

N.D.A.G. Letter to Sanstead (Dec. 22, 1989)

December 22, 1989

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

Dear Dr. Sanstead:

Thank you for your July 10 letter in which you request an Attorney General's opinion concerning the new home-based instruction exemption to the compulsory attendance law. I apologize for the delay in responding to your letter.

You request an opinion on whether parents may continue to seek approval as a private school under N.D.C.C. § 15-34.1-03 even though they fit the definition of home-based instruction set forth in section 4 of House Bill No. 1421. In conjunction with this question, you indicate that previously the state superintendent and county superintendent approved a "home school" as a private school if the statutory requirements were met. You ask if this practice may continue. You also request an opinion on whether the use of the word "parent" in the home-based instruction statute, set forth in section 4 of House Bill No. 1421, includes "parent, guardian, or other person" which is referenced in the introduction to N.D.C.C. § 15-34.1-03.

Prior to 1989, there was no exception to the compulsory attendance law for children who were being educated at home by a parent or parents. In addition to three exceptions that are not relevant here, the following was the exception to the compulsory attendance statute:

That the child is in attendance for the same length of time at a parochial or private school approved by the county superintendent of schools and the superintendent of public instruction. No such school shall be approved unless the teachers therein are legally certificated in the state of North Dakota in accordance with section 15-41-25 and chapter 15-36, the subjects offered are in accordance with sections 15-38-07, 15-41-06, and 15-41-24, and such school is in compliance with all municipal and state health, fire, and safety laws.

N.D.C.C. § 15-34.1-03(1). The compulsory attendance law does not define the term "private school." N.D.C.C. § 15-34.1-03(1) prohibits the county superintendent or the superintendent of public instruction from approving a private or parochial school unless the school "is in compliance with all municipal and state health, fire, and safety laws."

N.D.C.C. ch. 18-12, which establishes a fire prevention code for school buildings, defines a private school as "an educational institution which students attend in lieu of public school attendance." N.D.C.C. § 18-12-02 (emphasis supplied). Therefore, the fire safety laws indicate that a private school is an institution and not a home in which parents teach their own children. The exception for private schools, considered along with the fire safety laws, suggests that private schools do not include home-based instruction.

More significantly, the Legislature has recently created separate and distinct exceptions for private schools and home-based instruction programs. In 1989, the 51st Legislative Assembly enacted a new exception to the compulsory attendance law for home-based instruction. 1989 N.D. Sess. Laws ch. 198. The compulsory attendance law now contains an exception for a child who "is receiving home-based instruction in accordance with the provisions of this chapter." *Id.* 2. "Home-based instruction" is defined as "an educational program for students based in the child's home and supervised by the child's parent or parents." *Id.* 4.

The legislative history of House Bill No. 1421 indicates that it was intended to both legalize and regulate "home-based instruction." See Hearings on H. 1421 Before the N.D. Senate Comm. on Education, 51st Legis. (1989).

The term "home-based instruction" is used throughout 1989 N.D. Sess. Laws ch. 198 rather than the term "home school." The deliberate omission of the word "school" in this exemption suggests an intent on the part of the Legislature to distinguish between what are commonly referred to as "schools" and an educational program based in a child's home and supervised by the child's parent or parents.

In addition, section 4 of 1989 N.D. Sess. Laws ch. 198 requires a parent providing home-based instruction to maintain certain records and to "furnish these records to any school to which the child may transfer upon request of the superintendent or other administrator of that public school district." *Id.* 4 (emphasis supplied). The statute also provides that a non-certified or non-certifiable parent must be supervised by a certified teacher either employed by the public school district in which the parent resides or by a state-approved private or parochial school. Section 5 of the session law requires a child receiving home-based instruction to take a standardized achievement test used by the school district in which the child resides or used by a state-approved private or parochial school. The test is to be administered by a certified teacher either employed by the public school district in which the parent resides or by a state-approved private or parochial school. *Id.* 5. These provisions indicate that the Legislature did not consider the terms "private school" or "parochial school" to encompass home-based instruction.

The language in the home-based instruction exception to the compulsory attendance law combined with the new exemption specifically for home-based instruction, indicates that the Legislature has established separate and distinct exceptions for private schools and parents teaching their children at home. The Legislature has thereby also indicated an intent that if a program meets the definition of home-based instruction, then the program cannot constitute a private school within the meaning of N.D.C.C. § 15-34.1-03(1).

