



Attorney General

1275 WEST WASHINGTON

Phoenix, Arizona 85007

Robert E. Corbin

June 27, 1988

Ms. Darlene Millar-Espinosa
Corey & Farrell, P.C.
Suite 600 Transamerica Bldg.
177 North Church Avenue
Tucson, Arizona 85701

Re: I88-071 (R88-067)

Dear Ms. Millar-Espinosa:

In response to your May 12, 1988 letter to Alfred C. Strachan, Associate to the Superintendent, Amphitheater School District, we concur that the District may, "without violating the stay-put provision of [20 U.S.C.] Section 1415(e)(3), suspend a handicapped student for up to ten days per incident of misconduct since suspensions of ten days or less do not constitute a change in placement under that statute."

We decline to review any other matter discussed in your letter.

Sincerely,

A handwritten signature in cursive script that reads "Bob Corbin".

BOB CORBIN
Attorney General

BC:LSP:amw

COREY & FARRELL, P. C.

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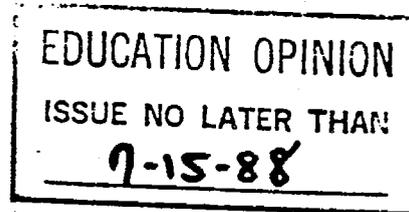
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May 12, 1988

888 067

Alfred C. Strachan
Associate to the Superintendent
Staff Relations
AMPHITHEATER SCHOOL DISTRICT
701 West Wetmore Road
Tucson, Arizona 85705



Re: Honig v. Doe: Suspension of Handicapped Students

Dear Mr. Strachan:

You requested that this office review the recent Supreme Court decision of Honig v. Doe¹, to determine its impact on our letter of December 10, 1987, regarding possible revisions in the District's suspension policy, Policy 5162, pursuant to Doe v. Maher². Our response has been delayed by our need to secure a copy of an opinion letter issued by the Office of Special Education Programs of the United States Department of Education, upon which the United States Supreme Court relied in the Honig decision. We attach a copy of that letter opinion for your consideration.

In our December 10, 1987 letter, we discussed the 9th Circuit's holding that suspensions of up to thirty days, under California law, did not constitute a change in placement under 20 U.S.C. 1415(e)(3), such that the stay put provisions of that section of the Education For All Handicapped Children Act ("EAHCA") were triggered. We recommended then that the District consider revising Policy 5162 pertaining to suspensions for less than ten days to eliminate the requirement that, should a handicapped student face suspension for less than ten days, a

¹ 108 S.Ct. 592 (1988).

² 793 F.2d 1470 (9th Cir. 1986).

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conference be held prior to imposing that suspension to determine whether the conduct giving rise to the suspension was handicapped related. Such a requirement did not appear to be mandated by Doe v. Maher, and in fact, was specifically not required. The 9th Circuit held that the EAHCA did not prevent districts from using "normal" disciplinary actions in dealing with handicapped students and that districts could impose short-term suspensions on handicapped students in order to protect other students and give the district breathing room to determine how to best handle a misbehaving handicapped student.

Additionally, we suggested that the district revise Policy 5162 to permit the handicapped students' advocate to attend the informal hearing granted to all students prior to suspension for less than ten days. However, we discussed postponing any revisions pending the decision of the Supreme Court in that case, as it was pending review. Under the name Honig v. Doe, the Supreme Court granted review of two narrow issues: whether the Act could be construed to contain a "dangerousness" exception to the stay put provisions of Section 1415(e)(3), and whether the 9th Circuit's holding regarding direct services placed an undue burden on state agencies. Although the question of whether a handicapped student could be suspended for ten days or less for handicap related misconduct was not a specific question upon which the Supreme Court granted review, that issue was discussed in the context of the first issue.

As you may recall, Honig/Maher involved efforts by the San Francisco Unified School District to expel two emotionally disturbed children indefinitely for "dangerous or disruptive behavior growing out of their disabilities."³ The 9th Circuit held that short-term suspensions did not constitute a change in placement such that the stay put provisions of 20 U.S.C. 1415(e)(3) were triggered but that an indefinite suspension in aid of expulsion did violate Section 1415(e)(3)⁴. As to this issue, the Supreme Court specifically held that the stay put provisions of §1415(e)(3) did not prevent a school district from

³ 108 S.Ct. at 596.

⁴ 793 F.2d at 1484.

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using "normal procedures" for dealing with dangerously disruptive students. In fact, the Court stated:

"More drastically, where a student poses an immediate threat to the safety of others, officials may temporarily suspend him or her for up to ten school days."⁵

In a footnote, the Court discussed the rationale behind the conclusion that such a suspension does not violate the Act. The Court found that while the congressional intent behind the Act was to prevent schools from permanently and unilaterally removing disabled students by using indefinite suspensions and expulsions, the Court found that "the power to impose fixed suspensions of short duration does not carry the [objectionable] potential for total exclusion" ⁶ The Court specifically disapproved the Court of Appeals finding that suspensions of up to thirty days would not be objectionable under Section 1415(e)(3) of the Act. The Court stated that such a suspension or one for more than ten days would constitute a change in placement such that the stay put provisions of the Act would be triggered.

