CHAPTER 33

Special Education for Handicapped Children

ARTICLE 1

General Provisions

Editor’s Note

Sections 59‑33‑10 through 59‑33‑110 designated as Article 1 by 2016 Act No. 242, Section 2.

**SECTION 59‑33‑10.** Legislative findings; declaration of purpose.

 The General Assembly finds that it is necessary and proper to provide an appropriate education for all handicapped children and youth enrolled in public schools or eligible for enrollment therein. It further finds that this purpose can best be accomplished through implementation of an intensive five‑year plan to expand and improve existing programs for exceptional children in the public schools. The purpose of this article is to provide for the mandatory establishment of educational and training services and facilities for handicapped children in the public schools, between the ages designated in Section 59‑63‑20, who cannot be trained adequately without special educational facilities and services.

HISTORY: 1962 Code Section 21‑295.10; 1972 (57) 2130.

Editor’s Note

Pursuant to the directive in 2016 Act No. 242, Section 2, “article” was substituted for “chapter” in this section.

CROSS REFERENCES

Director of Special Education of State Department of Education, or designee, an ex officio member of Advisory Council to S.C. Head and Spinal Cord Service Delivery System, see Section 44‑38‑380.

Provisions relating to bill of rights for handicapped persons, see Sections 43‑33‑510 et seq.

LIBRARY REFERENCES

Schools 148(2).

Westlaw Key Number Search: 345k148(2).

C.J.S. Schools and School Districts Sections 700 to 702, 717, 719.

Attorney General’s Opinions

Neither the “Education For All Handicapped Children Act”, 20 USCA Section 1401, et seq. (P.L. 94‑142), nor South Carolina law require that a local school district provide a free appropriate public education for a handicapped child who has graduated from high school and/or completed the program of special education provided in his or her individualized education program. 1979 Op Atty Gen, No 79‑92, p 126.

The State Department of Education has the legal responsibility to provide an appropriate education for all handicapped children and youth, outside the jurisdiction of the Department of Mental Retardation, who are enrolled and eligible for enrollment in public schools, including the so‑called “profoundly” mentally retarded. 1978 Op Atty Gen, No 78‑129, p 161.

**SECTION 59‑33‑20.** Definitions.

 As used in this article:

 (a) “Handicapped children” shall mean those who deviate from the normal either psychologically or physiologically to such an extent that special classes, special facilities, or special services are needed for their maximum development, including educable mentally handicapped, trainable mentally handicapped, emotionally handicapped, hearing handicapped, visually handicapped, orthopedically handicapped, speech handicapped, and those handicapped by learning disabilities as defined in item (1), Section 59‑21‑510.

 (b) “Professional workers” shall mean personnel certified and approved by the Department of Education and shall include, but not be limited to, speech and hearing specialists, mobility instructors, special education interns, special education administrators, supervisors or coordinators devoting full time to special education, and teachers of any class or program defined in this article who meet the requirements of the article.

 (c) “Special education services” shall mean, but not be limited to, special classes, special housing, homebound instruction, special rental facilities, braillists and typists for visually handicapped children, transportation, maintenance, instructional materials, therapy, professional consultant services, psychological services, itinerant services and resource services.

HISTORY: 1962 Code Section 21‑295.12; 1972 (57) 2130.

Editor’s Note

Pursuant to the directive in 2016 Act No. 242, Section 2, “article” was substituted for “chapter” in this section.

**SECTION 59‑33‑30.** Establishment by State Board of Education of program of specialized education for handicapped children; rules and regulations.

 The State Board of Education shall establish a program of specialized education for all handicapped children in this State utilizing the personnel and facilities of, and administered by, the State Department of Education under the direction of the State Superintendent of Education and shall further prescribe standards and approve the procedures under which the facilities are furnished and services provided. The Board shall establish screening, evaluating and placement procedures for handicapped students who will participate in the programs established under this article and shall determine certification requirements for teachers, minimum room size standards and standards for other equipment and materials used in such programs. To carry out the provisions of this article the Board may promulgate such rules and regulations, not inconsistent with law as it shall deem necessary and proper.

HISTORY: 1962 Code Section 21‑295.11; 1972 (57) 2130.

Editor’s Note

Pursuant to the directive in 2016 Act No. 242, Section 2, “article” was substituted for “chapter” in this section.

CROSS REFERENCES

State Board of Education regulations pertaining to instructional programs, see S.C. Code of Regulations R. 43‑220 et seq.

LIBRARY REFERENCES

Schools 148(2).

Westlaw Key Number Search: 345k148(2).

