

## Campbell University School of Law Scholarly Repository @ Campbell University School of Law

---

Scholarly Works

Faculty Scholarship

---

1997

# Must Public Schools Accept Home-Schooled Students on a Part-time Basis?

Lisa Lukasik

*Campbell University School of Law*, [lukasikl@campbell.edu](mailto:lukasikl@campbell.edu)

Follow this and additional works at: [http://scholarship.law.campbell.edu/fac\\_sw](http://scholarship.law.campbell.edu/fac_sw)

---

### Recommended Citation

Lisa Lukasik, *Must Public Schools Accept Home-Schooled Students on a Part-time Basis?*, 28 Sch. L. Bull. 16 (1997).

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Repository @ Campbell University School of Law. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Scholarly Repository @ Campbell University School of Law.

# Must Public Schools Accept Home-Schooled Students on a Part-Time Basis?

by Lisa Lukasik

A YOUNG HUSBAND AND WIFE, neither of whom has a college education, choose to educate their children at home for religious reasons. As the children advance in their studies, they reach a point at which they are both eager and ready to engage in an advanced and sophisticated course, such as chemistry. Neither parent feels competent to instruct the children on that subject, and the home school does not have the laboratory equipment necessary to provide thorough training in chemistry even if the parents felt up to the task. Do the public schools have an obligation to accept those children for that one chemistry class per day, while permitting them to continue receiving the rest of their education at home?

The number of children enrolled in home schools in North Carolina reached 13,801 during the 1995-96 school year;<sup>1</sup> this number represents a 100 percent increase over the 1992-93 school year enrollment.<sup>2</sup> As home schools become responsible for the education of increasing numbers of North Carolina's children, the variety of circumstances in which a home-school parent may wish to enroll the children in public schools for parts of days is sure to expand, and in some situations the parent's motivation may not be directly related to educational objectives. The parent may wish to work

part-time, for example, or merely get a break during the day. In other instances, the parents may not feel they have the education or skills to teach certain subjects: fully 50 percent of parents who home-school have no more education than a high school diploma.<sup>3</sup> In one survey, 76 percent of home educators indicated a desire to enroll their children part-time in academic courses in public or private schools.<sup>4</sup>

When a home-schooled student seeks admission to a public school for less than the full day, with the remainder of the instruction to be accomplished at home, must a public school admit this part-time student? This article considers federal constitutional law and state law and concludes that neither requires that public schools enroll a home-educated student for a partial day.<sup>5</sup> On the other hand, no law prohibits local boards from exercising their discretion to adopt policies concerning the admission of such students on a case-by-case basis into their administrative unit.<sup>6</sup>

3. CHRISTOPHER J. KLICKA, *THE RIGHT TO HOME SCHOOL: A GUIDE TO THE LAW ON PARENTS' RIGHTS IN EDUCATION* 1 (1995) (stating that "at least 50% of the parents [who teach in home schools] have only a high school diploma"); MARALEE MAYBERRY ET AL., *HOME SCHOOLING: PARENTS AS EDUCATORS* (1995), at 30-31 (stating that only one-third of the parents included in the survey conducted by the authors "graduated from college with an undergraduate degree").

4. MARALEE MAYBERRY ET AL., *supra* note 3, at 73 (1995).

5. This conclusion applies with equal force to admission to nonclass activities, such as clubs. For interscholastic athletics, special rules may apply. That discussion is beyond the scope of this article.

6. Such policies must, of course, be implemented in ways that are nondiscriminatory and are consistent with the Individuals with Disabilities Education Act.

Lisa Lukasik is a judicial clerk at the North Carolina Supreme Court.

1. ROD HELDER, DIVISION OF NON-PUBLIC EDUCATION, OFFICE OF THE GOVERNOR, 1996 NORTH CAROLINA HOME SCHOOL STATISTICAL SUMMARY 2 (1996).

2. *Id.* at 4.

