HOUSE EDUCATION COMMITTEE

March 7, 1983

The meeting was called to order by Chairman Fritz Daily in the Old Supreme Court Chambers of the Senate, in the Capitol Building at 12:30 p.m., with all members present except for Representatives Yardley and Schye, who were excused.

Chairman Daily opened the meeting to a hearing on Senate Bills: 158 and 445.

SENATE BILL 158

SENATOR BOB BROWN, District 10, Whitefish, opened by stating this is a simple recodification bill. It pertains to the school for the deaf and blind. In the establishment of the schools for the deaf and blind, the most recent recodification occurred in 1943. In the statutes, the language limits the schools to 1 1/2 FTE's. This bill updates that language, and changes the name of the school from the Montana State School for the Deaf and Blind, to the Montana School for the Deaf and Blind. The bill also grants rulemaking to the Board of Public Education.

PROPONENTS

BOB DEMING, Montana School for the Deaf and Blind, said we are in support of this bill for the students of our school. We ask your support to clean Senate Bill 158 up for the school.

ROGER TIPPY, Montana School for the Deaf and Blind Foundation, said the substantive change in the bill takes place in section 9. This section states that the Board of Public Education, by contract with a non-profit corporation, may receive, invest, and expend gifts to the school. All the auditors are doing is saying the existing statute doesn't comply with what the agency was doing. It has been worked out with the agency and found to be satisfactory. The repealers in the language are being taken out. (see exhibit 1)

HIDDE VAN DUYM, Board of Public Education, rose in support of Senate Bill 158, for reasons previously stated.

Senator Brown closed.

Questions from committee. Rep. Hannah asked Mr. Van Duym whether or not there is any increase in duties of the board over what they are currently doing. The response was the board now serves as a board of trustees, much like a local board of trustees. There should be no increase one way or the other. This is simply a revision in the language.

Rep. Eudaily asked Senator Brown if it is a good idea to eliminate a local board, even if it is only of an advisory capacity. The advisory board is appointed by the board of public education, through their rule making policy, was Senator Brown's response.

Chairman Daily closed the hearing on Senate Bill 158, at 12:40 p.m.

SENATE BILL 445

SENATOR BOB BROWN, District 10, Whitefish, opened by stating this is a committee bill from the Senate Committee on Education. There is a conflict between different sections of the community regarding private and public education. Many evangelical private schools are unlike established schools, and that is the reason for the controversy today. Their views were expressed to us as follows. The private evangelical people told us that they make no distinction between their private ministry and their educational ministry. The public school accreditation requirements are a violation of their first amendment right to freedom of religion. They feel the government should not prescribe to them what to teach at the educational level, anymore than they should tell them what to teach in their church ministries. Parents have the absolute right to choose the education of their children. They told us that there should be no requirement that private school teachers be certified in order to teach. They also stated that they should not be required to provide the public school system with the names of the students who attend their schools. These views represent 2% to 3% of the school age young people of Montana. Since the beginning of our republic, our political views have held that a literate, informed public is essential to representative democracy. Accordingly, all 50 states have established compulsory school attendance requirements. Montana and other states have also established minimum accreditation standards. Private schools in this century, have all willingly conformed to the state regulations. It has only been very recently that the established system has been challenged to eliminate school attendance requirements for private parochial schools; a claim that the state has no right to interfere. This would make it impossible to enforce our truency laws. This position is in direct challenge to the whole concept of public compulsory education. After consultation with all parties involved, the Senate Education Committee recommends Senate Bill 445 to you, which names the following provisions. The bill requires a private parochial school to maintain records on pupil attendance and disease immunization and make such records available to the county superintendent of schools on request. The school must provide at least 180 days of pupil instruction or the equivalent in accordance with 20-1-302. The students must be housed in a building that complies with applicable local health and safety regulations. The instructors must provide an organized course of study that includes instruction in the subjects required of public schools as a basic instructional program pursuant to 20-7-111.

This bill attempts to strike a delicate balance and compromise between the right of the state to ensure quality education, and the right of the parent to educate their children in the way they best see fit. Senator Brown proposed an amendment to Senate Bill 445. (see exhibit 2)

SENATOR JOSEPH MAZUREK, District 16, Helena, said many of the objections to this bill have been addressed. We have worked very hard over a number of work sessions. I think this is a good compromise. It requires nothing more of the church related school than of the public school. The church school is required to teach only the subjects required for minimum accreditation by the Board of Public Education. The home or private school would still have to comply with stated curriculum requirements. A very good compromise has been reached, as both sides are somewhat unhappy.

RON MAYNOR, Missoula, submitted a written copy of his testimony. (see exhibit 3)

ROD SVEE, Office of Public Instruction, submitted a revised bill showing comparisons between Senate Bill 445, and House Bill 635. Mr. Svee went through the new sections in the bill. (see exhibit 4)

RICHARD TRERISE, Montana Association of County School Superintendents, said the state needs the authroity to deal with those isolated instances where the educational rights of children are being deprived, and the right to be notified of the home school.

BILL JOHNSON, Boulder, said I am an advocate of home schools. I am for this bill with one small exception. The new section, section 2-C, says "to be housed in a building that complies with the local health and safety regulations." I am wondering if the people are saying I have to have a public building erected in order to teach my child.

MONTEY PERRY, Said I support this bill whole heartedly. I think it may be hard to define sincerely held religious beliefs. I would like to see an amendment to leave that section out.

DOCTOR R.D. DION, Montana Association of Church Schools, said we have some reservations about this bill, in the area of maintaining records and making these records available to the county superintendents upon request. Otherwise, we appreciate the work that has been put into this bill.

JOHN FRANKINO, Montana Catholic Conference, said I am speaking today also for Mr. Earl Reimer, Director of the Association of Non-public Schools. Both Mr. Reimer and I have testified before this committee concerning our positions toward governmental regulation. We have no objection to the sections of the bill that deal with the schools we are involved with.

HIDDE VAN DUYM, Board of Education, passed out written comments concerning the Board of Public Education's compulsory attendance policy, and a statement concerning Senate Bill 445. (see exhibit 5)

JAMES MAPLEDORAM, Helena, said in general, I support the bill except for section 2-2-C, to change and specify by law the basic subjects of reading, writing, english, math, science, history, and social studies.

JOHN MAYNARD, Assistant Attorney General, said this bill does strike a very delicate balance. I would urge your support for the bill, so we can see how it will work in actual operation during the next two years. At that time, we will be able to report on the program.

DOUG KELLEY, Montana Association of Church Schools, said I support this bill with reservations. We disagree as to the ruling Mr. Svee has handed out. If there is going to be any relationship to the State of Montana, we would rather have it through this legislative body, than the State Board of Public Education. We are also in opposition to the record-keeping provision.

DAVID SEXTON, Montana Education Association, said the State of Montana has a legal obligation, as well as a social and moral obligation, to ensure that the children of Montana receive an adequate education. This bill is not as strong as we would like to see it, but we do see it as a reasonable compromise.

