

HOMESCHOOLING: PERSPECTIVE FROM SPANISH EDUCATIONAL LEGISLATIVA

LA ESCOLARIZACIÓN EN CASA: PERSPECTIVA DESDE LA LEGISLACIÓN EDUCATIVA ESPAÑOLA.

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Resumen

En este supuesto práctico se pretende, por parte del inspector de referencia de un CEIP público, garantizar el derecho a la educación presencial de dos alumnos a los cuales su familia no llevaban al centro educativo de referencia, porque su familia había decidido educarlos en casa.

Palabras clave: *5605.04 Derecho Constitucional, 5605.02 Derecho Civil, 5801.03 desarrollo del programa de estudios, 5802.02 organización y dirección de las Instituciones Educativas, 5802.04 niveles y temas de Educación y 5802.99 otras (supervisión e inspección educativa).*

Abstract

In this case study, the reference inspector of a primary school is trying to guarantee the right to face-to-face education of two students whose families did not take them to the reference school, because their families had decided to educate them at home.

Keywords: 5605.04 Constitutional law, 5605.02 Civil law 5801.03 development of the study program, 5802.02 organization and Management of Educational Institutions, 5802.02 organization and management of educational institutions, 5802.04 levels and subjects of education, 5802.99 others (supervision and Educational Inspection).

PREAMBLE

As inspectors, we face various challenges, some of which directly impact the competencies of the Education Inspection, such as ensuring the Fundamental Right to Education for all students, especially those enrolled in the Compulsory Stage (6-16 years). This right, still in the 21st-century society, must be guaranteed and ensured in all educational institutions.

The practical case presented to us is paradigmatic because, due to various social, economic, and cultural factors, a family decides not to physically take their children to an educational institution. They argue that they can better guarantee their children's Right to Education than educational authorities can, through homeschooling (Kunzman, R., y Gaither, M. (2013). Homeschooling: A comprehensive survey of the research. *Other Education-the journal of educational alternatives*, 2(1), 4-5).

In this case, we consider: can homeschooling, per se, justify parents' decision not to send their children to traditional schools? The answer to this question, we understand, cannot be general or definitive, as the situation of each family and, especially, the personal and family circumstances of each student must be analyzed.

In this practical case, a priori, there is a clash of fundamental rights: that of the family to receive the religious and moral education that is in accordance with their own convictions, as opposed to a compulsory and presential schooling in an educational center offered by the Educational Administration, which, for its part, must be the guarantor of the unrenounceable obligations attributed to them by the legislator with regard to guaranteeing the effectiveness of the Right to Basic Education.

Throughout the practical scenario, we will unravel and substantiate this collision of rights between families and public administrations, reminding, in the

ultimate instance, that both families and public authorities are subject to the Constitution and the rest of the legal framework.

On the other hand, it should be noted that anyone who, by virtue of their profession or function, becomes aware of a minor's situation of neglect must act in accordance with the law, taking appropriate protective measures and reporting it to the Public Prosecutor.

Therefore, can homeschooling be considered a situation of neglect, as it arises *de facto* due to the non-compliance or the impossible or inadequate exercise of guardianship over minors?

It can be argued that the absence of schooling or repeated and unjustifiably unexplained non-attendance at an educational institution, along with continued permissiveness or encouragement of truancy during compulsory schooling stages, could be considered a circumstance of neglect of a student.

We will try to support and give an answer to these and other questions that we raise throughout the practical case, framing them in what is understood as a situation of helplessness, analyzing the circumstances with sufficient gravity that, valued and weighted according to the principles of necessity and proportionality, suppose a threat to the physical or mental integrity of the minor, without losing reference to the educational regulations, the sentences dictated in this regard by the Supreme Court and the Constitutional Court and the communiqué of the Attorney General's Office of the State, suppose a threat for the physical or mental integrity of the minor, without losing reference to what the educational regulations indicate, sentences dictated in this respect by the Supreme Court and the Constitutional Court and the communiqué of the State Attorney General's Office in this respect, in order to be able to give a response, from the educational inspection service to the situation raised.

1. INTRODUCTION

We present a practical case in which the family of two students aged 6 years and 10 years (1st and 5th grade of Primary Education respectively), from a town in Toledo (Autonomous Community of Castilla-La Mancha), decide that their children should study at home, alleging that they are very responsible parents and that they consciously want to take exclusive charge of their children's education, without delegating it to the State or to private third parties. Faced with the continuous calls of attention from the director of the educational center of reference and the opening of the Absenteeism protocol towards their children, this family alleges that their children are not at "risk" and that the Fundamental Right to Education is covered with excellence at home. They allege that the fact of not taking their children to school is based as proof of a greater commitment and responsibility towards their education, exercising the preferential right they have as parents to decide what type of education they want for their children.

Bearing in mind that the compulsory nature of basic education, according to article 27 of the Constitution, integrates the content of the fundamental right to education, our fundamental law thus configures a right-duty protected in a privileged way by being included within the so-called fundamental rights or those of maximum constitutional protection. And precisely this maximum protection is further reinforced by the express mandate to the public authorities in the fifth paragraph of the aforementioned article 27: "The public authorities shall guarantee the right of all to education...".

As stated in the Resolution of September 4, 2023, from the Vice-Ministry of Education, Universities, and Research, which approves the General Plan of Action and Training for the Education Inspection of Castilla-La Mancha for the academic year 2023/2024, the actions of the Education Inspection Services stem directly from article 27 of the Spanish Constitution. This article entrusts public authorities

with the inspection and accreditation of the educational system to ensure compliance with laws.

In essence, the role of educational inspection is to guarantee access to the educational system for all students and offer them appropriate educational attention, ensuring a suitable placement, specifically in this case, that allows these students to attend a school during the compulsory stage. To achieve this, as education inspectors, and in accordance with the regulations that govern and determine the organization and functioning of our actions, particularly within the framework of Castilla-La Mancha, we must reference Decree 34/2008 of February 26, 2008, which establishes the organization of the Education Inspection of Castilla-La Mancha, and the Order of April 8, 2008, which further develops it. Implementation of planning is highlighted as one of the guiding principles in our professional practice. These actions must contribute with assurances to the academic success of all students, participating in the improvement of learning and, consequently, in the enhancement of educational quality.

