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STATE OF IOWA • DEPARTMENT OF PUBLIC INSTRUCTION

GRIMES STATE OFFICE BUILDING • DES MOINES, IOWA 50319-0146

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Declaratory Ruling #40
(Cite as 5 D.o.E. Dec. Rul. 5)
December 30, 1986

Dr. Ben Norman, Superintendent
Ankeny Community School District
420 S.W. School Street
Ankeny, Iowa 50021

Mr. and Mrs. Patrick Garvey
1305 N.W. Eden Lane
Ankeny, Iowa 50021

Dear Dr. Norman and Mr. and Mrs. Garvey:

On December 1 and 4, 1986, we received a Petition for Declaratory Ruling from each of you, both dealing with primarily the same issues. I have taken the liberty of consolidating the requests and facts to issue one Ruling.

Your inquiries center on an interpretation of Iowa Code section 282.3, specifically questioning the legality of promoting a student directly to first grade, bypassing kindergarten, and the circumstances under which pupil acceleration may be taken.

The facts surrounding the existing controversy are as follows:

Ankeny Community School District (hereafter the District) has a policy which, in some respects, mirrors Iowa statutes. The policy reiterates the law regarding admittance to the public schools: "A pupil shall not be admitted to kindergarten unless he/she is five years of age on or before the fifteenth day of September of the current year. . . . A birth certificate or other satisfactory evidence of age shall be required of each pupil entering school in this district for the first time." Exhibit 1, Board Policy 501.2. See Iowa Code § 282.3 (1985). The policy continues, "A pupil shall not be admitted to the first grade unless he/she is six years of age on or before the fifteenth of September of the current year." *Id.* The policy stops here, not addressing other first grade entrance possibilities; the Iowa Code section on which the policy was based continues:

No child shall be admitted to the first grade unless the child is six years of age on or before the fiteenth of September of the current school year; except that a child under six years of age who has been admitted to school work for the year

immediately preceding the first grade under conditions approved by the department of public instruction, or who has demonstrated the possession of sufficient ability to profit by first grade work on the basis of tests or other means of evaluation recommended or approved by the department of public instruction, may be admitted to first grade at any time before December 31.

Iowa Code § 282.3(2) (1985) (emphasis added).

A second board policy dealing with elementary grade level acceleration indicates that any requests for advanced placement, acceleration, or "grade skipping" will be entertained for grades 1-6 if made prior to May 1, and then only for the following year. Board Policy 605.3-1 (Exhibit #2). In essence, if we are correctly interpreting the policy, no student is permitted to bypass kindergarten or first grade in the District.

Exhibit 2 delineates the District's procedures and criteria for determining the advisability of grade acceleration. Id. The criteria upon which a decision is based are pupil assessment through testing in reading, mathematics and language; observation of the student; a review of student records; and a written recommendation of the school psychologist. Id. A decision-making conference is held, including the child's parent(s), and a majority decision is sought in the absence of a full consensus. Id. If so desired, the parent(s) may appeal the decision of the conference committee to the superintendent who then issues an opinion, following a conference with the parents, based upon all information collected.¹ I am in full agreement with the criteria and procedures adopted by the board; I have no knowledge of what particular instruments are being utilized in the evaluation, however. A list of the Department's recommended tests is included below.

Mr. and Mrs. Garvey, in their request for Declaratory Ruling, have supplied information about their daughter. Heather Lynne Garvey became 5 years old on December 14, 1986 (Birthdate 12/14/81). Her parents describe her as "well ahead of others her age" both academically and socially. She displays "exceptional work habits, fine motor coordination, and self-discipline." Most importantly, Heather has a desire to learn and a love of challenge and stimulation.

Mrs. Garvey operates a day-care center and was trained at Iowa State University where she received a Masters degree. She is familiar with the development of children and believes she has the ability to recognize pupil readiness. Her desire that Heather be able to bypass kindergarten, if qualified, stems from a concern that Heather will be bored, that her

¹ Although the policy does not announce further avenues for appeal from the superintendent's decision, the recognized chain of decision-making includes an appeal to the board. From there, Iowa Code chapter 290 authorizes appeals to the State Board of Education if brought within thirty days. Chapter 17A of the Iowa Code details the procedure for review of the State Board's decisions by the district court.

interest in learning will be suppressed if she has to go through a year of kindergarten. She is, of course, willing to have Heather tested to see if educational experts concur with her assessment of her daughter.