## No Obligation under the United States Constitution

The United States Constitution contains no language that expressly deals with education, and the United States Supreme Court has never ruled on home schooling per se or on the relationship between home schools and public schools. Nonetheless, its rulings in three closely related areas—a student's "right" to a public education, a student's property interest in education, and a parent's liberty interest in directing a child's education—together support the conclusion that public schools have no obligation under the United States Constitution to enroll home-school students on a part-time basis.

### No "Right" to a Public Education

Most compellingly, when the United States Supreme Court addressed the question of children's right to public education, the Court expressly held that a child does *not* possess a fundamental right to public school education under the federal Constitution.<sup>7</sup> "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution," the Court said. "Nor do we find any basis for saying it is implicitly so protected."<sup>8</sup> Thus a home-school parent cannot argue that his or her child has a constitutionally protected right to attend the public school for a partial day.

### No Property Interest in Partial-Day Attendance

The United States Supreme Court has ruled that, even though children have no constitutional right to a public education, once a state decides to provide public education, it has conferred an important benefit that cannot be taken away from students without due process of law. That is, the Court has recognized that children possess a *property interest* in education, protected under the Fourteenth Amendment of the United States Constitution. The cornerstone case supporting the property interest is *Goss v. Lopez*,<sup>9</sup> in which the Court held that children cannot be suspended from public school without a hearing. In *Goss* and similar cases, the property interest belongs to a student who is enrolled in

public school; the benefit of public education has been conferred and the property interest has attached. A home-school student who is not enrolled in the public schools (but wishes to enroll on a part-time basis) has not been conferred such a benefit and no property interest in school attendance has attached.

The home-school parent might argue that the state, by making public education available generally, has conferred a benefit upon all children in the state, regardless of whether a particular child was enrolled in the public schools, and that the property interest recognized in *Goss* would extend to require that public schools admit a home-educated student on a part-time basis. Such an argument seems doomed to failure. The Supreme Court in *Goss* was concerned only about a "total exclusion from the educational process."<sup>10</sup> Unlike the students in *Goss*, home-schooled students seeking part-time admission into a public school chemistry course are *not* "total[ly] exclu[ded]" from the educational process" if they are denied admission to a particular public school course. On the contrary, they continue to receive education at home. Therefore the holding of *Goss* does not extend to the circumstance in which home-school parents wish to integrate their education of their children with public schooling.

### No Liberty Interest in Demanding Partial-Day Attendance

In *Pierce v. Society of Sisters*,<sup>11</sup> the United States Supreme Court held that *parents and guardians* (as opposed to children or students) possess a "liberty" interest protected under the Fourteenth Amendment to "direct the upbringing and education of children under their control."<sup>12</sup> This holding has been interpreted by courts to recognize that *parents* have a federal constitutional right to choose to educate their children at home.<sup>13</sup>

10. *Id.*

11. 268 U.S. 510 (1925).

12. *Id.* at 534-35.

13. See, e.g., *Mazanec v. North Judson-San Pierre Sch. Corp.*, 614 F. Supp. 1152, 1160 (N.D. Ind. 1985) (ruling that parents have a "constitutional right to educate [their] children in an educationally proper home environment"), *aff'd*, 798 F.2d 230 (7th Cir. 1986); *Care and Protection of Charles*, 504 N.E.2d 592, 598, 600 (Mass. 1987) (stating that home education is a "right protected by the Fourteenth Amendment" and that the object of compulsory attendance laws is "that all children shall be educated, not that they shall be educated in any particular way"); *Delconte v. North Carolina*, 313 N.C. 384, 400, 329 S.E.2d 636, 646 (1986) (recognizing that "if [the court] interpreted [North Carolina's] present school attendance statutes to preclude home instruction, serious constitutional questions would arise").

7. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

8. *Id.* at 35.

9. 419 U.S. 565, 576 (1975).

Although this parental right to choose education *outside* the public schools does not directly create a right of access to education *inside* the public schools, home-school parents may argue that their liberty interest in choosing outside education is unfairly burdened if they are not able to access resources in the public schools to complement the educational opportunities they are able to provide at home. Without such access, their argument may go, the right to choose outside education is not meaningful.

