1981 WL 158166 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
February 25, 1981

Re: Requested Opinion

***1** Dr. Charlie G. Williams
State Superintendent of Education
Rutledge Building
Columbia, South Carolina

Dear Dr. Williams:
You have requested an opinion of this Office concerning the applicability of § 1-23-310, et seq., Code of Laws of South Carolina, as amended (hereinafter A.P.A.) to determinations by the State Board of Education pursuant to § 59-65-40. The A.P.A. requires that certain procedures be followed in the disposition of 'contested cases' before state agencies. § 59-65-40 authorizes the State Board of Education to approve of instruction for students at a place other than a school.

The question presented herein is a novel one, which is made all the more difficult by a lack of definition of terms and the overlay of the relatively recent A.P.A. onto administrative machinery long in place. § 59-65-40 was originally enacted as Section 4 of Act No. 131, Acts and Joint Resolutions of South Carolina, 1967, South Carolina's compulsory attendance law. The compulsory attendance law establishes absolute requirements for elementary and secondary school attendance for children within a designated age range and enumerates five categories of exemption. The general attendance requirement and the exemptions are expressed in mandatory terms. § 59-65-40 (§ 4 of Act No. 131 of 1967), however, is permissive, stating, 'Instruction during the school term to a place other than a school may be substituted for school attendance . . ..' (Emphasis added). The statute further provides that the substituted instruction must be approved by the State Board of Education and creates a standard to guide the Board. Neither § 59-65-40 nor the remaining statutes comprising the compulsory attendance law expressly require or provide for any hearing. No legislative intent is manifest on the face of the compulsory attendance law, requiring any particular type of hearing for the approval of a program of substituted instruction.

Additionally, the State Board of Education has promulgated R43-246.[1] This administrative regulation delegates the initial burden of evaluating the proposed substituted instruction to a local school board and provides for an appeal to the State Board from the disapproval of a proposed program. Thus, the State Board has attempted to limit its involvement with § 59-65-40 to that of an appellate body.

The A.P.A., in § 1-23-310, defines the terms 'contested case' and 'license' as follows:
'Contested case' means a proceeding, including but not restricted to ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing.

'License' includes the whole part of any agency permit, franchise, certificate, approval, registration, charter, or similar form of permission required by law, but it does not include a license required solely for revenue purposes.

***2** The procedural requirements of the A.P.A. are mandatory in a 'contested case'; however, defining the scope of that term presents some difficulty.

Clearly, nothing in the compulsory attendance law expressly requires a hearing. [2] The South Carolina School Code is replete with statutes expressly requiring hearings. See, for example, § 59-25-200 (revocation or suspension of teaching certificate); § 59-25-460 (teacher dismissal); § 59-61-50 (permit for selling course of instruction); and § 59-31-550 (hearing on textbook adoption). Had the General Assembly intended that the Board conduct a hearing on every request for substituted instruction, it could have included a provision in the compulsory attendance law similar to those cited.

A more difficult question is presented in fully interpreting the phrase 'by law'; which is to say, did the legislature intend the phrase 'by law' to include matters outside of state statutory enactments? South Carolina's A.P.A. is silent on this point; therefore, a comparison of South Carolina's statute to those of other jurisdictions is necessary. Four general variations appear in other statutes. North Carolina, for example, in its A.P.A. defined 'contested cases' as, '. . . any agency proceeding by whatever named called, wherein the legal rights, duties or privileges of specific parties are to be determined'. This statute, originally enacted in 1973, was amended in 1975 to read like South Carolina's statute, except that the term 'adjudicatory' was inserted before the term 'hearing'. The 1973 North Carolina A.P.A. apply to prerequisite such as 'by law' in order that the A.P.A. apply to administrative proceedings, as noted in 53 N.C.L. Rev. 833, 869 (1975):
The North Carolina A.P.A.'s formulation is a distinct improvement since, when there is no statute that requires a hearing, constitutional due process issues are not involved in determining the applicability of its adjudication provisions.

Were South Carolina's A.P.A. like the old North Carolina Law, a hearing might be required for a matter arising under § 59-65-40; however, North Carolina's amendment apparently represents that the old provision proved too broad in scope.

The second variation involves statutes drawn like South Carolina's; however, a split of authority exists among states with this variation as to its application. Some states have read into the term 'by law' not just state statutes but constitutional requirements as well. Kopper Kettle Restaurants, Inc. v. City of St. Robert, 439 S.W.2d 1 (Mo. Ct. of App. 1969), and School District No. 8 v. State Board of Education, 176 Neb. 722, 127 N.W.2d 458 (1964). Other state courts, apparently have not extended 'by law' beyond statutory requirements. McAuliffe v. Carlson, 30 Conn. Sup. 118, 303 A.2d 746 (1973), and Schweitzer v. Michigan State Board of Forensic Polygraph Examiners, 77 Mich. App. 749, 259 N.W.2d 362 (1977). A Michigan court, in Kelly Downs, Inc. v. Michigan Racing Commission, 60 Mich. App. 539, 231 N.W.2d 443 (1975), considered a provision of that state's A.P.A. which is substantially the same as South Carolina's § 1-23-370(a), stating:
***3** Further indication that the provisions of the Administrative Procedures Act do not apply in the instant case is found in M.C.L.A. § 24.291(1); M.S.A. § 3.560(191)(1), which provides as follows:
'When licensing is required to be preceded by notice and an opportunity for hearing, the provisions of this act governing a contested case apply.'

Since the provisions of the Administrative Procedures Act governing contested cases apply in licensing situations only when licensing is required to be preceded by notice and an opportunity for hearing, and M.C.L.A. § 431.38(4); M.S.A. § 18-966(8)(4) contains no requirement of notice and hearing, it is obvious that the proceedings in the instant case are not governed by the provisions of the Administrative Procedures Act.

