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Opinion No. 11-44

Requiring Home School Students to Take TCAP and Other Examinations

QUESTION

Can Tennessee require home school students authorized pursuant to Tenn. Code Ann. §§ 49-50-801, 49-6-3050, or other such sections, to take TCAP, Gateway, End of Course, and other such examinations?

OPINION

The State of Tennessee can require home educated students whose education outside of public schools is authorized by Tenn. Code Ann. § 49-6-3050 to participate in assessments or examinations such as the current TCAP or End of Course assessments or their successors, to the extent those assessments are not designed or implemented for the purpose of complying with the Elementary and Secondary Education Act, 20 U.S.C. §§ 6301 et seq.

ANALYSIS

Existing Assessments of Home School Students

As an exception to the general rule compelling attendance of school age children in a duly established public school, the State of Tennessee permits parents to educate their children at home, subject to certain requirements. Tenn. Code Ann. § 49-6-3050 (2011); Anderson v. Anderson, 56 S.W.3d 5, 7 n.1 (Tenn. Ct. App. 1999).

While allowing home school children to be educated outside the public school system, the State retains the authority to regulate the education of those students whose parents choose home school. See Crites v. Smith, 826 S.W.2d at 466-67 (noting, in reference to home education, that "The government has the power to see that the children of its citizens receive an education according to reasonable minimum standards from instructors having minimum qualifications.").

The State permits the home education of children under one of two frameworks created in Tenn. Code Ann. § 49-6-3050 (the "Home School Statute"). First, the Home School Statute permits students to be educated in home schools where the parents are "associated with an organization that conducts church-related schools, as defined by § 49-50-801, that are supervised by the organization through the director of schools of the organization's department of education, and that administer standardized achievement tests at the same time the tests are given in their

regular day schools." Tenn. Code Ann. § 49-6-3050(a)(2)(A) (2011). Children educated under this subsection of the Home School Statute are required to participate in academic assessments in Grades 9-12. Tenn. Code Ann. § 49-6-3050(a)(2)(B) (2011).

Alternatively, subsection (b) of the Home School Statute permits parents who meet statutory requirements to conduct home school for their children independent of a church-related school. Children educated under this subsection are required to take the same examinations administered to public school students within the same Local Education Agency ("LEA") in grades 5, 7, and 9. Tenn. Code Ann. § 49-6-3050(b)(5)(A) (2011).

Potential Federal Preemption of State Home School Assessments

The opinion request asks whether The Elementary and Secondary Education Act, as amended by the No Child Left Behind Act of 2001 (the "ESEA"), 20 U.S.C. §§ 6301 *et seq.*, may prohibit the State from requiring home school students to participate in certain academic assessments.

While the relevant language in the ESEA, as amended, is not clear, we believe that a court would likely find that the ESEA does not preclude the State of Tennessee from requiring home school children to participate in existing academic assessments, and that the State may require new assessments to the extent those assessments are not designed or implemented for the purpose of complying with the ESEA.

The No Child Left Behind amendment to the ESEA provides, in relevant part, that:

> "Nothing in this Act [*20 USCS §§ 6301 et seq.*] shall be construed to affect a home school, whether or not a home school is treated as a home school or a private school under State law, nor shall any student schooled at home be required to participate in any assessment referenced in this Act [*20 USCS §§ 6301 et seq.*]."

20 U.S.C. § 7886(b) (2011).

The final clause of subsection 7886(b) provides that a state cannot require home school students to participate in assessments "referenced in" the ESEA. A number of different types of assessments are "referenced in" the ESEA, including, but not limited to: Annual assessments in Math and Reading/Language Arts; Science assessments at least once in grades 3-5, 6-9, and 10-12; National Assessment of Education and Progress; Screening assessments for preschool students at risk for reading failure; School and system needs assessments; Teacher assessments; and assessments of English proficiency. *See* 20 U.S.C. §§ 6301 *et seq*.

To the extent that the assessments that are the subject of your question – TCAP, Gateway, End of Course, and other such examinations – fall within the scope of the assessments referenced in the ESEA, the final clause of subsection 7886(b) would seem to prohibit the State from requiring that home school students participate in them. The State law requirement that home school students participate in all of these examinations, however, existed prior to the

passage of subsection 7886(b). If the ESEA is construed to prohibit pre-existing examinations, then the ESEA would in fact be "affecting" home school students contrary to the first clause of subsection 7886(b).