2. BACKGROUND

The director of CEIP "XXX" of the town of "ZZZ", sent by email to this inspector, on Wednesday, September 21, 2023, a communication from Mr. "AAA" and Ms. "BBB", requesting the cancellation of the enrollment of their children, alluding to the preferential right they have as parents to decide what type of schooling they want for their children, "CCC" enrolled in 1st grade of EP and "DDD" enrolled in 5th grade of EP, both enrolled in CEIP "XXX" of the town "ZZZ".

Consequently, this inspector visits the school on Tuesday, September 26, 2023, to inquire about the situation of the students "CCC" and "DDD" and urges the principal to inform the family that homeschooling is not authorized in Spain and, therefore, they must return to class in person.

On September 27, 2023, the principal sent the families a communiqué urging them to return their children to school in person.

To this message, the family replied with a letter dated October 3, 2023, ratifying the decision not to take their children to the school under the exercise of the preferential right that they have, as parents, to decide what type of education they want to give their children.

The principal sent this communication to this inspector on Friday, October 6, 2023, together with the report of absences of the students "CCC" and "DDD" shown in the document attached to this report and reproduced below:

STUDENT DATA	LEVEL	No. OF UNEXCUSED ABSENCES ACADEMIC YEAR 2023/24
"CCC"	1º EP	20 (every school day of the year)
"DDD"	5º EP	20 (every school day of the year)

3. ACTIONS TAKEN

Article 27.5 of the Spanish Constitution states that the public authorities guarantee the right of all to education through a general education program, with the effective participation of all affected sectors and the creation of educational centers.

Hence, the Castilla-La Mancha Administration has established a suitable structure to guarantee this fundamental right to all citizens of the region. In line with the administrative structure created by the Decree 68/2023, dated July 9, the Department of Education, Culture, and Sports is responsible for implementing education policies at all levels. The organizational structure and distribution of

competencies of the Department of Education, Culture, and Sports are regulated by Decree 108/2023, dated July 25.

It is important to highlight that one of the central executive bodies within this framework is the Vice-Ministry of Education. According to this decree, the head of this Central Executive Body is responsible for defining, planning, and executing educational policies at all levels, as well as those related to Research, Development, and Innovation (I+D+I). This includes handling concessions, authorizations, and sanctions not explicitly assigned to other bodies.

Additionally, it's worth noting that the Vice-Ministry of Education oversees the direction of the Education Inspection, and as such, plays a crucial role in the case presented in the practical scenario.

According to article 151 of Organic Law 2/2006 of May 3 on Education, one of the functions of educational inspection is to advise, guide, and inform the various sectors of the educational community in exercising their rights and fulfilling their obligations. That is why this inspector must undertake various actions to ensure the right to education for students "CCC" and "DDD" so that they attend in-person classes. Furthermore, the inspector will exercise the powers granted by article 153 of Organic Law 2/2006 of May 3 on Education. For the presented case, the actions specified in the field of education inspection in Castilla-La Mancha will be developed, as outlined by Decree 34/2008, dated February 26, 2008, which establishes the organization of the Education Inspection of Castilla-La Mancha. This includes the Order of April 8, 2008, issued by the Department of Education and Science, which further details the organization and functioning as determined by Decree 34/2008, dated February 26, 2008. The intervention model, for the resolution of the practical case, is geared towards a planned and rigorous approach, especially in the meticulous examination of the documentation provided by the family and in the study of the educational

regulations that guarantee the right to education for all students, regardless of their individual circumstances.

To provide advice and information, we must carry out certain actions, including:

1. Regulatory oversight:

- Spanish Constitution (arts. 14, 27, 149).
- Organic Law 8/1985, of July 3, 1985, regulating the Right to Education (arts. 1, 4, 6, 14).
- Organic Law 2/2006 of May 3 on Education, modified by Organic Law 3/2020 of December 29 (arts. 1, 2, 3.3, 4, 71, 80, 151, 153, 153 bis, Forty-second Additional Provision).
- Organic Law 1/1996, of January 15, 1996, on the Legal Protection of Minors, partially amending the Civil Code and the Civil Procedure Law.
- Organic Law 10/1995, of November 23, 1995, of the Penal Code.
- Royal Decree of July 24, 1889, publishing the Civil Code.
- Law 5/2014, of October 9, on the Social and Legal Protection of Children and Adolescents of Castilla-La Mancha. (DOCM of October 17, 2014), repealed by Law 7/2023, of March 10, on Care and Protection of Children and Adolescents of Castilla-La Mancha (DOCM of March 14, 2023, and BOE of April 6, 2023). This rule would be applicable if the case was dated prior to the publication of the aforementioned Law 7/2023.)
- Law 7/2010, of July 20, 2010, of Education of Castilla-La Mancha (DOCM of July 28, 2010 and BOE of October 13, 2010) - Law 7/2010, of July 20, 2010, of Education of Castilla-La Mancha (DOCM of July 28, 2010 and BOE of October 13, 2010) - Resolution of 04/09/2023, of the Vice-Ministry of Education, Universities and Research approving the General Plan of Action

and Training of the Inspection of Education of Castilla-La Mancha for the 2023/2024 academic year.

Case law on face-to-face or home schooling.

2. Supervision of the documentation provided by the school and the family:

- Communications sent by the principal to the parents of students "CCC" and "DDD".
- Absence reports of students "CCC" and "DDD" for the school year 2023/24.
- Written communication sent to the school principal by the parents of the students "CCC" and "DDD" stating their decision not to bring their children to school in person.

3. Analysis of the documentation gathered by this inspector, in several work sessions.

4. LEGAL BASIS

4.1. In order to study the consultation formulated to us, we must start from the constitutional regulation of the right to education as a fundamental right.

Article 27 of the Spanish Constitution (EC) establishes the following in this regard:

1. Everyone has the right to education. The freedom of teaching is acknowledged.
2. Education shall aim at the full development of the human personality, respecting democratic principles of coexistence, and fundamental rights and freedoms.