OPPONENTS

SENATOR THOMAS F. KEATING, District 32, Billings, said the bureaucrats supported this bill unequivocably, but those citizens who must operate under this legislation were proponents with numerous reservations. I was the sponsor of Senate Bill 331, which specified that an organized course of study with specific subjects could be used in the private and parochial schools, rather than having to be controlled under the codes by the Office of Public Instruction or the Board of Public Education. The state has provided the people with a quality educational opportunity. It is up to the citizens to accept or reject that opportunity. There is no requirement that every kid has to subscribe. The citizens are opposed because they say it is binding upon them. Shouldn't that segment of our society which chooses to be free, be given that right. They should be free to choose an alternative course of study. Parents who accept the responsibility of educating will do a better job than surrogate parents imposed by law. Senate Bill 445 does not allow freedom of responsibility. We don't think you can amend it to satisfy everyone who would function under it. I would rather the bill die than impose unwanted restrictions upon our society.

VIRGINIA BAKER, Fairfield, said I have an amendment to propose to the committee. I can't understand why parochial and church were grouped together, and private and home grouped together. I propose that you put private, parochial, and church together, because it is a group of children away from the home being taught by someone other than the public school. The term private school is not defined. The home school is defined by instruction by the parent of the child in their residence. I don't think the state can compel us to keep records on immunization. I don't think you can compel 180 days of pupil instruction, or building safety requirements. I don't think you can apply these regulations to the home. I do agree the bill should contain a provision for a recognized course of study. I am opposed to having the board prescribe to us what to teach. If this bill is passed, I think there will be a problem with the definition of school and pupil. I oppose this bill on religious and constitutional grounds. Ms. Baker submitted copies of her proposed amendment. (see exhibit 6)

JAY WILSON, Christian Education Association, said we are opposed to this legislation. I would like to bring to the committee's attention something that hasn't been touched in the other hearings. About two thirds of the way through the Communist Manifesto, there is a program for taking over advanced countries. Among the components of this program are income tax, national banks, and free education for all children in public schools. There were no public schools in this country at the writing of the constitution. Public schools did not become part of the American scene until after the Civil War. John Dewey's educational system was designed to do two things. To reduce literacy down to that of an animal so the world could be made safe for socialism. We view Senate Bill 445 as another move toward this philosophy. Under no circumstances can we ever allow the county superintendents access to our records, or control of our curriculum. The state should stay out of private education altogether.

PASCAL REDFERN, Missoula, said on principal, I am still against this bill. We believe our rights come from God. The ultimate authority to establish a system of education is with the people. I have not heard any parents testifying in support of these bills. Where is the public outcry for this legislation. We feel threatened that the state is trying to come in and surround us. Mr. Redfern finished his testimony by saying give me liberty or give me death.

RICK BAWCOM, Missoula, said there are fundamental principles being brought forth here. Our forefathers did not write to any great detail concerning the matter of education. We want the ability to teach values and beliefs; we want quality education. Much is spoken of today in public education about values. Who's values are we talking about? Is it the values of humanism? Is it the

values of biblical christianity? I appreciate the work that has been done on this bill, but I think there are some great defects in it. It is putting too strong a hold over the parents and their responsibilities. I believe that the fear of the lord is the beginning of knowledge. It is my responsibility to educate my children. It is my desire to have the freedom to do so. I oppose this bill on constitutional and religious grounds. The price of freedom is eternal vigilance.

SUE SAPKA, Ovando, said if we are required to follow the standards of public education in the home school, I feel those standards should be quality ones. The teacher who is currently teaching my child has had years of education and experience, yet these papers have not been corrected properly. There are mistakes on the papers, as well as punctuation and spelling errors which have not been corrected. I don't think we should be fenced in by these standards.

LOREN HINEBAUN, Glendive, said what about the people who have failed to be educated in the public schools. You can't educate people if they don't want to be educated.

STEVE HINEBAUN, Terry, said who owns the kids, the state or the parents. When the state starts to put regulations on people, they don't generally take them off, they add to them.

GEORGE CRIPE, Havre, said this is a violation of the separation of church and state. We try, because of our faith, to be law abiding citizens. We want to cooperate with the authorities, but we believe government gets its power from God. I ask you to kill this bill.

DAVID PEASE, Hamilton, said if we didn't have the cesspool of public education, humanism, and socialism that is rampant, I would not have had to drive from Hamilton, Montana, to speak to you today. No more than I would allow a rapist into my home to rape my wife, would I allow the Montana Education Association or any other socialistic, humanistic organization enter my house to rape my child's mind. The savors of war and revolution are shaking in the educational system.

PATTY BARNETT, Missoula, submitted a written copy of her testimony. (see exhibit 7)

Prepared statements were also submitted by ROXANNE SPORLEDER, Valier, (see exhibit 8), and LINDA HOLDEN, Valier, (see exhibit 9)

Senator Brown closed by stating I hope this isn't a debate over the success or failure of the public education system. The bill is an attempt to clarify the law and to make it more workable. Much of the opposition has come from home school people in terms of reluctant support, or in terms of a proposition. Last year the attorney general ruled that home schools weren't legal under Montana law. Senate Bill 445 recognized these schools. The law is clarified in favor of private religious schools, in order to clarify what they are allowed to do. On page 4, line 7, the term applicable is the key term. If you live in your house and your family resides there, you would meet these standards. On page 9, the bill indicates that private schools provide an organized course of instruction which includes instruction in the subjects required for public schools as a basic instructional program. The Board of Public Education has determined the accreditation standards for Montana. As a matter of policy, we have resisted placing specific accreditation requirements in the law. We have left this in the hands of the Board of Public Education. That is the reason that the provision is written this way. A comment was made about page 2, line 16, concerning sincerely held religious beliefs. This is the term of art that has been used by the Supreme Court in other similar cases. Sincerely held religious beliefs has a defined legal meaning established in court. In our research in the Senate, one of the pieces of literature we found most helpful was an article from the Ohio Northern University Law Review. (see exhibit 10)

Questions from committee. Rep. Eudaily said I don't see a definition of private school here. Doesn't private school fit in more closely with a parochial school than a home school? Senator Brown answered the state is greatly limited on it's restrictions concerning the private parochial school. Freedom of religion applies to them where it does not to the private schools.

Rep. Hannah asked Senator Mazurek to explain the distinction between private and church related schools. The response was we felt it was advisable to leave some distinction between home schools and private schools. If a home school is affiliated with an organization with seriously held religious beliefs, I don't see any reason why they can't come under the first subsection. The difference between the constitutionality of the two is the seriously held religious beliefs.

Rep. Hammond asked Mr. Hinebaun what would keep him from keeping his children home in order to work on the farm. The response was the constitution specifies what the state should do. If I was infringing upon the life, liberty, or property of my children, they would have to come in and do something. But until that time, I have jurisdiction over my children.

Rep. Sands said we are dealing with two different forms of education. One gets preferred treatment because they are of a religious affiliation. What is the reason for this distinction? What is the difference between lines 9 to 11, ard lines 19 to 20? Senator Mazurek responded I don't know that there has to be a difference. The people were concerned about the religious aspect. We tried to address their concerns.