No court has recognized this argument. More specifically, no court has held that a parent's "right" to "direct the education of [his or her] children" requires public schools to admit home-schooled students when they request part-time attendance in public schools. Why is a parent's right to direct the child's education not infringed when a public school denies part-time enrollment to home-schooled students?<sup>14</sup> It is because when public schools do not offer part-time enrollment options, parents still retain control over the education of their children. Parents retain the three primary educational options open to all parents: (1) full-time attendance at public school, (2) full-time attendance at private school, and (3) full-time attendance in home school.<sup>15</sup>

Additionally, parents enjoy many supplemental educational alternatives without part-time enrollment in the public schools. The hypothetical home-school-parents at the outset of this article, for instance, enjoy a limitless range of options to resolve their dilemma: (1) bringing a tutor into the home school to instruct chemistry during the regular home-school day, (2) substituting for chemistry a related course that the home-educator feels competent to teach, (3) postponing the study of chemistry for a semester while the home-educator takes a course to prepare to teach that subject, or (4) attempting to learn chemistry with the home-schooled students while teaching the subject. With such options available to the home-educator, neither commentator nor court has suggested that a public school must admit a home-schooled student on a part-time basis to satisfy constitutional rights of parents to direct their children's education.

14. *Pierce*, 268 U.S. at 534-35. See generally Lisa M. Lukasik, Comment, *The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools*, 74 N.C. L. REV. 1913 (1996) (discussing the impact of the federal Constitution upon the obligation of public schools to admit home-educated students for one or two classes per day).

15. The parent might also attempt to arrange a part-time enrollment option within a private school while continuing to educate his or her child at home for the rest of the school day.

## No Obligation under State Law

Even if the federal Constitution creates no such obligation, it is, of course, fully within the authority of the state of North Carolina to create an obligation for public schools to enroll home-school students for partial days upon request by a parent. This section of this article will (1) discuss whether such an obligation exists under the state constitution, (2) discuss whether such an obligation exists under state statutory law, (3) review legislative and legal dispositions of related issues and consider their bearing on the issue, and (4) make it clear that under North Carolina law, local boards of education enjoy discretion to adopt policies guiding the case-by-case determination of whether or not to admit a home-schooled student into a particular class in a public school.

## No Obligation under the State Constitution

Unlike the federal Constitution, the North Carolina Constitution does acknowledge a right to education, but it appears to limit the right to public education. Article 1, Section 15 provides that "[t]he people have a right to the privilege of education."<sup>16</sup> But Article IX, Section 3 requires only that "every child of appropriate age and of sufficient mental ability shall attend public schools, *unless educated by other means*."<sup>17</sup> Essentially, the state constitution provides a "right" to public education only when a child is *not* "educated by other means." The North Carolina Supreme Court has held that the "other means" of education contemplated by the constitution include home schooling and that when a student is educated at home, that student need not attend public schools.<sup>18</sup> Consequently, when a student and his or her family elect home education (a means of education other than public school), the state constitution no longer demands that public schools assume responsibility for that child's education.

In its July 1997 decision in *Leandro v. Ingram*,<sup>19</sup> the North Carolina Supreme Court explicitly held that the state constitution "guarantee[s] every child of this state an opportunity to receive a sound basic education in our public schools." Because that decision is so new, its ultimate impact cannot be fully predicted. It is possible

16. N.C. CONST. art. I, § 15.

17. *Id.*, art. IX, § 3 (emphasis added).

18. *Delconte v. North Carolina*, 313 N.C. 384, 400, 329 S.E.2d 636, 636.

19. \_\_\_ N.C. \_\_\_, 488 S.E.2d 249 (1997).

that, in future cases, *Leandro* will be interpreted to mean that public schools must enroll a home-educated student for a partial day. After all, *Leandro's* constitutional protection extends to "every child."

For two reasons, however, that interpretation of *Leandro* seems unlikely. First, what *Leandro* extends to every child is "an opportunity" to receive a sound basic education in the public schools. By choosing home schooling, a child's parents have, in effect, elected not to take advantage of that opportunity. And, second, the *Leandro* decision was in no way concerned with home schooling. It was, instead, concerned simply with whether there was a minimally acceptable qualitative standard under the state constitution for the operation of *the public schools*. It held that there was: Public schools must provide every child (meaning, it would seem, every child in the public schools) with the opportunity for a sound basic education.