3. Public authorities guarantee the right of parents to ensure that their children receive religious and moral education in accordance with their own convictions.

4. Basic education is compulsory and free.

5. Public authorities guarantee the right of all to education through a general education program, with the effective participation of all affected sectors and the establishment of educational centers.

6. Individuals and legal entities are recognized the freedom to create educational centers, within the framework of respect for constitutional principles.

7. Teachers, parents, and, where applicable, students will participate in the control and management of all centers supported by the government with public funds, according to the terms established by law.

8. Public authorities will inspect and accredit the education system to ensure compliance with the laws.

9. Public authorities shall assist educational institutions that meet the requirements established by law.

10. The autonomy of the universities is recognized, under the terms established by law.

4.2. The obligatory nature of basic education, according to article 27 of the Constitution, integrates the content of the fundamental right to education. Our fundamental law thus configures a right-duty protected in a privileged way by being included within the so-called fundamental rights or those of maximum constitutional protection. And precisely this maximum protection is reinforced even more in the express mandate to the public authorities in the fifth paragraph

of the aforementioned article 27: "Public authorities guarantee the right of all to education..."

4.3. The legal development of the fundamental right to education, as it could not be otherwise, ratifies the compulsory nature of basic education. Thus, the first article of Organic Law 8/1985, of July 3, 1985, regulating the Right to Education (LODE) establishes that "All Spaniards have the right to a basic education that allows them to develop their own personality and to carry out an activity useful to society. This education shall be compulsory and free of charge at the basic general education level..."

For its part, article four of the LODE, regulates the rights and obligations of parents in relation to the education of their children:

1. "Parents or guardians, in relation to the education of their children or wards, have the following rights:

(a) To receive an education, with the maximum guarantee of quality, in accordance with the purposes established in the Constitution, in the corresponding Statute of Autonomy and in the educational laws.

b) To choose an educational center, whether public or other than those created by the public authorities.

(...)

f) To participate in the organization, operation, government and evaluation of the educational center, under the terms established by law.

(...)

2. Likewise, as those primarily responsible for the education of their children or wards, they are entitled to:

a) Adopt the necessary measures, or request the corresponding help in case of difficulty, so that their children or wards attend compulsory education and attend classes regularly.

b) To provide, to the extent of their availability, the resources and conditions necessary for school progress.

c) To stimulate them to carry out the study activities entrusted to them.

d) To actively participate in the activities that are established by virtue of the educational commitments that the centers establish with the families, in order to improve the performance of their children.

e) To know, participate and support the evolution of their educational process, in collaboration with the teachers and the centers.

f) To respect and enforce respect for the rules established by the center, the authority and the educational indications or guidelines of the teaching staff.

g) Promote respect for all members of the educational community."

In accordance with the above, it is clearly established that parents have the obligation to ensure that their children attend classes regularly, in order to be able to make the educational process of their children effective, without the rule expressly providing for any exception.

It is also interesting to consider article six of the same organic law, on the rights and duties of students, in its paragraphs 3 and 4:

"3. The following basic rights are recognized for students:

(a) To receive a comprehensive education that contributes to the full development of their personality.

b) To have their personal identity, integrity and dignity respected.

c) To have their dedication, effort and performance objectively valued and recognized.

d) To receive educational and professional guidance.

e) To have their freedom of conscience, religious convictions and moral convictions respected, in accordance with the Constitution.

f) Protection against any physical or moral aggression.

g) To participate in the functioning and life of the center, in accordance with the provisions of the regulations in force.

h) To receive the necessary help and support to compensate for personal, family, economic, social and cultural deficiencies and disadvantages, especially in the case of special educational needs, which prevent or hinder access to and permanence in the educational system.

i) To social protection, in the educational sphere, in cases of family misfortune or accident.

4. The basic duties of the students are:

a) To study and make an effort to achieve the maximum development according to their abilities.

b) To participate in educational activities and, especially, in school and complementary activities.

c) To follow the teacher's guidelines.

d) To attend class punctually.

e) To participate and collaborate in the improvement of school coexistence and in the achievement of an adequate study climate in the center, respecting the right of their classmates to education and the authority and guidelines of the teaching staff.

f) To respect the freedom of conscience, religious and moral convictions, and the dignity, integrity and privacy of all members of the educational community.

g) To respect the rules of organization, coexistence and discipline of the educational center.

h) To conserve and make good use of the center's facilities and teaching materials."

Article 14 of the LODE, for its part, establishes, in general for all educational centers, the following:

"1. All educational centers must fulfill certain minimum requirements to provide quality-assured education. The Government shall establish these minimum requirements by regulation.

2. The minimum requirements will refer to the academic qualifications of the teaching staff, student-teacher ratio, teaching and sports facilities and number of school places."

4.4 We now refer to the Organic Law 2/2006, of May 3, 2006, on Education (LOE). Article 1 of the LOE establishes the principles of education as follows:

"The Spanish educational system, configured in accordance with the values of the Constitution and based on respect for the rights and freedoms recognized therein, is inspired by the following principles:

a) An effective fulfillment of the rights of children as established in the Convention on the Rights of the Child, adopted by the United Nations on November 20, 1989, ratified on November 30, 1990, and its Optional Protocols, recognizing the best interests of the child, their right to education, to be free from discrimination and to participate in decisions that affect them, and the obligation of the State to ensure their rights.

a bis) The quality of education for all students, without any discrimination based on birth, sex, racial, ethnic or geographical origin, disability, age, illness, religion or beliefs, sexual orientation or sexual identity or any other personal or social condition or circumstance.

b) Equity, which guarantees equal opportunities for the full development of the personality through education, educational inclusion, equality of rights, and the right to education for all and

(...)

e) The flexibility to adapt education to the diversity of aptitudes, interests, expectations and needs of the student body, as well as to the changes experienced by the student body and society.

