

7/20/93



ERRY E BRANSTAD GOVERNOR

DEPARTMENT OF EDUCATION  
WILLIAM L LEPLEY ED.D DIRECTOR

DECLARATORY RULING #44  
(Cite as 5 D.o.E. Decl. Rul. 33)

Mr. John D. Cruise  
Attorney At Law  
920 S. Dubuque Street  
Box 2000  
Iowa City, IA 52244

Dear Mr. Cruise:

On June 22, 1993, the Department of Education received a Petition for Declaratory Ruling from you as attorney for the Iowa City Community School District, in order to help officials in that district properly respond to existing and potential requests related to students' and parents' rights under the laws of Iowa. Specifically your questions related to students who are under competent private instruction and who are dual enrolled in the public school district of their residence.

I.  
QUESTIONS PRESENTED

I have taken the liberty of rephrasing your questions to comport with the applicable facts and law.

- A. May a parent who desires to excuse his or her child from a required course<sup>1</sup> effectively excuse that child by disenrolling the student from school to engage in competent private instruction under Iowa Code chapter 299A, and dual enrolling the child under section 299A.8 for all but the objectionable or undesired course?
- B. May a student under competent private instruction attend courses at a community college, college, or university at the expense of the child's resident school district under the Postsecondary Enrollment Options Act utilizing dual enrollment (again, section 299A.8) as the sole nexus with the school district?

<sup>1</sup>In this instance, the course is 8th grade science which is not subject to the excused provisions of the human growth and development law or other "opt-out" statutes.

II.  
APPLICABLE LAW

The relevant provisions of the Iowa Code are detailed below:

*Attendance requirements.* Except as provided in section 299.2, the parent, guardian, or legal or actual custodian of a child who is of compulsory attendance age, shall cause the child to attend some public school, an accredited nonpublic school, or competent private instruction in accordance with the provisions of chapter 299A, during a school year, as defined under section 279.10. The board of directors of a public school district or the governing body of an accredited nonpublic school shall set the number of days of required attendance for the schools under its control.

The board of directors of a public or the governing body of an accredited nonpublic school may, by resolution, require attendance for the entire time when the schools are in session in any school year and adopt a policy or rules relating to the reasons considered to be valid or acceptable excuses for absence from school.

Iowa Code §299.1(1993).

*Private instruction.* The parent, guardian, or legal custodian of a child of compulsory attendance age who places the child under private instruction shall provide, unless otherwise exempted, competent private instruction in accordance with this chapter. A parent, guardian or legal custodian of a child of compulsory attendance age who places the child under private instruction which is not competent private instruction, or otherwise fails to comply with the requirements of this chapter, is subject to the provisions of sections 299.1 through 299.4 and the penalties provided in section 299.6.

For purposes of this chapter "competent private instruction" means private instruction provided on a daily basis for at least one hundred forty-eight days during a school year, to be met by attendance for at least thirty-seven days each school quarter, by or under the supervision of a licensed practitioner in the manner provided under section 299A.2, or other person under section 299A.3, which results in the student making adequate progress.

For the purposes of this chapter and chapter 299, "private instruction" means instruction using a plan and a course of study in a setting other than a public or organized accredited nonpublic school.

Iowa Code §299A.1(1993).

*Competent private instruction by licensed practitioner.* If a licensed practitioner provides competent instruction to a child of compulsory attendance age, the practitioner shall possess a valid license or certificate which has been issued by the state board of educational examiners under chapter 272 and which is appropriate to the ages and grade levels of the children to be taught. Competent private instruction may include, but is not limited to, a home school assistance program which provides instruction or instructional supervision offered through an accredited nonpublic school or public school district by a teacher, who is employed by the accredited nonpublic school or public school district, who assists and supervises a parent, guardian, or legal custodian in providing instruction to a child. If competent private instruction is provided through a public school district, the child shall be enrolled and included in the basic enrollment of the school district as provided in section 257.6. Sections 299A.3 through 299A.7 do not apply to competent private instruction provided by a licensed practitioner under this section. However, the reporting requirement contained in section 299A.3, subsection 1,

shall apply to competent private instruction provided by licensed practitioners that is not part of a home school assistance program offered through an accredited nonpublic school or public school district.

Iowa Code §299A.2(1993).