Accordingly, the language of 20 U.S.C. § 7886(b) contains an internal conflict, and Congressional intent regarding the issue of pre-existing assessments of home school students is unclear.[1] If Congress intended the final clause of subsection 7886(b) to prohibit pre-existing home school assessments to the extent those assessments overlap with the type of assessments "referenced in" the ESEA, that outcome would certainly "affect" home schools, contrary to the language of the first clause of subsection 7886(b).

Because the plain meaning of the text of subsection 7886(b) is ambiguous, a proper construction of the statute requires resort to other methods of ascertaining Congressional intent, including examining the context of the full statutory scheme and the legislative history. *See Fullenkamp v. Veneman*, 383 F.3d 478, 483 (6th Cir. 2004) ("the structure and language of the statute as a whole can aid in interpreting the plain meaning and...legislative history can be looked to if the statutory language is unclear.") (citing *United States v. Choice*, 201 F.3d 837, 841 (6th Cir. 2000)).

In light of the overall context of the No Child Left Behind amendment to the ESEA and the legislative history surrounding the language of section 7886, Congress intended to preclude imposition of federal control over home schools through the ESEA.[2] In keeping with that intent, and considering the limiting language in the first clause of subsection 7886(b), it appears that Congress did not intend to displace existing State regulation of home education, including assessment systems, and that the State retains the authority to require assessments of home school students' academic progress.[3] The final clause of subsection 7886(b), then, is most

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[1] In construing federal statutes, "the first step „is to determine whether the language at issue has a plain and unambiguous meaning.'" *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002) *(*quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). To determine whether a statute offers a plain meaning, we examine the language and design of the statute as a whole. *United States v. Ninety-Three Firearms*, 330 F.3d 414, 420 (6th Cir. 2003). Where statutory language is unambiguous and the "statutory scheme is coherent and consistent," this ends the inquiry. *Barnhart*, 534 U.S. at 450. Where, on the contrary, statutory language is ambiguous, other tools, such as the legislative history, may be consulted. *Ninety-Three Firearms*, 330 F.3d at 420.

[2] *See* 20 U.S.C. §7886(c) (2011) ("Nothing in this Act [20 U.S.C. §§ 6301 *et seq*.] shall be construed to permit, allow, encourage, or authorize any Federal control over any aspect of any private, religious, or home school, whether or not a home school is treated as a private school or home school or under State law."); *see also U.S. House of Representatives, Report of the Committee on Education and the Workforce on H.R. 1*, Rept. 107-63 (107th Congress, 1st Session) (Noting that "Earlier this year, *the Committee heard from many organizations representing private schools and home schools who expressed concerns that the bill be clear that its requirements should not apply to home schools,* nor should the requirements apply to private schools if private schools do not receive ESEA funds or services. *Accordingly, the Committee has made absolutely clear that the requirements do not apply to home schools* nor to private schools that do not receive ESEA funds or services.")(emphasis added).

[3] This analysis applies equally to all Tennessee students educated in the home, whether pursuant to Tenn. Code Ann. § 49-6-3050(a)(2)(A) or § 49-6-3050(b). The ESEA provisions prohibiting federal control over "home schools" apply "whether or not a home school is treated as a home school or a private school under State law." 20 U.S.C. § 7886(b), (c) (2011).

reasonably construed as prohibiting the State from requiring home school students to participate in assessments designed or implemented for the purpose of complying with the ESEA.[4] Thus, the State retains the authority to require home school students to participate in assessments not designed or implemented for the purpose of complying with the ESEA.

Accordingly, Tennessee can require home school students authorized pursuant to Tenn. Code Ann. §§ 49-50-801, 49-6-3050, or other such sections, to take TCAP, Gateway, End of Course, and other such examinations that were not designed or implemented for the purpose of complying with the ESEA.

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[4] It should be noted that under any construction of the final clause of subsection 7886(b), the current TCAP assessment regime is not likely to be construed as an assessment "referenced in" the ESEA, and consequently forbidden to home school students. Although TCAP assessment data are utilized to track Adequate Yearly Progress under the ESEA, the TCAP assessments themselves are not directly "referenced in" the ESEA, nor are the TCAP assessments or the End of Course evaluations structured identically to those assessments "referenced in" the ESEA. Finally, the TCAP assessment regime existed prior to the No Child Left Behind amendment to the ESEA, and the TCAP assessments were not designed or implemented for the purpose of compliance with the ESEA.