



Attorney General

1275 WEST WASHINGTON

Phoenix, Arizona 85007

Robert K. Corbin

June 22, 1989

The Honorable C. Diane Bishop  
Superintendent  
Arizona Department of Education  
1535 West Jefferson  
Phoenix, Arizona 85007

Re: I89-057 (R88-064)

Dear Superintendent Bishop:

The Arizona Department of Education has asked us to review Ariz. Att'y Gen. Op. I84-036 in light of the United States Supreme Court's ruling in Honig v. Doe, \_\_\_ U.S. \_\_\_, 108 S.Ct. 592 (1988), aff'g as modified, Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986). In Ariz. Att'y Gen. Op. I84-036 we addressed suspension and expulsion policies in special education under the Education of the Handicapped Act (EHA), 20 U.S.C. § 1415(e)(3).

In Honig, the Court held that a school district may not suspend handicapped children from school indefinitely pending completion of expulsion proceedings, but may suspend handicapped children who are endangering themselves or others for up to ten days without first determining whether the misconduct is related to the disability.<sup>1/</sup>

In construing the "stay-put" provision in section 1415(e)(3) (handicapped child shall remain in current educational placement pending completion of any review unless parents and educational agency agree otherwise), the Court determined that the provision does not contain a "dangerousness" exception. Honig, 108 S.Ct. at 605. The Court observed,

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1. See also Ariz. Att'y Gen. Op. I88-071. (without violating EHA's stay-put provision, a school district may suspend a handicapped student for up to ten days per incident since suspensions of ten days or less do not constitute a change of placement).

however, that this "does not preclude the [educational] agency from using its normal procedures for dealing with children who are endangering themselves or others." Id., and that such procedures, for example, may include the use of "timeouts, detention or the restriction of privileges." Id.

Next, the Court noted that "[m]ore drastically, where a student poses an immediate threat to the safety of others, officials may temporarily suspend him or her for up to 10 school days." Id. (emphasis added.) In reaching that conclusion, the Court deferred to the construction of section 1415(e)(3) adopted by the United States Department of Education (Department).

The Department of Education has adopted the position . . . that a suspension of up to 10 school days does not amount to a "change in placement" prohibited by § 1415(e)(3). . . . [A] suspension in excess of ten days does constitute a prohibited "change in placement"

. . . .

108 S.Ct. at 605 n.8.<sup>2/</sup>

Although the misconduct addressed in Honig was related to the disability and the Court approved the Department's position, the Court did not articulate or infer any requirement of an initial determination of whether the misconduct was related to the child's disability. Moreover, the Court viewed the up-to-ten-day suspension as ensuring the safety of others by prompt removal of the child and providing a "cooling down" period for review of the child's individualized educational program.

The Court noted that nothing in § 1415(e)(2-3) prevents educational agencies from by-passing the administrative process "where exhaustion [of such process] would be futile or inadequate," and then seeking "injunctive relief under § 1415(e)(2)." 108 S.Ct. at 606. The Court stated, however, that:

In any such action § 1415(e)(3) effectively creates a presumption in favor of the child's

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<sup>2/</sup>See also Goss v. Lopez, 419 U.S. 565, 574-576 (1975) (suspension of ten school days or more works a sufficient deprivation of property and liberty interests to trigger the protections of the Due Process Clause).

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current educational placement which school officials can overcome only by showing that maintaining the child in his or her current placement is substantially likely to result in injury either to himself or herself, or to others.

Id.

In summary, Honig provides the following guidelines for suspensions:

1. Suspension of a handicapped child for up to ten school days does not amount to a change of placement.

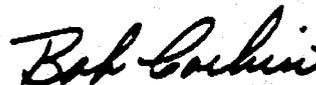
2. Suspension of ten school days or more works a sufficient deprivation of property and liberty interests to trigger the protections of the Due Process Clause.

3. Suspension in excess of ten school days amounts to a change of placement that invokes the stay-put provision of EHA § 1415(e)(3).

4. When following normal school procedures for dangerous misconduct or responding to an immediate threat to the safety of others, a student may be suspended prior to the educational agency's determination of whether the misconduct is related to the disability, so long as that suspension is for no more than ten days.

Ariz. Att'y Gen. Op. I84-036 is modified in accordance with this opinion.

Sincerely,



BOB CORBIN  
Attorney General

BC:LSP:ieb