(...)

f) The educational and professional orientation of the students, as a necessary means for the achievement of a personalized formation, which favors an integral education in knowledge, skills and values.

g) The individual effort and motivation of the students.

h) The effort shared by students, families, teachers, schools, administrations, institutions and society as a whole.

h bis) The recognition of the role of parents and legal guardians as the first responsible for the education of their children.

i) The autonomy to establish and adapt the organizational and curricular actions within the framework of the competences and responsibilities that correspond to the State, the autonomous communities, the local corporations and the educational centers.

j) The participation of the educational community in the organization, governance and operation of schools.

(...)

o) Cooperation between the State and the Autonomous Communities in the definition, application and evaluation of educational policies.

p) The cooperation and collaboration of the educational administrations with local corporations in the planning and implementation of educational policy.

q) Freedom of education, which recognizes the right of parents and legal guardians to choose the type of education and the center for their children, within the framework of the constitutional principles.

(...)

Article 2 of the LOE, on the other hand, after enumerating the purposes of the educational system, imposes on the public authorities the following guidelines for their achievement, in paragraph 2 of the precept:

"2. The public authorities will give priority attention to all the factors that favor the quality of education and, in particular, the qualification and training of teachers, their teamwork, the provision of educational resources, research, experimentation and educational renewal, the promotion of reading and the use

of libraries, pedagogical, organizational and managerial autonomy, leadership, educational and professional guidance, Education Inspectorate and evaluation."

Article 4 of the LOE regulates basic education as follows:

"1. The basic education referred to in article 3.3 of this Law is compulsory and free for all persons.

2. The basic education comprises ten years of schooling and is developed, in a regular way, between the ages of six and sixteen. Nevertheless, the students will have the right to remain in ordinary regime taking the basic education until the age of eighteen, fulfilled in the year in which the course finishes, under the conditions established in the present Law.

3. Without prejudice to the fact that throughout basic education a common education is guaranteed for students, attention to diversity shall be adopted as a fundamental principle. When such diversity so requires, the pertinent organizational and curricular measures shall be adopted, in accordance with the provisions of this Law."

Title II of the Law is dedicated to "Equity in Education". In the first of its precepts, article 71, the following principles on educational equity are established:

1. Educational administrations will provide the necessary means for all students to achieve maximum personal, intellectual, social, and emotional development, as well as the objectives established in this Law in a general sense.

2. It is the responsibility of educational administrations to ensure the resources necessary for students who require educational attention different from the ordinary, due to having special educational needs, developmental delays, language and communication development disorders, attention or learning disorders, severe unfamiliarity with the language of instruction, being in a socio-educational vulnerability situation, having high intellectual abilities, joining

the educational system late, or due to personal conditions or school history. These students should be able to achieve the maximum development of their personal capacities and, in any case, the objectives established for all students in a general sense.

3. Educational administrations will establish the procedures and resources necessary to identify early the specific educational needs of the students mentioned in the previous paragraph. The comprehensive care for students with specific educational support needs will begin from the moment that such a need is identified and will be governed by the principles of normalization and inclusion.

4. It corresponds to the educational administrations to guarantee the schooling, regulate and ensure the participation of parents or guardians in the decisions that affect the schooling and educational processes of these students. They are also responsible for adopting the appropriate measures so that the parents of these students receive adequate individualized advice, as well as the necessary information to help them in the education of their children.

The second chapter of Title II on equity deals with the "Compensation of inequalities in education" and establishes the following principles for such compensation in article 80:

"1. In order to make the principle of equality effective in the exercise of the right to education, public administrations will implement compensatory actions for individuals, groups, and territorial areas in unfavorable situations, providing the necessary economic resources and support for this purpose.

2. Compensatory education policies will reinforce the action of the educational system to prevent inequalities resulting from social, economic, cultural, geographic, ethnic, or other factors.

3. It is the responsibility of the State and the autonomous communities, within their respective areas of competence, to set their priority objectives for compensatory education.

4.5. Considering these organic provisions and addressing the posed question, to analyze the legal significance of the parents' decision for their school-age children not to attend in-person classes, it is appropriate to ask the following question:

Does the obligation to receive basic education become effective only through mandatory enrollment and physical attendance at educational institutions?

It is evident that the Constitution establishes the obligation to pursue compulsory education as a right-duty for the simple reason that it is a suitable instrument, the main one, to achieve the objective of education, namely, the free development of the human personality. The Constitution establishes this duty as an obligation of public authorities. It is a non-waivable duty/right for both citizens and public authorities. This is clearly inferred from the aforementioned norms, which use imperative and decisive terms to ensure the achievement of the fundamental objectives of education.

From the aforementioned provisions of the Education Acts (LODE and LOE), the obligation to make compulsory basic education effective through enrollment is clearly evident, constituting such enrollment an obligation for parents and students. On the other hand, public administrations must guarantee enrollment.

The transcribed provisions also include legal provisions regarding the flexibility that should govern the actions of public authorities to adapt to the diverse circumstances of students and different socio-economic situations.

4.6. Hence, with the undeniable obligation of public authorities, parents, and students to make the right to basic education effective through compulsory enrollment established, it is now necessary to analyze the legal implications of the failure to fulfill this obligation by parents or legal guardians.

Nothing is stipulated regarding such non-compliance in the organic laws that develop the fundamental right to education. We must turn to the Organic Law 1/1996, of January 15, on the Legal Protection of Minors, partial amendment of the Civil Code, and the Law of Civil Procedure, which contains rules that must necessarily be taken into account in the scenario presented. We highlight the following provisions:

Article 2: Best interests of the child.

"1. Every minor has the right to have his or her best interests valued and considered as paramount in all actions and decisions concerning him or her, both in the public and private sphere. In the application of the present law and other norms that affect them, as well as in the measures concerning minors adopted by public or private institutions, the Courts, or legislative bodies, their best interests shall prevail over any other legitimate interest that may concur.

(...)

2. For the purposes of the interpretation and application in each case of the best interests of the minor, the following general criteria shall be taken into account, without prejudice to those established in the specific applicable legislation, as well as those others that may be deemed appropriate in view of the specific circumstances of the case:

(a) The protection of the right to life, survival and development of the minor and the satisfaction of his basic needs, both materials, physical and educational as well as emotional and affective.

