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MEMORANDUM

July 20, 2012

To: HSLDA Members

From: Michael P. Donnelly, Esq.

Re: Private Education Under Ohio Administrative Code 3301-35-08

In *Ohio v. Whisner*, 47 Ohio St.2d 181, 351 N.E.2d 750 (1976), the Ohio Supreme Court stated “. . . it has long been recognized that the right of a parent to guide the education, including the religious education, of his or her children is indeed a fundamental right guaranteed by the Due Process Clause of the Fourteenth Amendment.” 47 Ohio St.2d at 214. Following the *Whisner* decision, the State Board of Education promulgated Ohio Administrative Code 3301-35-08, which allows for schools with truly held religious beliefs to be established without a charter from the State Board of Education.

These private schools, also known as “non-chartered, non-tax-supported schools,” have come to be known as “-08 schools.” Because Ohio’s homeschooling regulation did not yet exist (it became law in 1989), some homeschooling families established “-08 schools” to comply with Ohio compulsory attendance laws. Since 1989, some families continue to establish -08 schools to privately educate their children at home.

The Ohio Department of Education (“ODE”) has been aware of this practice for years and has never legally challenged it in court. Some years ago, the ODE began compiling an annual list of -08 schools, a practice they continue today. While there is no regulatory or statutory authority for the ODE to compile such a list, HSLDA believes it is probably within the administrative authority of the ODE to compile such a list for the purposes for which it uses the list—providing local school districts information for compliance with the Individuals with Disabilities Education Act (“IDEA”) and for administration of the Post Secondary Enrollment Option (“PSEO”) program.

NOTE: IDEA regulations merely require that the local education agency (the school district) attempt to make contact. The law does not mandate that schools must respond to that contact. The school may voluntarily respond to the contact, and in most cases, this response will result in no further contact by the district.

In 2005, the ODE began sending back forms that did not contain certain information. In the subsequent two years and through negotiation, HSLDA was able to navigate this conflict and get most schools on the “approved list” even though the law does not explicitly require that an -08 school be on a list and that being on a list does nothing to affect the legal status of an -08 school that is properly formed.

Then in 2007, the ODE refused to list certain -08 schools it deemed did not comply with the ODE’s interpretation of the governing regulation. Students in unlisted -08 schools were unable to participate in the Ohio State PSEO program and were deemed to be at a slightly increased risk for a truancy investigation by the local school district. HSLDA had very few reports of students of unlisted -08 schools being reported for truancy. HSLDA defends members against prosecution for truancy who, because of truly held religious beliefs, organize single-family -08 schools to educate their own children.

In 2008, HSLDA represented over 100 families who had formed -08 schools and received a denial letter from the ODE. The dispute centered on an argument made by the ODE that -08 schools had to comply with fire regulations for Educational Group E in the Ohio State Fire Code. HSLDA disagrees. Although a complicated issue, HSLDA’s position is that a building’s primary purpose defines its category for the fire code. The mere fact that children gather in a building that is otherwise a residence should not convert it into a “school” for the purpose of complying with the state fire code.

Nevertheless, the ODE pressed its case and, in 2009, obtained a ruling from a hearing officer that -08 schools with 6 or greater enrolled students must comply with education group E fire code regulations. HSLDA disagrees with this ruling and has not as of this writing determined whether or not to appeal.

However, what is clear is that -08 schools with 5 or fewer enrolled students do not need to comply with these rules. This covers over 99% of families who would like to form an -08 school and otherwise qualify.

HSLDA provides a sample letter for members who have established a private school under this regulation for use as its “report to parents.” HSLDA has also created a cover letter for members to use when filing the “report to parents.” HSLDA reached an agreement with the ODE in September 2006 on a comparatively simple form for our members to use. This form contained some additional information—contact phone number, physical address, and school district identifier—that was requested by the ODE. This year’s sample cover letter (rather than the “report to parents” letter) contains this additional information. A school that does not provide this information will not be registered on the -08 schools list. Even if a school is not listed, HSLDA believes that a school that files its report to parents and is in compliance with the regulation is a valid -08 school regardless of whether the ODE lists the school.

Instructions for Starting an -08 School:

1. Review the Ohio Administrative Code, Section 3301-35-08 (<http://codes.ohio.gov/oac/3301-35-08>) and determine whether your school is in compliance with the requirements.
2. If your school is in compliance, download HSLDA's "Sample 'Report to Parents' Letter for a Non-Chartered Non-Tax Supported (08) School" (<http://members.hsllda.org/state/OH/default.asp>) and the "Sample Cover Letter for 'Report to Parents' Letter" (<http://members.hsllda.org/state/OH/default.asp>). Complete this form and mail **by September 30th** to:

Bev Russell
Non-Chartered, Non-Tax Coordinator
Ohio Department of Education
25 S. Front Street, Mail Stop 309
Columbus, Ohio 43215-4183

3. Complete HSLDA's "Report of Attendance at a Non-Chartered, Non-Tax Supported School" (<http://members.hsllda.org/state/OH/default.asp>) and mail to your **local school board treasurer within the first two weeks of the beginning of the school year.**
4. Before mailing, copy all paperwork for your school's records. Send the documents Certified Mail/Return Receipt Requested.