The controversy here stems from the district's position that no child can be placed in first grade without attending kindergarten. The District has propounded five questions for resolution:

- (1) Is the District, with its current policies, in compliance with the law?
- (2) If the Board of Education wishes to revise their policies, what are the requirements and minimum age as set forth in section 282.3 for a child to enter first grade?
- (3) Does the word "or" in line 5 [of section 282.3(2)] provide for testing of children prior to entering kindergarten who have not reached the age of six by September 15th; thus enabling a child, if recommended, to enter first grade without enrolling in kindergarten?
- (4) What does the Department of Education recommend as set forth in this paragraph with the words ". . . or other means of evaluation recommended or approved by the department of public instruction"?
- (5) If the policies are not in compliance with the law, what must the Ankeny School District do to gain compliance?

We will address these questions first, and then respond to Mr. and Mrs. Garvey's questions.

(1) To answer this question requires application of the principles of statutory construction. See Iowa Code chapter 4 (1985). The statute begins with explicit language prohibiting children under six from being admitted to first grade. Two exceptions follow the prohibition. The exceptions are for (a) students admitted to kindergarten in an approved program in this state or an approvable program elsewhere, and (b) students who have demonstrated (by tests or evaluations) "the ability to profit from first grade work." The operative word, however, as concerns the two exceptions is "may": children meeting either of the exceptions "may be admitted to first grade at any time before December 31."

When used in the context of legislation, the word "may" confers a power. Iowa Code § 4.1(36) (c) (1985). If the language had been "shall" or "must" the District would have been under a duty or obligation to admit such children to first grade prior to December 31. *Id.* at (a), (b). Instead, the District has discretion to admit a child fitting either of the exceptional circumstances.

In the absence of mandatory language, it is my conclusion that the District's policy is in compliance with the law. However, the failure to exercise the discretion given to a political body by the general assembly may be considered an arbitrary and capricious board action. "The terms 'arbitrary' and 'capricious' . . . mean that the action complained of was

without regard to established rules or standards . . . or without consideration of the facts of the case." Churchill Truck Lines, Inc. v. Transportation Regulation Board of the Iowa Department of Transportation, 274 N.W.2d 295, 299-300 (Iowa 1979) (emphasis added). Therefore, a legal challenge could be brought against a school district board of directors for refusing to consider an individual child's particular circumstances or qualifications when the statutory authority exists to do so. The educational question is whether the practice of blanketly refusing to deal with exceptional children in this manner is sound, defensible, and appropriate. This issue lies squarely within the province of the board to resolve. But see Iowa Code Supp. § 280.16 (1985) (Appropriate Instructional Program Review).

(2) The statute, as I have construed it, would seem to imply that any child, regardless of age, may be placed in first grade if he or she falls into one of the two exceptions.

(3) Yes. As I read the statute, the two exceptions are for (a) students who have been admitted to an approved kindergarten and (b) students who may or may not have been admitted to kindergarten, but show readiness and the ability to benefit by first grade work. Moreover, the language "at any time before December 31" would not appear to operate to prevent a school from placing a child directly into first grade if he or she "qualifies" on the basis of testing and other evaluations.

(4) The Department recommends, but does not require, the use of the following instruments, and not necessarily to the exclusion of others:

SUGGESTED ASSESSMENT INSTRUMENTS*

I. LEVEL OF DEVELOPMENTAL SKILLS

A. Large Muscle Coordination

1. Vineland Adaptive Behavior Scales

B. Small Muscle Coordination

1. Bender Visual Motor Gestalt Test
2. Berry Visual Motor Inventory

C. Visual Discrimination and Memory

1. Bender Visual Motor Gestalt Test
2. Benton Visual Retention Test
3. Berry Visual Motor Inventory

D. Language Skills

1. Peabody Picture Vocabulary Test
2. Stanford-Binet (vocabulary list)
3. Basic Concept Inventory (Boehm)

* The suggested instruments are provided as examples of the type of assessment devices that would be appropriate for collecting needed data. Evaluators are not limited to these instruments nor is it meant that all of the instruments should be utilized.

