

Opinion No. 88-10

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OPINION OF: HAL STRATTON, Attorney General

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TO: Honorable Richard P. Cheney, State Representative, P.O. Box 10311, Farmington, NM 87499

QUESTIONS

Do public schools have a constitutional or statutory obligation to provide educational services to students within private, for-profit adolescent psychiatric care and substance abuse treatment centers?

CONCLUSIONS

No, but if the student is handicapped, federal law may require such education.

ANALYSIS

A private facility in Farmington, New Mexico provides "treatment services including education" during the course of a forty-two-day program for adolescent substance abuse treatment. The facility seeks funding from the local school board for the program's educational component. The state department of education has not approved the facility's educational program.

A. Statutory and Regulatory Framework

A minor who receives mental health services in a residential facility is not "allowed to remain ... for more than thirty days without receiving educational services." Section 43-1-18 NMSA 1978. Thus, a facility that offers a forty-two-day residential treatment program, meaning the "care, treatment or habitation rendered inside or on the premises of a mental health ... facility, hospital, clinic, [or] institution ... when the [minor] resides on the premises," Section 43-1-4(Q) NMSA 1978, must provide education to its minor residents. This statute does not require a school district to fund or provide the educational program the facility offers.

To the extent a minor is handicapped and the handicap requires his placement in a residential facility, however, federal law may impose such an obligation on the school district. The Education For All Handicapped Children Act ("EAHCA"), 20 U.S.C. §§ 1401 to 1461, as amended, provides federal funds to participating states to assist in providing educational and other related services to handicapped children. EAHCA requires a state that receives grants under the Act to "assur[e] all handicapped children the right to a

free appropriate public education." Id. § 1412.¹ The Act broadly defines "handicapped children" to include "mentally retarded ... seriously emotionally disturbed ..., [and] other health impaired children ..., who by reason thereof require special education and related services." Id. § 1401(a)(1). We have found no judicial decision holding that alcoholism or substance abuse is a "handicap" under EAHCA.

EAHCA's requirement of a "free appropriate public education" means "special education" and "related services" that: are provided at public expense, and under public supervision and direction; meet the standards of the state educational agency; and conform to an individualized educational program ("IEP"). Id. § 1401(a)(18). It includes preschool, elementary, and secondary education. Id. "Special education" means "[s]pecially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." Id. § 1401(a)(16). Related services include: "transportation, and such developmental, corrective, and other supportive services (including ... medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education." Id. § 1401(a)(17). The IEP is a comprehensive statement of a handicapped child's educational needs that the school and the child's parents jointly formulate. Id. § 1401(a)(19).

Federal regulations supplement EAHCA. "If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child." 34 C.F.R. § 300.302 (1987). A state educational agency must insure that a handicapped child who is placed in or referred to a private school or facility is provided special education and related services in conformance with an IEP and at a school or facility that meets the state's educational standards. 34 C.F.R. § 300.401 (1987).

In February, 1984, New Mexico became the final state to participate in the EAHCA's grant provisions. New Mexico statutes implement EAHCA. Section 22-13-5 NMSA 1978 requires school districts to provide "special education sufficient to meet the needs of all exceptional children." "Exceptional children" include handicapped children; they are "school age persons whose abilities render regular services of the public school to be inconsistent with their educational needs." Section 22-13-6(B) NMSA 1978. Section 22-13-7(B) NMSA 1978 provides: "The department of education ... shall set standards for ... educational offerings for exceptional children in public schools, in private nonsectarian, nonprofit training centers and in state institutions under the authority of the secretary of the health and environment department." Section 22-13-8(B) NMSA 1978 permits local school boards to contract with private, nonsectarian, nonprofit educational training centers for educating exceptional children and to pay those centers. Section 22-13-8(C) NMSA 1978 requires the state superintendent to approve all such agreements and further provides:

All agreements must provide for diagnosis and an educational program for each child which meets state standards for such programs. The agreements must also acknowledge the authority and responsibility of the local board and the department of education to conduct on-site evaluations of programs and pupil progress to insure [the programs are] meeting state standards.

Section B of the "Educational Standards for New Mexico Schools," dated July, 1987, contain the department of education's standards. "When a child's handicaps are so severe that the Educational Appraisal and Review Committee has recommended that a public school setting is inappropriate for a child's particular needs, the local education agency shall make appropriate alternative arrangements for the child's educational programming." Section B.1.7.1. At section B.1.7.2 the regulations discuss the private programs a school may use as alternative programs. These include a private facility and a nonsectarian, nonprofit educational training center. The State Superintendent of Public Instruction must approve programs of education and ancillary services for exceptional children. Section B.1.3.6. Sections B.2.0 to B.2.14.2 describe the screening, referral, evaluation, identification, and placement procedures that are part of formulating and implementing an IEP. Home based or hospital services are to be provided when:

The exceptional child has a health impairment or condition which, as determined by the Educational Appraisal and Review Committee, is such that placement outside the school setting would be in the best interest of the child, and the child requires interim special education services in a home or hospital setting.

(1) Such determination must be based upon a licensed physician's/psychiatrist's written report addressing the etiology, prognosis, physical/mental capabilities and limitations ... of the health impaired child. The report must verify that the relocation of the child to a school or special class could be medically harmful to the child.

(2) Direct instruction must be provided each student for five (5) or more hours per week with the maximum service time to be determined by an Educational Appraisal and Review Committee.

Section B.1.3.4.(g).