The Court further noted that even where a school district would not be able to impose a ten day suspension on a handicapped student, because such a suspension would violate a state law, a ten day suspension would nevertheless not violate Section 1415(e)(3). This statement was made in response to the California Superintendent of School's argument that, because the schools districts in California would not always have the option of imposing a ten day suspension on a particular student since California statutes limit suspensions of any given student to a maximum cumulative total of twenty days per school year, a "dangerousness" exception to Section 1415(e)(3) was necessary to protect not only the handicapped student from himself but also protect others in the school.⁷

⁵ 108 S.Ct. at 605.

⁶ 108 S.Ct. at 605, Footnote 8.

⁷ 108 S.Ct. at 606, Footnote 9.

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Thus, although not specifically spelled out, the Court's holding that Section 1415(e)(3) was not violated by the imposition of short term suspensions of not more than ten days clearly refers to a per-incident suspension of not more than ten days. If state law precludes cumulative suspensions of more than twenty or thirty days per student per year, a ten day suspension may, in that situation, violate state law, but would not be violative of Section 1415(e)(3) as a less than ten day suspension does not trigger the stay-put provisions of that statute.

Arizona statutes are silent as to the total number of days per year, cumulatively, that any given student may be suspended.⁸ District policy also contains no limitation upon the cumulative number of days a given student may be suspended during a school year.⁹ Therefore, it is our conclusion that the District can, without violating the stay-put provisions of Section 1415(e)(3) suspend a handicapped student for up to ten days per incident of misconduct since suspensions of ten days or less do not constitute a change in placement under that statute.¹⁰

In light of this opinion, the District may now wish to consider revising Policy 5162 to remove the requirement that the District determine, prior to suspending a handicapped student, that the misconduct giving rise to the suspension was not related to the student's handicap. Under Honig v. Doe, the District clearly may suspend the handicapped student for up to ten days

⁸ See A.R.S. §15-843.

⁹ See Policy 5162.

¹⁰ This conclusion is consistent with the E.H.A. policy letter cited by the Court and attached to this letter. The Department of Education stated therein that ". . . States and localities [should] be alert to the possibility that repeated discipline problems may indicate that services being provided by a particular [handicapped] child . . . should be reviewed . . . ; we have not . . . established a specific rule . . . on how many non-consecutive days of suspension constitutes a change in placement"

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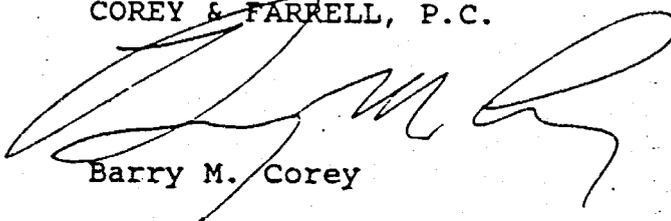
for misconduct regardless of whether the misconduct is handicapped related.

Attached is a proposed revision to Policy 5162 reflecting the Honig holding, as well as incorporating the suggestion that the handicapped student's advocate be present at the informal hearing granted to all students prior to short-term suspension to facilitate correct changes in placement, if necessary, and to allow the advocate the opportunity to provide relevant information.

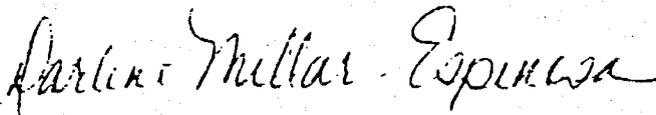
Thank you for permitting us to work with you in connection with this matter. Pursuant to your request, we are forwarding a copy of this letter to the Office of the Attorney General for review. Please do not hesitate to contact us should you have any questions.

Very truly yours,

COREY & FARRELL, P.C.



Barry M. Corey



Darlene Millar-Espinosa

BMC/DM-E/tlg

Students

Student Due Process

A student code of conduct shall be published and all students be informed of its content at the beginning of the school year. Parents/Guardians may receive copies of the student code of conduct upon request. Provisions should be made to allow for reasonable explanation of these rules upon request of any interested party. (See Policy 5153 - Student Code of Conduct)

All correspondence and communication in the following processes shall be provided in English and the primary language of the home.

Procedure for Suspension of Students From 1 to 10 School Days Inclusive

Step 1:

A student should be granted an informal hearing, prior to which s/he will receive notice, written or oral, of what s/he is accused of doing and at which there will be an informal presentation of the evidence the authorities have of the alleged misconduct. Once the student has received notice, s/he should then be asked to explain his/her version of the situation and facts. (NOTE: Prior to any action being taken, identify if the student is handicapped and if so, immediately proceed to the section herein concerning special education students.)