C.J.S. Schools and School Districts Sections 700 to 702, 717, 719.

United States Supreme Court Annotations

Education, learning disabled students, free and appropriate public education, reimbursement of private school tuition, lack of prior special education services through public schools, see Forest Grove School Dist. v. T.A., 2009, 129 S.Ct. 2484, 557 U.S. 230, 174 L.Ed.2d 168.

Attorney General’s Opinions

Attorney General’s office respectfully declines to issue opinion as to whether Education for All Handicapped Children Act (20 USCA Sections 1401 et seq.) requires state plans to provide education to handicapped children expelled from school for reasons unrelated to handicaps; however, state law does not appear to prohibit State Board from requiring, by regulation, that education be provided for such students if that education is undertaken in adult school, night school, or in setting other than school grounds; such would be matter of policy to be determined by Board, and Office makes no comment concerning such policy considerations. 1990 Op Atty Gen No. 90‑64.

The “Education of the Handicapped Act”, 20 USCA, Section 1401 et seq., (P. L. 94‑142) does not require that the “free appropriate public education” mandated by the Act be in excess of the regular school year, or one hundred eighty (180) days, as provided by State law and regulations of the State Board of Education. 1979 Op Atty Gen, No 79‑69, p 85.

The State Department of Education has the legal responsibility to provide an appropriate education for all handicapped children and youth, outside the jurisdiction of the Department of Mental Retardation, who are enrolled and eligible for enrollment in public schools, including the so‑called “profoundly” mentally retarded. 1978 Op Atty Gen, No 78‑129, p 161.

**SECTION 59‑33‑40.** Surveys and educational plans of school districts; annual reports

 Each school district individually or in combination with other school districts shall conduct a survey of the educational needs of all handicapped children within its jurisdiction and, with the assistance of the State Department of Education, devise an educational plan for the children concerned. This plan shall provide instruction through the use of resource rooms, crisis teachers, itinerant teachers, diagnostic/prescriptive teachers, self‑contained classes, or other models approved by the State Department of Education. The plan shall be presented to the Department for approval within one year after February 14, 1972. An annual report shall be made by each district to the Department to indicate the extent to which the plan has been implemented and to report additional planning.

HISTORY: 1962 Code Section 21‑295.13; 1972 (57) 2130.

**SECTION 59‑33‑50.** Establishment and operation of programs by school districts; contracts between districts; special arrangements for multiple‑handicapped children.

 The board of trustees of each school district shall, upon approval of its district’s plan by the State Department of Education, establish and operate a program which will insure an appropriate education for each handicapped child resident within the district and shall maintain adequate records of the training and services provided and the children participating in the program. When a school district cannot satisfy the requirements of this section by providing for the education of its resident handicapped children because of insufficient numbers, the district may contract with other districts within the State or school systems or public or private institutions or agencies within or without the State which maintain approved special educational facilities; provided, that such institutions or agencies shall accept applicable children into the program regardless of color, race, sex, or religion. The sending district must document this lack of numbers and receive prior approval from the State Department of Education. The sending district may contract and pay the receiving district or institution the per capita cost of instruction, special equipment and special services not reimbursed to the receiving district by State, Federal and other moneys plus the cost of transportation and of maintenance if the nonresident children must reside away from their homes. The district which enters into such nonresident contract arrangements, which are approved by the State Department of Education, shall be reimbursed by the department for tuition, fees, transportation and books, not to exceed the per pupil cost of educating a handicapped child of identical age in the public schools. Special arrangements for multiple‑handicapped children for whom special appropriations are provided because of the severity of their handicaps may be made with the Department.

HISTORY: 1962 Code Section 21‑295.14; 1972 (57) 2130; 1973 (58) 1862.

CROSS REFERENCES

Transportation of handicapped persons, see Section 59‑67‑520.

LIBRARY REFERENCES

Schools 148(2).

Westlaw Key Number Search: 345k148(2).

C.J.S. Schools and School Districts Sections 700 to 702, 717, 719.

Attorney General’s Opinions

Neither the “Education For All Handicapped Children Act”, 20 USCA Section 1401, et seq. (P.L. 94‑142), nor South Carolina law require that a local school district provide a free appropriate public education for a handicapped child who has graduated from high school and/or completed the program of special education provided in his or her individualized education program. 1979 Op Atty Gen, No 79‑92, p 126.

