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OFFICIAL OPINION NO. 15-02

RE: **SDCL 13-28-51: Partial enrollment of a student receiving alternative instruction**

Dear Mr. Freeman;

The Attorney General received a request for an official opinion from you on behalf of the Britton-Hecla School District Board of Education.

Question:

Does SDCL 13-28-51 provide a school district with the discretion to require that a student excused from attendance, by means of receiving alternative instruction pursuant to SDCL 13-27-2 and SDCL 13-27-3, first attend on a full-time basis before the school district considers allowing the student to attend on a partial basis?

Answer:

No. Pursuant to SDCL 13-28-51, if requested by a parent who is a resident of the school district, partial enrollment of a child excused from attendance by SDCL 13-27-2 must be allowed.

Facts:

A parent who is a resident of the Britton-Hecla School District requests their child be allowed to attend public school on a partial basis. The child is receiving alternative instruction and was previously excused from full-time attendance by means of SDCL 13-27-2 and SDCL 13-27-3. The School District has interpreted SDCL 13-28-51 to initially require full-time enrollment to the public school subject to the discretion of the School District to allow partial enrollment at a later date.

In re Question:

Pursuant to SDCL 13-27-2 and 13-27-3, a child may be excused from school attendance if that child is provided with alternative instruction for a period of time equal to that of a child attending public school. Children excused from attendance by SDCL 13-27-2, however, may again be admitted to a public school by operation of SDCL 13-28-51 which provides:

> The resident school district of a child excused from school attendance pursuant to § 13-27-2 shall admit that child to a public school in the district upon request from the child's parent or legal guardian. A child enrolled in a school district pursuant to this section may be enrolled in a school of the school district on only a partial basis and shall continue to also receive alternative instruction pursuant to § 13-27-3.
> (emphasis added).

As a matter of statutory construction, "...the term, shall, manifests a mandatory directive and does not confer any discretion in carrying out the action so directed." SDCL 2-14-2.1; *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 21, 757 N.W.2d 756, 762-63 ("[w]hen 'shall' is the operative verb in a statute, it is given 'obligatory or mandatory' meaning.") (citations omitted). Additionally, "Words and phrases in a statute must be given their plain meaning and effect." *Pete Lien & Sons, Inc. v. Zellmer*, 2015 S.D. 30, ¶ 35, 865 N.W.2d 451, 463 (citations omitted). When the language is "clear, certain and unambiguous", the statute must be applied as clearly expressed. *Id.*

Here, SDCL 13-28-51 is not ambiguous and must be applied as written. By the use of the word "shall" in the first sentence of SDCL 13-28-51, the Legislature determined admittance is not discretionary. SDCL 13-28-51 plainly requires that children previously excused from attendance pursuant to SDCL 13-27-2 shall be admitted to the public school. Accordingly, a child previously excused from attendance pursuant to SDCL 13-27-2 is guaranteed admittance to a public school within the district in which they reside.

The second sentence of SDCL 13-28-51, however, provides "[a] child admitted pursuant to this section may be enrolled...on only a partial basis" provided the child continues to receive alternative instruction in accordance with SDCL 13-27-3. "A statute must be read as a whole and effect must be given to all its provisions. The Legislature does not intend to insert surplusage in its enactments." *Nat'l Farmers Union Prop. & Cas. Co. v. Universal Underwriters Ins. Co.*, 534 N.W.2d 63, 65 (S.D. 1995) (citations omitted). Pursuant to the first sentence of SDCL 13-28-51, the admission of the child is mandatory and unconditional. The statute is likewise clear that such enrollment may be on a partial basis. Both the mandatory and permissive portions of SDCL 12-13-51 must be given effect. Had the Legislature intended to provide the school district with discretion to condition admittance on full-time enrollment, it would not have used the term "shall" to require the school district to admit a child. S*tate v. Young*, 2001 S.D. 76, ¶ 12, 630 N.W.2d 85, 89 (The Legislature "knows how to exempt or include items in its statutes"). Instead, partial enrollment was provided as an option with admittance being guaranteed. The School District cannot, therefore, condition admittance on full-time enrollment.

In conformance with the canons of statutory construction, both provisions of SDCL 13-28-51 are given effect by requiring admission of the child and providing the parents with the choice of enrollment on a full-time or partial basis.

Sincerely,

Marty J. Jackley
Attorney General

MJJ/RW/lde