffensive" to the provisions of the EAHCA. See Doe v. Maher, 793 F.2d 1470, 1484 (9th Cir. 1986).

The determinative problem to resolve is whether a disciplinary measure constitutes a change in placement or a deprivation of an appropriate public education. The U.S. Court of Appeals in Doe v. Maher addressed this issue when it evaluated the California Education Code on suspension.

The Court was influenced by several factors in determining what types of suspension are reasonable and will not result in a change of placement. The factors included:

- 1) The existence of a "normal" procedure of implementation that does not single out handicapped students for adverse treatment;
- 2) The suspension period is fixed and temporary;
- 3) The suspension grants the school officials some "breathing space" for developing strategies to cope with the child during pendency of any ensuing review proceedings.

See Doe v. Maher, 793 F.2d 1470, 1485.

Based upon the above factors, the Court concluded suspension of up to thirty (30) days, under the California Code, was not such a substantial deprivation "as to constitute a 'change in placement' or a loss of a 'free appropriate public education' within the meaning of the EAHCA." Id.

Furthermore, the period for suspension must not violate the EAHCA "stay-put" provision. 20 U.S.C. §1415(e)(3)(1982). This provision prescribes that the handicapped child shall "during the pendency of any [review proceedings under the EAHCA]...remain in the then current educational placement of such child."

Fixed-time suspensions of thirty (30) days or less do not conflict with the "stay-put" provisions, in that, a "deadline" for the student's return to school is pre-determined, and thus, allows the resolution of any disputes arising from the instigating situation that initiated the implementation of disciplinary measures. Doe v. Maher, 793 F.2d at 1486.

Conversely, indefinite suspensions conflict with the "stay-put" provisions, in that, school authorities could effectually avoid the "stay-put" provisions by unilaterally making the determination to suspend a student indefinitely for merely disrupting the educational process. Id.

Clearly, under the legal conclusions of Doe v. Maher, school administrators now have the ability to suspend handicapped students for misbehavior as much as thirty (30) days without first determining if the behavior was related to their handicap. This depends upon whether an applicable suspension statute or regulation exists, that does not adversely discriminate against handicapped students and provides for a suspension period that is fixed and temporary.

Arizona's current statutory provisions regarding

suspension do not "single-out" handicapped students for adverse treatment but are silent concerning the amount of time that suspension periods can be fixed A.R.S. §15-840 et seq.; cf. California Education Code §§48903, 48912 (Deering Supp. 1986).

As previously discussed, indefinite suspension periods grant school officials unreasonable latitude in the discipline of handicapped students, resulting in the abuse of the EAHCA's "stay-put" provisions. But, Arizona has a "save-all" provision in A.R.S. §15-843(B) which places the authority to create rules for discipline, suspension, and expulsion of pupils with the governing boards of the school district, in consultation with teachers and parents. Therefore, school administrators are currently capable of establishing "fixed-time" rules for suspension. These promulgated rules must be definite as to time, thereby, not constituting either a change in placement or a deprivation of an appropriate public education when applied to handicapped students.

## 2) Nonhandicap-Related Suspension

As has been discussed, determination of the type of misbehavior, either handicap-related or non-handicap related, for suspension of thirty (30) days or less is not necessary pursuant to Doe v. Maher.

Suspensions for longer than thirty (30) days constitute a change in placement in the handicapped student's IEP. Accordingly, the same EAHCA procedures used for expulsion must be complied with to determine if the handicapped student's individualized educational program should be adjusted.

## C. Prior Arizona Attorney General's Opinions

After reviewing prior Arizona Attorney General's Opinions concerning expulsion/suspension of handicapped students, two opinions readily surfaced (I79-132 and I84-036).

Opinion I79-132 set forth that no disciplinary problem involving a handicapped child was sufficient justification for expulsion, and suspension for a period of time necessary to change placement could be applied to a handicapped student only if he is a danger to himself or others.

Attorney General's Opinion I84-036 maintained that expulsion of handicapped students was permissible as long as the misconduct was non-handicap related. The type of conduct was determined by the application of procedures outlined in the Education for All Handicapped Act (EHA),

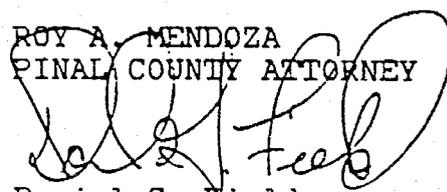
20 U.S.C. §1401 et. seq. as set forth in S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981), cert. denied, 454 U.S. 1030 (1981). The Attorney General's Opinion further expounded that temporary suspension of handicapped students could be employed only if the instigating misbehavior was not handicap-related.

Since the release of the foregoing opinions, the case law in the area of expulsion/suspension of handicapped students has further evolved, both expanding the authority of school administrators in the application of disciplinary measures and more narrowly defining the requisite due process procedures to be used by school officials when addressing problems involving handicapped children.

Under current case law, expulsion of a handicapped student for non-handicap related misbehavior is proper after complying with EAHCA procedures for change in placement. Moreover, suspension of thirty (30) days or less is available without making a determination of whether the misconduct is related to the handicap. A suspension of more than thirty (30) days requires compliance with EAHCA procedures for change in placement. Obviously, the law has expanded since the release of the past Arizona Attorney General's Opinions.

Sincerely,

ROY A. MENDOZA  
PINAL COUNTY ATTORNEY

  
Daniel G. Field  
Deputy County Attorney

DGF/lf