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November 21, 1985

ATTORNEY GENERAL OPINION NO. 85- 159

Dennis W. Moore
District Attorney
Johnson County Courthouse
P.O. Box 728, 6th Floor Tower
Olathe, Kansas 66061

Re: Schools -- School Attendance, Curriculum and
Accreditation -- Responsibility to Investigate Home
Instruction

Synopsis: A local board of education has no authority to investigate situations involving home instruction to determine compliance with the compulsory school attendance statutes, K.S.A. 1984 Supp. 72-1103 et seq. However, upon receiving a report that a child is not enrolled in a public or nonpublic school, the Department of Social and Rehabilitation Services has a duty under K.S.A. 1984 Supp. 38-1501 et seq. to determine whether a child's home instruction may violate the compulsory school attendance law. Cited herein: K.S.A. 1984 Supp. 38-1502, as amended by L. 1985, Ch. 145, §3; 38-1510; 38-1524; 38-1529; 72-1111; 72-1113; 72-8205.

* * *

Dear Mr. Moore:

As District Attorney of Johnson County, you request our opinion on an aspect of the compulsory school attendance statutes, K.S.A. 1984 Supp. 72-1103 et seq. Specifically,

you ask which agency has the responsibility to determine whether a course of home instruction meets the requirements of those statutes in cases where a board of education has reported to the Department of Social and Rehabilitation Services (SRS) that a child is not attending school but is instead receiving home instruction.

With exceptions not relevant to this discussion, K.S.A. 1984 Supp. 72-1111(a) mandates that every parent having charge of any child between the ages of 7 and 16 shall require such child to attend continuously a public school each school year or "a private, denominational or parochial school taught by a competent instructor for a period of time which is substantially equivalent to the period of time public school is maintained in the school district in which the private, denomination or parochial school is located." Because it contains no express or implied exception for home instruction, the law compels a child's attendance at a public, private, denominational or parochial school. However, there is no definition of what constitutes a "private, denominational or parochial school."

K.S.A. 1984 Supp. 72-1113 provides that for public schools, the local board of education shall designate an employee to report children not attending school to SRS and to determine the acceptability and validity of offered excuses for absence of children attending school. The local board of education is to adopt rules for the determination of valid excuses for absence from school. K.S.A. 1984 Supp. 72-1113(d). For nonpublic schools, K.S.A. 1984 Supp. 72-1113(a) and (f) require likewise that the governing authority of the nonpublic school designate an employee to report children not attending school to SRS and to determine the acceptability and validity of offered excuses for absence of children attending school. Again, the governing authority is to adopt rules for the determination of valid excuses for absence from school. K.S.A. 1984 Supp. 72-1113(d), (f).

These provisions demonstrate a legislative intent that, at least for purposes of the compulsory attendance statutes, a nonpublic school, i.e., a private school, have "employees(s)" and a "governing authority." Home instruction was apparently not contemplated. However, we recognize that home instruction is nonetheless widespread across the State of Kansas. Despite this, we find no authority in Kansas statutes for a local school board to investigate home instruction to

determine compliance with the compulsory school attendance law. Rather, the local board's authority is limited to public schools. See K.S.A. 1984 Supp. 72-8205(a). Further, a school board cannot enlarge the authority or power granted it by statute. N.E.A.-Wichita v. U.S.D. No. 259, 234 Kan. 512, 517 (1983).

The statute which sets forth the duty of SRS to investigate reports of child abuse or neglect provides:

"(a) The state department of social and rehabilitation services shall have the primary duty to receive and investigate reports of child abuse or neglect for the purpose of determining whether the report is valid and whether action is required to protect the child from further abuse or neglect. If the department determines that no action is necessary to protect the child but that a criminal prosecution should be considered, the department shall make a report of the case to the appropriate law enforcement agency.

. . . .

"(b) Whenever any person furnishes information to the state department of social and rehabilitation services that a child appears to be a child in need of care, the department shall make a preliminary inquiry to determine whether the interests of the child require further action be taken. Whenever practicable, the inquiry shall include a preliminary investigation of the circumstances which were the subject of the information, including the home and environmental situation and the previous history of the child." K.S.A. 1984 Supp. 38-1524(a) and (b).

Under this statute, SRS's authority to investigate does not arise until it has received a report of child abuse or neglect, or information that a child appears to be a child in need of care. A "child in need of care" is defined as

including a person less than 18 years of age who "is not attending school as required by . . . 72-1111, and amendments thereto." (Emphasis added.) K.S.A. 1984 Supp. 38-1502(a)(6), as amended by L. 1985, Ch. 145, §3. In our opinion, before SRS may conclude that a child's absence from public school gives rise to a child in need of care situation, it must also be determined that the child is not attending a private school.

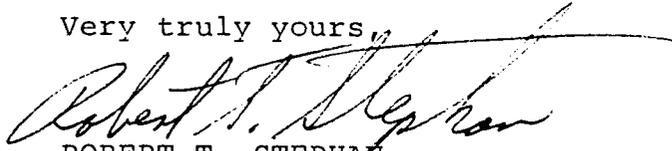
The legislature has placed upon SRS the duty to make a preliminary inquiry for the purpose of determining whether a report of non-attendance is valid. That determination is at present exceedingly difficult because Kansas statutes contain no definition of "private school" as that term is used in the compulsory school attendance law. Further, no administrative rules and regulations define that term or attempt to set forth guidelines for the establishment of a private school. While no published cases in Kansas have defined "private school," the same decisions have nonetheless held that parents' attempts to teach their children at home did not constitute a private school under the facts presented. See e.g., In Re Sawyer, 234 Kan. 436 (1983); State v. Garber, 197 Kan. 567 (1966), cert. denied 389 U.S. 51 (1967); State v. Lowry, 191 Kan. 701 (1963). These cases provide the only guidelines currently available for SRS to apply in evaluating the validity of a report that a child is not attending a private school. However, because Sawyer, supra, may be read to indicate that certain home instruction may constitute a "private school" for purposes of the compulsory school attendance law, it cannot automatically be assumed that all home instruction violates the compulsory school attendance law.

Under current law, the ultimate determination of whether a particular instance of home instruction meets the requirements of the compulsory school attendance law lies with the courts. However, where SRS has received information that a child is not enrolled in either a public or private school but is instead receiving home instruction, SRS has the duty to apply the factors set forth in Sawyer to determine whether such instruction may violate the compulsory school attendance statutes. If SRS representatives believe the situation involves mere home instruction and thus presents a child in need of care under the legal definition of the term in K.S.A.

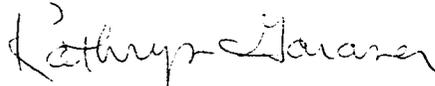
Dennis W. Moore
Page 5

1984 Supp. 38-1502(a)(6), as amended, the case should be referred to the county or district attorney. See K.S.A. 1984 Supp. 38-1510; 38-1529.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Kathryn Gardner
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RTS:JSS:KG:crw