### No Obligation under State Statutes

The North Carolina statutory scheme for home schooling is very straightforward, imposing only a few requirements on parents as they establish and operate their home schools.<sup>20</sup> First, the statutory definition of "home school" itself sets a couple of requirements: "a non public school in which one or more children of not more than two families or households receive academic instruction from parents or legal guardians or a member of either household."<sup>21</sup> This definition embodies two requirements: (a) children from not more than two families or households may attend a single home school, and (b) a family member, legal guardian, or member of one of the households must act as teacher. Second, there is a statutory requirement that the family or household member teaching in the home school "shall hold at least a high school diploma or its equivalent."<sup>22</sup> And, third, a home school must make itself subject to certain attendance, immunization, scheduling, and testing requirements.<sup>23</sup> Beyond these definitions and requirements, the statutes explicitly provide that

home schools shall *not* "be subject to any other law relating to education except requirements of law respecting immunization."<sup>24</sup> Once parents choose to educate their children at home, they need satisfy only a few requirements to operate a home school in compliance with the statutory standards.

Nothing in the General Statutes directly addresses the relationship between attendance at a home school and attendance in a public school, and nothing in the statutes directly contemplates the situation in which a home-schooled student (or any student) seeks part-time attendance in a public school.

Acting on the mandate of Article I, Section 15 of the state constitution, which directs the state to "guard and maintain" the privilege of education,<sup>25</sup> the North Carolina legislature enacted G.S. 115C-366(a), which reads:

All students under the age of 21 years who are domiciled in a school administrative unit who have not been removed from school for cause, or who have not obtained a high school diploma, are entitled to the privileges and advantages of the public schools to which they are assigned by the local boards of education.<sup>26</sup>

This statutory "right" to public education appears broader than the constitutional right to education in North Carolina discussed above in that it does not contain the "unless educated by other means" proviso contained in the state constitution, but it does contain two significant limits on the right of access to the public schools.

First, the exact language of the statute limits the right to public school to students who (1) are under twenty-one years old, (2) are domiciled in a school administrative unit, (3) have not been removed from school for cause, and (4) have not already obtained a high school diploma. Thus any child (home-schooled or not) who does not satisfy each of these four requirements is not entitled to the "privileges and advantages of the public schools." Of course, many home-schooled children *are* under twenty-one years old, *are* domiciled in a public school's administrative unit, *have not been* removed from school for cause, and *do not have* a high school diploma. These children are not exempted under this first limitation.

20. See generally G.S. 115C-563 through -565 (1995).

21. G.S. 115C-563(a) (1995).

22. G.S. 115C-564 (1995).

23. *Id.* The home school must elect to operate under the requirements applicable to either private church schools and schools of religious charter, G.S. 115C-547 to 115C-554 (1995), or qualified nonpublic schools, G.S. 115C-555 to 115C-562 (1995), and must meet the requirements of the elected form. G.S. 115C-564 (1995). The requirements are substantially similar. Additionally, in home schools, safety and sanitation inspections shall be waived if the school is a private residence, and testing requirements need be satisfied only on an annual basis.

24. G.S. 115C-565 (1995).

25. N.C. CONST. art. I, § 15 ("The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.").

26. G.S. 115C-366(a) (1992).

Second, the language of the statute limits students' rights of access only to the existing "privileges and advantages of the public school to which they are assigned."<sup>27</sup> In other words, a student does *not* enjoy a statutory right to a privilege or advantage that may be provided in *some* school but is not provided by the particular public school to which the student is assigned. Each student is entitled only to the "privileges and advantages" provided by the school to which he or she is assigned.

