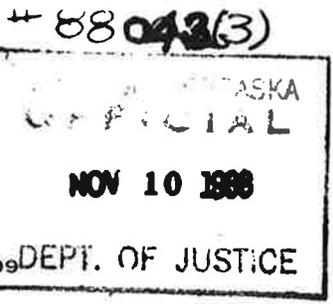


Linda Willard



DEPARTMENT OF JUSTICE

STATE OF NEBRASKA
TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509

ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General

DATE: November 7, 1988
SUBJECT: Education of the Handicapped Act, 20 U.S.C. §1401 (et. seq.); Obligations of Public Agencies; Rights of Nonpublic School Children.
REQUESTED BY: Senator Dennis Baack
Nebraska State Legislature
WRITTEN BY: Robert M. Spire, Attorney General
Harold Mosher, Assistant Attorney General

You introduced LB 896 during the second session of the Ninetieth Legislature (1988). It was indefinitely postponed at your request. In your letter of inquiry you state that you intend to introduce similar legislation during the next legislative session and ask two questions based on LB 896, supra. However, only one of the questions need to be considered in view of our response thereto.

LB 896 of the Second Session of the Ninetieth Legislature of the State of Nebraska

LB 896, as introduced, added a subsection (5) to Neb.Rev.Stat. §79-1701 (Reissue 1987). It stated:

(5) Any student attending a private parochial, or denominational school which elects not to meet the state accreditation or approval requirements who has been identified as handicapped pursuant to Public Law 94-142, the Education for all Handicapped Children Act of 1975, and the Special Education Act shall have an individualized education plan with specific goals and objectives developed jointly between the child's parents, the monitor, and the county superintendent of the county in which the child resides. Such plan shall be in compliance with state and federal rules and regulations. The progress of the student in reaching the goals and objectives set forth in such plan shall be reviewed at least annually by the child's parents, the monitor, and the superintendent.

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Any student attending a private, parochial, or denomination school which elects not to meet the state accreditation and approval requirement whose performance suggests a need for special education services shall be referred by the monitor to the county superintendent for appropriate evaluation. The county superintendent shall arrange for an appropriate evaluation and review the results of that evaluation with the monitor and the child's parents.

Failure by a private, parochial, or denominational school which elects not to meet the state accreditation and approval requirements to comply with state and federal mandates regarding education for handicapped children shall result in the State Department of Education withdrawing the exemption from state accreditation and approval requirements for such school.

Is it Constitutional to Withdraw the Exemption Granted to a Private, Parochial or Denominational School from State Accreditation and Approval Requirements in the Event Any Such School Fails to Comply with LB 896?

It is to be noted that pursuant to Neb.Rev.Stat. §79-1701(2) (Reissue 1987), private, denominational and parochial schools are exempted from accreditation and approval requirements upon the filing of a statement with the Commissioner of Education, signed by the parents or legal guardians of all children attending any such school, which states, among other things, that the requirements for approval and accreditation required by law violates sincerely held religious beliefs of the parents or legal guardians. It is also to be noted that pursuant to LB 896, if a private, denominational or parochial school which is exempt from state accreditation and approval requirements fails to "comply with state and federal mandates regarding education for handicapped children" it would result "in the State Department of Education withdrawing the exemption from state accreditation and approval requirements for such school." Hence the ultimate question is whether such a result is constitutional?

Pursuant to the Education of the Handicapped Act, 20 U.S.C. §1401 (et. seq.), and the administrative regulations applicable thereto, a public education is available to each handicapped child but the parents or legal guardians of such a child have the option of providing an alternative education at their own expense

if they so desire.¹ Indeed, there is nothing in the Education of the Handicapped Act, or the administrative regulations applicable thereto, which denies the rights of parents to educate their children at home or in a private school in accordance with their State's provisions for these alternatives. See also, EDGAR at 34 C.F.R. §§ 300.651-662. While these regulations define the nonpublic school handicapped child's right to participate in certain public services, they do not expand or limit a State's authority to regulate or otherwise set standards for the education of handicapped children whose parents choose to enroll them in nonpublic educational programs. Consequently, we are of the opinion that the failure of private, parochial or denominational schools to comply with the "federal mandates regarding education for handicapped children" is not a legal basis upon which the exemption status of such schools from State approval and accreditation regulations can be revoked. The Education of the Handicapped Act, 20 U.S.C. §1401 (et. seq.), simply does not impose duties upon non-public schools which are not under contract with a public agency to provide special education for handicapped children and therefore LB 896 would be unenforceable if it were enacted into operative law.

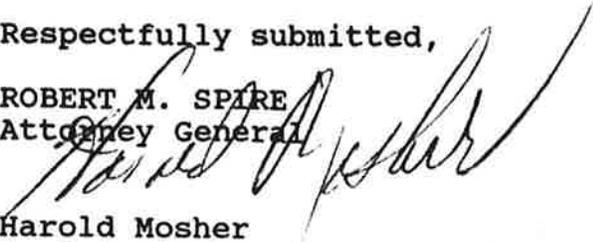
Notwithstanding the above, we wish to make it clear that the Education of the Handicapped Act, 20 U.S.C. §1401 (et. seq.), does not limit or deny participating States their right to protect children from abuse or neglect. When any physician, medical institution, nurse, school employee, social worker, or any other person has reasonable cause to believe that a child or an incompetent or disabled person has been (a) placed in a situation that endangers his or her life or physical or mental health; (b) is cruelly confined or cruelly punished; (c) deprived of necessary food, clothing, shelter, or care; (d) left unattended in a motor vehicle, if such minor child is six years of age or younger; (e) sexually abused; or (f) sexually exploited, he or she is requested, indeed has a duty, to report such incident to the proper law enforcement agency or to the county attorney or to this office. Child abuse or neglect will not be tolerated.

¹ 34 C.F.R. §300.403(a) provides in pertinent part:

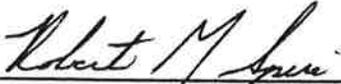
If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required to pay for the child's education. (Emphasis added.)

Respectfully submitted,

ROBERT M. SPIRE
Attorney General


Harold Mosher
Assistant Attorney General

APPROVED:


Attorney General

20-17-13