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The Honorable James Brochin
221 James Senate Office Building
Annapolis, Maryland 21401-1991

Dear Senator Brochin:

You have asked whether it is constitutional for a public school system to deny special education services to a home-schooled student on the basis that such a student attends neither a public school nor a private school.

In your letter requesting this advice, you refer to the situation of a child in Baltimore County with a learning disability who had previously received speech therapy through the public school system. You indicate that the child has been denied special education services, apparently because the child is now being educated at home. You also refer to a previous letter of advice from this Office, which addressed the question whether local school systems are required by the federal Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1400 *et seq.*, to provide special education services to children participating in home instruction. Letter of Staff Attorney Jackie C. La Fiandra to Richard Scott, Specialist, Guidance and Career Development, Maryland State Department of Education (April 5, 2000). A copy of that letter is attached.

April 2000 Advice Letter

In her letter, Ms. La Fiandra concluded that the parts of IDEA that require the provision of services to children voluntarily placed in private schools by their parents do not apply to home-schooled students. As is evident from the attached memorandum, Ms. La Fiandra's analysis was based on the following propositions:

1 - IDEA and its implementing regulations require local school systems to make available special education services to children with disabilities who are enrolled in public or private schools, but are silent on whether that obligation extends to home-schooled children.

2 - The federal Office of Special Education Programs (OSEP) has taken the position that the determination whether a home school arrangement should be considered a “private school” for purposes of IDEA depends on whether the particular state recognizes the home school arrangement as a “private school.”

3 - The Maryland State regulation that defines “school” does not encompass most home school arrangements.

Of course, under this analysis, a local school system is not prohibited from providing services to home-schooled students. Rather, it is simply not required to do so by IDEA.

Subsequent Authority

After Ms. LaFiandra wrote her advice letter, two courts and at least one state attorney general have had occasion to consider the same issue. Each has applied the same analysis as Ms. LaFiandra and reached the same conclusions concerning the application of IDEA to home-schooled students. *See Forstrom v. Byrne*, 775 A.2d 65, 68, 69-73 (N.J. App.Div. 2001) (home school is not a “nonpublic school” under New Jersey law); *Hooks v. Clark County School District*, 228 F.3d 1036, 1039-41 (9th Cir. 2000) (because home education is not a “private school” under Nevada law, local school district not required by IDEA to provide services to home-schooled child); Opinion of the Arizona Attorney General No. I00-012 (May 17, 2000), 2000 WL 726847 (because a home school is not a “private school” under Arizona law, IDEA does not require local school districts to provide services to home-schooled students).

Although some commentators have argued that the underlying purpose of IDEA would support extension of special education services to home-schooled children,¹ all of the legal authority that I have found agrees that IDEA does not specifically require that a local school system provide special education services to home-schooled students.

Constitutionality

You have asked whether the “practice” of providing special education services to public school students and subsidizing services for private school students, but not extending services to home-schooled students, is constitutional.

Equal Protection and Due Process

A law or practice offends due process if it infringes a fundamental right. A law or practice is subject to “strict scrutiny” under the Equal Protection Clause² if it affects a fundamental right or a suspect classification. *Rios v. Montgomery County*, 386 Md. 104, 121, 872 A.2d 1 (2005); *Murphy v. Edmonds*, 325 Md. 342, 356, 601 A.2d 102 (1992). Otherwise, the law or practice need only have a rational relationship to a legitimate governmental purpose. *Id.*³ The courts have held that the right to a public education is not the sort of fundamental right that is subject to strict scrutiny under the State or federal constitutions. *Hornbeck v. Somerset County Board of Education*, 295 Md. 597, 642-57, 458 A.2d 758 (1983).

The United States Court of Appeals for the Ninth Circuit considered whether the exclusion of home school students from special education services subsidized under IDEA violated the equal protection and due process guarantees of the federal constitution in *Hooks*. In that case, the plaintiffs asserted that the failure to extend special education services to

¹ See, e.g., Lambert, *Finding the Way Back Home: Funding for Home School Children under the Individuals with Disabilities Education Act*, 101 Colum.L.Rev. 1709 (2001).

² The Court of Appeals has held that Article 24 of the Maryland Declaration of Rights embodies the same principles as the Equal Protection and Due Process clauses of the United States Constitution. *Attorney General v. Waldron*, 289 Md. 683, 704, 426 A.2d 929 (1981); *Hornbeck v. Somerset County Board of Education*, 295 Md. 597, 640, 458 A.2d 758 (1983).