The authority should make every reasonable effort to verify all facts and statements prior to making a judgment involving any disciplinary action affecting the rights of a student.

Special Education Student

If the student has been identified as a handicapped student, the authority will contact, by telephone or in person, the student's advocate or his or her designee, and discuss with the advocate the student's special education program. The student's advocate is a special education teacher assigned to be the student's advocate and his or her identity can be found on the student's I/E/P. (See also District Policy 5177/8) This discussion will be informal in nature with the intent to determine if:

- a/ The behavior that may lead to suspension is caused by handicapping condition, and

Students

Student Due Process (continued)

Procedure for Suspension of Students From 1 to 10 School Days Inclusive

Special Education Student (continued)

b/ The special education placement and IEP are appropriate/

If, as a result of the discussion, it is determined that the behaviors are not caused by the handicapping condition and that the special education services are appropriate, the student can be suspended, not to exceed 10 school days, and then returned to his/her previous school placement/

If the behaviors are caused by the handicapping condition, then the authority must contact the school psychologist and request a multi-disciplinary conference to determine an alternative placement and/or revise the individual education plan/

Step 2:

After this informal hearing, the authority may either suspend the student up to 10 school days or exonerate the student. A written record of this action must be kept on file. If the student is exonerated, a record must also be retained.

Step 3:

If suspension is involved, then the following procedures should be observed:

- a. A reasonable effort should be made to notify the parent or guardian before the student is allowed to leave the campus. If unable to locate parent, then the student may be isolated until regular dismissal time and then given a written message to the parent to be delivered by the suspended student. A similar written message to the parent(s) shall be mailed to the parent(s). The parent(s) or the student, if over 18 years of age or emancipated, should be informed of his/her right to request an informal hearing with the responsible administrator to challenge the suspension or otherwise explain the pupil's actions. If an informal hearing is requested, it shall be held as soon as practical prior to the suspension being invoked.

Students

Student Due Process (continued)

Procedure for Suspension of Students From 1 to 10 School Days Inclusive

The parent or student, if over 18 years of age or emancipated, shall be informed of their right to a hearing before the governing board or its designee to challenge the suspension following efforts of an informal nature to resolve disagreements. NOTE: All correspondence should be written in a manner that will ensure effective communication.

- b. A letter should be written in a reasonable and timely manner the parent(s) or guardian, or student if over 18 years of or emancipated, explaining the terms and reasons for the suspension and the dates involved.
- c. A complete and accurate record of the total procedure should be kept by the authority.
- d. All suspensions must be reported to the governing board within 5 days in accordance with Arizona Revised Statute 15-843(J).

NOTE: The courts recognize that if a student poses a danger to him/herself, to others, or to school property, s/he may be suspended summarily and the informal hearing conducted as soon as practicable, not more than 10 days after suspension.

SPECIAL EDUCATION STUDENTS

SHOULD THE STUDENT BE IDENTIFIED AS A HANDICAPPED STUDENT, THE STUDENT'S ADVOCATE, OR HIS/HER DESIGNEE SHALL BE CONTACTED BEFORE THE INFORMAL HEARING AND BE GIVEN THE OPPORTUNITY TO ATTEND THE INFORMAL HEARING. THE STUDENT'S ADVOCATE IS A SPECIAL EDUCATION TEACHER ASSIGNED TO BE THAT STUDENT'S ADVOCATE. THE IDENTITY OF A PARTICULAR STUDENT'S ADVOCATE CAN BE FOUND ON THAT STUDENT'S I.E.P. (SEE ALSO DISTRICT POLICY 6171.8).

Students

Student Due Process (continued)

Procedures for Suspension for Over 10 Days

Step 1:

Student should be granted an informal hearing, prior to which s/he will receive notice, written or oral, of what s/he is accused of doing and at which there will be an informal presentation of the evidence the authorities have of the alleged misconduct. (NOTE: Prior to any action being taken, determine if the student is handicapped and if so, immediately proceed to the section herein concerning special education students.)

Once the student has received notice, s/he should then be asked to explain his/her version of the situation.

The authority should make every reasonable effort to verify all the facts and statements prior to making judgment.

Special Education Student

If the student has been identified as a handicapped student, a Responsibility Conference must be held in accordance with procedures outlined in District Policy 5162 (h, i, j, k).

If, as a result of the Responsibility Conference, it is determined that the alleged behaviors are not caused by the handicapping condition and that the special education placement and IEP are appropriate, the authority may proceed to Step 2.

If an expulsion hearing or suspension hearing for less than 10 days is preceded by a suspension of more than 10 days, a formal Responsibility Conference will be held prior to the disciplinary hearing as provided in Policy 5162(f).

During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his/her present educational placement. This does not preclude the school from using its normal procedures for dealing with students who are endangering themselves or others.