

## **N.D.A.G. Letter to Sanstead (Sep. 12, 1990)**

September 12, 1990

Honorable Wayne G. Sanstead  
Superintendent  
Department of Public Instruction  
State Capitol  
600 East Boulevard Avenue  
Bismarck, ND 58505

Dear Dr. Sanstead:

Thank you for your June 14, 1990, letter concerning approval of rules you have prepared pursuant to 1989 N.D. Sess. Laws ch. 198 § 5(4). You requested a review of the rules pursuant to N.D.C.C. § 28-32-02, as well as response to three specific questions. My opinion concerning the legality of the rules pursuant to N.D.C.C. § 28-32-02 has been provided to you separately. This is my response to the three separate questions you asked.

Your first question relates to the validity of including a rule requiring a nationally standardized academic aptitude test in addition to the nationally standardized achievement test.

You indicate an academic aptitude test is needed to provide the local school superintendent with knowledge of a student's academic potential to compare to achievement test results for the determination of reasonable academic progress. You also indicate that the results would aid the parent in conducting home-based instruction, would make the local superintendent's determination about academic progress less subjective and would further the best interests of the student.

Public administrators with the responsibility for administering legislation cannot adopt rules that exceed or supersede statutory authority providing them with regulatory power. Medical Properties v. North Dakota Board of Pharmacy, 80 N.W.2d 87 (N.D. 1956). Rules are adopted by public administrators to provide specifics for the administration of law that have not been included in the basic legislation administered. Our supreme court has determined that administrative rules have a presumption of validity comparable to that of the presumption of validity of legislation. Newman Signs, Inc. v. Hjelle, 268 N.W.2d 741, 750 (N.D. 1978).

The question then becomes whether 1989 N.D. Sess. Laws ch. 198 provides the Superintendent of Public Instruction with authority for including academic aptitude testing as part of the information used to determine reasonable academic progress. In interpreting statutes, words must be given their plain, ordinary and commonly understood meaning, and consideration should be given to the ordinary sense of statutory words, the

context in which they are used, and the purpose which prompted their enactment. N.D.C.C. § 1-02-02. Coldwell Banker v. Meide and Son, Inc., 422 N.W.2d 375 (N.D. 1988). Additionally, if a statute is ambiguous because it does not specifically resolve the issue at hand, extrinsic aids may be used to determine the legislative intent. N.D.C.C. § 1-02-39.

Although academic aptitude testing was not specifically mentioned, the Superintendent of Public Instruction was delegated the authority and responsibility for adopting rules for the determination of reasonable academic progress for the purpose of quality assurance in home school education. Thus, the legislation may be considered ambiguous. It is therefore appropriate to consider the above-cited rules of statutory construction and review the meaning of the statute, giving consideration to its context, its purpose, and the object sought to be attained.

N.D.C.C. § 15-21-04 gives the Superintendent of Public Instruction general supervision of common and secondary schools. Because of the state's compelling interest in assuring its citizens a quality education (1989 N.D. Sess. Laws ch. 198), the Superintendent of Public Instruction was given responsibility to adopt rules to provide quality assurance in education and the determination of reasonable academic progress.

The introductory language of section 5 of chapter 198 deals with the state's compelling interest in quality education for its citizens and describes those subsections which follow as being "minimum indices" of a quality education. The word "indices" was modified by the word "minimum" by amendment during the legislative session. This preliminary language is not limited to those students who score less than the 30th percentile on standardized achievement tests as far as the state's compelling interest or the minimum indices in quality education are concerned.

Subsection 1 of section 5 requires a standardized achievement test for all students. It is therefore one of the minimum indices of a quality education to be used by the public school district or state-approved private school and is to be administered by a certified teacher.

Subsection 2 addresses test scores on the achievement test and those students which score below the 30th percentile nationally, including the assessment of the need for special education or the presence of a developmental disability. This determination is by the multidisciplinary assessment team and "licensed professionals."

Subsection 3 sets out the duties of a supervising teacher who would be utilized if a supervised program was required based on the qualifications of the parent desiring to provide home-based instruction. This supervisory teacher evaluates the student's progress and reports to the local or county superintendent on that evaluation.