NOTES OF DECISIONS

In general 1

1. In general

Federal Individuals with Disabilities Education Act did not prohibit reimbursement to parents for cost of education of learning disabled child in private school which had not been approved by state because school did not adhere to some state teacher certification standards, where fact that placement offered by public schools was inappropriate under Act is what prompted placement of child in private school and school succeeded in providing child with appropriate education within meaning of Act. Carter By and Through Carter v. Florence County School Dist. Four (C.A.4 (S.C.) 1991) 950 F.2d 156, certiorari granted in part 113 S.Ct. 1249, 507 U.S. 907, 122 L.Ed.2d 649, affirmed 114 S.Ct. 361, 510 U.S. 7, 126 L.Ed.2d 284. Education 883

**SECTION 59‑33‑60.** Cooperation with other agencies; acceptance of donations.

 District and State educational agencies are required to cooperate with other agencies within the State, both public and private, interested in working toward the education, training and alleviation of the handicaps of handicapped children, and all such agencies are authorized to accept gifts or donations from such private agencies.

HISTORY: 1962 Code Section 21‑295.15; 1972 (57) 2130.

**SECTION 59‑33‑70.** Funding; article is supplementary.

 The General Assembly shall appropriate funds to implement the provisions of this article with initial funding for planning and organizing to begin with the fiscal year 1972‑1973. Costs for all programs for handicapped children shall be shared with the school districts on the same basis that education costs are currently provided for such children attending the public schools. The provisions of this article are supplementary to all existing programs for the education of handicapped children.

HISTORY: 1962 Code Section 21‑295.16; 1972 (57) 2130.

Editor’s Note

Pursuant to the directive in 2016 Act No. 242, Section 2, “article” was substituted for “chapter” in this section.

LIBRARY REFERENCES

Schools 19(1).

Westlaw Key Number Search: 345k19(1).

C.J.S. Schools and School Districts Sections 7, 13.

**SECTION 59‑33‑80.** Legislative declaration of policy as to residential and nonresidential programs.

 The General Assembly declares that the public policy of this State is to provide, when feasible, the resources, assistance, coordination, and support necessary to enable the handicapped person to receive an education within the context of his home and community. Where individuals have previously been placed in residential treatment centers it is recognized that the services and programs to be provided under this article will offer new resources for the care and training of such individuals at home. The governing agencies of such residential programs are encouraged to investigate the resources to be provided by this article and, where appropriate, work closely with the family, guardian, or other responsible agent to effect the meaningful return of institutionalized persons to the more normal environment of their homes and communities. At the same time, the General Assembly directs responsible agencies administering residential programs not to view this article as reason for the indiscriminate return home of current institutional residents.

 In no instance shall the governing agency of such residential center return a person to his home without the advance, written consent of his parent, guardian, or other responsible party.

 However, where the parent, guardian, or other responsible party shall oppose the recommendation of the agency administering the residential program to return the individual to his home, the agency, based upon professional judgment, may place the individual in other nonresidential programs such as foster homes, community residences, halfway residences, or other similar services designed to promote the growth and development of the handicapped individual.

HISTORY: 1962 Code Section 21‑295.17; 1972 (57) 2130.

Editor’s Note

Pursuant to the directive in 2016 Act No. 242, Section 2, “article” was substituted for “chapter” in this section.

LIBRARY REFERENCES

Schools 154(3).

Westlaw Key Number Search: 345k154(3).

C.J.S. Schools and School Districts Section 720.

**SECTION 59‑33‑90.** Subpoena power of hearing officers; placement of handicapped children in alternative programs.

 Notwithstanding any other provision of law:

 Duly appointed hearing officers of local school districts and other state operated programs shall have the power of subpoena consistent with the requirements and regulations of Public Law 94‑142.

 Regarding handicapped children placed in alternative programs for non‑educational reasons:

 (1) No agency of the State shall place handicapped children of lawful school age in residential, institutional or foster home settings without insuring that such children shall have available to them a free and appropriate public education in conformance with the provisions of Public Law 94‑142.

 (2) In placing children determined to be handicapped by State Board of Education regulations, state agencies must procure, except in emergency situations, advance approval by the State Department of Education. The Department shall insure that an appropriate Individual Education Plan shall be developed by the pupil’s home school district and that the proposed educational placement meets all the provisions of Public Law 94‑142.

 Regarding handicapped children placed in other programs for educational reasons, when local school districts must place handicapped children of lawful school age in programs external to the child’s home district for educational reasons, the district making the placement shall insure that such placement shall be at no cost to parent or child including room, board, education and related services and non‑medical care.

HISTORY: 1980 Act No. 482, Section 2B‑D.

CROSS REFERENCES

Inclusion of children admitted to residential institutions of the Department of Mental Health with respect to participation in district programs for handicapped children supported under the Educational Finance Act, see Section 59‑20‑41.

