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NO.
STATE OF NEBRASKA
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DATE: July 6, 1993

SUBJECT: Services for deaf and hard of hearing students.

REQUESTED BY: Joe Lutjeharms, Commissioner of Education
Lincoln, Nebraska 68509

WRITTEN BY: Don Stenberg, Attorney General
Harold Mosher, Senior Assistant Attorney General

Federal law and state law place the responsibility on the public schools to arrange for the special education services to be provided. In Nebraska, school districts may provide special education services directly or may contract with another entity to provide such services. *See* Neb. Rev. Stat. §§ 79-3301 through 79-3365 (1987), as amended. The role of the Nebraska Department of Education in such matters includes (1) establishing a program known as the Diagnostic Resource Center at Cozad; (2) operating educational and residential components of the Nebraska Schools for the Deaf and the Visually Handicapped (which offer contractual services to school districts under specific state statutes); (3) approving residential services and service agencies; and (4) providing public schools with technical assistance. Your inquiry is limited to five rather broad questions dealing with special education services for deaf and hard of hearing students. Your questions are discussed in the order propounded.

1. Is it permissible for the Nebraska Department of Education (NDE) to contract for Nebraska School for the Deaf (NSD) educational or residential services with one or more school districts? For the purposes of this question, assume that such a

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situation would involve school districts contracting with NDE for NSD services to be provided under existing NSD statutes, but the actual services would be provided on behalf of NSD by a school district operating under contract with NDE. In other words, part of all of NSD would exist as a contract operation.

The State Board of Education has certain specific constitutional latitude, in dealing with school districts, including certain elements of legislative authority. *See* Neb. Const., Art. VII, §§ 2, 3, 4 and 11. *See also* ***School District No. 8 v. State Board of Education***, 176 Neb. 722, 127 N.W.2d 458 (1964). NDE has specific statutory authority "to set up one or more approved schools for handicapped children. . . ." *See* Neb. Rev. Stat. § 79-3337 (1989). It therefore appears to us that NDE has legal authority to operate NSD services and other special education services through contacts with school districts.

2. If one or more special education schools were created under Neb. Rev. Stat. § 79-3337 by NDE, could such schools be operated on contract by individual school districts for NDE? Again, for purposes of this question, assume that individual school districts would contract for educational or residential services with NDE's special education school or schools, which in turn would contract with one or more different school districts to actually provide the contracted services for the requesting school district.

Yes. See answer to question 1 above.

3. May NDE contract with another state for educational or residential services that are offered by NSD or a Nebraska special education school created pursuant to Neb. Rev. Stat. § 79-3337? For purposes of this question, assume that a school district is not going to contract directly with a public agency in another state to provide educational and residential services, which we assume would be no problem. Instead, assume that a system would be created where a Nebraska school district would contract with NDE under the auspices of NSD (which may or may not be located at the current Omaha campus) or a state special education school created under Neb. Rev. Stat. § 79-3337, and that the NDE state school in turn would contract with another state to have the services of the

Nebraska state school provided by a state facility in the other state.

Subject to certain conditions, state law authorizes local school districts to place handicapped children in special education programs requiring residential care in another state. *See* Neb. Rev. Stat. §§ 79-3335, 79-3341, 79-3342 and 79-3348 (1987). In the absence of specific facts, we decline to analyze whether a Nebraska school district could contract with NDE and NDE in turn could contract with another state to have the services provided by a state facility in another state. In general, *see* Neb. Const., Art. XV, § 18.

4. May NDE contract for educational and residential services of NSD or a state school for special education created under Neb. Rev. Stat. § 79-3337 with a private agency in Nebraska? Again, for purposes of this question, we assume there would be no problem with an individual school district contracting directly with a private school education provider. What this question involves is a situation in which the individual school district doesn't contract directly with a special education provider, but instead contracts with NSD (either at its present location or somewhere else) or a state special education school operated under the auspices of Neb. Rev. Stat. § 79-3337 and that such NDE school in turn contracts with a private agency to perform the functions of the state school for the contract which NDE has with the school district of residence.

Subject to certain conditions, state law authorizes local school districts to place handicapped children in special education programs operated by private institutions. *See* Neb. Const., Art. VII, § 11 and Neb. Rev. Stat. § 79-3313 (1989). In the absence of specific facts, it is difficult to understand what facts might exist which would give rise to this question and whether such facts would or would not preclude NDE from contracting with a private institution to perform the functions of a state school for the benefit of a local school district. We therefore, decline to answer this question in the absence of specific facts.

5. Although we assume that most of the agencies with which NDE might contract for educational or residential services to be offered as an extension of NSD or another special education state school would be through agencies that are private in nature and incorporated, there is a possibility

that some might be effectively controlled by individual religious denominations or religious organizations. Would there be constitutional barriers to the Department, through NSD or a separately created state special education school, contracting with a corporation or school controlled or operated by a religious denomination to provide special educational or residential special education services on behalf of the state schools? Specifically, would such contracting be appropriate under Article VII, Section 11 of the Nebraska Constitution?

Neb. Const., Art. VII, § 11 states as follows:

Notwithstanding any other provisions in the Constitution, appropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof; provided, that the Legislature may provide that the state or any political subdivision thereof may contract with institutions not wholly owned or controlled by the state or any political subdivision to provide for education or other services for the benefit of children under the age of 21 years who are handicapped, as that term is from time to time defined by the Legislature, if such services are nonsectarian in nature. All public schools shall be free of sectarian instruction.

Clearly, this constitutional provision would allow NDE to contract with nonpublic institutions to provide special education services for the benefit of handicapped children under the age of 21 years so long as such services are nonsectarian.

6. Can the Department enter into interlocal cooperation contracts with school districts for the provision of special education services pursuant to the Interlocal Cooperation Act (Neb. Rev. Stat. §§ 13-801 through 13-827)?

Yes.

Summary

Since these are broad questions, we have dealt with the responses in a fairly broad manner. If you have a specific contracting proposal for which you would need a more detailed legal opinion, we obviously will need to examine the specific contract.

Respectfully submitted,

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APPROVED:

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