The supreme court of Virginia reached the same conclusion in a case involving similar statutory exemptions for private schools and home-based instruction. See Grigg v. Commonwealth, 224 Va. 356, 297 S.E.2d 799 (1982). The Virginia compulsory school attendance law provided, in part, "that parents shall send their school-age children to 'a public school, or to a private, denominational or parochial school, or have such . . . children taught [in a home] by a tutor or teacher of qualifications prescribed by the State Board of Education and approved by the division superintendent . . .'" 297 S.E. 2d 799, 800. Mrs. Grigg was instructing her children at home, but had not sought or received approval as a qualified tutor or teacher. *Id.* at 801. The Griggs argued that they had established their own private school, which schools were not regulated in Virginia, and that they therefore were in compliance with the compulsory attendance law. *Id.* The Virginia Supreme Court disagreed.

The court held that "the creation of separate and distinct categories of exemption for private schools on the one hand and home instruction on the other is determinative of the question whether mere home instruction may constitute attendance at a private school." *Id.* at 802-03. The Virginia Supreme Court further held this determinative effect is not dependent on whether the statutes regulate private schools. Finally, the supreme court of Virginia noted:

In Code 22-275.1, the General Assembly clearly created separate and distinct categories of exemption from public school attendance -- private schools and home instruction representing two such categories. With respect to these two categories, it was the obvious legislative intent that one exemption should operate in one set of circumstances and the other in a different set, else there would have been no reason to create both exemptions.

Id. 803.

Based on the foregoing discussion, it is my opinion that the Legislature's creation of separate and distinct exceptions for private schools and home-based instruction means that those who fit within the definition of "home-based instruction" cannot constitute a "private school" within the meaning of N.D.C.C. § 15-34.1-03(1).

Your second request concerns whether the use of the word "parent" in section 4 of House Bill No. 1421 includes "parent, guardian, or other person" as referenced in the introduction to N.D.C.C. § 15-34.1-03.

N.D.C.C. § 15-34.1-03 establishes the exceptions to the compulsory attendance law. The first paragraph of N.D.C.C. § 15-34.1-03 refers to "parent, guardian, or other person." The home-based instruction exception set out in subsection 5, however, provides: "[t]hat the child, not including a child with developmental disabilities as defined by subsection 1 of section 25-01.2-01, is receiving home-based instruction in accordance with the provisions of this chapter." N.D.C.C. § 15-34.1-03(5) (emphasis supplied).

The pertinent "provisions of this chapter" which govern home-based instruction are set out at sections 4 and 5 of House Bill No. 1421. 1989 Sess. Laws ch. 198, §§ 4, 5. Those sections are specific in making reference only to "parent" or "parents." They are clear and unambiguous in this regard and no reference whatsoever is made to "guardian, or other person."

The legislative history surrounding the enactment of House Bill No. 1421 also supports the conclusion that home-based instruction is limited to a "parent" or "parents." The following question and response occurred at one legislative hearing:

Representative Gerald Halmrast:

Under this bill does it require that the teacher be the parent or could it be possible for the parent to farm out a student to somebody else who is certified?"

Solicitor General Jim Vukelic:

Mr. Chairman, Representative Halmrast, it would have to be a parent. The bill is specific as to that.

Hearing on H. 1421 Before the N.D. House Education Comm., 51st Leg. (Feb. 8, 1989)
(testimony of Jim Vukelic).

It could be contended that N.D.C.C. § 15-34.1-03, which makes reference to "parent, guardian or other person," conflicts with sections 4 and 5 of House Bill No. 1421 (1989 N.D. Sess. Laws ch. 198, 4, 5), which only make reference to "parent" or "parents." It could also be contended that such a conflict is irreconcilable. N.D.C.C. § 1-02-07 provides that if there is an irreconcilable conflict between two provisions "the special provision must prevail and must be construed as an exception to the general provision, unless the general provision is enacted later and it is the manifest legislative intent that such general provision shall prevail." The 1971 Legislative Assembly enacted the legislation which provides the reference to "parent, guardian, or other person" set out in the first paragraph of N.D.C.C. § 15-34.1-03. 1971 N.D. Sess. Laws ch. 158, 5. This statute would be a general provision in relation to home-based instruction. The 1989 Legislative Assembly enacted the home-based instruction statutes set out at sections 4 and 5 of House Bill No. 1421.

N.D. Sess. Laws ch. 198, § 4, 5. These statutes would be special provisions covering home-based instruction.

Application of the rule of statutory interpretation set forth in N.D.C.C. § 1-02-07 results in the conclusion that sections 4 and 5 of House Bill No. 1421 (1989 N.D. Sess. Laws ch. 198, 4, 5), which contain the reference to "parent" and "parents," prevail over N.D.C.C. § 15-34.1-03, which makes reference to "parent, guardian, or other person."

Based upon the analysis set forth above it is my opinion that the use of the word "parent" in section 4 of House Bill No. 1421 does not also include "guardian, or other person" which is set out in the first paragraph of N.D.C.C. § 15-34.1-03.

I hope this discussion is helpful to you.

Sincerely,

Nicholas J. Spaeth

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