

VOLUME NO. 37

OPINION NO. 98

SCHOOL DISTRICTS - Special education, state funding; SCHOOL DISTRICTS - Special education, services for institutionalized children; EDUCATION - Special education, school districts, state funding; EDUCATION - Special education, school districts, services for institutionalized children; REVISED CODES OF MONTANA, 1947 - Sections 38-1327, 71-1905, 71-1907, 71-2001, 71-2002, 71-2401, 71-2402, 71-2403, 75-6302, 75-6313, 75-6314, 75-6315, 75-6901 et seq., 75-7802 et seq., 83-303.

- HELD: 1. A school district may not establish a special education policy wholly independent of state funding.
2. The special education program established by the Boulder School District is not required to serve children in the Boulder River School and Hospital or residents who are in group homes within the district at its own expense but may do so cooperatively or by contract.

8 December 1977

Georgia Ruth Rice
Superintendent of Public Instruction
State Capitol Building
Helena, Montana 59601

Dear Mrs. Rice:

You have requested my opinion on the following questions:

1. May a school district establish a special education program without requesting state funds?

2. If School District No. 7 in Boulder establishes a special education program, must that program serve children in the Boulder River School and Hospital or in group homes within the district who are ex-residents of the Boulder River School and Hospital?

I.

All school districts are required, after September 1, 1977, to establish special education programs (section 75-7805, R.C.M. 1947) in compliance with guidelines adopted by the Board of Public Education upon recommendation of the Superintendent of Public Instruction (section 75-7802, R.C.M. 1947).

The establishment of special education programs is initially governed by section 75-7811, which provides:

The determination of the children requiring special education and the type of special education needed by these children shall be the responsibility of the trustees, and such determination shall be made in compliance with the procedures established in the rules of the superintendent of public instruction. Whenever the trustees of any district intend to establish a special education class or program, they shall apply for approval and funding of the class or program by the superintendent of public instruction.

This section places upon the district trustees the initial burden of determining the need for special education programs, in compliance with rules adopted by the Superintendent of Public Instruction. No program may be operated without approval of the Superintendent. Chapter 539 of the 1977 Session Laws added the language in the second and last sentences of section 75-7811 which provide that the district "shall apply for approval and funding" and that the program must be approved annually "to be funded as part of the maximum-budget-without-a-vote for special education." (Emphasis added.) The addition of these references to funding show prima facie a legislative intent that special education programs must be included as part of the ordinary district budgeting and financing procedures.

A district's maximum budget without a vote is generally determined by the costs allowed by section 75-6905. The first 80% of that budget is called the "foundation program," and is jointly financed by the county equalization fund (mainly county property tax) and state equalization aid. The remaining 20% of the maximum budget without a vote, or the "permissive levy" is funded jointly by the district mill levy and the state. Any expenditures in excess of the maximum budget must be funded by a district levy approved by the voters. The maximum budget for special education is separately determined and then added to the district's regular program budget to arrive at a total maximum budget without a vote.

Subsections (20), (21), and (22) of section 75-6905 provide the general guidelines for establishing that portion of a district's maximum budget without a vote to be allocated to special education. Subsection (20)(c) provides in part:

The total amount of allowable costs that are approved for the special education budget shall not, under any condition, be less than the maximum-budget-without-a-vote amount for one regular ANB for each special full-time pupil in the school district. (Emphasis added.)

In other words, the district's per-pupil budget for full-time special education pupils may not be approved by the Superintendent unless it is equal to or greater than the district's per-pupil budget in regular programs. The clear implication of this provision for the present question is that a district must submit a special education budget meeting this minimum for the approval and funding as previously described.

Further limitation upon the district's latitude in budgeting and funding special education is found in section 75-7813.1, the allowable cost schedule for special education programs. These allowable costs constitute the components of the district's maximum budget for special education pursuant to section 75-6905. While some of these costs simply "may not exceed" specified limits (see, e.g., subsection (a)(i)), other costs must be included on a full or prorated basis. See Rules MAC 48-2.18(30)-S18500 and S18510.

The mandate for state, county and district funding for special education is evident in chapter 69 of Title 75, governing state equalization aid to public schools. Section 75-6901 requires that the state "shall aid in the support of

its several school districts" based upon their financial need. The general fund budget of the district "shall be financed" by the state-county foundation program revenues. Section 75-6906 similarly requires that the foundation program "shall be financed" by state and county funds. Section 75-6917 requires that state equalization aid:

shall be distributed and apportioned to provide an annual minimum operating revenue for the elementary and high schools in each county...
(Emphasis added.)