*Dual enrollment.* If a parent, guardian, or legal custodian of a child who is receiving competent private instruction under this chapter submits a request, the child shall also be registered in a public school for dual enrollment purposes. If the child is enrolled in a public school district for dual enrollment purposes, the child shall be permitted to participate in any academic activities in the district and shall also be permitted to participate on the same basis as public school children in any extracurricular activities available to children in the child's grade or group, and the parent, guardian, or legal custodian shall not be required to pay the costs of any annual evaluation under this chapter. If the child is enrolled for dual enrollment purposes, the child shall be included in the public school's basic enrollment under section 257.6.

Iowa Code 299A.8(1993).

The Postsecondary Enrollment Options law reads in pertinent part as follows:

As used in this chapter, unless the context otherwise requires:

2. "Eligible pupil" means a pupil classified by the board of directors of a school district, by the state board of regents for pupils of the school for the deaf and the Iowa braille and sight saving school, or by the authorities in charge of an accredited nonpublic school as a ninth or tenth grade pupil who is identified according to the school district's gifted and talented

criteria and procedures, pursuant to section 257.43, as a gifted and talented child, or as an eleventh or twelfth grade pupil, during the period the pupil is participating in the enrollment option provided under this chapter. A pupil attending an accredited nonpublic school shall be counted as a shared-time student in the school district in which the nonpublic school of attendance is located for state foundation aid purposes.

Iowa Code §261C.3(2) (1993)

Chapter 257 contains the provisions of the school finance laws. The relevant sections include the following:

1. *Actual enrollment.* Actual enrollment is determined on the third Friday of September in each year and includes all of the following:
  - a. Resident pupils who were enrolled in public schools within the district in grades kindergarten through twelve and including prekindergarten pupils enrolled in special education programs.
  - b. . . .
  - c. Shared-time and part-time pupils of school age enrolled in public schools within the district, irrespective of the districts in which the pupils reside, in the proportion that the time for which they are enrolled or receive instruction for the school year is to the time that full-time pupils carrying a normal course schedule, at the same grade level, in the same school district, for the same school year, are enrolled and receive instruction. Tuition charges to the parent or guardian of a shared-time or part-time non-resident pupil shall be reduced by the amount of any increased state aid received by the district by the counting of the pupil.

- e. Resident pupils receiving competent private instruction from a licensed practitioner provided through a public school district pursuant to chapter 299A shall be counted as six-tenths of one pupil.
- f. Resident pupils receiving competent private instruction under dual enrollment pursuant to chapter 299A shall be counted as one-tenth of one pupil.

2. *Basic enrollment.* Basic enrollment for a budget year is a district's actual enrollment for the base year. Basic enrollment for the base year is a district's actual enrollment for the year preceding the base year.

4. *Budget enrollment.* Budget enrollment for the budget year is the basic enrollment for the budget year.

Iowa Code §257.6(1), (2), (4) (1993).

### III. DISCUSSION

A resolution of both of your questions involves, to some extent, an attempt on my part to divine the intent of the legislature in enacting the competent private instruction (colloquially "home schooling") law and the dual enrollment provision. Iowa Code section 299.1 for many, many years required children of compulsory attendance age to be educated either in a public school or "elsewhere," so long as they received "equivalent instruction by a certified teacher." See e.g., Iowa Code §299.1(1981). In Iowa under the former law, notwithstanding the exemptions under section 299.2 and 299.18, a parent could fulfill the compulsory attendance obligation by enrolling the child in public school, accredited private school, nonaccredited private school, or by engaging a properly certified (now "licensed") teacher to provide private instruction. In 1991, the General

Assembly expanded the options available to parents by enacting chapter 299A, "Competent Private Instruction," whereby the "parent, guardian, or legal custodian" of a child of compulsory attendance age could provide direct instruction to the child without regard to the parent's or guardian's educational qualifications. 1991 Iowa Acts ch. 200, §§3-30. In lieu of the previous requirements of a minimum curriculum taught by a properly licensed or certified teacher, the legislature opted to assure student progress by the alternative means of standardized testing or portfolio evaluation. Iowa Code §§299A.2-4. These forms of assessment are inapplicable if the person providing the instruction holds a valid Iowa teacher's license appropriate for the age of the child being taught, or if the instruction program is supervised by someone with such licensure.<sup>2</sup> Id. at §299A.2.