Chairman Daily closed the hearing at 2:10 p.m.

FRITZ DAILY, Chairman

Cheryl Fredrickson, secretary

ADDITIONAL INFORMATION ATTACHED

HOUSE EDUCATION AND CULTURAL RESOURCES COMMITTEE

March 7, 1982

Information Sheet - Senate Bills 158 and 445

Senate Bill 445 - By Request of the Senate Committee on Education and Cultural Resources

This Committee bill is the result of concern over the provisions in SB 253 (Regan) and SB 331 (Keating) regarding state requirements for church and home schools. Senate Bill 445 divides nonpublic schools into: parochial or church schools; and private or home schools. A home school is defined in 20-5-102(2)(g).

To qualify its students for exemption from compulsory enrollment, a parochial or church school must:

(a) maintain attendance and immunization records;

(b) provide 180 days of pupil instruction or the equivalent;

(c) be housed in a facility meeting local fire and health standards; and

(d) provide an organized course of study that includes instruction in the subjects required of public schools as a basic instructional program as defined by the accreditation standards.

A private or home school must:

(a) comply with (a) through (c) above;

(b) notify the county superintendent of the student enrollment at the school; and

(c) provide instruction in the program required by the accreditation standards.

The above requirements were derived from SB 253 and HB 635 (Keenan). Teacher qualifications and provisions for measurements of achievement were not included in this bill.

The qualification of a parochial or church school as one which is "affiliated with a religious organization with sincerely held religious beliefs" was derived from language in various court decisions.

Senate Bill 158 - Brown

This bill revises various statutes governing the Montana School for the Deaf and Blind in the following manner:

(1) Section 20-8-101, MCA -- eliminates the local executive board. Supervision and control of the school rests with the Board of Public Education exclusively.

(2) Section 20-8-102, MCA -- substitutes "specialists" for "foreman" employed for vocational training purposes.

(3) Section 20-8-104, MCA -- prescribes rulemaking authority for the Board of Public Education for eligibility for admittance to the school.

(4) Section 20-8-105, MCA -- revises the upper age limit from 21 years to 18 years for mandatory attendance at a private or out-of-state institution which affords the child an education such as the one available at the School for the Deaf and Blind. This amendment provides consistency with the fact that the upper limit for attendance at the school is 18 years of age.

(5) Section 20-8-106, MCA -- provides rulemaking authority for the Board of Public Education for transfers of students from the school to other educational placements.

(6) Section 20-8-107, MCA -- eliminates the collection of reimbursements from the federal government for Indian children.

(7) Section 20-8-109, MCA -- conforms the school term to the term provided for public schools in 20-1-301, MCA.

(8) Sections 20-8-110 and 20-8-11, MCA -- clarifies that the Board of Public Education shall manage the use of donations, gifts, or grants to the school. Donations and other proceeds and property may be managed by the Board directly or through a contract with a nonprofit corporation.

(9) Section 20-8-113, MCA -- clarifies the duties of the superintendent of the School for the Deaf and Blind.

(10) Section 20-8-116, MCA -- provides that the school may be used during the summer for continuing education programs of a vocational nature.

(11) New Section 13 -- provides that employees of the school acquire acceptable total communications skills as prescribed by the Board of Public Education.

VISITOR'S REGISTER

HOUSE Education COMMITTEE

BILL 158 DATE 3/7

SPONSOR Brown

NAME	RESIDENCE	REPRESENTING	SUP-PORT	OP-POSE
Bob Deming	GT. FALLS	MSDB	X	
Rosalie Pappy	Helena	MSDB Foundation	X	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

FORM CS-33

VISITOR'S REGISTER

HOUSE Education COMMITTEE

BILL 445 DATE 3/7

SPONSOR Brown

NAME	RESIDENCE	REPRESENTING	SUP-PORT	OP-POSE
Rick Lawson	#6 1st W. Riverside Msla 59802	my children		X
Patty Barrett	407 Dearborn Msla	myself		X
Doug Kallsey	1330 LeGrande Helena	MACS		X
Dr R A Dion	4417-3rd Ave N Gt Falls	MACS		X
John Frankino	Helena	Mt. Cath. Conf	X	
George Cripe	Lavoie	my own children		X
Jay Wilson	Bozeman	Christian Education Inc		X
[illegible]	[illegible]	Christian Ed [illegible]		X
[illegible] Hinobanh	[illegible]	" " "		X
Pascal Redfern	Missoula, Mt	Christian Ed. & Church of Christ		X
Ron Maynor	Missoula, MT	My Family		X
[illegible]	[illegible]	my family		X
Virginia Baker	Fairfield MT	self		amend X
David Pease	Hamilton, MT.	Self		X
[illegible]	[illegible]	[illegible]		X
[illegible]	Missoula MT	self		X
Richard Trerise	Helena	MACSS	✓	
Rod Svee	Helena	OPI	✓	
Linda Haesler	Valier	self	✓	
Rosanne Spoklie	Valier	self	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

FORM CS-33
1-83

or portion thereof, shall be applied to the proper use and benefit thereof, and all donations, gifts, devises, or grants which have been heretofore or may hereafter be made by any person or corporation to said school shall vest in the state of Montana for the use and benefit thereof.

History: En. Sec. 11, Ch. 182, L. 1943; R.C.M. 1947, 80-113.

20-8-111. Duty of board of public education as to property of school. The board of public education shall have the power and it shall be its duty to receive, hold, manage, use, and dispose of any and all real and personal property made over to such board or to the state of Montana by purchase, gift, devise, bequest, or otherwise acquired and the proceeds, interest, and income thereof for the use and benefit of said school.

History: En. Sec. 12, Ch. 182, L. 1943; R.C.M. 1947, 80-114.

20-8-112. Expenditure of school moneys. No moneys belonging to the deaf and blind school fund shall be expended for any purpose other than for the Montana state school for the deaf and blind, and any moneys belonging to any fund or funds which may be hereafter created for such school shall be expended for the express purpose designated in the act or acts creating such fund or funds and for no other purpose.

History: En. Sec. 14, Ch. 182, L. 1943; R.C.M. 1947, 80-116.

20-8-113. Additional duties — superintendent of school for the deaf and blind. The superintendent of the Montana school for the deaf and blind is hereby authorized to add to his present duties that of acting as combined employment placement officer and school field worker temporarily for the sake of economy in order to set up this office and operate same until such time as in his opinion evidence warrants employing a part-time employment officer and school field worker and part-time instructor.

History: En. Sec. 1, Ch. 189, L. 1945; R.C.M. 1947, 80-117.

20-8-114. Instructor. When said superintendent believes he needs such part-time instructor, he shall make recommendations to the board of public education.

History: En. Sec. 2, Ch. 189, L. 1945; R.C.M. 1947, 80-118.

20-8-115. Employment placement officer — qualifications. Such employment placement officer must have a working knowledge of the sign language and taught 3 years or more in a deaf school.