Protective services for developmentally disabled persons, see Sections 43‑35‑5 et seq.

Special educational services for which state aid is allowed, see Section 59‑21‑540.

Federal Aspects

For Public Law 94‑142, see generally, notes, 20 U.S.C.A. Sections 1401, 1411‑1420,.

LIBRARY REFERENCES

Schools 154(3), 155.5(1).

Westlaw Key Number Searches: 345k154(3); 345k155.5(1).

C.J.S. Schools and School Districts Sections 704, 720.

**SECTION 59‑33‑100.** Special education for emotionally handicapped pupils.

 In addition to those services currently provided to “emotionally handicapped pupils” as those pupils are defined in subsection (4) of Section 59‑21‑510, the State Department of Education shall contract with the Continuum of Care Policy Council to provide services approved by the State Board of Education to enable “emotionally handicapped pupils” to benefit from special education.

HISTORY: 1984 Act No. 512, Part II, Section 9, Division II, Subdivision A, SubPart 6, Section 1.

LIBRARY REFERENCES

Schools 148(3).

Westlaw Key Number Search: 345k148(3).

C.J.S. Schools and School Districts Sections 700 to 702, 719.

**SECTION 59‑33‑110.** Mediation as part of due process provision.

 The State Board of Education shall establish a mediation process as a part of the “due process” provision required in accordance with Public Law 94‑142. If all parties agree, mediation will be used before any due process hearings required by Public Law 94‑142 or at any time during the due process procedures. During discussions of the mediation process with parents, it must be clearly stated that the right of the parents or the school district to due process is in no way compromised by agreeing to mediation and that neither parents nor the school district are bound by the outcomes of mediation. The mediation process must be developed by July 1, 1994, and implemented during the 1994‑95 school year.

HISTORY: 1993 Act No. 86, Section 2.

Federal Aspects

Public Law 94‑142, as amended, see 20 U.S.C.A. Sections 1400 et seq.

LIBRARY REFERENCES

Schools 155.5(1).

Westlaw Key Number Search: 345k155.5(1).

C.J.S. Schools and School Districts Section 704.

ARTICLE 3

Adult Students with Disabilities Educational Rights Consent Act

**SECTION 59‑33‑310.** Short title.

 This chapter may be cited as the “Adult Students with Disabilities Educational Rights Consent Act”.

HISTORY: 2016 Act No. 242 (H.5021), Section 1, eff June 5, 2016.

CROSS REFERENCES

Protection of persons under disability and their property, “supports and assistance” defined, see Section 62‑5‑101.

**SECTION 59‑33‑320.** Transfer of rights to eligible adult student; exceptions.

 When a student who is eligible for special education under the Individuals with Disabilities Education Act “IDEA”, 20 U.S.C. Section 1411, et seq., reaches age eighteen or is emancipated by a court of competent jurisdiction, all rights accorded to the student’s parents under this article transfer to the student except as provided in Sections 59‑33‑330 and 59‑33‑340. Nothing in this article may be construed to deny an adult student eligible for special education the right to have an adult of his choice support the student in making decisions regarding the student’s individualized education program.

HISTORY: 2016 Act No. 242 (H.5021), Section 1, eff June 5, 2016.

**SECTION 59‑33‑330.** Delegation of right to make educational decisions.

 An adult student who is eligible for special education, who has not been determined to be incapacitated pursuant to Article 5, Title 62, may delegate his right to make educational decisions to another adult. An adult student may delegate educational rights by naming an agent through a duly executed power of attorney or by using a form that the State Department of Education shall develop and provide.

HISTORY: 2016 Act No. 242 (H.5021), Section 1, eff June 5, 2016.

CROSS REFERENCES

Transfer of rights to eligible, adult, student, exceptions, see Section 59‑33‑320.

**SECTION 59‑33‑340.** Identification of eligible adult student as incapable of communicating educational program wishes, interests, or preferences; procedures; designation of educational representative.