Assuming, arguendo, that § 59-65-40 involves licensing, a hearing is not required by statute, and the Michigan authority is applicable here.

The third variation is the simplest with which to deal, for it involves administrative procedure acts in which the 'by law' phrase of 'contested case' is clearly limited to a hearing required by statute. Rybinski v. State Employee's Retirement Commission, 173 Conn. 462, 378 A.2d 547 (1977) and the federal administrative procedure act, 5 U.S.C. § 554. Reference to this variation is no aid here.

Finally, the fourth variation is more explicit than South Carolina's but still presents difficulty in application. For example, the pertinent portion of the District of Columbia Administrative Procedure Act (D.C. Code 1973, § 1-1510), defines 'contested case' as follows:

[T]he term 'contested case' means a proceeding before the Commissioner, the Council, or any agency in which the legal rights, duties, or privileges of specific parties are required by any law (other than this chapter), or by constitutional right, to be determined after a hearing. . . .

The District of Columbia statute was enacted by Congress, and, like South Carolina's A.P.A., the statute was derived from the Model State Administrative Procedure Act. Chevy Chase Citizens Association v. District of Columbia Council, 327 A.2d 310 (Dist. of Col. Ct. of App. 1974). The South Carolina definition of 'contested case' is a verbatim enactment of the Model State Administrative Procedure Act's definition of that term. Thus, a legitimate question can be raised whether the A.P.A. hearing requirement encompasses hearings required by constitutional provision, in view of Congress having seen the necessity to expressly include a constitutional basis for hearings. This opinion will not reach the answer to this question, for, as discussed hereinafter, no constitutional right to a hearing exists pursuant to § 59-65-40.

In general, the United States and the South Carolina Constitutions require administrative hearings only in limited circumstances. The due process of law provisions do not apply to every proceeding or action taken by a governmental agency. [3] The question here is whether a particular type of hearing must be conducted; that is, whether certain persons are entitled to procedural due process in a State Board of Education determination pursuant to § 59-65-40. In Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), the Supreme Court declared:

***4** The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite.

The Court proceeded to discuss in detail the scope of the terms 'liberty' and 'property'; however, full discussion of the concepts of 'liberty' and 'property' is unnecessary here Both federal and state courts have thoroughly considered the constitutionality of state compulsory school attendance laws, uniformly upholding them. In doing so, at least two federal district courts have held that compulsory school attendance laws do not abridge either the liberty or property interests guaranteed by the United States Constitution. The following language from Hanson v. Cushman, 490 F. Supp. 109 (W. D. Mich. 1980), is relevant:

The plaintiffs claimed right to educate their children through a program of home study free from the requirement of compliance with state education laws involving teacher certification does not rise above a personal or philosophical choice, and therefore, is not within the bounds of constitutional protection. Plaintiffs have established no fundamental right that has been abridged by Michigan's compulsory attendance statute . . . or by its requirement of teacher certification. . . . Thus, the state need not demonstrate a 'compelling interest' in requiring children to attend school and that children be taught only by certified teachers. (citations omitted).

See also Scoma v. Chicago Board of Education, 391 F. Supp. 452 (N.D. Ill. 1974), and People v. Turner, 121 Gal. App. 2d Supp. 861, 263, P. 2d 685 (1953), appeal dismissed 347 U.S. 972, 74 S.Ct. 785, 98 L.Ed.2d 1112.

While no court has considered the constitutionality of South Carolina's compulsory attendance law, the appears to be above constitutional reproach, based upon the plethora of existing authority in other jurisdictions. Upon this proposition, how can it be argued that § 59-65-40 creates or impinges on a right involving a personal liberty or property interest? The statute in question merely authorizes a limited exception to compulsory public school attendance and does not alter the basic purpose for compulsory attendance. That purpose is to ensure that children within a specified age range receive an education sufficient to allow them to become self-sufficient productive citizens in contemporary society. Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 321 L.E.2d 15 (1972); San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973); and Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

Based upon the foregoing discussion, the opinion of this office is that § 59-65-40 does not give rise to a 'contested case' within the intent of South Carolina's A.P.A., and therefore, the A.P.A. is not applicable to determinations by the State Board of Education pursuant to § 59-65-40.

Sincerely,

***5** Paul S. League
Assistant Attorney General

Footnotes

1 R43-246 states, 'Any reference which requires the State Board of Education to approve either a program of instruction or a course of instruction which is required to be considered equivalent to instruction given to pupils of like ages in either the public or private schools where such pupils reside shall be considered approved by the State Board of Education upon the approval by the board of trustees of the district in which either the school program or course is conducted. The disapproval by the district board of trustees of either any school program or course of study may be appealed, within ten (10) days from the date of the disapproval of such school program or course of study, to the States Board of Education'.

2 Section 59-5-70, which is not part of the compulsory attendance law, states, 'The Board may, in its discretion, designate one or more of its members to conduct any hearing in connection with any responsibility of the Board and to make a report of any such hearing to the Board for its determination'. This authorizing legislation does not require the State Board of Education to hold any hearing but merely vests the Board with discretion to hold a hearing. A hearing conducted pursuant to § 59-5-70 would have to comply with the A.P.A. only if such hearing comes within the definition of a 'contested case'.

3 See Article I, § 3, Constitution of South Carolina, 1895, as revised; Article V and Amendment XIV, Constitution of the United States. These provisions stated the general requirements concerning due process in federal and state law. Also, see Article I, § 22, Constitution of South Carolina, 1895, as revised, concerning administrative agencies' judicial and quasi-judicial decision-making.

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