(...)

c) The convenience that his life and development take place in an adequate family environment free of violence. (...)

3. These criteria shall be weighted considering the following general elements:

a) The age and maturity of the minor.

b) The need to ensure their equality and non-discrimination due to their special vulnerability, whether it be the lack of a family environment, experiencing abuse, having a disability, sexual orientation, and identity, refugee status, asylum seeker, or subsidiary protection, belonging to an ethnic minority, or any other relevant characteristic or circumstance.

c) The irreversible effect of the passage of time on their development.

d) The need for stability in the solutions adopted to promote the effective integration and development of the child in society, as well as to minimize the risks that any change in material or emotional situation may cause to their personality and future development.

e) (...)

f) Any other elements of consideration that, in the specific case, are deemed relevant and respect the rights of the minors.

The above elements must be assessed jointly, in accordance with the principles of necessity and proportionality, so that the measure adopted in the best interest of the minor does not restrict or limit more rights than those it protects.

4. In the event that any other legitimate interest concurring with the best interests of the minor, priority should be given to measures that, while responding to this interest, also respect the other legitimate interests present.

In case all competing legitimate interests cannot be respected, the best interests of the child shall take precedence over any other legitimate interest that may be present.

Decisions and measures adopted in the best interests of the child should always consider the fundamental rights of other persons who may be affected.

(...)

Article 9 quater regulates the duties of minors in the school environment:

"1. Minors must respect the rules of coexistence in educational centers, study during compulsory education stages, and maintain a positive learning attitude throughout the formative process.

2. Minors are required to respect teachers and other employees of educational centers, as well as their fellow students, avoiding situations of conflict and school bullying in any of its forms, including cyberbullying.

3. Through the education system, minors will acquire knowledge of their rights and duties as citizens, including those that arise as a result of the use of Information and Communication Technologies in the educational environment.

While this regulation does not explicitly mention the obligation to attend classes, it cannot be inferred that such an obligation does not exist. Compulsory enrollment is unequivocally established in the Education Acts (LOE and LODE). The legislator, in the case of Organic Law 1/1996, is assuming the legal obligation of enrollment established in special laws and has chosen not to reiterate this obligation. It is implicitly understood from the mentioned article, which asserts the

obligation of minors to respect the rules of coexistence in educational centers, presupposing the mandatory nature of enrollment.

In any case, the primary guiding criterion for the interpretation of the rules affecting minors is their best interests. See that, in the configuration of this best interest, the Organic Law establishes as the first parameter for its protection "The protection of the right to life, survival and development of the minor and the satisfaction of his basic needs, both materials, physical and educational as well as emotional and affective". As it could not be otherwise, the first of the fundamental rights, the right to life, to physical integrity, is the first element that must always be considered in the decisions affecting minors.

Note that in this same section a), the first one that the law establishes to guide the applicator of the rule in determining what constitutes the "best interests of the minor", it also refers to the satisfaction of their basic needs, including material and physical needs, but also educational, emotional and affective needs. These needs are certainly behind the legislator's decision to establish compulsory schooling in order to make effective compliance with the constitutional duty for all to receive basic education (cf. Constitutional Court Judgment 133/2010, of December 2).

It is also of interest to consider the guiding principles of administrative action in relation to minors, listed in Article 11 of Organic Law 1/1996, of January 15, 1996, on the Legal Protection of Minors, partially amending the Civil Code and the Civil Procedure Law:

"1. Public Administrations will facilitate minors with the appropriate assistance for the exercise of their rights, including the support resources they may need.

(...)

Public Administrations must consider the needs of minors when exercising their competencies, especially in matters of control over food products, consumption, housing, education, health, social services, culture, sports, shows, media, transportation, leisure, gaming, open spaces, and new technologies (ICTs).

Public Administrations will particularly consider the proper regulation and supervision of those spaces, centers, and services where minors regularly stay, concerning their physical-environmental conditions, hygiene and health, accessibility, and universal design, as well as human resources. This includes their inclusive educational projects, the participation of minors, and other conditions that contribute to ensuring their rights.

2. The guiding principles for the actions of the public authorities in relation to minors shall be as follows:

a) The supremacy of their best interests.

(...)

h) Objectivity, impartiality and legal certainty in protective actions, guaranteeing the collegiate and interdisciplinary nature in the adoption of measures affecting them.

i) Protection against all forms of violence, including physical or psychological abuse, humiliating and degrading physical punishment, neglect or negligent treatment, exploitation, that carried out through new technologies, sexual abuse, corruption, gender violence or violence in the family, health, social or educational spheres, including bullying, as well as human trafficking and smuggling, female genital mutilation and any other form of abuse.

j) Equal opportunity and non-discrimination on any grounds whatsoever.

k) Universal accessibility for children with disabilities and reasonable accommodation, as well as their full and effective inclusion and participation.

(...)

Once again, we see that the rule again prioritizes a global and interdisciplinary consideration of the best interests of the minor. This should be the scope of analysis and solution of the difficulties that may arise in the effectiveness of compulsory education, especially in a situation such as the one we are living in.

Also of interest is the consideration of article 12 of the aforementioned Law, on the actions for the protection of minors:

“1. The protection of minors by public authorities will be carried out through the prevention, detection, and resolution of situations of risk, establishing appropriate services and resources for this purpose, exercising guardianship, and, in cases of declaration of abandonment, assuming guardianship by operation of law. In protective actions, family measures should always take precedence over residential ones, stable measures over temporary ones, and consensus-based measures over imposed ones.

2. Public authorities will ensure that parents, guardians, custodians, or foster parents adequately fulfill their responsibilities and will provide them with accessible services for prevention, advice, and support in all areas affecting the development of minors. (...)

As we can see once again, public authorities have an explicit and clear legal mandate, from which they cannot deviate, to ensure the fulfillment of the duties of parents, guardians, etc., including, without any doubt, the obligation for minors to attend school.