At the same time as the legislature allowed home schooling of a child by his or her parent, it also enacted a provision entitling the home schooling parent to have the child take advantage of "any academic activities in the district" as well as the opportunity for the child "to participate on the same basis as public school children in any extracurricular activities available" at no cost to the parent. Iowa Code §299A.8. This parental option, mandatory upon the school when timely requested by a parent, is called "dual enrollment."<sup>3</sup>

Neither the General Assembly nor the State Board of Education in its rulemaking capacity limited or further defined the availability or extent of dual enrollment. However, with respect to the funding mechanism to help public schools offset the administrative responsibilities associated with dual enrollment as well as the actual costs of student participation in courses, academic activities, or extracurricular programs, the legislature did determine that a dual enrolled pupil is to be counted as one-tenth of a pupil for purposes of state aid. Iowa Code §257.6(1)(f)(1993). In 1992-93, the state cost per pupil was \$3,336.00; one-tenth of that amount is approximately \$334.00.

Did the legislature intend that a pupil could be home schooled only for a brief portion of the child's educational day, that the school pick up the costs of instruction and all of the other costs inherent in providing an education for the majority

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<sup>2</sup>The state board of education adopted rules establishing the parameters of the supervision. See 281 IAC 31.3.

<sup>3</sup>If a child is dual enrolled and the parent chooses the standardized testing option for assessment purposes, there is no cost to the parent for the testing. The resident district pays.

of the day, as well as of its extracurricular program, and pay the tab for any testing, all for \$334.00? That appears to be the question before me.

I could take the position that there is no statutory limitation on the number of courses or activities that a child can elect to participate in under dual enrollment, and suggest that the absence of such a limitation means that the answer to this question is yes. But the drastically reduced amount of funding for a dual enrolled student, coupled with the common law view of parental rights in the area of public school curriculum, seriously compromise that approach.

It is fairly well-settled law that in the absence of a constitutional provision or a statute allowing a parent to excuse a child from instruction, the parent's right to determine the curriculum of instruction for the child is virtually non-existent; that power rests with the elected school board in whom the state legislature has vested it. In a very early case ultimately decided by the Indiana Supreme Court, a father who objected to his son's being required to take music in secondary school challenged the school's refusal to excuse his son from the music course. The Indiana Supreme Court wrote, after establishing that the music requirement fell comfortably within the discretionary power conferred by the legislature on the school district and its board of directors, :

The important question arises, which should govern the public high school . . . as to the branches of learning to be taught and the course of instruction therein, -- the school trustees of such city, to whom the law has confided the direction of these matters, or the . . . will of the [parent] . . . ? We are of the opinion that only one answer can or ought to be given to this question. The . . . wishes of the [parent] . . . must yield and be subordinated to the governing authorities of the school . . .

State ex rel. Andrew v. Webber, 108 Ind. 31, 8 N.E. 708(1886).

In a similar line of cases, albeit ones where the students' parents were seeking to opt-out of courses due to religious beliefs, there is a consistent theme that bending to the will of the parent regarding a child's curriculum would "result in a substantial disruption to the public schools," an occurrence the schools are justified in avoiding. See, e.g., Mozart v. Hawkins



County Bd. of Educ., 827 F.2d 1058 (6th Cir.1987) ("The divisiveness and disruption caused by the opt-out remedy would be magnified if the schools had to grant other exemptions." Id. at 1072 (Kennedy, J., concurring)); Ware v. Valley Stream High School Dist., 551 N.Y.S.2d 167, 550 N.E.2nd 420 (Ct. App. 1989) ("The First Amendment does not guarantee that a school curriculum will offend no religious group. Moreover, parents have no constitutional right to tailor public school programs to individual preferences, including religious preferences." Id. at 174 (citing Epperson v. Arkansas, 383 U.S. 97)).

If the constitution does not afford the parents a right to determine their child's curriculum nor to opt him in or out of classes on request, only a regulation, statute, or local school board policy could offer such an option.

The answer in the Indiana case would no doubt have been different had the state legislature enacted a statute allowing a parent to excuse his or her child from music instruction. Under Iowa law, if a child has a bona fide religious objection to health or physical education, the child can be excused from those courses.<sup>4</sup> Of more recent enactment, Iowa's human growth and development law (section 279.50) also contains an excusal or "opt-out" provision, this one without the requirement that the subject matter conflict with the child's religious beliefs. However, the list of topics under the human growth statute does not include "science." Thus, in the absence of a state or federal statute or rule entitling a parent to excuse a child from a particular course, the parent has no such right.<sup>5</sup> The school board could, by policy, confer this right, but as your declaratory ruling petition makes no mention of such a policy, I assume it does not exist in Iowa City.

