

OP. NO. 03-048

EDUCATION: PUPILS – COMPULSORY SCHOOL ATTENDANCE.

CONSTITUTION OF VIRGINIA: EDUCATION (COMPULSORY EDUCATION).

Whether particular organization is 'private, denominational, or parochial school' under Virginia's compulsory attendance statute requires factual review that is inappropriate for Attorney General.

The Honorable Linda T. Puller
Member, Senate of Virginia
October 31, 2003

Issue Presented

You ask whether enrollment of a student in a private learning program satisfies the requirements of Virginia's compulsory attendance statute. In the alternative, you inquire concerning the requirements for a program to qualify as a "school" under the compulsory attendance statute.

Response

Virginia law does not define "school" for purposes of the compulsory school attendance laws. Accordingly, it is my opinion that whether a particular organization is a "private, denominational or parochial school" within the meaning of Virginia's compulsory attendance statute is a factual determination. For many years, Attorneys General have concluded that § 2.2-505, the authorizing statute for official opinions of the Attorney General, does not contemplate that such opinions be rendered on matters requiring factual determinations, rather than matters interpreting questions of law.¹

Background

You relate that several parents in Fairfax County have removed their children, who are special education students, from the Fairfax County Public Schools and have enrolled them in private learning programs. You advise that some of these programs do not offer a "full" curriculum or permit a parent to enroll a child in a specific part of the program. You note that while some of these organizations provide extensive educational services, they are not "schools." You relate that other programs provide fewer services but claim to be "schools." You also relate that some of these programs are not certified or accredited as "schools" by the political subdivision in which they are located or by regional accrediting bodies. You do not state whether the Board of Education has licensed the private learning programs as "schools for students with disabilities,"² as required by § 22.1-323.³

Applicable Law and Discussion

Section 22.1-254(A), Virginia's compulsory attendance statute, provides, in part:

Except as otherwise provided in [Article 1, Chapter 14 of Title 22.1], every parent, guardian, or other person in the Commonwealth having control or charge of any child who will have reached the fifth birthday on or before September 30 of any school year and who has not passed the eighteenth birthday shall, during the period of each year the public schools are in session and for the same number of days and hours per day as the public schools, send such child to a public school or to a private, denominational or parochial school or have such child taught by a tutor or teacher of qualifications prescribed by the Board of Education and approved by the division superintendent or provide for home instruction of such child as described in § [22.1-254.1](#).

As prescribed in the regulations of the Board of Education,^[4] the requirements of this section may also be satisfied by sending a child to an alternative program of study or work/study offered by a public, private, denominational or parochial school or by a public or private degree-granting institution of higher education.^[5]

The statutes governing the compulsory school attendance laws⁶ do not define the term "school." Absent a statutory definition, words are given their ordinary meaning.⁷ The term "school" means "an organization that provides instruction"⁸ or "[a]n institution of learning and education, esp[ecially] for children."⁹ Such general definitions of so common a term provide little guidance in ascertaining whether a particular organization is a "school" within the meaning of Virginia's compulsory attendance statute.

The Supreme Court of Virginia has determined that home instruction does not constitute a "private school" for purposes of compulsory attendance.¹⁰ Virginia courts have not otherwise considered whether a particular institution is a "school" within the meaning of the compulsory school attendance laws. Courts in other states, however, have considered the question weighing various factors to determine whether a given arrangement is a "school."¹¹ Naturally, the provisions of a compulsory attendance statute directly impact a court's analysis.¹²

Some courts have considered statutes like Virginia's that contain no statutory definition of "school" and provide little guidance otherwise. The Supreme Court of Washington observed that "to attend a private school"

means more than home instruction; it means the same character of school as the public school, a regular, organized and existing institution making a business of instructing children of school age in the required studies and for the full time required by the laws of this state.... This provision of law is not to be determined by the place where the school is maintained, nor the individuality or number of the pupils who attend it. It is to be determined by the purpose, intent and character of the endeavor.^[13]

A Kansas court, considering a requirement similar to Virginia's, noted that the subject child did not attend school for the requisite period.¹⁴ An Indiana court, also interpreting a similar statute, noted that the instruction period for the sole student was the same as that for children in public school.¹⁵ The Indiana court also examined at length the qualifications of the instructor, a former schoolteacher.¹⁶

Whether a particular organization constitutes a "school" for purposes of compulsory attendance is a fact-specific determination. For many years, Attorneys General have concluded that § 2.2-505, the authorizing statute for official opinions of the Attorney General, does not contemplate that such opinions be rendered on matters requiring factual determinations, rather than matters interpreting questions of law.¹⁷ The particular facts that might influence a court, however, include whether the institution presents itself as a school, whether the instructional periods satisfy statutory requirements, whether the curriculum and teachers are of adequate quality¹⁸ and whether the Board of Education has licensed the institution as a "school for students with disabilities."¹⁹

Your question is further complicated by its special education aspect. The Individuals with Disabilities Education Act²⁰ is designed "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living."²¹ The primary mechanism for determining and implementing a "free appropriate public education" under the Act is the "individualized education program,"²² which identifies the educational needs of a particular student and the means by which those needs are met. Your request describes the actions of several parents utilizing a private service, without specifying the services required in the "individualized education program" or the manner in which the private service may meet the children's needs. The facts you provide do not afford a sufficient basis to determine whether the organization about which you inquire is a school. In any event, such a conclusion requires a factual determination. This Office historically has declined to render opinions that involve determinations of fact rather than questions of law.²³

Conclusion

Virginia law does not define "school" for purposes of the compulsory school attendance laws. Accordingly, it is my opinion that whether a particular organization is a "private, denominational or parochial school" within the meaning of Virginia's compulsory attendance statute is a factual determination. For many years, Attorneys General have concluded that § 2.2-505, the authorizing statute for official opinions of the Attorney General, does not contemplate that such opinions be rendered on matters requiring factual determinations, rather than matters interpreting questions of law.²⁴

¹ See cites *infra* note 17.

