LONG & DiPIETRO, LLP
ATTORNEYS AT LAW
175 Derby Street
Unit 17
Hingham, MA 02043
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www.long-law.com

MICHAEL J. LONG
ROSANN DiPIETRO
KELLY T. GONZALEZ
LESLIE C. CAREY

JOSEPH P. LONG
OF COUNSEL

TELEPHONE (781) 749-0021
FACSIMILE (781) 749-1121
email@long-law.com

LEGAL ADVISORY:
HOME EDUCATION PROGRAMS

In recent years, school administrators have responded to an increasing number of requests for approval of home education programs under MGL Chapter 76, Section1. These materials are intended to discuss in a general way legal issues relating to home education, parental rights, and responsibilities of school superintendents and school committees vis-à-vis proposed home education programs in Massachusetts. This is not intended to give legal advice as to the handling of any particular home school request.

I. THE RIGHT TO EDUCATE STUDENTS AT HOME

Since the 1920s, the United States Supreme Court has rendered a number of decisions supporting parental rights to educate students in non-public schools or at home. *See, e.g., Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (statute requiring public school education unconstitutional); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (prohibition against teaching German in private school overturned); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (compulsory attendance laws not applicable to Amish students). These cases exclude from the powers granted to a state or local school district the authority "to standardize its children by forcing them to accept instruction from public school teachers only." *Pierce*, 268 U.S. at 535. The *Pierce* Court elaborated: "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with a high duty, to recognize and prepare him for additional obligations." 268 U.S. at 535.

The Massachusetts Supreme Judicial Court also has weighed in on home schooling in relation to compulsory attendance laws. Interpreting a predecessor to the current compulsory attendance statute, the Massachusetts Supreme Judicial Court made plain that "[t]he great object of these provisions of the [compulsory education] statutes has been that all the children shall be educated, not that they shall be educated in any particular way." *Commonwealth v. Roberts* 159 Mass. 372 (1893); *see also Care and Protection of Charles*, 399 Mass. 324, 336 (1987). That said, parents' rights to direct their children's educations are "not absolute but must be reconciled with the substantial state interest in the

education of its citizenry." *Id.* at 334. As discussed in the next section, the Supreme Judicial Court has developed certain guidelines to help school districts and courts balance the state's interests and parents' rights.

II. COMPULSORY ATTENDANCE: *CARE & PROTECTION OF CHARLES* AND *CARE & PROTECTION OF IVAN*

As noted above, the corollary to the rule that parents have a right to direct their children's education is that school systems have the responsibility to ensure that education is provided. To that end, the thoroughness and efficiency standards of G.L. c. 76, § 1 come into play.[1]

In *Care and Protection of Charles,* 399 Mass. 324 (1987), which case arose in the context of a G.L. c. 119 care and protection case, the Supreme Judicial Court began by "caution[ing] the superintendent or school committee that the approval of a home school proposal must not be conditioned on requirements that are not essential to the State interest in ensuring that 'all the children shall be educated.'" *Id.* The Court then clarified a number of guidelines for the review and approval of home education plans in light of the G.L. c. 76, § 1 standards. Among those guidelines are:

1. "Approval [for the home school program] must be obtained *in advance,* i.e., prior to the removal of the children from the public school and [prior] to the commencement of the home schooling program." *Id.* at 337; *see also Care and Protection of Ivan*, 48 Mass. App. Ct. 87 (1999); *app. rev. denied* (2000).

2. "[T]he superintendent or school committee must provide the parents with an opportunity to explain their proposed plan and present witnesses on their behalf. A hearing during a school committee meeting would be sufficient to meet this requirement." *Care and Protection of Charles,* 399 Mass. at 337; *see also Care and Protection of Ivan*, 57 Mass. App. Ct. 87.

3. "[T]he parents bear the responsibility of demonstrating that the home school proposal meets the requirements of G.L. c. 76, § 1, in that the instruction will equal 'in thoroughness and efficiency, and in the progress made therein, that in the public schools in the same town....'" *Care and Protection of Charles,* 399 Mass. at 337-38. The following factors may be considered in determining whether a home school proposal meets those standards,

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[1] G.L. c. 76, § 1 states in relevant part:

> Every child between the minimum and maximum ages established for school attendance by the board of education shall, subject to section 15, attend a public day school in the town the student resides, or some other day school approved by the school committee, during the number of days required by the board of education in each school year unless the child. [..] is being otherwise instructed in a manner approved in advance by the superintendent or the school committee.

with proposed curriculum and number of hours of instruction in each subject being the "primary" considerations:

a. Curriculum to be taught in comparison to the mandatory subjects public schools much teach;
b. Length of school year and hours of instruction in each subject;
c. Academic credentials/competency of person providing instruction, though teacher certification and college degree are not required;
d. Access to textbooks, workbooks, and other instructional aides to ensure breadth of curriculum/subjects and grade level;
e. Periodic standardized testing, progress reports, and/or work samples to ensure educational progress; and
f. Home visits may not be required as long as other procedures are in place to ascertain thoroughness of program and student's progress. (See discussion of *Brunelle*, below.)

4. If the parents' plan for home schooling "is rejected, the superintendent or the school committee must detail the reasons for the decision. The parents must then be given an opportunity to revise their proposal to remedy its inadequacies." *Id.* at 338

5. In the event parents commence home schooling absent the school committee's approval of a plan, the school committee must demonstrate that the instruction outlined in the home school proposal fails to equal in thoroughness and efficiency that which is available in the public schools.