Subsection 4 deals with the duty of the local or county superintendent of schools to determine reasonable academic progress. This requirement is not limited to certain students but is a general requirement. The local or county superintendent will use all

reports and tests from unsupervised and supervised home-based schools that are required to be filed with the local or county superintendent. This reasonable academic progress determination is made by considering the child's age or stage of development pursuant to subsection 4, and the parent is notified and must make a good faith effort to remedy any deficiencies. Both subsections 2 and 4 of section 5 of chapter 198 use language that modifies the term "reasonable academic progress" by relating it to "learning abilities" or "consistent with the child's age or stage of development."

The state has a compelling interest in quality education for all students. The Legislature has set out only "minimum indices" of quality education, and has placed the responsibility on the state Superintendent of Public Instruction to guide those with the responsibility to determine reasonable academic progress. Therefore, the state Superintendent of Public Instruction's ability to provide guidance by rule is not limited to only those methods set forth by the Legislative Assembly.

Furthermore, because a certified teacher and an approved and supervised educational system will not have continuous contact and association with home schooled students, the state Superintendent of Public Instruction must have the ability to promulgate rules setting forth standards and procedures that will allow for a determination of reasonable academic progress in a manner as reliable as determinations made by public or approved private schools for their students.

The Superintendent of Public Instruction has general supervisory responsibility for all the common and secondary schools. The Legislature recognized the responsibility and expertise of the Superintendent and the Department of Public Instruction and delegated the administration of quality assurance standards for home-based schooling in this state to the Superintendent. The Legislative Assembly therefore places reliance on the state Superintendent to determine standards of quality assurance that will fulfill the state's compelling interest in education for all of its citizens.

It cannot be reasonably expected that the Legislative Assembly expected local or county superintendents of schools and other licensed professionals to make the determination of reasonable academic progress without information and standards for guidance. The state Superintendent was given the duty to adopt rules to assist local educators and to provide uniformity and objectivity in making that determination. Unless statewide standards and information are supplied, each school superintendent or county superintendent would be left to make determinations on reasonable academic progress without the objectivity and uniformity provided by statewide rules. The determinations between districts could therefore vary greatly as to how such decisions were made and the basis for them.

The object of chapter 198 of the 1989 Session Laws is to provide temporary permission to engage in home-based instruction. However, the determination of quality education is not left to the parent but to public officials with expertise in making those determinations. The Legislative Assembly expressly provided for "minimum indices" of quality education recognizing that home schooled students would be the only group of students in this state

who did not have continuous contact with certificated teachers and other trained personnel in the education system.

Considering the statutory language noted above, and the temporary nature of the home-based instruction law, it is my opinion that the state Superintendent may establish uniform criteria for determining reasonable academic progress, including a requirement for the administration of a nationally standardized academic aptitude test.

Your second question asks whether the rules you propose provide for the determination of reasonable academic progress for a handicapped student if the parent rejects services made available by a public school. The rules you have adopted do not specifically deal with the subject of rejection of services by the parents of a handicapped child.

The rules as proposed, together with the statute they implement, contemplate cooperation by all parties involved, including the parent, teachers, administrators, and other licensed professionals, who may be part of the multidisciplinary assessment team or the individual education program team.

If that cooperation does not result in a quality education and reasonable academic progress for all students, handicapped and non-handicapped, it would be appropriate to proceed under section 3 of chapter 198 for a determination by the court of the presence of educational deprivation.

Your last question relates to whether the rules that you have proposed provide the maximum safeguards for the rights of the students and parents. It is not clear whether your question relates to only students requiring special education or to all students.

You apparently relate the term "maximum safeguards" to the term "due process" with respect to this question. Naturally, the process that is due varies from situation to situation. It appears that the rules that you propose provide substantial due process rights, and that the review and determination by professional educators, licensed professionals such as school psychologists or clinical psychologists, the parents, and other persons, further the goal of quality education in North Dakota.

Sincerely,

Nicholas J. Spaeth

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