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<sup>4</sup>See Iowa Code §256.11(6): "A pupil is not required to enroll in either physical education or health courses if the pupil's parent or guardian files a written statement with the school principal that the course conflicts with the pupil's religious beliefs."

<sup>5</sup>Although the United States Constitution or a state constitution could also be a source of a parental "right" to excuse a child from particular instruction (generally speaking, only when the school's curriculum compels a student to perform a ritual that violates the student's freedom of religion), your background facts do not indicate that the request that the student be excused from science was based upon the religious views or beliefs of either the parent or the child.

Has the advent of the home schooling law rendered inapplicable the common law principle that the school board is vested with the exclusive control of the curriculum? Can a parent now, using chapter 299A, do indirectly that which he or she could not do directly, i.e., effectively excuse the child from science? I do not think that was the legislature's intent in allowing dual enrollment, particularly given the minimal funding provision of 257.6(1)(f). As additional evidence of what I perceive to be the General Assembly's intent that a child who is enrolled in all but one class is not under "competent private instruction" is the language in section 299.1 that a parent has three choices of educational setting: public school, accredited nonpublic school, or competent private instruction; also, section 299A.1 states that this term means "instruction . . . in a setting other than a public or organized accredited nonpublic school." It simply sounds to me as though a parent picks one of the three options. If he or she picks public school or accredited nonpublic school, the parent is then in the realm of statutory and common law rights to determine the curriculum.

Although the General Assembly is, of course, free to amend the law at any time in the future to nullify my decision in this regard, I view the current law in the area of dual enrollment as providing a home schooling parent with the opportunity to have the child take advantage of courses or activities in the public school that do not readily lend themselves to the home instruction setting; for example, chorus; band or orchestra; physical education (for team play); industrial arts and other vocational or technical courses; and biology, chemistry, or other "lab" courses. Perhaps the parent feels poorly qualified to teach English or mathematics and wishes the child to receive more competent instruction from the school's teachers. The parent's motivation for seeking dual enrollment could be for the sole purpose of free standardized testing, or for participation in volleyball or football. But I cannot see where the legislature intended that a mere fraction of the costs of a regular student's education should be stretched to cover all but one course. Accordingly, the answer to your first questions is no.

A similar analysis answers the second question regarding college attendance by high school students. The Postsecondary Enrollment Options Act, codified in Iowa Code chapter 261C, states that the Act's purpose and policy is

. . . to promote rigorous academic or vocational-technical pursuits and to provide a wider variety of options to high school pupils by enabling ninth and tenth grade pupils who have been identified as gifted and

talented, and eleventh and twelfth grade pupils to enroll part time in nonsectarian courses in eligible postsecondary institutions of higher learning in this state.

Iowa Code §261C.2(1993). This opportunity is available to "eligible pupils," as defined in section 261C.3(2) and quoted above in Part II of this declaratory ruling. Iowa Code §261C.4(1993) ("An eligible pupil may make application . . ."). This law was enacted in 1987, predating the competent private instruction chapter by four years. There is no mention of its applicability to home schooled students; similarly there is no specific mention of the Postsecondary Enrollment Options Act in chapter 299A or particularly section 299A.8 describing dual enrollment.

I do note that section 261C.4 contains the statement that in order for a college level course to be paid for by the public school district, a "comparable course must not be offered by the school district or accredited nonpublic school in which the pupil attends." (Emphasis added.) This phrasing would at least imply that the student seeking to use the Act must be attending instruction in an accredited nonpublic school or a public school, as well as being "classified by the board of directors of a school district or the authorities in charge of an accredited nonpublic school as an eleventh or twelfth grade pupil" or, if a ninth or tenth grader, be identified by the same authorities as a talented or gifted pupil.

A child under competent private instruction is *by definition* not attending a public or accredited private school. See Iowa Code §299.1 (parent shall enroll the child in a public school, accredited nonpublic school, or provide competent private instruction in accordance with chapter 299A). Does requesting dual enrollment on the competent private instruction form (required by section 299.4) change the child's status from being a child under competent private instruction to a child "enrolled" in a public school? I do not think so, and I reach this conclusion not only on the plain language of the statute but also on the state funding provisions for dual enrollment (.1 of a regular pupil) and for payment of the tuition for the postsecondary courses.