² "School for students with disabilities" means a privately owned and operated preschool, school, industrial institution or educational organization, no matter how titled, maintained or conducting classes for the purpose of offering instruction, for a consideration, profit or tuition, to persons with mental retardation, visual impairment, speech/language disorders, hearing impairments, specific learning disabilities, physical disabilities, emotional disturbance, severe disabilities, or multiple disabilities." Va. Code Ann. § 22.1-319 (LexisNexis Repl. Vol. 2003).

³ Section 22.1-323(A) specifies that "[n]o person shall open, operate or conduct any school in this Commonwealth without a license or certificate to operate such school issued by the Board of Education."

⁴See § 22.1-16 (LexisNexis Repl. Vol. 2003) (authorizing Board of Education to promulgate regulations necessary to carry out provisions of Title 22.1).

⁵The Board of Education's "Rules Governing Alternative Education" require that the local school board approve courses offered by alternative education programs. See 8 Va. Admin. Code 20-330-10 (West 2002). You indicate that the local school board has not approved the programs about which you inquire as "schools." For purposes of this opinion, I assume that the courses have not received local approval either.

⁶Tit. 22.1, ch. 14, art. 1, §§ 22.1-254 to 22.1-269.1 (LexisNexis Repl. Vol. 2003); see also Va. Const. art. VIII, § 3 ("The General Assembly shall provide for the compulsory elementary and secondary education of every eligible child of appropriate age, such eligibility and age to be determined by law.").

⁷See *Grant v. Commonwealth*, 223 Va. 680, 684, 292 S.E.2d 348, 350 (1982); 1987-1988 Op. Va. Att'y Gen. 513, 514.

⁸Merriam-Webster's Collegiate Dictionary 1042 (10th ed. 2000).

⁹Black's Law Dictionary 1346 (7th ed. 1999).

¹⁰See *Grigg v. Commonwealth*, 224 Va. 356, 363-64, 297 S.E.2d 799, 802-03 (1982) (finding that General Assembly's creation of two distinct categories of exemption from compulsory school attendance — private schools and home instruction — clearly indicates intent that categories operate independently); see also § 22.1-254(A) (LexisNexis Repl. Vol. 2003) (providing that home instruction of child by parent or guardian is not "classified or defined as a private, denominational or parochial school").

¹¹See, e.g., *Burrow v. State*, 669 S.W.2d 441, 443 (Ark. 1984) (noting that instruction of child in home by parent, without teacher qualifications, using correspondence school curriculum, does not constitute "school"); *State v. Counort*, 124 P. 910, 911 (Wash. 1912) (holding that instruction of child by parent, who is competent to instruct child, does not satisfy statutory requirement of attendance at private school). *But see* *People v. Levisen*, 90 N.E.2d 213 (Ill. 1950) (holding that home schooling constitutes "private school" where parents provide children with education that is equal or superior to that taught in public schools).

¹²See, e.g., *Levisen*, 90 N.E.2d at 214-15; *State v. Hershberger*, 144 N.E.2d 693 (Ohio Ct. App. 1955) (noting that compulsory school attendance laws in both states require that private school instruction be equivalent to that received in public schools); see Allan E. Korpela, Annotation, *What Constitutes a Private, Parochial, or Denominational School Within Statute Making Attendance at Such School a Compliance with Compulsory School Attendance Law*, 65 A.L.R.3d 1222 (1975 & Supp. 2003) (discussing various statutory requirements and judicial analyses in several jurisdictions). Section 22.1-254(A), Virginia's compulsory attendance statute, specifies that a child of appropriate school age must be in an alternative school "during the period of each year the public schools are in session and for the same number of days and hours per day as the public schools."

¹³*Counort*, 124 P. at 911-12.

¹⁴ See *State v. Garber*, 419 P.2d 896, 900 (Kan. 1966) (interpreting statute requiring that attendance at private, denominational, or parochial schools be for same period as public school). In fact, one morning a week the child studied at a school established by the Amish. *Id.* at 898. Of the remaining weekdays, one hour was devoted to study at home and five hours were spent in vocational training. *Id.*

¹⁵ See *State v. Peterman*, 70 N.E.550, 550-51 (Ind. App. 1904) (interpreting statute providing that terms of private or parochial schools should not be less than that of public schools).

¹⁶ *Id.*

¹⁷ See 2001 Op. Va. Att'y Gen. 73, 74; see also Op. Va. Att'y Gen.: 1999 at 132, 132; 1986-1987 at 1, 6 (citing predecessor § 2.1-118); accord 1991 Op. Va. Att'y Gen. 122, 124.

¹⁸ See cases cited *supra* notes 11-15.

¹⁹ See definition *supra* note 2.

²⁰ 20 U.S.C. §§ 1400-1490 (2000).

²¹ 20 U.S.C. § 1400(d)(1)(A).

²² See 20 U.S.C. § 1414(d).

²³ See 1991 Op. Va. Att'y Gen. 122, 124, and opinions cited therein.

²⁴ See cites *supra* note 17.

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