Common Questions:

1. **I do not have a bachelor's degree—may I teach or be an administrator under the -08 regulation?**

No. The regulation states that administrators and teachers (or persons giving instruction) must have a bachelor's degree or its equivalent. The ODE has agreed that a degree from a Bible college or institute is equivalent to a bachelor's degree.

2. **What is a school day?**

A school day is any day during which your school is open and providing instruction or other educational activities. The -08 regulation requires that your school have a **minimum of 182 school days of at least five hours** (the hourly requirement does **NOT** include "noon recess"). The five hours may include both classroom instruction and other educational activities.

3. **What procedures for promotion must my school follow?**

No specific procedure must be followed—your school may develop its own. The procedure can be simple or more complex—one example is to promote a student to the next grade when he/she has completed all textbooks for a particular grade and is ready to start the next grade's work.

4. **What about state and local health, fire, and safety laws?**

As a general rule, a building must comply with building codes that specifically apply to the building's primary intended purpose. If you teach your own children in your home as an -08 school, your home would not need to meet the fire and safety code requirements of a "school building." According to the National Fire Protection Association Code, Section 15.1.4.3, "In cases where instruction is incidental to some other occupancy [e.g., a single-family residence], the section of this Code governing such other occupancy [residence] shall apply." The NFPA has been incorporated into the Ohio Basis Building Code. See *DeRolph v. State*, 712 N.E. 2d 125, 157 (Ohio Cmpl 2006). Additionally, HSLDA has successfully litigated this issue in North Dakota. *Birst v. Sanstead*, 493 N.W. 2d 690 (N.D. 1992).

The ODE appears to have determined that all -08 schools are classified as Educational Group E buildings and must therefore meet certain statutory inspection criteria. The code cited by the ODE however, O.A.C. 1301:7-7-02, explicitly states that a building used by five (5) or fewer persons for educational purposes is not subject to this grouping. HSLDA also believes that a reasonable interpretation of the regulation should also permit a single family of 5 or more to use a residence for educational purposes without being classified under Educational Group E.

However, a hearing officer ruling in 2009 determined that -08 schools with 6 or more students must comply with Educational Group E fire code regulations. HSLDA disagrees with this ruling and is considering an appeal of it.

5. May I use my own letter (not the HSLDA form) to certify compliance with the -08 regulation?

Yes, you may use whatever method you choose to file a report to parents. However, HSLDA has found that members who use our sample letters may be less likely to have issues with the ODE.

6. Do I have to wait until after July 1st to file my report to parents with the ODE?

No. The only date in the -08 regulation is September 30th – the date by which the report to parents must be filed each year. However, out of courtesy for the ODE's administrative procedures, you may wish to wait until after July 1st to file the report.

7. Do I have to tell the ODE how many students are in my school?

No. The regulation explicitly states the information you are to report and to whom it is to be reported. The regulation does not contain any requirement that -08 schools disclose how many students are in their school to the ODE. However, if you do not disclose this information your school may not be put on the ODE's "approved -08 school list." While this list does not affect the legal status of your school, certain government officials may rely on this list for purposes of determining whether students are complying with compulsory attendance law or for qualification for certain government benefits (e.g. PSEO).

8. What do I do if the school district contacts me (by phone, certified letter, etc.) about services for special needs students?

By contacting your school, the school district is fulfilling its responsibility under federal law to offer special needs services to all private school students in its jurisdiction. Please note that you are not legally required to respond to the school district; however, to prevent school officials from continuing to contact you, you may wish to respond.

If you do not wish to receive services from the public school, simply complete Form C (http://members.hslda.org/state/OH/OH_Form_C.pdf), indicating that you do not wish to participate, and send it to the school district.

If you do wish to receive services for your students, you should make arrangements directly with the school district.

On occasion, school officials have asked to visit -08 schools. If a school official contacts you requesting a visit, you may contact HSLDA or simply tell the official that you prefer to handle the matter through written correspondence. Home visits are not authorized under Ohio law.

9. Is an -08 school the same as homeschooling?

No. Students educated under O.A.C. 3301-35-08 (the -08 regulation) are considered private school students, not homeschooled students. This is a matter of legal status. This distinction is important because two different regulations govern homeschoolers and non-chartered, non-tax supported (private) school students. O.A.C. 3301-34 (the homeschooling regulation) contains provisions for homeschoolers that do not apply to private school students.

Furthermore, -08 school students are considered private school students for the purposes of the Ohio Athletic Associations rules.

10. How should I decide which approach to choose?

By reading both the homeschooling and the -08 school regulations and understanding their differences, you can determine which approach to educating your students is appropriate. You can also contact HSLDA to discuss the pros and cons of each method in light of your specific situation.

O.A.C. 3301-34-01 through -06 (homeschooling regulation):

<http://codes.ohio.gov/oac/3301-34>

O.A.C. 3301-35-08 (Non-chartered, non-tax supported school regulation):

<http://codes.ohio.gov/oac/3301-35-08>

11. What about PSEO?

HSLDA is aware that some members have in the past filed under the -08 regulation in order to obtain benefits under the Ohio State PSEO program for postsecondary education for their children. HSLDA advises its members not to form an -08 school solely for this reason and further advises its members to carefully consider the pros and cons of participating in the PSEO program.