What does this limitation mean for whether public schools must admit a home-schooled student on a part-time basis? In a nutshell, a particular public school is not required by G.S. 115C-366(a) to admit a home-schooled student for a partial day unless part-time admission is one of the "privileges and advantages" generally offered by that particular school. In other words, if the public school has a policy permitting students to attend class on a part-time basis, then the public school must provide that privilege to all students (whether home-schooled or not) assigned to that school. However, if a particular public school does not permit part-time attendance as a general policy matter, then part-time attendance is not one of the "privileges and advantages" of that public school, and none of the students in that administrative unit (whether home-schooled or not) may rely upon G.S. 115C-366(a) to demand such a privilege.

A parent might attempt to argue that the "privileges and advantages" of the public schools are simply the individual classes offered by a school. If a school offers chemistry, for example, the parent might argue that all students assigned to that particular school would be "entitled" to the "privilege" of that chemistry course, regardless of any other circumstance. But G.S. 115C-366(a) *does not* provide that a student is entitled to each course offered by a public school in isolation from any school policies or practices. Instead, the statute provides that a student assigned to a particular school is entitled only to "the privileges and advantages" of that public school as provided by that school. Chemistry may be listed in the course offering of a particular school, but access to that class may be limited to a specific number of students in a particular grade who have performed successfully on a prerequisite course. The mere fact that a public school offers a particular course does not entitle any student in the administrative unit to enrollment in that course. Essentially, under the terms of G.S.

115C-366(a), students attending public schools may enjoy the benefits of that particular school only as administered by the local school board. If a public school does not provide unlimited access to each of its courses, then unlimited access to any subject for which the public school may hire a teacher is not a "privilege and advantage" of that public school.

Even if it could be argued that some students do possess a statutory right to attend a particular class offered at a particular school, that right is waived by the parents of home-schooled students when they elect home education. A statutory right is waived by implication if an individual's conduct is inconsistent with the purpose of the statute creating the right in the individual.<sup>28</sup> G.S. 115C-366(a) serves the purpose of ensuring that all children are able to obtain education sufficient to satisfy their compulsory attendance requirements under G.S. 115C-378. A parent's choice to home school indicates that the parent does not wish to satisfy his or her child's compulsory attendance obligations via public schools. This choice is inconsistent with the purpose of G.S. 115C-366(a), which provides a right to public schools for students who choose public schools as the means by which they will satisfy their attendance obligations. Home-school parents waive their right to a public school education for their children (including their ability to access a particular course) by implication when they elect home education. Essentially, the rights created under G.S. 115C-366(a) are waived in favor of another "means of education," and G.S. 115C-366(a) is not violated by denying home-schooled students admission to public school classes.

### Additional Legal Considerations

Neither the North Carolina Constitution nor the North Carolina General Statutes requires public schools to admit a home-schooled student who requests enrollment in one or two classes in public school. This conclusion is bolstered by dicta in an opinion by the North Carolina Supreme Court and an opinion of the North Carolina Attorney General.

In *Delconte v. State*, the North Carolina Supreme Court addressed the question of "whether [Mr. Delconte's] home instruction [of two of his four children was] prohibited by our compulsory school attendance statutes."<sup>29</sup> In concluding that home education

27. *Id.* (emphasis added).

28. *In re West*, 212 N.C. 189, 193 S.E.2d 796 (1937).

29. *Delconte v. State*, 313 N.C. 384, 385, 329 S.E.2d 636, 638 (1985).

did not violate compulsory attendance laws, the court outlined the four educational options that it felt would satisfy the state's school attendance requirements.<sup>30</sup>

[W]e conclude that there are four ways by which school-aged children in this state may comply with our school attendance statutes. First, under N.C.G.S. § 115C-378, a child may attend public school. Second, under this same section, a child may attend an "approved," "nonpublic school" which maintains the required records and conducts its curriculum concurrently with the local public school. Third, a child may attend a "private church school or school of religious charter" which meets the requirements of Part 1, Article 39, Chapter 115C. Fourth, a child may attend a "nonpublic school" which qualifies by meeting the requirements of Part 2, Article 39, Chapter 115C.<sup>31</sup>

Essentially, the state supreme court accepted the dichotomy created in the state constitution between public schools and nonpublic schools, or "other means" of education. Just as the state constitution addresses the issue of attendance at public schools as an all-or-nothing proposition, the state supreme court recognized that in order to satisfy attendance statutes, students must attend public school or one of three forms of "nonpublic" schools. The supreme court did not list a part-time attendance arrangement at multiple schools as an option available upon demand by a student, nor did it state that such an arrangement would satisfy the compulsory attendance requirements of the state. Thus the decision in *Delconte* supports the conclusion that public schools are not required to admit home-schooled students on a part-time basis.