Another article of Organic Law 1/1996, illustrating the legislator's intent to guarantee the right to education through compulsory school education, is Article 13, which addresses the obligations of citizens and their duty of confidentiality.:

"1. Any person or authority and especially those who, due to their profession or function, detect a situation of abuse, risk or possible neglect of a minor, shall inform the authority or its closest agents, without prejudice to providing immediate assistance as required.

2. Any person or authority who becomes aware that a minor is not attending school or is not attending school regularly and without justification, during the compulsory period, shall inform the competent public authorities, who shall take the necessary measures for his or her schooling.

3. The authorities and persons who, by virtue of their profession or function, have knowledge of the case shall act with due reserve.

Any unnecessary interference in the child's life shall be avoided in the proceedings. (...)"

Not attending school on a regular basis and without justification, may motivate the appreciation of the situation of neglect, in accordance with the provisions of Article 18 of the aforementioned law:

"1. When the Public Entity verifies that the minor is in a situation of abandonment, it will act in the manner provided for in article 172 and following of the Civil Code, assuming the guardianship thereof by operation of law, taking the appropriate protective measures and informing the Public Prosecutor's Office and, if applicable, the judge who ordered the ordinary guardianship.

2. In accordance with the provisions of article 172 and following of the Civil Code, a situation of abandonment will be considered to occur when, in fact, it results from the non-compliance or the impossible or inadequate exercise of the

protection duties established by laws for the care of minors, when they are deprived of the necessary moral or material assistance.

(...)

In particular, it will be understood that there is a situation of abandonment when one or more of the following circumstances occur with sufficient severity that, evaluated and weighed in accordance with the principles of necessity and proportionality, pose a threat to the physical or mental integrity of the minor.":

(...)

g) "The absence of enrollment or repeated and inadequately justified non-attendance at the educational center, and the continued permissiveness or inducement to school absenteeism during compulsory schooling stages. (...)

4.7. As can be seen, the determination of abandonment due to non-attendance at the educational center requires that absenteeism be repeated and not justified. This rule also imposes the obligation on parents to justify their behavior to the educational center.

This brings us to what, in our opinion, constitutes the fundamental core of the raised question: Can homeschooling per se justify the decision of parents for their children not to attend school? The answer to this question, we believe, cannot be general or definitive, as the situation of each family must be analyzed at each moment, and especially the personal and family situation of each student."

In this situation, we understand that the effectiveness of the fundamental right to education, in its development as the obligation to attend classes, clashes with another fundamental right: the right of parents to ensure that their children receive religious and moral education in accordance with their own convictions.

We believe that such a conflict must be examined on a case-by-case basis, considering the specific context of each family.

In our opinion, conducting such a factual and contextual analysis is essential to verify the factual basis of school absenteeism: that the lack of class attendance is repeated and lacks justification. However, we must emphasize that the analysis should be done on a case-by-case basis.

We reiterate that it is not appropriate to conclude abstractly that the situation of homeschooling directly supports the actions of parents who decide not to enroll their children in school. This would mean depriving public authorities of the non-waivable obligations assigned to them by the legislator regarding the guarantee of the effectiveness of the right to basic education, particularly in ensuring compliance with compulsory education. It would also legitimize the direct non-compliance with rules by citizens. We are dealing with rules of public law, thus fully imperative in nature. The parents' disregard for these rules would constitute a violation of the principle of legality imposed by the Constitution on both citizens and public authorities in article 9.1: "Citizens and public authorities are subject to the Constitution and the rest of the legal system."

It is important to recall that parents indeed have the right to participate in the educational sphere, as provided for in the laws. This participation will undoubtedly be one of the channels for addressing concerns related to homeschooling with educational institutions and, if necessary, with educational authorities. Parents also have at their disposal the legal avenues established by the legal system for reviewing administrative actions: that is, the exercise of legal actions against administrative actions (or administrative inaction).

In any case, if students are absent from class, we emphasize that the situation of each child and each family, as well as the timing of such absence, should be assessed. This is particularly relevant in the context of homeschooling,

where, as we have seen, the law requires, for the determination of absenteeism and the implementation of measures by public authorities, that repeated non-attendance without justification be established. These circumstances will trigger the activation of protocols against absenteeism, the implementation of which falls under the jurisdiction of regional administrations, with the necessary collaboration of educational institutions.

Let us remember that article 13 of the Organic Law for the Legal Protection of Minors obliges any person who becomes aware of a minor's unjustified absence from class to inform the competent authorities. This obligation is especially imposed on those who, due to their situation or function, are aware of these situations. So that schools, if these situations occur, and if it is understood that they are unjustified, must proceed immediately to the communication to the competent authority.

We consider interesting to bring here an extract of the public statement made by the Attorney General's Office on September 3 (the content of this statement is the one that also integrates the service note No. 1 / 2020 of the Attorney General's Office for the Unification of criteria between the different Juvenile Sections of the Provincial Prosecutor's Offices regarding SCHOOL ABSENTISM).

(...)

It should be recalled that in the age brackets between 6 and 16 years of age, the legal obligation of compulsory schooling persists under the terms and conditions established by the state and autonomous community legislation applicable in each case.

(...)

The attendance of students, in the above parameters and conditions, is an unavoidable obligation for parents or guardians of the minors concerned. Their voluntary, unjustified and persistent non-attendance will entail the legal consequences derived from the breach of the duties inherent to the parental authority, as has been occurring habitually so far in cases of absenteeism.

The educational centers, when they detect cases of voluntary and unjustified non-attendance to the classrooms, will be in charge of communicating to the respective Local or Provincial Commissions of Absenteeism such non-compliances and of carrying out the pertinent administrative procedures. Only in cases of repeated and unjustified absence from class shall a copy of the file opened for such purposes be sent to the Public Prosecutor's Office, in accordance with the respective protocols in force in each territory.

Once these administrative files have been received in the Prosecutor's Office, the appropriate pre-procedural proceedings will be initiated in order to individually weigh the circumstances of each case, modulating the adequacy of the institutional response to the specific situation of the affected students and their respective families, taking into consideration the school and family environment.

