

The State of South Carolina



Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE: 803-734-3636
FACSIMILE: 803-253-6283

January 22, 1991

C. Wade Cleveland, Esquire
Legal Counsel
Greenville County School District
301 Camperdown Way
Box 2848
Greenville, SC 29602

Dear Wade:

On behalf of the Board of Trustees of the Greenville County School District, you have requested an Opinion of this Office as to several questions concerning the Home Schooling Statute, S.C. CODE ANN. § 59-65-40 (1990). Section 59-65-40 provides, in part, as follows:

A. Parents or guardians may teach their children at home if the instruction is approved by the district board of trustees of the district in which the children reside. A district board of trustees shall approve home schooling programs which meet the following standards:....

The standards that the program must meet to be approved under this statute include qualifications of the parent to teach, the length of the instructional day, the contents of the curriculum, the maintenance of records of instruction, access of the student to library facilities, and participation of the students in a statewide testing program.

The first of your questions relates to whether parents may be exempt from § 59-65-40 by claiming that their home instruction constitutes a private school under §59-65-10 or a "member school" of an "organization" under that statute. Section

C. WADE CLEVELAND, ESQUIRE

January 22, 1991

Page 2

tion 59-65-10 provides, in part, as follows:

A. All parents or guardians shall cause their children or wards to regularly attend a public or private school or kindergarten of this State which has been approved by the State Board of Education or a member school of the South Carolina Independent Schools Association or some similar organization or a parochial, denominational or church-related school, or other programs which have been approved by the State Board of Education....

The following rules of statutory construction are applicable here:

The Supreme Court's primary function in interpreting a statute is to ascertain the intention of the Legislature...where the terms of statute are clear and unambiguous, there is no room for interpretation and we must apply them according to their literal meaning." S.C. Department of Highways and Public Transportation v. Dickinson, 288 S.C. 189, 341 S.E.2d 134 (1986).

General and special statutes should be read together and harmonized if possible. But to the extent of any conflict between the two, the special statute must prevail. Criterion Insurance Co. v. Hoffman, 258 S.C. 282, 188 S.E.2d 459 (1972).

Here, the Legislature has made clear its intent that parents who teach their children at home must meet the requirements of § 59-65-40. An entire statute with particularized standards is set forth as conditions that must be met before approval of the home instruction program. The statute was enacted in 1988 (Act 593) to amend earlier legislation, and in the title stated that its purpose in making that amendment was "...to allow a parent or guardian to educate his child at home upon the approval of the home instruction by the school district board of trustees...." See Sutherland

C. WADE CLEVELAND, ESQUIRE

January 22, 1991

Page 3

Statutory Construction, Vol. 2A § 47.03. No purpose would have been served by the Legislature's providing separate, specific provisions for home instruction in § 59-65-40, if those requirements were inapplicable to home schools that claimed to be "private school[s]" or associated with other home schools in an "organization" "similar" to the South Carolina Independent Schools Association. The Legislature is presumed "not to do a futile thing." State ex rel. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964).

As a more specific statute (see Criterion) and as a more recent statute (Yahnis Coastal, Inc. v. Stroh Brewery, 295 S.C. 243, 368 S.E.2d 64 (1988)) as well as in carrying a plain legislative meaning (Dickinson), § 59-65-40 is controlling with respect to § 59-65-10. Therefore, regardless of whether a home school might, in the absence of § 59-65-40, constitute a private school or a member of a "similar organization" under § 59-65-10, if the children are taught at home by parents or guardians, their instruction must be approved pursuant to § 59-65-40. ^{1/} That the Legislature intended to deal with home instruction separately in § 59-65-40 is also supported by paragraph (D) thereof which states that certain provisions therein for placement of home taught students do not affect the right of a parent to enroll his child in a private or parochial school under § 59-65-10(a).

These conclusions are supported by case law from other states. In Grigg v. Commonwealth of Virginia, 297 S.E.2d 790,803 (VA 1982), the court ruled as follows:

"...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 differ-

^{1/} A previous Opinion of this Office stated that home use of correspondence courses does not constitute a "private school" (Ops. Atty. Gen. February 1, 1984), but this statement need not be addressed further here because this matter is governed by § 59-65-40.

C. WADE CLEVELAND, ESQUIRE

January 22, 1991

Page 4

ent set, else there would have been no reason to create both exemptions. (emphasis added)

Equally clear is the legislative intent that home instruction by an unapproved tutor or teacher would not qualify for exemption under any circumstances. [footnote omitted] When a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way...."