History: En. Sec. 3, Ch. 189, L. 1945; R.C.M. 1947, 80-119.

20-8-116. Employment placement officer — duties. As employment placement officer, it shall be his duty to gather and record such data and statistics to help him locate suitable employment for such deaf and hard-of-hearing persons not in attendance at said school or for those who have been trained by the department of social and rehabilitation services when it so requests such assistance. He shall consult with various county, state, and federal agencies and with the department of social and rehabilitation services to secure employment for self-sustaining persons. He shall coordinate work with such federal agencies as social security and reemployment

Exhibit 1

20-8-117. Field worker — duties. As field worker he shall consult with school officers, parents, or guardians of adult deaf relative to handicapped children, relative to their admission to said school.

History: En. Sec. 5, Ch. 189, L. 1945; R.C.M. 1947, 80-121.

20-8-118. Part-time instructor's duties. As part-time instructor, he shall teach and prepare students in the school for employment and other duties, as directed by the superintendent.

History: En. Sec. 6, Ch. 189, L. 1945; R.C.M. 1947, 80-122.

20-8-119. Salary. His salary shall be fixed by the board and paid as salaries of other employees of said school.

History: En. Sec. 7, Ch. 189, L. 1945; R.C.M. 1947, 80-123.

CHAPTER 9

FINANCE

Part 1 — School Budgets

Sections

20-9-101. Application of budget system for districts.
20-9-102. General supervision of school budgeting system.
20-9-103. School budget form.
20-9-104. General fund cash reserve.
20-9-105. Insurance fund cash reserve.
Sections 20-9-106 through 20-9-110 reserved.
20-9-111. Initial budget items for completion — estimated budgeting authority.
20-9-112. Notice of preliminary budget meeting.
20-9-113. Preparation and adoption of preliminary budget by trustees.
20-9-114. Preparation of preliminary budget by county superintendent if no budget submitted.
20-9-115. Notice of preliminary budget filing and final budget meeting.
Sections 20-9-116 through 20-9-120 reserved.
20-9-121. County treasurer's statement of cash balances and bond information.
20-9-122. Statement of district, city, and town valuations.
20-9-123. County superintendent's estimates of revenue and supply of other financial and statistical information.
Sections 20-9-124 through 20-9-130 reserved.
20-9-131. Final budget meeting.
20-9-132. Final budget adjustment procedures.
20-9-133. Adoption and expenditure limitations of final budget.
20-9-134. Completion, filing, and delivery of final budgets.
Sections 20-9-135 through 20-9-140 reserved.
20-9-141. Computation of general fund net levy requirement by county superintendent.
20-9-142. Fixing and levying taxes by board of county commissioners.
20-9-143. Allocation of federal funds in lieu of property taxation.
Sections 20-9-144 through 20-9-150 reserved.
20-9-151. Budgeting procedure for joint districts.
20-9-152. Fixing and levying taxes for joint districts.
Sections 20-9-153 through 20-9-160 reserved.
20-9-161. Definition of emergency for budgeting purposes.
20-9-162. Authorization for emergency budget adoption.
20-9-163. Resolution for emergency budget — petition to superintendent of public instruction or to the board of regents.
20-9-164. Notice of emergency budget resolution.
20-9-165. Emergency budget limitation, preparation, and adoption procedures.
20-9-166. State financial aid for emergency budgets.

Exhibit 2

PROPOSED AMENDMENTS TO SENATE BILL 445 SENATOR BOB BROWN (Proffitt)

1. Page 2, line 12.
Following: "parochial"
Strike: "or"
Insert: ","

2. Page 2, line 13.
Following: "school"
Insert: ", or religious school"

3. Page 2, line 15.
Following: "is"
Insert: "a religious organization or is"

March 7, 1983

SB 445 Exhibit 3

Gentlemen, I come before you as a resident of this fair state, a father, and concerned citizen. You have before you for your consideration a proposed bill imposing certain regulations upon home schools. I believe a part of such consideration should be the motives behind my antagonism to home schools [redacted] and the motives of a mother and father to teach their children at home. For this reason I have taken this day from my business and travelled some distance.

What are the motives prompting the introduction of a [redacted] bill by the public education establishment? Money. Simply money. Some may say "out of the noble desire of wanting the best education for each child in our state." Is that all they consider my children to be, objects to be educated? Shall my child not be clothed, fed, housed, and loved? Where were the "concerned" bureaucrats when my wife was going through the painful jaws of childbirth as I looked on incapable of more than an encouraging word or a conforting ress? Where were the compassionate government educators when my wife and I knelt and prayed and cried for our sick children, helpless against a bacteria or virus working havoc upon their tiny bodies? I dare say Mommy and Daddy have more love and compassion for our children. Money. That is the "noble" motive of the teachers' unions in seeking the restriction and even demise of home schools. The unions lose jobs and the school district loses subsidies when the number of children in their schools declines.

What are my motives in teaching my children at home in contrast to sending them to the government school? Surely it cannot be money for even if I rent my house, in that rent is the cost of property and school taxes the landlord pays on that house. I purchased desks and a school curriculum with which to teach my children. I have already paid for those things in the government schools. [redacted]

Have I the motive of protecting my child from those insidious childhood diseases so easily contracted in the government school? No! They have already contracted nearly everything under the sun at church as we go three times a week. They have been innoculated, vaccinated, and protected against everything our doctors knew of and could invent. I will not bore you with all of my non-motives for teaching my children at home, but simply get to the reason most heavy upon my heart.

I see nothing wrong with parents delegating to others their God-ordained responsibility of educating their children. That educating is not only to prepare them with the necessary tools with which to provide for themselves, but also to train them up in the "nurture and admonition of the Lord." The government schools do neither. We are all well aware of government school test scores declining for the past several decades. And the only spiritual experience a child gains in the public schools is a drug trip. I love my children enough to not subject them to the religion of humanism which is taught in every public school in these United States. I cannot subject my children to the muggings, beatings, robberies, extortions, rapes, and even murders found in the government schools. Montana may or may not be as bad as the rest of the country, but nonetheless, I do not consider it a healthy environment for my children. Remember, their mother and I love and know them more than the state.

You may be asking, "Don't the parents sending their children to the government schools love their children? Aren't they concerned for their well-being?" I personally beleive so. But we are dealing with understanding. Most parents do not understand the problems with the government schools. And many parents find it easier to say "have a good day" at 8 a.m. and "did you have a good day?" at 4 p.m. Home teaching is not the easier of the two courses. Parents are being forced to support the government

school system so how can you find fault with them utilizing it? If they had a true choice, whether or not to pay the school tax, I really wonder how many would leave the government schools and send their children to private schools or tutors? Home teaching for some is not a choice due to many good reasons. With my wife and me it is a necessity due to our religious convictions not allowing for the false doctrine at even the private school in our area.