Only those cases that lack clear and definite justification for the exemption, even temporary, of the student's duty to attend school in person will motivate the Public Prosecutor's Office to continue its proceedings for the purpose of bringing criminal action against those parents or guardians who have allegedly violated the duties inherent to parental authority in this area."

4.8. We can only agree with each one of the considerations made in this communiqué from the State Attorney General's Office, which are based on the same legal assumptions that we have set out above.

In "extreme situations", the parents' refusal to allow their children to attend classes at the school could constitute a crime of family abandonment typified in article 226 of the Penal Code (Organic Law 10/1995, of November 23, 1995, of the Penal Code) for "failing to comply with the legal duties of assistance inherent to parental authority", which carries a penalty of disqualification of between four and ten years to exercise it. However, it is our understanding that a crime could only be considered a crime in "truly serious situations" since criminal law is "the last ratio."

4.9. In conclusion, notwithstanding the above, it can only be deemed as school absenteeism when the non-attendance in class is not justified. Therefore, the particular situation of each child, in this case, homeschooling, should be assessed by both educational institutions and competent authorities. We believe that these circumstances cannot serve as a justification for absenteeism.

Hence, individuals who, by virtue of their role, become aware of unjustified school absenteeism are especially obligated to report it to the relevant authorities so that, if necessary, appropriate intervention measures can be taken.

Regarding homeschooling in Spain, cases that end up in the courts are very rare, despite the fact that this practice is considered illegal or unregulated, depending on the legal reference used. Legal proceedings typically commence with a complaint filed by educational institutions, social services, or family members close to the affected minors. Most complaints lead to inquiries opened by the Minor's Prosecutor's Office, which conducts the necessary investigations. If it is determined that the minors are being neglected, it is considered a minor offense that may be taken to court.

Constitutional Court Ruling no. 260/1994 of October 3, 1994, urges the Generalitat of Catalunya to provide schooling to the affected minors, initiating the

pertinent procedures to ensure the proper schooling of the minors, without going into the merits of the case.

Supreme Court judgment no. 1669/1994 of October 30, 1994, the supreme court interprets the position of the unschooled parents as an attitude of objection to the general education system and a proposal of alternative education to the formal system. The Supreme Court makes a series of relevant observations on what is to be understood by the right to education within the legal framework of the Constitution. The Supreme Court clarifies that the role of the State in educational matters consists of favoring the right to education, and this obligation of the State must be compatible with the right of parents to decide the type of education for their children. The Supreme Court considers that the family is an institution capable of contributing to the integral formation of the person, although with an evident limitation, that of not being the ideal environment for the development of the personal and social relationships so important in the plural society in which we live.

Constitutional Court Ruling No. 133/2010 of December 2, 2010, with this ruling the TC ratifies the decision of the Court of First Instance of the Civil Court of Coín, sentence 36/2003 and that of the Provincial Court of Malaga, sentence 548/2005, which forces three families practicing homeschooling to school their children. The importance of this process lies in the fact that for the first time the Constitutional Court pronounced on the legality of homeschooling. The Constitutional Court states that the motivation used by the families, based on the right of parents for their children to receive the religious and moral education that is in accordance with their own convictions (art. 27.3 CE), would be inadmissible to claim the alleged right to home schooling, since "the imposition of the duty of schooling of children between six and sixteen years of age (art. 4. of the LOE) (...) constitutes a limit incorporated by the legislator that is constitutionally viable because it finds justification in other constitutional determinations contained in

art. 27 CE and because it does not generate a disproportionate restriction of the right in question.

The CT ended by upholding the legislator's decision to establish a model of compulsory basic education of a determined duration. Therefore, finally the TC denies the protection requested by the appellants before the sentence 36/2003 of the Court of 1st instance of the civil of Coín and the one of the Provincial Court of Málaga, sentence 548/2005, which obliges these families practicing homeschooling to send their children to school.

4.11 From the legal standpoint, homeschooling appears as an illegal educational option, by failing to comply with art. 4 of the LOE, which states:

"1. The basic education referred to in article 3.3 of this Law is compulsory and free for all persons.

2. Basic education comprises ten years of schooling and takes place, on a regular basis, between the ages of six and sixteen. However, pupils shall have the right to remain in ordinary schooling until they reach the age of eighteen in the year in which the course ends, under the conditions established in this Law.

However, if instead of the LOE, we turn to the EC, we can see that homeschooling is no longer an illegal option, but an unregulated one.

4.12 The situation narrated in the description of the facts, and which are attached to this report, may imply a possible breach of the parental duties of the parents of the aforementioned students "CCC" and "DDD", in accordance with the provisions of article 154 of the Civil Code, which determines that "unemancipated children are under the parental authority of their parents" and establishes that "this authority includes" the duties and powers of "watching over them, keeping them in their company, feeding them, educating them and providing them with an integral formation".

4.13: On the other hand, Law 7/2023, of March 10, of Attention and and Protection of Children and Adolescents of Castilla-La Mancha in Mancha in paragraph 1 of article 38 establishes that "a situation of risk is understood as that in which, due to circumstances situation is understood as that in which, due to circumstances, deficiencies or family, social or educational conflicts, the family, social or educational conflicts, the minor is harmed in his or her personal, family, social or educational development. in his or her personal, family, social or educational development, in his or her welfare or in his or her rights, so that, without their rights, in such a way that, without reaching the entity, intensity or persistence that would that would justify the declaration of a situation of helplessness and the assumption of the guardianship by the guardianship by operation of law, it is necessary the intervention of the public administrations of Castilla-La Mancha to eliminate, reduce or compensate for the compensate the difficulties or maladjustment that affect him/her, and to avoid his/her abandonment and social exclusion, without having to be and social exclusion, without having to be separated from their family environment".