Grigg quoted from a similar California case as follows:

[T]he Legislature intended to distinguish between private schools, upon the one hand, and home instruction by a private tutor or other person on the other. If a 'private school' as that term is used in [the Compulsory Education Law] necessarily comprehends a parent or private tutor instructing at home, there was no necessity to make specific provision exempting the latter." People v. Turner, 121 Cal. App.2d Supp. 861, 263 P.2d 685, 688 (1953), App. Dismissed, 347 U.S. 972 (1954)

In addition, a Florida court has ruled comparably, as follows, in State v. M.M., 407 So.2d 987,990 (Fla. App. 1981):

"...the Legislature in section 232.02, clearly intended to distinguish between private schools on the one hand and home instruction by a private tutor on the other. If 'private school', as that term is used in section 232.02(3) necessarily comprehended a parent or private tutor instructing at home, there would have been no necessity for the Legislature to enact section 232.02(4) [concerning home instruction by private tutor]."

C. WADE CLEVELAND, ESQUIRE

January 22, 1991
Page 5

Delconte v. State, 329 S.E.2d 636 (N.C. 1985) also noted that courts have concluded that home schools could not constitute private schools in those states which have separate statutes for home instruction. North Carolina had no such home instruction for application in that case. Grigg, supra, also reviewed a case from another state which had no separate home instruction provision and concluded that this distinction from Virginia, which had such a provision, was "not only substantial but also crucial." (emphasis added) 297 S.E.2d at 802.

Also distinguishable here is People In Interest of DB, 767 P.2d 801 (Colo. App. 1988) in which a child was being home taught but was also enrolled in a separate private school where he received testing. The court held that the child was in compliance with the private school provisions of Colorado's Compulsory School Attendance Law by enrollment at the private school because the statute had been amended so as to substitute the language "[a child] [w]ho is enrolled" for "[a child] who attends". In contrast, South Carolina's law requires that a child "attend" a public or private school or "member school" (§ 59-65-10) as well as providing very specific, recent requirements which must be met before "[p]arents or guardians may teach their children at home...." Section 59-65-40.

Here, where South Carolina has provided, in very specific and very recent legislation, the requirements that must be met before home instruction may be approved, this statute is controlling and its terms must be met if parents or guardians are teaching their children at home regardless of whether such teaching would otherwise constitute a "private school" or "member school" of a "similar organization" under § 59-65-10(A) in the absence of § 59-65-40. Section 59-65-40 approval would have to be obtained by parents who had associated with other home schools in an organization of such schools and/or parents who had incorporated their home teaching programs because § 59-65-40 is clear that the terms of that statute must be met before children may be taught at home. This letter expresses no opinion as to whether any particular home school or organization of home schools, in the absence of § 59-65-40, would constitute a "private school" or "member school" under § 59-65-10. Instead, the conclusion is that § 59-65-40 is controlling as to § 59-65-10 as to the approval of requests for home instruction.

You have also asked whether school boards may set a deadline for accepting parents' applications for approval of their home schooling programs and have attached a memorandum in which you conclude that applications should be accepted after any such deadline. Although § 59-65-40(B) directs district boards of trustees

C. WADE CLEVELAND, ESQUIRE

January 22, 1991

Page 6

to "...provide for an application process which elicits the information necessary for processing the home schooling request...", the plain meaning (Dickinson, supra) of these terms does not indicate authorization of school districts to set a deadline beyond which applications would not be accepted. Section 59-65-40 sets a number of standards that must be met before a home teaching program is approved, but these standards do not include application by a particular deadline. Although the reference in § 59-65-40(B) to providing for an application process and provisions therein for notification of the parents as to the meeting at which the application will be considered contemplates that a reasonable period of time will be needed by the district to review the request and consider it at a meeting, the Legislature indicates no intent that this reasonable period of time would include deadline setting. No opinion is expressed herein as to what would constitute a reasonable period of time for reviewing the application because such a matter would involve factual questions that are beyond the scope of Opinions of this Office. (Ops. Atty. Gen. December 12, 1983).

In conclusion, the General Assembly has made clear its intent that the requirements of § 59-65-40 must be met before parents or guardians may teach their children at home regardless of whether, in the absence of that statute, home instruction would constitute a private school or a "member school" of an organization of other home schools. In addition, under that statute, although school district boards of trustees may take a reasonable period of time to review and act on an application for home instruction, deadlines may not be set beyond which applications would no longer be considered.

Yours very truly,



J. Emory Smith, Jr.
Assistant Attorney General

JESjr/jps

REVIEWED AND APPROVED BY:



JOSEPH D. SHINE
Chief Deputy Attorney General



ROBERT D. COOK
Executive Assistant for Opinions