I will not judge parents sending their children to the government schools. Please do not allow a government school official to judge my home teaching. How can someone who allows humanism, confusion, and illiteracy in one school be qualified to judge christianity, the 3 "Rs", and obedience in another school? If he approved my home school, would that mean it was bad enough ~~or~~ good enough? Respectfully, I cannot and would not allow such accreditation by the state of my obedience toward God. Pastor Sileven in Nebraska and Ronnie K. Maynor in Montana will never surrender their God given responsibilities to the state.

I plead with you to pass ~~reject~~ amend this bill with amendment-3. It is good that home schools are recognized, but not when placed under the same yoke of the proven incompetency of ~~the~~ a government ~~administrator~~ school official. Please delete subsections 2(d) and 2-2(c), and have them read "provide instruction in Social Studies, history, mathematics, english grammar, literature, and science."
Thank you.

Exhibit 4

SB 445

(a) enrolled in a private--institution parochial or church school which provides--instruction--in--the--program prescribed--by--the--board--of--public-education-pursuant-to 20-7-111 is affiliated with a religious organization with sincerely held religious beliefs and which is in compliance with the provisions of [section 2(1)];

parochial or church school

SB 445

(b) enrolled in a private or home school that complies with the provisions of [section 2(2)]. For the purposes of this subsection (b), a home school is the instruction by a parent of his child, stepchild, or ward in his residence.

Nonpublic or Home School

(a) enrolled in a private-institution--which--provides instruction-in-the-program-prescribed-by-the-board-of-public education--pursuant--to--20-7-111 nonpublic OR A HOME school

HB 635

that has demonstrated compliance with the provisions of [section 5] in a written statement by the child's parents OR guardians IN THE CASE OF A HOME SCHOOL, or BY A nonpublic school authority, submitted to and accepted for filing by the county superintendent;

written statement

SB 445

(b) notify the county superintendent of schools of the student's attendance at the school; and

notification from home schools

Attendance Officer

635 15 [5] maintain a record of all parents, guardians, and
16 other responsible persons whose children attend nonpublic OR
17 HOME schools in the district and institute proceedings
18 against those parents, guardians, or other responsible
19 persons whose children attend a nonpublic OR A HOME school
20 for which a statement of compliance with [section 5] has not
21 been accepted for filing under 20-3-205; and

Administrative Rules now in effect

10.65.302 PROCEDURES FOR ATTENDANCE OFFICER (1) The attendance officer is mandated to enforce the compulsory attendance provision of Montana school law and has been vested with the necessary police and investigatory powers to enforce compulsory attendance provisions of Montana law to ensure the children are enrolled and attending a public school or enrolled in a private institution which provides the basic instructional program; as described in 10.55.402 and 10.55.403 of the Administrative Rules of Montana.

(2) In the capacity of enforcing compulsory school attendance law the attendance officer may notify the county superintendent of his county of the existence of the private institution after determining that a child is enrolled in a private institution.

(3) The attendance officer shall, at the discretion of the county superintendent, accompany and/or assist the county superintendent in the county in determining whether the nonpublic school is providing the basic instructional program as prescribed.

AUTH: 20-2-121, MCA IMP: 2-5-101, MCA, 20-5-102, MCA.

635 County Superintendent

(2) review, investigate, and accept for filing or reject any statement from a nonpublic DR a HOME school submitted in accordance with 20-5-102 and make the statement available to the attendance officer of the district in which the nonpublic DR HOME school is located; and

Administrative rules now in effect

10.65.303 PROCEDURES FOR COUNTY SUPERINTENDENT (1) The county superintendent as an elected local school official must meet certain teaching and administrative qualifications in school matters. The county superintendent has general supervision of the schools of his county and is responsible to perform any duty prescribed by the board of public education.

(2) The office of public instruction will provide technical assistance to all county superintendents, upon their request, so they in turn can perform the mandates of this policy.

(3) The governing authority of a private institution may request the attendance officer to contact the county superintendent for a determination of whether a private institution is providing a basic instructional program.

(4) The county superintendent, upon request by the attendance officer, shall contact the governing authority of the private institution and determine annually whether the children within his county who are attending a private institution are receiving a basic instructional program as set forth by the board of public education.

(5) If the county superintendent determines that the private institution is providing a basic instructional program as prescribed, the county superintendent shall notify the attendance officer that the private institution is providing the basic instructional program to the children of that institution and is therefore in compliance with the compulsory attendance law.

(6) Should the county superintendent determine that the children attending a private institution are not receiving a basic instructional program, he shall specify the deficiency (ies) to the governing authority of the institution and may allow the latter a reasonable probationary period of up to six months in which to correct the deficiency (ies), after which probationary period he shall report the same to the local attendance officer who then, if necessary shall pursue the remedies provided by law to assure that proper compulsory attendance at an institution with at least the basic instructional program is provided.

(7) The governing authority of a private institution which is found by the county superintendent not to provide a basic instructional program may appeal the county superintendent's decision to the board of public education and the board shall apply the Administrative Procedures Act in this appeal.

AUTH: 20-2-121, MCA IMP: 20-3-205 (22), MCA

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NEW SECTION. Section 5. Nonpublic OR HOME school requirements for compulsory enrollment exemption. To qualify its students for exemption from compulsory enrollment under 20-5-102, a nonpublic OR A HOME school shall:

(1) provide instruction at least equivalent to the program prescribed by the board of public education pursuant to 20-7-111;

(2) offer instruction within buildings and facilities that:

(a) comply with local health and safety regulations; and

(b) provide adequate safeguards against the loss of educational and administrative records either through storage in fire-resistant containers or facilities or through the retention of duplicates in a separate and distant area;

(3) provide at least 180 days of pupil instruction OR THE EQUIVALENT NUMBER OF HOURS in accordance with 20-1-301 and 20-1-302;

(4) maintain for each student a record that includes:

(a) a record of attendance;

(b) a list of courses completed; and

(c) measurement of achievement in each area included in the program of instruction prescribed by the board of public education pursuant to 20-7-111; and

NEW SECTION. Section 2. Nonpublic school requirements for compulsory enrollment exemption. (1) To qualify its students for exemption from compulsory enrollment under 20-5-102, a parochial or church school shall:

(a) maintain records on pupil attendance and disease immunization and make such records available to the county superintendent of schools on request;

(b) provide at least 180 days of pupil instruction or the equivalent in accordance with 20-1-301 and 20-1-302;

(c) be housed in a building that complies with applicable local health and safety regulations; and

(d) provide an organized course of study that includes instruction in the subjects required of public schools as a basic instructional program pursuant to 20-7-111.

(2) To qualify its students for exemption from compulsory enrollment under 20-5-102, a private or home school shall:

(a) comply with the provisions of (a) through (c) of subsection (1);

(b) notify the county superintendent of schools of the student's attendance at the school; and

(c) provide instruction in the program prescribed by the board of public education pursuant to 20-7-111.

NEW SECTION. Section 3. Codification instruction. Section 2 is intended to be codified as an integral part of Title 20, and the provisions of Title 20 apply to section 2.