II. ABILITY TO INDEPENDENTLY FOLLOW DIRECTIONS APPROPRIATE TO THE RECEIVING GRADE LEVEL

1. ABC Inventory
2. Vineland Adaptive Behavior Scales

III. ABILITY TO MEET THE SOCIAL AND ACADEMIC DEMANDS OF THE ENVIRONMENT

1. Vineland Adaptive Behavior Scales
2. Alpern-Boll Developmental Profile
3. Behavior Problem Check List
4. Child Behavior Rating Scale

IV. WRITTEN REPORTS OF PROFESSIONAL PERSONNEL BASED UPON THE USE OF STRUCTURED OBSERVATIONAL INSTRUMENTS

V. INTELLECTUAL FUNCTIONING AS EVIDENCED BY PERFORMANCE GREATER THAN TWO STANDARD DEVIATIONS ABOVE THE MEAN (UPPER 3%) ON A RELIABLE INDIVIDUAL TEST OF GENERAL INTELLIGENCE VALID FOR THE INDIVIDUAL PUPIL

1. Wechsler Preschool and Primary Scale of Intelligence
2. Stanford-Binet Intelligence Scale

5. Since question number (1) above was answered affirmatively, this question is moot.

Mr. and Mrs. Garvey have asked the following questions in their Petition:

- (A) What does the word "or" mean in [the exceptions clause]?
- (B) Can the "other means of evaluation" include participation in a kindergarten setting after [Heather] is five years old so that a teacher may evaluate her performance by observation? (This would mean her attendance in kindergarten classes at some point during the second semester of the 1986-87 school year.)
- (C) In accordance with section 282.3(3), can a school board require "the attainment of a greater age" only where the Code already mentions a specific age, or can they arbitrarily rewrite the Code to include an age requirement where there previously was none?

We respond to these questions as follows:

(A) "Or" implies an alternative. "When the word 'or' is used in a statute, it is presumed to be disjunctive unless the contrary legislative intent appears." Kearney v. Ahmann, 264 N.W.2d 768 (Iowa 1978). This conclusion is consistent with my response to question (3) above.

(B) Yes, "other means of evaluation" could include the recommendation of a kindergarten teacher, which implies enrollment and attendance for a period of time. However, in Heather's case she would not be able to

enroll in kindergarten second semester of this year as you suggest. The third unnumbered paragraph of Iowa Code section 282.3(2) states:

No child shall be admitted to school work for the year immediately preceding the first grade unless the child is five years of age on or before the fifteenth of September of the current school year.

Heather's birthday clearly falls after the fifteenth of September of the current school year. The language of that section of the statute is mandatory. School districts lack discretion in admitting children to kindergarten unless they are five by September 15 of the school year. 1980 Op. Att'y Gen. 258 (Hagen to Murray, State Senator, 7/2/79). Such is not the case with admittance to first grade.

(C) The subsection to which you refer in your final question reads as follows:

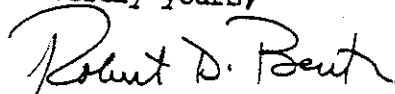
Nothing herein provided shall prohibit a school board from requiring the attainment of a greater age than the requirements herein set forth.

Iowa Code § 282.3(3) (1985). A reasonable construction of this section results in the conclusion that a school district could decide not to admit children to kindergarten whose fifth birthday fell before December 31 of the current school year, for example. It appears to give local boards authority to set a higher age entrance requirement, but not a lower one.

In summary, assuming the child meets or exceeds the readiness requirements of the district for admission to first grade, I conclude that a district may advance a pupil directly into the first grade, but is not required to do so. It is, of course, permissible for a district to include the recommendation of a kindergarten teacher in its acceleration criteria, which presupposes enrollment in kindergarten prior to advancing the student.

I have not addressed the educational issue of whether a school district's policy of blanket denial of accelerating students until after first grade would be appropriate or reasonable in every situation. Decisions such as those are best resolved on a case-by-case basis.

Sincerely yours,



Robert D. Benton, Ed.D.
Director, Department of Education

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