STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
K STREET FAX (402) 471-4725

DON STENBERG
ATTORNEY GENERAL

STEVE GRASZ
LAURIE SMITH CAMP
DEPUTY ATTORNEYS GENERAL

#02006

NO.
STATE OF NEBRASKA
OFFICIAL
FEB 21 2002
DEPT. OF JUSTICE

SUBJECT: Services for developmentally disabled individuals who have graduated from high school but not reached age 21

REQUESTED BY: Senator Dennis M. Byars
Nebraska Legislature

WRITTEN BY: Don Stenberg, Attorney General
Charles E. Lowe, Assistant Attorney General

You have asked this office for its opinion as to whether the pending LB 1035 "is necessary to address a gap in services to developmentally disabled students who have graduated [from high school] and have not yet reached age 21." You indicate that, at the present time, the Department of Health and Human Services ("HHS") provides services under the Developmental Disabilities Services Act, Neb. Rev. Stat. §§ 83-1201 through 83-1226 (1999) (hereinafter sometimes referred to as "Act") only to developmentally disabled students who graduate from high school and have reached the age of 21 and that, therefore, there is a gap in services for those who have graduated but not yet turned 21. You note that Neb. Rev. Stat. § 83-1216(1) (1999) appears to cover this subject already. You, therefore, ask whether, in light of § 83-1216(1), there is a "gap" to be closed by legislation.

Review of § 83-1216(1)

Section 83-1216(1) provides as follows:

Jennifer M. Amen
David K. Arterburn
William R. Barger
L. Jay Bartel
Frances M. Bertsch
Vicki L. Boone-Lawson
J. Kirk Brown
Marie C. Clarke
Delores N. Coe-Barbee
Dale A. Comer
David D. Cookson
Kyle C. Dahl
Douglas D. Dexter
Jodi M. Fenner
Scott G. Gunem
Susan J. Gustafson
Robert E. Harkins
Royce N. Harper
Jason W. Hayes
Amber F. Herrick
William L. Howland
Marilyn B. Hutchinson
Kimberly A. Klein
Charlotte R. Koranda
George R. Love
Charles E. Lowe
Lisa D. Martin-Price
Lynn A. Melson
Ronald D. Moravec
Fredrick F. Neid
Teresa J. Nutzman-Buller
Thomas J. Olsen
Hobert B. Rupe
James D. Smith
James H. Spears
Mark D. Starr
Martin Swanson
John R. Thompson
Melanie J. Whittamore-Mantzios
Linda L. Willard

Printed with soy ink on recycled paper

> Beginning July 1, 1995, persons determined to be eligible for specialized services who on or after September 6, 1993, graduate from high school, reach the age of twenty-one years, *or* are currently receiving services shall receive services in accordance with the Developmental Disabilities Services Act. (Emphasis supplied.)

On its face it would appear that § 83-1216(1) provides three distinct situations in which a person deemed eligible for specialized services would be entitled to receive them. The use of the word "or" in the statute indicates that these situations are listed in the disjunctive - *i.e.*, if any one of them applies, then services are to be provided. Thus, a person eligible for specialized services who graduates from high school *or* who reaches the age of 21 *or* who was receiving such services on July 1, 1995, "shall receive services in accordance with the Developmental Disabilities Services Act." Accordingly, it would appear from this perspective that there is no "gap" since an eligible person who graduates from high school at any age is to receive services under the Act.

Meaning of "graduate from high school"

There is, however, some ambiguity in the statute which makes such a simple analysis problematic. Specifically, in the context of individuals with developmental disabilities the meaning of the term "graduate from high school," as used in § 83-1216(1) is not clear. The term itself is not defined anywhere in the Act.