 An adult student who is eligible for special education and has not been determined to be incapacitated pursuant to Article 5, Title 62, may be identified as incapable of communicating, with or without reasonable accommodations, his wishes, interests, or preferences with respect to his educational program as early as sixty calendar days before his eighteenth birthday or sixty‑five business days before an eligibility meeting, if he is undergoing initial eligibility for special education services, and also may have an educational representative designated pursuant to the following procedures:

 (1)(a) The student’s physician, nurse practitioner, physician’s assistant, psychologist, or psychiatrist must certify in writing to the local education agency in which the adult student is enrolled that he has examined or interviewed the student and, based upon this exam, finds the student incapable of communicating, with or without reasonable accommodations, his wishes, interests, or preferences regarding his educational program. The licensed professional’s certification must include the date of the examination, the basis for the determination, and whether the student’s incapability of communicating, with or without reasonable accommodations, his wishes, interests, or preferences with respect to his educational program is likely to last until after age twenty‑one. The licensed professional’s certification must remain in effect during the period the student receives educational services as an adult, regardless of whether the student transfers to another school or local education agency, if the student’s subsequent local education agency is promptly provided with the documentation that the prior local education agency relied on in allowing an educational representative to participate on the student’s behalf. The licensed professional referenced in this item may not be an employee of the local education agency or state education agency serving the student.

 (b) For the purposes of this section, a person is considered incapable of communicating, with or without reasonable accommodations, his wishes, interests, or preferences if he is unable to:

 (i) express, either verbally, through an interpreter, or through augmented communication devices, his wishes, interests, or preferences for his education program; or

 (ii) understand, even with the support from family, administrators, and experts in the field, what choices are available in a proposed education decision or program. “Support” in this context includes a wide range of disability supports, including explaining options in plain language, using interpreters, providing visual aids, providing the information more slowly, or in similar chunks, or any other method that is effective in communicating with the student with a disability.

 (2) Upon receiving the certification, the superintendent of the local education agency or his designee shall, within ten days, provide a copy of the designation to the student and notify him in writing that a professional has certified that he is incapable of communicating, with or without reasonable accommodations, his wishes, interests, or preferences with respect to his educational program and that an educational representative will be designated to make such decisions for him. The superintendent also shall notify the student in writing that he has a right to challenge the designation of the educational representative.

 (3) A challenge to the designation of an educational representative must be made in writing and may be made by the student or by another person with a bona fide interest and knowledge of the student, except that challenges may not be made by an employee of a local education agency or state education agency. A challenge by an adult student must assert that he is capable of communicating, with or without reasonable accommodations, his wishes, interests, or preferences concerning his educational program as provided in this section.

 (a) A challenge may be made at any time during which an educational representative is designated to act on the adult student’s behalf. A challenge must be provided in writing to the superintendent of the local school district or his designee, who shall within ten business days notify the student and current appointed representative in writing.

 (b) Upon receipt of a written challenge in accordance with this section, the local education agency may not rely on an educational representative for any purpose.

 (4) If the adult student does not object to the designation, his custodial parent or adult spouse may act as the educational representative. If the custodial parent or the adult spouse are unavailable to act on behalf of the student, the educational representative may be an adult sibling, grandparent, or other adult relative, in that order of priority. If these relatives are not willing and able to serve as the educational representative of the adult student, then the local education agency providing services to the student shall designate a surrogate parent, as defined in 34 C.F.R. Section 300.519 to serve in this capacity.

 (5) The authority of an educational representative is limited to the authority to consent to educational services, and specifically does not include the authority to remove an adult student from educational services. The authority of an educational representative continues until he challenges the designation, he is no longer eligible for special education, or an order is issued pursuant to Article 5, Title 62, which terminates the authority of the educational representative.

HISTORY: 2016 Act No. 242 (H.5021), Section 1, eff June 5, 2016.

CROSS REFERENCES

Transfer of rights to eligible, adult, student, exceptions, see Section 59‑33‑320.

**SECTION 59‑33‑350.** Authority of educational representative.

 The educational agent or educational representative is authorized to make educational decisions for a student and has the same rights as the student to participate in the individualized educational program and to request, receive, examine, copy, and consent to the disclosure of the plan or another educational record. The educational agent or the educational representative shall participate based upon a determination of the student’s preferences to the extent they can be determined. If the student’s preferences cannot be determined, then the decisions must be based upon the student’s best interest as determined by the educational agent or educational representative. An educational agent or educational representative who in good faith makes a decision about educational services is not subject to civil or criminal liability because of the substance of the decision.

HISTORY: 2016 Act No. 242 (H.5021), Section 1, eff June 5, 2016.

**SECTION 59‑33‑360.** Transition plan.

 As part of the student’s transition plan, starting at age thirteen, local education agencies shall assist students eligible for special education with the transition to adulthood, including the need to make educational decisions.

HISTORY: 2016 Act No. 242 (H.5021), Section 1, eff June 5, 2016.

**SECTION 59‑33‑370.** Promulgation of regulations, policies, and guidelines.

 The South Carolina Department of Education shall promulgate regulations, policies, and guidelines to implement this article.

HISTORY: 2016 Act No. 242 (H.5021), Section 1, eff June 5, 2016.