4.14 Also to be noted from the above-mentioned regulation, Law 7/2023, of March 10, Article 47, which defines a situation of helplessness as follows of helplessness when "an event occurs as a result of the non-compliance, or of the impossible or inadequate impossible or inadequate exercise of the duties of protection established by the laws for the the laws for the guardianship of minors, when they are deprived of the necessary moral or material of the necessary moral or material assistance". In the same article 47 in its second point it is indicated that it will be understood that there is a situation of situation of helplessness when one or some of the following circumstances are given with sufficiently serious that, valued and weighted in accordance with the principles of necessity and necessity and proportionality, they suppose a threat for the

physical or mental integrity of the minor mental integrity of the minor, among them the one included in paragraph "g)". The absence from school or repeated and not adequately justified lack of attendance to the educational center and the permissive the educational center and the continued permissiveness or inducement to school absenteeism during the to truancy during the stages of compulsory schooling".

5. CONSIDERACIONES

The Planning of the work, as a guiding principle in the performance of the inspection function, has facilitated the study of the aforementioned regulations. Therefore, after analyzing the documents provided by the "XXX" educational institution, the family of students "CCC" and "DDD", and the reasoning presented by this inspector based on the previously mentioned regulations, it is concluded that the mentioned students must attend a physical educational institution and exercise their right to education. Consequently, it is necessary to submit a report to the head of the Provincial Education Delegation of Toledo. This report should then be forwarded to the Prosecutor for Minors of Castilla-La Mancha to ensure the right to education of the affected students.

6. PROPOSAL

In view of the facts described and their assessment in accordance with current regulations, the undersigned Inspector proposes:

To issue the necessary instructions so that the situation of absenteeism of the students "CCC" and "DDD" both enrolled in the CEIP "XXX" of the town "ZZZ", alluding to the parents "AAA" and Ms. "BBB", that their children are being home schooled (homeschooling) be communicated to the Prosecutor's Office for Minors of Castilla-La Mancha, in order that appropriate measures be taken to

facilitate the home schooling of their children. "BBB", that their children are being home schooled (homeschooling) be communicated to the Prosecutor's Office for Minors of Castilla-La Mancha, so that the appropriate measures may be adopted to facilitate the effective exercise of their Right to Education.

Toledo, xxxx 2023.

7. CONCLUSIONS

With the entry into force of the new Organic Law 3/2020 of 29 December, which amends the Organic Law 2/2006 of 3 May on Education, the performance of the Education Inspectorate becomes even more relevant with regard to the principles of action of the Education Inspectorate, as referred to in the new art. 153. Bis: Respect for fundamental rights and public freedoms, defense of the common interest and democratic values and avoidance of any conduct that could lead to discrimination based on origin, gender, sexual orientation, religion, opinion or any other personal or social circumstance.

Let us not forget that the Education Inspectors have the function of ensuring compliance with the laws, so we must inform the different sectors of the educational community, of the rights they have, as has been evident in this case, which revolved around ensuring the Fundamental Right to Education of students in the case raised.

We must make real the constitutional mandate that advocates the Fundamental Right to Education of any citizen, regardless of their personal or social circumstances, and therein lies the quality factor that the inspection service provides, in the exercise of its functions, enforcing the principles and purposes contained in the Education Laws and guaranteeing in a Democratic and Lawful

State, access to Education to all citizens, without any type of discrimination for any personal or social circumstance can prevail.

The Education Inspectorate, as a factor of Quality of the Educational System, has to contribute to guarantee the rights of all students, since it is the most important area of its content within the exercise of the functions attributed to us by the Organic Law 2/2006, of May 3, on Education and in the development regulations of each of the educational administrations.

8. REFERENCES

- Constitución Española (BOE del 29/12/1978)
- Ley Orgánica 8/1985, de 3 de julio Reguladora del Derecho a la Educación (LODE)
- Ley Orgánica 3/2020 de 29 de diciembre que modifica la Ley Orgánica 2/2006 de 3 de mayo de Educación.
- Ley Orgánica 2/2006 de 3 de mayo de Educación.
- Ley Orgánica 1/1996, de 15 de enero, de Protección Jurídica del Menor, de modificación parcial del Código Civil y de la Ley de Enjuiciamiento Civil.
- Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal.
- Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil.

- Ley 5/2014, de 9 de octubre, de Protección Social y Jurídica de la Infancia y la Adolescencia de Castilla-La Mancha. (DOCM de 17 de octubre de 2014), **derogada** por la Ley 7/2023, de 10 de marzo, de Atención y Protección a la Infancia y la Adolescencia de Castilla-La Mancha (DOCM de 14 de marzo de 2023 y BOE de 6 de abril de 2023).
- Ley 7/2010, de 20 de julio, de Educación de Castilla-La Mancha (DOCM de 28 de julio de 2010 y BOE de 13 de octubre de 2010).
- Decreto 68/2023, de 9 de julio, por el que se establece la estructura de la Administración Regional.
- Decreto 108/2023, de 25 de julio, por el que se establece la estructura orgánica y distribución de competencias de la Consejería de Educación, Cultura y Deportes.
- Decreto 34/2008, de 26-02-08, por el que se establece la Ordenación de la Inspección de Educación en Castilla-La Mancha.
- Orden de 08-04-2008, de la Consejería de Educación y Ciencia, que desarrolla el Decreto 34/2008, de 26-02-2008, por el que se establece la ordenación de la Inspección de Educación de Castilla-La Mancha y en la que se determina su organización y funcionamiento.
- Resolución de 04/09/2023, de la Viceconsejería de Educación, Universidades e investigación por el que se aprueba el Plan General de Actuación y Formación de la Inspección de Educación de Castilla-La Mancha para el curso 2023/2024.
- Comunicado público efectuado por la Fiscalía General del Estado el 3 de septiembre (nota de servicio n° 1/ 2020 de la Fiscalía General del Estado para la Unificación de criterios entre las distintas Secciones de Menores de las Fiscalías Provinciales en materia del ABSENTISMO ESCOLAR).
- Sentencia de la Sala primera del tribunal Constitucional 133/2010, de 02/12/2010, sobre escolarización obligatoria de menores de edad (BOE de 5 de enero de 2021)

- Sentencia del Tribunal Constitucional N.º 260/1994 de 3 de octubre.
- Sentencia del Tribunal Supremo N.º 1669/1994 de 30 de octubre.