It is our understanding, based upon a letter dated April 25, 2001, from Ron Ross, Director of HHS, to Douglas D. Christensen, Commissioner of Education, that HHS has interpreted the term "graduate from high school" as requiring that the individual "pass the standard, required curriculum for all students and receive a high school degree or diploma." HHS believes that most persons with developmental disabilities who would also qualify for specialized services under the Act, principally those with mental retardation, cannot "graduate from high school under the plain and ordinary definition of that word." HHS, which is charged with the implementation of the Act (Neb. Rev. Stat. § 83-1209), concludes that "graduation as used in Section 83-1216 would not include a 'Certificate of Attendance,' 'Certificate of Completion' or a lowered standard of graduation." HHS' interpretation of the term "graduate from high school," as found in § 83-1216(1), is not unreasonable and has considerable support.

In the absence of anything to the contrary, statutory language, of course, is to be given its plain and ordinary meaning. *Ameritas Life Insurance Corp. v. Balka*, 257 Neb. 878, 882, 601 N.W.2d 508, 511 (1999); *Bohm v. DMA Partnership*, 8 Neb.App. 1069, 1075-76, 607 N.W.2d 212, 217 (2000). In this connection, Webster's New Universal Unabridged Dictionary (2d ed. 1983) defines the word "graduate" as meaning "to receive a degree or diploma in recognition of the completion of a course of study at a school or college." If a student does not complete a "course of study" that constitutes a recognized

curriculum for high school students, then he or she does not "graduate," according to this dictionary definition.

Under Art. VII, § 1 of the Nebraska Constitution the Legislature is directed to "provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years." Moreover, the Special Education Act, Neb. Rev. Stat. §§ 79-1110 through 79-1178 (1996, Cum. Supp. 2000, and Supp. 2001) is applicable to all developmentally disabled individuals until they reach the age of 21. Neb. Rev. Stat. § 79-1126 (Cum. Supp. 2000). Thus, those individuals with developmental disabilities who do not "graduate from high school" and who have not turned 21 are still entitled to receive the services outlined in the Special Education Act from the schools.

The Nebraska Department of Education has issued rules and regulations to implement the Special Education Act. 92 NAC 51. In those rules and regulations the Department has interpreted the concept of "graduation from high school" in a manner which is consistent with HHS' interpretation of that term and with the plain and ordinary meaning of that term, as discussed above. In § 004.03 of 92 NAC 51 the rule states:

> 004.03A Students with disabilities who have graduated from high school with a *regular high school diploma* are not eligible to receive a FAPE (free appropriate public education).
>
> 004.03A1 The exception in Subsection 004.03A does not apply to students who have graduated but have not been awarded a *regular high school diploma*.
>
> 004.03A2 Graduation from high school with a *regular diploma* constitutes a change in placement, requiring written prior notice in accordance with Subsection 009.03 of this Chapter.

(Emphasis supplied.) "Free appropriate public education or FAPE" is defined in §003.20 of the Department of Education's rules and regulations as meaning:

> [S]pecial education and related services which are provided at public expense, under public supervision and direction, at no cost to parents and in conformity with the individual education program or individualized family service plan with meets the requirements of Section 007, which meets the standards of the state, including the requirements of this rule and includes birth to age five, elementary or secondary school education.

Accordingly, the Department of Education has interpreted the Special Education Act as covering individuals with developmental disabilities until they are 21 years of age unless they have graduated from high school with a *regular diploma*. This interpretation, which is consistent with the plain and ordinary meaning of "graduate," dovetails with HHS'

interpretation of § 83-1216(1) that services under the Developmental Disabilities Services Act will not be provided to those under 21 who have not graduated from high school with a regular diploma. These interpretations by the Department and HHS are also consistent with §§ 79-1125.01 and 79-1126 (both of which speak of providing services under the Special Education Act until an individual reaches the age of 21, although § 79-1125.01 does not apply directly to those who are placed in special education programs) and with the Legislature's intent, as expressed in § 83-1216(4), to utilize to the greatest extent possible funding sources within the Department of Education and, specifically, the Division of Rehabilitation Services to provide specialized services to developmentally disabled individuals.[1]

In light of the foregoing, HHS' practice of not providing specialized services under that Developmental Disabilities Services Act to those developmentally disabled individuals younger than 21 who have not graduated from high school with a regular diploma appears to be in conformity with existing law, the plain and ordinary meaning of the statutory term "graduate from high school," and the rules and regulations which have been promulgated by the Department of Education.