Section 75-6919 requires that state equalization aid "shall be apportioned" to the school districts. These provisions clearly show a strong state policy toward providing each school district with a level of state funding which will insure the quality and stability of the district's educational programs, including special education. This policy, along with the specific language of section 75-7811 and the budgetary treatment of special education which have been previously discussed, inescapably lead to the conclusion that a district may not conduct a special education program based solely upon its own financial resources.

II.

Your second question asks whether a special education program established by the Boulder School District must serve children in the Boulder River School and Hospital, or in group homes in Boulder. Section 75-7805 broadly provides that "the board of trustees of every school district must provide or establish and maintain a special education program for every handicapped person..." That same section further provides that, to the "maximum extent appropriate," children in public institutions must be "educated with children who are not handicapped."

The implication in section 75-7805 that institutionalized children are entitled to enjoy local school district programs where appropriate is further reflected in other statutes. Section 38-1327 provides that a mental health facility treating children must make special provisions for "[o]pportunities for publicly supported education suitable to the educational needs of the patient." Section 75-7810 provides that when a child in a state supported institution, at the recommendation of institution officials, "attends classes conducted by a school within a local district," then the district or county wherein the child's parents reside

"shall pay tuition to the district or county operating the school...." Lastly, section 75-7806(4) provides that when an agency has responsibility for a handicapped person between the ages of 21 and 25 for whom appropriate services cannot be provided, then the agency may contract with the local school district to provide those services.

Title 71 contains a number of provisions dealing with services for "developmentally disabled" persons who may receive a variety of "protective services" from the Department of Social and Rehabilitative Services (SRS) (section 71-1905). SRS has responsibility for direct provision of needed services including "education and training" (section 71-1905), but can arrange with other "persons or agencies" to cooperatively provide services without charge. If this cannot be arranged, SRS may purchase these services (section 71-1907).

Section 71-2001, et. seq., establishes "community homes" as an "alternative to existing state institutions." Counties and school districts are "authorized" to provide facilities and services "at their own expense," but they are not required to do so. (section 71-2002). The Developmental Disabilities Act, section 71-2401, et seq charges SRS with the duty of implementing "community centered" services including "education services" (section 71-2401) in cooperation with local agencies. (Section 71-2403.) These services may be provided directly by the state or by contract or cooperative arrangement with local government units.

None of the statutes discussed above provides a definitive answer to the present question. The special education statutes first discussed imply a right of children to enjoy public education programs where it is appropriate or necessary for them to do so. No clear obligation exists, however, for a school district to provide special education services on demand at their own expense for institutional or group home children. On the other hand, the developmental disability statutes place a burden upon the state to provide necessary services, and allow, but do not require local districts to cooperate in providing those services.

Therefore, a consideration of general school attendance statutes is helpful. Section 75-6302 requires trustees to admit any child to a school in a district when the child, is inter alia, a "resident of the district...." That section further provides:

The trustees of any district shall have the authority to assign and admit any nonresident child to a school in the district under the tuition provisions of this Title.

Sections 75-6313, 75-6314, and 75-6315 govern the obligation of a school district to pay the tuition of a child attending school in another district. Section 75-6315 specifically refers to section 83-303 to determine the residence of a child for school attendance. That section generally establishes the residence of a minor unmarried child as that of his parents.

With this as a background, the special education statutes must be read to require a district to provide services at the district's expense only for those children who are resident in that district. Thus, when section 75-7806 requires establishment of a special education program if there are sufficient numbers of handicapped children "in the district" to justify the program, it means children who are legally resident in the district. While handicapped children have statutory rights to public education opportunities, as discussed above, it would be unreasonable to require the Boulder School District to include all children in the state institution when budgeting for special education. The numbers of institutional or group home children requiring public special education programs would obviously vary from time to time, which would make planning difficult for the district. If institutional or group home children in the district need public special education services, it is the responsibility of the state to work cooperatively with the local district to furnish those services in the best interests of the children involved. This can be done, as reflected in the statutes, by cooperation, contract or other arrangement with the local district.

THEREFORE, IT IS MY OPINION:

1. A school district may not establish a special education policy wholly independent of state funding.
2. The special education program established by the Boulder School District is not required to serve children in the Boulder River School and Hospital or residents who are in group homes within the district at its own expense but may do so cooperatively or by contract.

Very truly yours,

MIKE GREELY
Attorney General