³ The courts have held that certain “quasi-suspect” classifications, not relevant to this discussion, should be subjected to an intermediate level of scrutiny. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-41 (1985) (intermediate level of scrutiny given to classifications based on gender and illegitimacy).

home-schooled students infringed on the liberty interest of the parents of such children to direct their children's education. See *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925). The Ninth Circuit noted that some courts have derived a parental right to educate their children at home from the general parental right recognized in *Pierce* and other cases. 228 F.3d at 1041-42. However, it held that a school district policy that attaches certain benefits to school attendance would not infringe that right and therefore was not unconstitutional under a "substantive" due process analysis. *Id.* at 1042. Maryland courts would likely reach a similar conclusion. See *Thomas v. Allegany County Board of Education*, 51 Md. App. 312, 316, 443 A.2d 622 (1982) (right of parents to send children to private school did not entitle those children to participate in extracurricular activities at public school); see also *Denis J. O'Connell High School v. Virginia High School League*, 581 F.2d 81, 84 (4th Cir. 1978) (same).

The plaintiffs in *Hooks* challenged on equal protection grounds both (1) the local school districts' policy of denying services to home-schooled students and (2) the delegation in IDEA to the states to determine whether home-schooled children are entitled to services required by the federal statute. The Ninth Circuit determined that each of these policies had a rational basis.

First, it noted that both a state and its school districts "have a legitimate interest in promoting educational environments that fulfill those qualifications that the State deems important." *Hooks*, 228 F.3d at 1043. Limiting the resources provided through IDEA to certain private schools advanced that interest by "steering scarce educational resources toward those qualified educational environments." *Id.* In my view, a court would likely reach the same conclusions if a challenge were made to Maryland's regulations governing whether home education qualifies as a "nonpublic school." Cf. *Thomas v. Allegany County Board of Education*, 51 Md. App. 312, 317-18, 443 A.2d 622 (1982) (exclusion of private school students from extra-curricular activity at public schools was justified by school system's interest in avoiding administrative inefficiency and therefore did not violate equal protection guarantee).

Second, the Ninth Circuit also found that the federal deference to state definitions of "private school" also had a rational basis. Citing Supreme Court decisions that have acknowledged "the deeply rooted tradition of state and local control over education," the Court reasoned that IDEA's deference to the states on the definition of a private school preserved that sovereignty. 228 F.3d at 1043. Again, in my view, a Maryland court would likely reach a similar conclusion.

An intermediate appellate state court in New Jersey reached a somewhat different result from *Hooks* based on its interpretation of the New Jersey Constitution. In *Forstrom v. Byrne*, 775 A.2d 65, 75 (N.J. App.Div. 2001), a trial court judge had applied a strict scrutiny standard and held that the denial of public funds for speech therapy services to home schooled students denied the plaintiff student equal protection guaranteed under the New Jersey Constitution. A panel of the appellate division of the New Jersey Superior Court rejected that analysis. It concluded that, “as a general proposition, ...the differentiation between the treatment of nonpublic school students receiving speech therapy benefits and a home-schooled child is not a violation of the equal protection clause of the United States or New Jersey Constitutions.” *Id.* at 68. However, the appellate court held that the state constitutional guarantee had been violated in the manner that the law was applied to the particular child who was the subject of the case.

In reaching that holding, the New Jersey court quoted and generally appeared to agree with the analysis in *Hooks* outlined above. 775 A.2d at 70-71, 73, 77. However, it also applied an analysis peculiar to the New Jersey Constitution, which the court distinguished from the analysis courts use with respect to Equal Protection Clause of the United States Constitution. *Id.* at 75-78. It concluded that there was no rational basis for the school system to refuse to serve a home-schooled child like the plaintiff who was willing to come to a public school for special education services.

The decision in *Forstrom* is likely to have limited applicability in Maryland. The decision was based on an analysis specific to the New Jersey Constitution. Moreover, even under that analysis, the court limited its holding to the particular facts of the case before it and declined to hold generally that the restriction of services subsidized by IDEA with respect to home-schooled students is unconstitutional.

Right to Free Public Education under Maryland Constitution

The Maryland Constitution guarantees the establishment and maintenance of “a thorough and efficient System of Free Public Schools” throughout the State. Maryland Constitution, Article VIII, §1. The constitutional guarantee is implemented in the State education law. *See, e.g.*, Annotated Code of Maryland, Education Article, §4-108(2) (duty of county board of education to maintain “reasonably uniform system of public schools”); §7-101 (providing for free admission of children to public schools). However, the constitutional guarantee does not entail that a parent or child has a right to elect to participate in selected portions of the public school program. *Thomas, supra*, 51 Md. App. at 319-20.;

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see also Forstrom v. Byrne, 775 A.2d at 75-76 (all that is required by a similar provision in New Jersey Constitution is that a child have access to a free public education).

Conclusion

For the reasons set forth above, it is my view that (1) the April 2000 advice letter from this Office correctly analyzes the federal and State laws governing the provision of special education services under IDEA to home-schooled students in Maryland and (2) those laws, so construed, are constitutional. Thus, neither IDEA nor the State education law requires that a local school system provide speech therapy services to a home-schooled student. However, neither do they bar the school system from providing such services.

Very truly yours,

Robert N. McDonald
Chief Counsel
Opinions and Advice