B. Caselaw

Initially, we note that private facilities may not sue public schools to recover the cost of providing education to residents. In *Juneau Academy v. Chicago Bd. of Educ.*, 122 Ill. App. 3d 553, 461 N.E.2d 597 (1984), a residential treatment facility for mentally handicapped adolescent boys sued the school district to recover the value of services the facility had rendered to the district's students. The state had not approved the facility. The facility argued that the school's duty under federal law to provide special education superseded the statutory approval requirement. The court rejected the argument and denied recovery: "A private education facility ... lacks standing to assert the rights of handicapped children to a free education." *Id.* at 557, 461 N.E.2d at 600.

Furthermore, a parent may not be able to recover the costs of unilaterally placing a child in a private facility that the state has not approved. In *Schimmel by Schimmel v. Spillane*, 630 F. Supp. 159 (E.D. Va.), *aff'd*, 819 F.2d 477 (4th Cir. 1987), the school offered an appropriate residential placement for a handicapped child. The parents rejected this placement and placed their child in another institution that was not approved by the state. The court refused to order the school to fund the placement: "Parents of handicapped students may not, because of personal desires, select a private institution of their choice, and have the school system pay for the tuition." *Id.* at 162. In *Lombardi v. Nyquist*, 63 A.D.2d 1058, 406 N.Y.S.2d 148, appeal denied, 45 N.Y.2d 710, 409 N.Y.S.2d 1029, 381 N.E.2d 616 (1978), the court upheld the education department's decision denying a local board permission to contract with a private school because the state had not approved the school.

Similarly, in *Taglianetti by Taglianetti v. Cronin*, 143 Ill. App. 3d 459, 493 N.E.2d 29 (1986), parents of an emotionally handicapped child sought reimbursement for their costs in unilaterally placing their child in a nonapproved, private facility. The court denied reimbursement, notwithstanding that the parents' placement may have been the appropriate one, because the school district had no authority to provide this placement. In *re Claudia K.*, 91 Ill. 2d 469, 440 N.E.2d 78 (1982), involved a suicidal, severely depressed child, adjudged delinquent and thereafter neglected, who was confined to a psychiatric hospital. The trial court determined that she was handicapped and, therefore, entitled to special education and related services. The trial court ordered, in a mandamus proceeding, that she be placed in a hospital and that the school district assume full financial responsibility therefor. The Supreme Court of Illinois reversed, holding that Illinois law prohibited the placement, because the facility had not been approved as required by law. In *Smrcka by Smrcka v. Ambach*, 555 F. Supp. 1227 (E.D.N.Y. 1983), the court denied reimbursement to parents who placed their child in a private school without initiating administrative procedures to challenge the school's failure to make an appropriate educational placement. Courts have, however, allowed parents to recover the costs of unilaterally placing a child in a private facility where the school's proposed IEP is inappropriate. *Burlington School Comm. v. Mass Dept. of Ed.*, 471 U.S. 359 (1985), upheld the parents' desired placement in a private school that the state had approved.

When a child is "handicapped," for example, is seriously emotionally disturbed, the school and the child's parents may dispute the child's need for a residential placement or the school's obligation to fund non-educational care at the residential facility. The courts' decisions in these situations turn on the IEP's appropriateness and whether the child's educational needs, as opposed to his medical and psychological problems, require the placement. Compare *Scituate School Comm. v. Robert B.*, 620 F. Supp. 1224 (D.R.I.), *aff'd*, 795 F.2d 77 (1st Cir. 1986) (school's IEP was appropriate and parents therefore could not recover cost of residential program), and *Ahern v. Keene*, 593 F. Supp. 902 (D. Del. 1984) (same) with *Kruelle v. New Castle County School Dist.* 642 F.2d 687, 695 (3d Cir. 1981) (residential placement for profoundly retarded child afflicted with cerebral palsy was "only realistic option for learning improvement"); *McKenzie v. Jefferson*, 566 F. Supp. 404 (D.D.C. 1983) (school must fund only

educational component of cost of day school at hospital, where child was hospitalized for medical reasons) and *Antkowiak*, 638 F. Supp. at 1571-72 (court must determine whether educational needs or medical and emotional needs are basis for residential placement), with *Papacoda v. Connecticut*, 528 F. Supp. 68, 71 (D. Conn. 1981) (child could not be educated without residential placement, because teaching program had to be coordinated with therapy program).

C. Conclusion

EAHCA and state law could, in a particular case, obligate a school district to provide educational services to students placed in a private, for-profit adolescent psychiatric care and substance abuse treatment center. The decision would depend, at least in part, on whether the child is "handicapped," whether the department of education has approved the center, whether "free appropriate public education" is otherwise available, and whether the placement is for education or other reasons. Moreover, such a child's needs can be assessed only on an individual basis and through the vast array of procedural requirements established by state regulations that are mandated by federal law. See 20 U.S.C. § 1415.

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GENERAL FOOTNOTES

[n1](#) Section 504 of the Rehabilitation Act, 20 U.S.C. § 794, prohibits discrimination against the handicapped. However, "[i]n the wake of *Davis* all courts save one have concluded Section 504 does not obligate a school system to finance a private [residential] placement." *Williams v. Gill*, 572 F. Supp. 509, 517 (N.D. Ill. 1983). See also *Darlene L. v. Illinois State Bd. of Educ.*, 568 F. Supp. 1340, 1346 (N.D. Ill. 1983) (specifically declining to hold that Section 504 imposes a greater duty on states to provide educational services to the handicapped than EAHCA). In *Teresa Diane P. v. Alief Indep. School Dist.*, 744 F.2d 484, 493 (5th Cir. 1984), the court observed that the regulations promulgated under the Rehabilitation Act require a free appropriate public education coextensive with EAHCA.