-End-

Teacher Qualifications

HB 635

(5) IN THE CASE OF A NONPUBLIC SCHOOL, employ as administrators, under written contract, only persons who are certified according to 20-4-101;

(a) ARE CERTIFIED TO TEACH IN ANY STATE;

(b) ARE ENROLLED IN AN EDUCATION PROGRAM LEADING TO TEACHER CERTIFICATION; OR

(c) PROVIDE EVIDENCE OF ACCEPTABLE EXPERIENCE ACCORDING TO CLEARLY IDENTIFIED CRITERIA CONSISTENT WITH THE EDUCATIONAL GOALS OF THE SCHOOL;

(5) IN THE CASE OF A NONPUBLIC SCHOOL, employ as teachers, under written contract, only persons who are certified according to 20-4-101;

(a) ARE CERTIFIED TO TEACH IN ANY STATE;

(b) TEACH AT LEAST HALFTIME IN A SUBJECT AREA IN WHICH THE PERSON HOLDS A BACHELOR OF SCIENCE OR A BACHELOR OF ARTS DEGREE; OR

(c) PROVIDE EVIDENCE OF ACCEPTABLE EXPERIENCE ACCORDING TO CLEARLY IDENTIFIED CRITERIA CONSISTENT WITH THE EDUCATIONAL GOALS OF THE SCHOOL;

(6) IN THE CASE OF A HOME SCHOOL, ALLOW AS TEACHERS ONLY PERSONS WHO MEET THE REQUIREMENTS OF SUBSECTIONS (5)(a) THROUGH (c); AND

Appeals Process

Appeal by the nonpublic or home school

NEW SECTION. Section 6. Rejection of nonpublic OR HOME school statement of compliance with compulsory enrollment exception. Whenever a nonpublic OR A HOME school statement of compliance with the provisions of [section 5], filed pursuant to 20-5-102, is rejected for filing by the county superintendent under 20-3-205, the county superintendent shall notify the person submitting the statement of the reasons for its rejection. An appeal of the rejection may be made to the board of public education within 10 days after the decision is rendered by the county superintendent. The decision of the board is final.

NEW SECTION. Section 7. Codification instruction. Sections 5 and 6 are intended to be codified as an integral

Administrative Rules now in effect

(6) Should the county superintendent determine that the children attending a private institution are not receiving a basic instructional program, he shall specify the deficiency (ies) to the governing authority of the institution and may allow the latter a reasonable probationary period of up to six months in which to correct the deficiency (ies), after which probationary period he shall report the same to the local attendance officer who then, if necessary shall pursue the remedies provided by law to assure that proper compulsory attendance at an institution with at least the basic instructional program is provided.

(7) The governing authority of a private institution which is found by the county superintendent not to provide a basic instructional program may appeal the county superintendent's decision to the board of public education and the board shall apply the Administrative Procedures Act in this appeal.

AUTH: 20-2-121, MCA IMP: 20-3-205 (22), MCA

At the public hearing which was held November 5, 1981 twenty-eight persons testified on the proposed rule. Their testimony falls into eleven categories each of which the board of public education specifically addresses as follows:

(a) There was concern that the rule violates the U. S. and Montana Constitution. The board disagrees, citing a narrative of William B. Ball on Constitutional Protection of Christian Schools submitted to the board by the Lewis and Clark Christian Academy which states in part: "Government may pose reasonable requirements pertaining to health, safety, sanitation and a basic core of learning.... Those state truancy laws which require a child to have a basic modicum of education in a safe and

Senate BILL NO. 445

INTRODUCED BY Bob Brown & Ed Smith Mazurek Boyd Blaylock McCallum Eck Haffey Berg

BY REQUEST OF THE SENATE COMMITTEE ON EDUCATION AND CULTURAL RESOURCES

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING EXEMPTIONS TO COMPULSORY ENROLLMENT IN PUBLIC SCHOOLS BY PROVIDING THAT A CHILD MAY BE EXEMPT IF ENROLLED IN A PAROCHIAL OR CHURCH SCHOOL WHICH KEEPS ATTENDANCE AND IMMUNIZATION RECORDS, PROVIDES 180 DAYS OF PUPIL INSTRUCTION OR THE EQUIVALENT, PROVIDES AN ORGANIZED COURSE OF STUDY, AND IS HOUSED IN A FACILITY MEETING FIRE AND HEALTH STANDARDS; PROVIDING THAT, FOR COMPULSORY ENROLLMENT EXEMPTIONS FOR STUDENTS IN PRIVATE OR HOME SCHOOLS, THE REQUIREMENTS FOR PAROCHIAL AND CHURCH SCHOOLS MUST BE MET AND IN ADDITION THAT NOTIFICATION OF ATTENDANCE MUST BE MADE TO SCHOOL AUTHORITIES; AMENDING SECTION 20-5-102, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 20-5-102, MCA, is amended to read:

"20-5-102. Compulsory enrollment and excuses. (1) Except as provided in subsection (2), any parent, guardian, or other person who is responsible for the care of any child who is 7 years of age or older prior to the first day of school in any school fiscal year shall cause the child to be instructed in the program prescribed by the board of public education pursuant to 20-7-111 until the later of the following dates:

(a) the child's 16th birthday;

(b) the date of completion of the work of the 8th grade.

(2) Such parent, guardian, or other person shall enroll the child in the school assigned by the trustees of the district within the first week of the school term or when he establishes residence in the district unless the child is:

(a) enrolled in a ~~private--institution~~ parochial or church school which ~~provides--instruction--in--the--program prescribed--by--the--board--of--public-education-pursuant-to 20-7-111~~ is affiliated with a religious organization with sincerely held religious beliefs and which is in compliance with the provisions of [section 2(1)];

(b) enrolled in a school of another district or state under any of the tuition provisions of this title;

(c) provided with supervised correspondence study or supervised home study under the transportation provisions of this title;

(d) excused from enrollment in a school of the district when it is shown that his bodily or mental condition does not permit his attendance and the child

cannot be instructed under the special education provisions of this title;

(e) excused from compulsory school attendance upon a determination by a district judge that such attendance is not in the best interest of the child; or

(f) excused by the board of trustees upon a determination that such attendance by a child who has attained the age of 16 is not in the best interest of the child and the school; or

(g) enrolled in a private or home school that complies with the provisions of [section 2(2)]. For the purposes of this subsection (g), a home school is the instruction by a parent of his child, stepchild, or ward in his residence.

(3) The excuse provided for in subsection (2)(d) of this section shall be issued by the district superintendent or the county superintendent when there is no district superintendent employed by the district. Whenever an excuse is denied by the applicable official, an appeal of such decision may be made to the district court of the county within 10 days after the decision upon giving a bond in the amount set by the court to pay all costs of the appeal. The decision of the district court shall be final."

NEW SECTION. Section 2. Nonpublic school requirements for compulsory enrollment exemption. (1) To qualify its students for exemption from compulsory enrollment under

20-5-102, a parochial or church school shall:

(a) maintain records on pupil attendance and disease immunization and make such records available to the county superintendent of schools on request;

(b) provide at least 180 days of pupil instruction or the equivalent in accordance with 20-1-301 and 20-1-302;

(c) be housed in a building that complies with applicable local health and safety regulations; and

(d) provide an organized course of study that includes instruction in the subjects required of public schools as a basic instructional program pursuant to 20-7-111.