In another Care and Protection case following the *Charles* decision, the Massachusetts Appeals Court applied the standards set forth in *Charles* and affirmed a lower court's decision that the children at issue were in need of care and protection where the parents refused to produce "a minimally adequate educational plan" or permit the school district to verify the students' progress. *Care and Protection of Ivan,* 24 Mass. App. Ct. at 88-91. There, the parents alleged that the approval process ran afoul of their "learner-led" approach to educating the children and their rights to privacy. Despite the parents' objections, the Appeals Court held that the conditions set for in the *Charles* case do not infringe upon parents' liberty or privacy interests with respect to home-schooling. *Id.* at 89-90.

Moreover, in that case, the court had extended the parents a final opportunity to submit an educational plan and obtain an independent of the evaluation before granting temporary legal custody to the Department of Social Services. As the Appeals Court noted, that decision "sets forth a reasonable course of action which would not jeopardize the learning capacity of their children and recognizes their right to school their children in their home." *Id.* at 91. The parents rejected that plan, and the Appeals Court affirmed the lower court's grant of temporary custody to the Department of Social Services.

While the *Charles* and *Ivan* cases provide some helpful guidance to school districts, we caution school officials to work with local counsel when making decisions about any specific home school application.

III. HOME VISITS CANNOT BE REQUIRED: *BRUNELLE V. LYNN PUBLIC SCHOOLS*

In *Brunelle v. Lynn Public Schools,* 428 Mass. 512 (1988), and a companion case, school officials were satisfied that a proposed home school plan sufficiently addressed teacher qualifications, curriculum, instructional materials, amount of time to be devoted to instruction, and student assessment or evaluation. As a matter of school policy, however, the Lynn Public Schools also required that home schoolers be periodically observed at home to evaluate the instructional process and to verify that the instructional plan was implemented as authorized by the school committee. The parents in the *Brunelle* case objected to the home observations and evaluations, asserting that these requirements violated the provisions of G.L. c. 76, § 1 and provisions of the Massachusetts Constitution.

Justice Greaney authored an opinion in which all seven Justices of the Supreme Judicial Court joined. The *Brunelle* decision reiterated that portion of the *Charles* decision stating that "'the approval of a home school proposal must not be conditioned on requirements that are not *essential* to the State interest in ensuring that all the children shall be educated.'" *Id.* at 514, *quoting Care and Protection of Charles,* 399 Mass. at 337 (internal quotations omitted). The Court also noted that compulsory education component of G.L. c. 76, §1 may be enforced via the exercise of "'*reasonable* educational requirements similar to those required for public and private schools.'" *Id.*, *quoting Care and Protection of Charles,* 399 Mass. at 336. Regarding the question at hand, however, the *Brunelle* Court recognized that whether home visits could be a required component of school districts' oversight of home school programs had been left unresolved. *Id.* at 515.

The *Brunelle* Court answered that question, holding that when parents satisfy other relevant criteria such as those outlined in *Care and Protection of Charles*, "a home visit is not presumptively essential to protection of the State's interest in seeing that children receive an education, and therefore, such visits may not be required as a condition to approval of the [parents'] plans." *Id.* at 515. Thus, in essence, *Brunelle* relieves school officials of the burden of determining whether to make home visits when they are otherwise satisfied with the home education. The Court has clearly indicated that there are other means to assess student progress and teaching methods. Those means may include periodic standardized testing, periodic reports on students' progress, and reports which review subjects, areas, and materials that have been covered and which are intended to be covered during a subsequent reporting period.

While *Brunelle* significantly narrows the circumstances under which the school district may conduct home visits, it does not rule out the possibility of all home visits. *Id.* at 519. Specifically, *Brunelle* left open the possibility of home visits "if a child is not making satisfactory progress under a home education plan, if a home is used to educate

children from other families, or if other circumstances make such a requirement essential and reasonable standards are formulated to enforce the requirement." *Id.* at 519. The opinion offered no guidance as to what constitutes "satisfactory progress" or what "other circumstances" may make a home visit "essential." These deliberate omissions should serve as warning that no hard and fast rules apply to this determination. There is no Ariadne to serve as guide out of the litigation labyrinth. Please review circumstances carefully with local counsel prior to making any judgments as to whether a particular case warrants a home visit. These cases can be extremely time consuming and costly.

IV. ANCILLARY ISSUES

A. Participation in Extracurricular Activities

Many parents educating students at home or in charter schools request that their children be allowed to participate in school-sponsored extracurricular events or activities. We are not aware of any statutes or case law requiring such action on the part of school districts. The Department of Elementary and Secondary Education has issued verbal opinions to the same effect. At the same time, there is no bar to the practice

Extracurricular and athletic programs are operated by public schools for students enrolled in the public schools. Home schooled students are not enrolled in the public school system of the city, town or district in which they reside and have, in fact, expressly sought permission to withdraw from the public school program.

The MIAA has adopted rules authorizing participation by home schooled students in interscholastic athletics if certain conditions are met.

B. Older Students

There have also been questions concerning a school district's obligation to review and approve a home education plan for a student over the age of 16. If approved, some home schooled students request that the district provide a diploma. To our knowledge, there are no cases or opinions imposing this obligation on a school district.

This advisory is for informational purposes only and may be considered advertising. It is not intended to and does not constitute legal advice with respect to any specific matter and should not be acted upon without consultation with legal counsel.