No "gap in services" based upon HHS' interpretation

Assuming that HHS does and will provide services under the Act to eligible developmentally disabled individuals younger than 21 who have graduated from high school with a regular diploma, it does not appear that there is a "gap" in coverage. If such an individual has not graduated from high school with a regular diploma, he or she will be covered under the Special Education Act until he or she turns 21, at which time he or she will receive services from HHS under the Developmental Disabilities Services Act. If such a developmentally disabled individual graduates from high school with a regular diploma

---

[1] After the Developmental Disabilities Services Act was initially enacted in 1991, the Department of Public Institutions promulgated rules and regulations for implementation of the Act, which rules and regulations have now been assumed by the Department of Health and Human Services (HHS). Section 011.06 of those rules and regulations, which are found at 205 NAC 2, states: "The Department authorizes funding for specialized supports and/or services to persons determined to be eligible who, on or after September 7, 1993, graduate from high school *and* reach the age of 21." (Emphasis supplied.) Clearly, the HHS rule requires *both* graduation from high school and reaching age 21 before services are provided.

While this two-prong test does not appear to be supported by the statutory language of § 83-1216(1), we infer from Director Ross' letter to Commissioner Cunningham that, in practice, HHS has provided and will provide services under the Act to eligible developmentally disabled individuals younger than 21 who graduate from high school with a regular high school diploma.

before reaching the age of 21, he or she will then be covered by the Developmental Disabilities Services Act.

Changing the law

If the Legislature wishes to change the law so as to provide specialized services under the Developmental Disabilities Services Act to developmentally disabled individuals younger than 21 who have not graduated from high school with a regular diploma, it may want to accomplish this by providing a statutory definition of the term "graduate from high school," as found in § 83-1216(1), which would include receiving the types of degrees or certificates given to developmentally disabled individuals who do not or are unable to successfully complete the normal high school curriculum.

We do not believe that LB 1035, as introduced, accomplishes the stated goal of eliminating any perceived gap in services to individuals with developmental disabilities and, indeed, that it would only add confusion and uncertainty to the law. The proposed changes to § 83-1216(1) delete any reference to graduation from high school and simply require that specialized services under the Act be provided to those eligible persons who have reached the age of 21. The result of enactment of this change would be that services under the Act would *not* be provided, regardless of whether or not an individual has graduated from high school, until the age of 21.

While LB 1035, as introduced, would insert into § 83-1216(1) language regarding the "intent of the Legislature" to provide services under the Act to those who have graduated from high school until they reach 21, this "intent" language would conflict directly with LB 1035's proposed specific statutory language which states the law as being that such services are provided only to those who are 21 years old or older. It also would not resolve the issue of what is meant by the term "graduate from high school." Thus, this "intent" language would, at best, do nothing but add a great deal of ambiguity and uncertainty to the law.

Conclusion

In conclusion, it is our opinion that, so long as HHS provides specialized services to developmentally disabled individuals younger than 21 who have graduated from high school with a regular high school diploma, there is no gap in services. Those developmentally disabled individuals younger than 21 who have not graduated from high school with a regular high school diploma continue to be covered by the Special Education Act.

If the Legislature wishes to provide services under the Developmental Disabilities Services Act to developmentally disabled individuals younger than 21 who are no longer in high school, but who have not graduated with a regular high school diploma, it could most easily accomplish this by providing a statutory definition of "graduate from high

school" which would include developmentally disabled individuals who finish their secondary education, but do not receive a regular high school diploma.

LB 1035, as introduced, does nothing to close any perceived gap in services and, indeed, would simply add uncertainty and ambiguity to the law. In fact, it might only exacerbate any gap that does exist by ensuring that specialized services under the Developmental Disabilities Services Act are provided only to developmentally disabled individuals age 21 or older - even those who have graduated from high school with a regular high school diploma.

Sincerely,

DON STENBERG
Attorney General

Charles E. Lowe
Assistant Attorney General

Approved by:

Don Stenberg
Attorney General

pc: Patrick O'Donnell
Clerk of the Legislature

17-666-18