

1989 S.C. Op. Atty. Gen. 60 (S.C.A.G.), 1989 S.C. Op. Atty. Gen. No. 89-22, 1989 WL 406112

Office of the Attorney General

State of South Carolina
Opinion No. 89-22
February 27, 1989

*1 The Honorable Charlie G. Williams
State Superintendent of Education
Department of Education
Rutledge Office Building
1429 Senate Street
Columbia, South Carolina 29201

Dear Dr. Williams:

You have requested the advice of this Office as to several questions concerning the amendments to the home instruction law passed by the legislature this year. Section 59-65-40 of the Code of Laws of South Carolina, 1976, as amended by Act 593 of 1988 (amendments). The amendments set forth a procedure for the approval of home instruction programs by school district boards of trustees. Your questions are separately addressed below.

You have asked whether a school district can require an on-site visit to the home as a condition prior to approval, and whether such visits can be made during the year to an approved program to determine whether the program is consistent with specified standards. Nothing in the amendments expressly provides for such an on-site visit. The only reference to the place of instruction is in Section (1)(B) of the amendments which reads as follows:

“The District Board of Trustees shall provide for an application process which elicits the information necessary for processing the home schooling request, including a description of the program, the text and materials to be used, the methods of program evaluation, and the place of instruction (emphasis added).”

The dominant factor in the construction of statutes is the intent of the legislature. *Spartanburg Sanitary Sewer District v. City of Spartanburg*, 283 S.C. 67, 321 S.E.2d 258 (1984). Because the amendments do not expressly provide for an on-site visit and because the only reference to the site is in the “description” of the place of instruction, a reasonable reading of the whole statute (Sutherland Statutory Construction, Volume 2A, Section 46.05) indicates that the legislature's intent was not to authorize blanket requirements for on-site visits. Although the place of instruction is not expressly listed as a standard for approval, if the description of the place of instruction requested to be submitted with the application is determined to be inadequate, the amendments do not appear to preclude school districts from requesting additional information which, at the option of the parents, could include an on-site visit.

Whether an application for home instruction could be disapproved upon the basis of the information supplied about the site in a description or an on-site inspection is not made expressly clear by the amendments. The use of mandatory language (Sutherland, Vol 2A, § 57.03) in the standards for approval could indicate that the place of instruction may not be a basis for disapproval of a program because it is not listed as a standard (§ 59-26-40(A)); however, the legislature is presumed not to pass legislation having no effect (Sutherland Vol 2A, § 46.05) which would mean that the requirement for including a description of the place of instruction with the application has a purpose. That the application is considered by a board of trustees at a meeting indicates the legislature's purpose of requiring a description of the place of instruction is related to the approval of the application; however, because the place of instruction is not an express standard for approval, school districts should be very cautious in relying upon the place of instruction as a basis for disapproving the application. Because information is required to be presented by the parents as to the students' receipt of regular instruction and academic progress and because students are to participate in grade level testing (§ 59-65-40(A)(4), (A)(6)

and (D)), the legislature has indicated an intent (Spartanburg, Supra.) that students receive regular instruction, achieve academic progress and perform at grade level. Accordingly, if a school district made a factual determination that the place of instruction was so inadequate as to interfere substantially (cf. § 1-23-380) with this intent for regular instruction, academic progress and grade level testing, such a determination might withstand a legal challenge; however, legislative clarification of these requirements may be desirable because of the absence of express guidance on this issue.

*2 You have also asked whether such on-site visits can be scheduled during the year to determine whether standards are being met. Although a board of trustees may notify parents to correct deficiencies if the school district determines that the parent is not maintaining the home school program in keeping with specified standards, the same reasons given for the absence of an intent to authorize blanket on-site visitation requirements prior to approval would indicate that no such on-site visit requirements could be imposed subsequently to determine whether standards are being maintained. See § 59-65-40(A)(7). In addition, the description of the place of instruction is only required to be a part of the application rather than an interim report. § (1)(B).

You have also asked whether a district can require a parent to present evidence of satisfactory completion of a prior grade before allowing the parent to seek approval for home instruction in the next higher grade. Here, although the amendments contain no express requirement for the presentation of evidence of satisfactory completion of a prior grade, the amendments' requirements for curriculum, information as to text and materials used, provision for readiness testing under the statewide testing program and Basic Skills Assessment Program for first grade students and requirements for testing for the students' "appropriate grade level" indicate that the legislature contemplated that the students would be taught on an appropriate grade level. Therefore, requesting information as to satisfactory completion of the prior grade level would seem to be consistent with legislative intent. Spartanburg, Supra.

You have also asked whether placement testing may be required if a parent cannot produce evidence of satisfactory completion of a prior grade. This question involves factual issues as to whether placement testing is the appropriate method of determining satisfactory completion of a prior grade. Because Opinions of this Office do not address factual questions, an administrative determination should be made as to whether placement testing is necessary for particular students. (Ops.Atty.Gen., December 12, 1983)

You have also asked whether a person other than a parent or guardian can be approved to teach a child or children in a home instruction setting. Giving the amendments their plain meaning (South Carolina Department of Highways and Public Transportation v. Dickinson, 341 S.E.2d 134 S.C. (1986)) indicates that the Legislature intended that only parents or guardians may be approved under the terms of the amendments to teach their children at home because the General Assembly's language clearly refers only to approval for the parents or guardians and the educational qualifications of them. § 59-65-40(A)(1). Therefore, if permission is desired for persons in addition to parents or guardians to teach in the home, such authorization would need to come from the legislature. I assume that you are inquiring only about regular instruction from particular individuals, and I do not address herein the question of occasional guest lecturers or field trips.

*3 For these same reasons, the General Assembly also does not appear to have provided authorization in the amendments for teaching children from more than one family by the parent or guardian of one of the children. The legislature would need to amend the home instruction amendments to provide such permission if such permission is desired. In determining that the amendments do not provide authorization for person to teach children at home other than the parents or guardians of the children being taught, I do not reach the questions of whether the teaching of children of more than one family would be authorized by other statutory authority. See e.g. § 59-65-10 of the Code as amended.

In conclusion, as to the first two of your questions, a reasonable reading of the amendments for home school instruction indicates that no blanket requirement can be imposed for on-site visits to a home prior to approval of a home instruction program or subsequently. Such visits could be made prior to approval only if the parent or guardian agrees to such

visits as an alternative to presenting additional information as to the place of instruction. Additionally, school districts should be very cautious in disapproving a home instruction program on the basis of the place of instruction. A decision disapproving the place might be supportable upon a factual determination that the place of instruction clearly and substantially interfered with regular attendance, academic progress and grade level testing performance. As to the third and fourth of your questions, the amendments clearly contemplate that a child will be taught on an appropriate grade level and an administrative determination should be made as to how such information may be provided. Finally, as to the last two of your questions, the General Assembly did not provide authorization in the amendments for students to be taught by persons other than their parents or guardians in a home instruction setting. If you have any questions, please let me know.

Yours very truly,

J. Emory Smith, Jr.
Assistant Attorney General

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