Section 261C.6 requires the school district to pay either the actual costs of the college course or \$250, whichever is lower. It is my experience that seldom if ever is college tuition lower than \$250 per course. That being the case, coupled with the fact that the only limitation on the enrollment status of the high school student in college is "part time" -- which is

defined with deference to the postsecondary institution's definition of full-time and part-time student -- it is possible for a student to take up to 12 or 13 course hours, or perhaps six courses per semester, at a cost of up to \$3,000 to the school district. Once again I must question whether the legislature intended that a dual enrolled student who generates a total of perhaps \$334 should cost the school district \$3,000, or even \$500, for that matter.

In my view this scenario would impose an undue financial hardship on school districts already straining to afford the \$250 per course minimum, even for a student who generates full state funding. This does not even consider a scenario of the dual enrolled high school pupil who, still of compulsory attendance age, dual enrolls for one or two courses at the public school, participates in one or more extracurricular activities, and seeks free standardized testing. If I were to interpret the two laws (299A.8 and 261C.4) as permitting home schooled, dual enrolled students to take advantage of the Postsecondary Enrollment Options Act, it is clear that a probability exists that the school district would be placed quickly in a deficit situation as to that pupil, which in turn would disadvantage the regular education pupils' programs. I sincerely doubt that this is what the legislature had in mind.

In summary, the traditional right of parents is to select among the options afforded them by the state legislature to educate the children of this state. It is not an unrestricted right of parents to mix-and-match education to the point of potentially bankrupting the public schools. It is true that a student enrolled in an accredited nonpublic school may apply to the public school to take courses there that are not available at the private school. Iowa Code §256.12(1). And that student may "pass through" the public school to utilize the Postsecondary Enrollment Options Act. Iowa Code §261C.3(2). Yet the public school in either of those cases is entitled to count the "shared-time" private school pupil in its enrollment on a pro rata basis, at least breaking even financially, in theory. *Id.* at §257.6(1)(c). It is also true that a parent choosing competent private instruction may dual enroll the child in the public school, thus taking advantage of two settings as well. However, the funding mechanism for dual enrollment does not appear to contemplate that the cost to the district would exceed the .1 funding generated by the dual enrolled pupil. I find this fact controlling on this issue of legislative intent to enable a dual enrolled child to pass through the public school and on to college courses.

Although you haven't asked whether a competent private instruction student enrolled in a public school's "home school assistance program" would be eligible for the Postsecondary Enrollment Options Act, my answer would be the same. That student generates .6 of the funding of a regular education pupil. Iowa Code §257.6(1)(e). That funding, even more clearly than the funding for dual enrollment, is targeted for the costs of providing licensed teachers, textbooks, and other expenses associated with providing education, even on a part-time basis.

Finally, in recognition of the fact supplied in your petition that the parental requestor in Iowa City is himself a licensed science teacher (employed outside of your district) whose desire to teach his son science is apparently due to his disagreement or dissatisfaction with the curriculum or methods employed in his son's school, I want to take this opportunity to make a statement. That father's proposal (removing his son from eighth grade science and teaching him at home) denies the student the benefits of both styles of instruction. I have steadfastly encouraged active parental involvement in children's education and in that vein I commend the Iowa City parent for wishing to teach his child science at home. But, given the fact that the parent's motivation for seeking excusal of his son from science does not stem from a religious objection to the curriculum, I fail to understand how the child's science education in school and under his father's tutelage in the late afternoon or evening would be detrimental to him. In effect he would have the benefit of two science courses and two teachers contemporaneously. Surely this parent can find some benefits in the dual education.

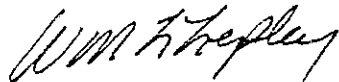
#### IV. DECISION

In response to question A, my answer is no, a parent may not use dual enrollment to enroll a child in all courses but one. The school district would be arguably fiscally negligent to fund at a deficit the education of a dual enrolled student. In the unlikely event that testing costs exceeded the .1 funding, they would have to be paid by the district regardless, due to the specific statute.

Likewise, a dual enrolled student under competent private instruction is not an "eligible student" for purposes of the Postsecondary Enrollment Options Act and may not enroll in college courses under the Act at district expense.

This agency will initiate rulemaking in the near future to adopt formally the positions announced herein.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "W. L. Lepley".

William L. Lepley, Ed.D  
Director