An opinion of the North Carolina Attorney General also supports this conclusion.<sup>32</sup> In 1987 the superintendent of the Davidson County schools requested that the attorney general address two relevant issues. The attorney general articulated the first of these issues as follows: "Does a student enrolled in a public school have a right to attend a private school for part of the school day?"<sup>33</sup> The short answer to this question, according to the attorney general, is no. A public school is not required to permit a shared attendance program between public and private schools, the attorney general

said, and a decision to deny part-time enrollment at public and private school would not "violate the constitutional rights of the parents or students."<sup>34</sup> It would seem nearly certain that, if a local school board may deny a combined enrollment policy between public and private schools without violating a student's or a parent's rights, then it may deny a combined enrollment policy between public and home schools without violating a student's or a parent's rights.

Thus both the North Carolina Supreme Court decision in *Delconte* and the attorney general's opinion on part-time enrollment support the conclusion that public schools are not constitutionally or statutorily required to admit home-schooled students on a part-time basis.

## Local School Board Discretion

The conclusion that public schools are not required under federal or state law to admit home-schooled students on a part-time basis seems clear. However, this does not mean that public schools are prohibited from accepting home-schooled students for one or two classes per day in particular circumstances. No statute directly defines guidelines or requirements to govern the possibility of part-time admission of home-schooled students in public school classes. In the absence of any statute or regulation to the contrary, "the authority to determine questions regarding the public schools generally rests with the local boards of education."<sup>35</sup> According to the North Carolina General Statutes, "[l]ocal boards of education . . . shall have general control and supervision of all matters pertaining to the public school in their administrative units."<sup>36</sup> Given the absence of other statutory direction, this statute gives local boards discretion to adopt policies to govern the acceptance of home-schooled students for part-time admission to their administrative unit.

In sum, although public schools are not required to admit home-schooled students into their classes for partial-day attendance, they are also not prohibited from admitting them. Local school boards possess

30. G.S. 115C-378 is the state's compulsory attendance statute. It requires that "[e]very parent, guardian or other person in this State having charge or control of a child between the ages of seven and 16 years shall cause such child to attend school continuously for a period equal to the time which the public school to which the child is assigned shall be in session." *Id.*

31. *Delconte*, 313 N.C. at 390, 329 S.E.2d at 640-41.

32. 57 N.C. Op. Att'y Gen. 26 (1987).

33. *Id.*

34. *Id.* However, the attorney general recognized that a local board must provide appropriate education to handicapped children and that the issue at hand might require a different result with handicapped children. *Id.* A discussion of appropriate education for handicapped children is beyond the scope of this article.

35. 57 N.C. Op. Att'y Gen. 26 (1987) [citing G.S. 115C-40 (1992)].

36. G.S. 115C-40 (1992).

broad authority to decide whether or not to admit a home-schooled student into a particular class, based not only upon the particular student's circumstances, but also upon the administrative and fiscal concerns of the public school at issue.<sup>37</sup>

## Conclusion

The number of home-schooled students in North Carolina is increasing. Consequently, new and complex questions regarding the relationship between home

---

37. A discussion of the financial implications of such a decision is beyond the scope of this article.

schools and public schools are beginning to arise. This article addressed one such question: Must public schools admit home-schooled students for partial-day attendance? Because no federal or state constitutional or statutory provision directly addresses this issue, consideration of this issue is complex. After reviewing relevant federal and state law, however, this article concludes that neither the existing federal law nor the existing state law *requires* public schools to enroll home-schooled students on a part-time basis. In addition, this article concludes that under North Carolina law, public schools are not *prohibited from* admitting such students. Instead, local school boards have discretion to determine, on a case-by-case basis, whether or not to permit a home-schooled student into a particular class in a public school. ■