(2) To qualify its students for exemption from compulsory enrollment under 20-5-102, a private or home school shall:

(a) comply with the provisions of (a) through (c) of subsection (1);

(b) notify the county superintendent of schools of the student's attendance at the school; and

(c) provide instruction in the program prescribed by the board of public education pursuant to 20-7-111.

NEW SECTION. Section 3. Codification instruction. Section 2 is intended to be codified as an integral part of Title 20, and the provisions of Title 20 apply to section 2.

-End-

EXHIBIT 5

WITNESS STATEMENT

Name HILDE VAN DUYM Committee On EDUCATION

Address 33 SO LAST CHANCE GULCH Date 07 MAR 83

Representing BOARD OF PUBLIC EDUCATION Support ✓

Bill No. SB 445 Oppose

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1. BOARD SUPPORTS THE BILL, IT COMMENDS THE SENATE FOR ITS EFFORTS

2. THE BILL ADDRESSES PREVIOUSLY EXISTING AMBIGUITIES, PARTICULARLY IN THE HOME SCHOOL AREA.

3. THE BOARD IS ANXIOUS TO SEE HOW IT WORKS IN ORDER TO REPORT BACK NEXT LEGISLATURE.

4.

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

Exhibit 6

A PROPOSED BILL, AMENDING SECTION 20-5-102, MCA

(and amending Senate Bill 445)

Section 1. Section 20-5-102, MCA, is amended to read:

"20-5-102. Compulsory enrollment and excuses. (1) Except as provided in subsection (2), any parent, guardian, or other person who is responsible for the care of any child who is 7 years of age or older prior to the first day of school in any school fiscal year shall cause the child to be instructed in the program prrscribed by the board of public education pursuant to 20-7-111 until the later of the following dates:

(a) the child's 16th birthday;

(b) the date of completion of the work of the 8th grade.

(2) Such parent, guardian, or other person shall enroll the child in the school assigned by the trustees of the district within the first week of the school term or when he establishes residence in the district unless the child is:

(a) enrolled in a private, ~~institution~~ parochial, or church school which:

(1) provides an organized course of study that includes instruction in the ~~program~~ subjects ~~prescribed~~ required by the board of public education pursuant to 20-7-111; and

(2) is housed in a building that complies with applicable local health and safety regulations.

(b) enrolled in a school of another district or state under any of the tuition provisions of this title;

(c) provided with supervised correspondence study or supervised home study ~~under the transportation provisions of this title~~ which provides an organized course of study that includes instruction in the subjects required by the board of public education pursuant to 20-7 ;

(d) excused from enrollment in a school of the district when it is shown that his bodily or mental condition does not permit his attendance and the child cannot be instructed under the special education provisions of this title;

(e) excused from compulsory school attendance upon a determination by a district judge that such attendance is not in the best interest of the child; or

(f) excused by the board of trustees upon a determination that such attendance by a child who has attained the age of 16 is not in the best interest of the child and the school.

(3) The excuse provided for in subsection (2)(d) of this section shall be issued by the district superintendent or the county superintendent when there is no district superintendent employed by the district. Whenever an excuse is denied by the applicable official, an appeal of such decision may be made to the district court of the county within 10 days after the decision upon giving a bond in the amount set by the court to pay all costs of the appeal. The decision of the district court shall be final."

[It may be necessary to amend the meanings of the terms "school" and "pupil."]

Exhibit 7

WITNESS STATEMENT

Name Patty Barnett Committee On Education

Address 407 Dearborn Mtla Date 3-7-83

Representing myself Support

Bill No. 445 Oppose X

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1.

2.

3.

4.

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

March 6, 1983

Exhibit 7

Members of the committee:

I wish to take a few moments to express to you some thoughts on the currently developing public school-private school-home school question.

First of all, I have no children of my own, but I have spent three years at the University of Montana studying to get a teaching certificate (two years specifically in the Elementary Education department). I have a very real burden and interest in the field of teaching children, and I see a very great need today.

The time that I spent at the University was disillusioning to say the least. More time was spent teaching why we should join the union, and how to defend teachers and the public education system, than was ever spent on practical, real methods for instructing children. What was even more disturbing was the subtil attitude and educational philosophy which took me a long time to perceive, and yet once I did perceive it, I could see that it was all pervasive in the classes I took. The unavoidable philosophy was, at the very least, anti-parent, anti-moral; it threw away every belief in right and wrong, destroyed parental rights for their children, and, if the truth be known, is more closely knit to Socialism than we dare even to think. After I began to read of the truth about "progressive education", and where it is leading our nation, I dropped out of the University and began to be involved in the home school movement.

I am delighted and thankful that the compromise bill on private education has allowed for exemption from compulsory attendance if the child is enrolled in a home school, but I am very much concerned about the controls which have been added. The Missoulian reported that "Private and home schools would have to provide a course prescribed by the board of public education'". This is a fearful and totally unacceptable control and power over parents. What use is it to teach children in a private school if these schools must submit to whatever curriculum or course of study the board of education should choose to prescribe? And what if the board should choose to make it hard for some parents by declaring that their course of study is not acceptable, that they must conform to the board's standard or lose their children? What recourse will parents have then?

May I submit here two statements quoted from the "Impact Report on Federal Involvement in Child Development, Prepared for MISSOURI PARENTS AND CHILDREN, April 1982" The first quote from John Stuart Mill:

> a general state education is a mere contrivance for molding people to be exactly like one another; and...the mold in which it casts them is that which pleases the predominant power in the

> government...;in proportion as it is efficient and successful, it establishes a despotism over the mind, leading by natural tendency to one over the body...

And now, from the United States Supreme Court 1925:

> to the extent that schooling is efficacious, the power to choose the goals of learning is the power to manipulate society...the fundamental theory of liberty upon which all governments in the union repose, excludes any general power of the state to standardize its children...(Pierce v. Society Of Sisters, 268 U.S. 510)

People in education today will undoubtably claim that standardizing and controlling education is in the best interest of both the children and the state. I reject both of these claims as false, and submit one last quotation, this from Mr. Frederic Bastiat who wrote in a turbulant period of France's history. In The Law (1850), this statesman attempted(but in vain) to warn his countrymen of the evils of the then encroaching Socialistic system by setting forth the true purpose and limitations of government and law. His comments are extremely valid for us today.

> Law is the common force organized to act as an obsticle to injustice. In short, law is justice.
>
> It is not true that the legislator has absolute power over our persons and property. The existence of persons and property preceded the existence of the legislator, and his function is only to guarentee their safety.
>
> It is not true that the function of law is to regulate our consciences, our ideas, our wills, our education, our opinions, our work, our trade, our talents or our pleasures. The function of law is to protect the free exercize of these rights, and to prevent any person from interfering with the free exercize of these same rights, by any other person.
>
> Since law necessarily requires the support of force, its lawful domain is only in the areas where the use of force is necessary. This is justice.
>
> Every individual has the right to use force for lawful self-defence. It is for this reason that the collective force--which is only the organized combination of the individual forces--may lawfully be used for the same purpose, and it cannot be used legitimately for any other purpose.
>
> Law is solely the organization of the individual right of self-defence, which existed before law was formalized. Law is justice.

Patty Barnett
Missoula, Montana

Exhibit 8

WITNESS STATEMENT

Name Mrs. Roxanne Sparleder Committee On Education

Address Box 940, Valier, Mt. Date March 7, 1983

Representing Self Support ✓

Bill No. Senate Bill #445 Oppose

Amend ✓

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments: I am for this Bill because:

1. This bill clarifies the present law by concisely listing various forms of alternate education. This is badly needed. Home schools are in limbo right now.
2. It does not subjugate all of the forms of education under one control, encouraging diversity and creativity. I do believe any more restrictions would move toward control.
3. It allows recourse for appeal through the local judicial system if there is a dispute or question of compliance
4. It is a reasonable compromise that gives protection to the children and yet allows religious freedom in education.

~~I do believe this Bill~~ could be amended clearly state the basic courses required in private education. Section 2, subsection 1, part (d) and Section 2, subsection 2, part (b) should be worded the same and should enumerate the specific courses.

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

* I would like Section 1, subsection 2, part (a) [lines 16-17] "... sincerely held religious beliefs ..." to remain intact.

FORM CS-34
1-83

I have had a home school for 4 years and my children have also attended a private Christian school for 5 years.

Exhibit 8
SB 445

My name is Roxanne Sparleder.

I ask you to support Senate Bill 445 ~~for these reasons~~. I am in favor & other bills for these reasons.

1) It will clarify our present law. Under the present law, all the alternate forms & private education are grouped under one term, "private institution." This is an ambiguous and confusing term. This bill concisely lists various forms.

2) This bill also does not subjugate all of the forms & education under one control. This freedom encourages diversity and creativity, and produces healthy stimulation that leads to quality for both private and public sectors.

W

2) This bill allows the ~~parents~~ recourse for appeal through the local judicial system ~~if~~ if there is a dispute or question of quality.

3) I believe it is a reasonable compromise that gives protection to the children and yet allows religious freedom in education.

Is it the intent of the Bill to make a distinction between the Church or parochial course requirements and the private or home school course requirement?

I would like this committee to consider recording Section 2, Sub 1, part (d) (lines 9-11) and Sub 2 part (c) (lines 19-20) to provide an organized course of study that includes instruction in Lang. Social studies, etc.).

Exhibit 9

WITNESS STATEMENT

Name Linda Haeden Committee On Education

Address Valier, Mt. Date March 7, 1983

Representing Myself & family Support X

Bill No. S.B. 445 Oppose

Amend X

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments: I am for this bill because

1. It makes the law more clear by concisely listing various forms of alternate education. It lists the home school & spells it out and the present law doesn't.
2. It does not subjugate all of the forms of education under one control, encouraging diversity & creativity. We don't need monopolys.
3. It allows recourse for appeal through the local judicial system if there is a question of compliance. I do not want to go through the local board of education and that would be unfair.
4. It is a reasonable compromise that gives protection to the children and yet allows religious freedom in education. It also allows home schools to exist.

I do believe this Bill could be Amended to Clearly State the basic Courses required of private education. Section 2 Subsection 1 part (d) and Section 2 Subsection 2 part b) should be the Same and ~~should enumerate the specific Courses~~.

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

Exhibit 9
SB 445

My name is Linda Holden and I have a "home" school. This has been a very rewarding and beneficial experience and because of this I am here to support S.B. 445. We are all interested in quality education for our children and I feel that this bills intent is for quality education.

My husband and I own land and raise registered cattle so we have the privilge of paying our share of taxes so that our children and any child may have opportunity to receive an education. However, we reserve the right to make the decision where our children will be educated and ~~what is best~~ for them. I feel this bill allows for that freedom of choice.

I would be willing to comply with this bill.

I would like you leave all of Section I - a intact except add the ammendment suggested by Senator Brown, added to it.

I also feel that section 2 / part (d) + section 2 subsection 2 part (b) should be the same for more clarity.

Attempted State Control of the Religious School: *Congress Shall Make No Law Inhibiting The Free Exercise of Religion?*

JEFFREY A. DRAKE*

INTRODUCTION

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."[1] The very first clause of the first amendment establishes the "separation of church and state" which has become so deeply entrenched in our traditions. Congress shall neither enact laws which promote religion, nor shall it inhibit the free exercise of one's beliefs. However, it is inevitable that some laws, although appearing neutral on their face, serve to either promote or inhibit the practice of religion. This conflict between the laws of the state and the practice of one's religion often seems to arise when dealing with the various compulsory education requirements of the states.

Virtually all states have a compulsory school attendance law which requires children between certain ages to attend school.[2] The high responsibility of the state for the education of its citizens was clearly recognized in *Wisconsin v. Yoder*.[3] *Yoder* reaffirmed the proposition that the state has the power and authority to "impose reasonable regulations for the control and duration of basic education."[4]

Despite the high priority which has been attached to the promotion of education, problems often arise when the state "imposes a reasonable regulation" that conflicts with an individual's religious beliefs. Although the state has a strong interest in educating its populace, it cannot indiscriminately impose rules and regulations that will impinge on a person's religious liberty.[5] Accordingly, it is necessary to strike a balance

* Associate in the firm of Charles S. Wilson & Associates, New Britain, Pennsylvania. B.A. Gordon College (1977); J.D. Capital University Law School (1980).

1. U.S. CONST. amend. I.

2. *See, e.g.*, OHIO REV. CODE ANN. §3321.03 (Page 1980) which provides in pertinent part:

> [T]he parent of a child of compulsory school age shall cause such child to attend a school in the parent's school district of residence. . . , or shall otherwise cause him to be instructed in accordance with law. Every child of compulsory school age shall attend a school . . . that conforms to the minimum standards prescribed by the state board of education. . . .

3. 406 U.S. 205, 213 (1972).

4. *Id.* The right of the state to reasonably regulate its citizens' education was first established by the Court in Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925).

5. The Supreme Court has held that:

> [A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children. . . .

406 U.S. at 214.

between valid governmental interests and the free exercise of religious beliefs.[6] This article will explore these conflicts and suggest a viable course of action when the interests of church and state collide.

I. HISTORICAL DEVELOPMENT OF THE FREE EXERCISE CLAIM

A. *Right to Attend a Non-Public School*

The past decade has witnessed a large increase in the number of private, sectarian schools. Many parents are dissatisfied with the state of the public schools and have decided that their children's continued attendance at public schools would violate their religious beliefs.[7] These parents have taken their children out of public schools and have enrolled them in private, religious schools.

Clearly, parents have the right to choose not to send their children to public schools. This right was upheld in *Pierce v. Society of Sisters*.[8] Parents, whose children are mandated to attend school because of the compulsory education statutes, may choose to provide an equivalent private education for their children.[9] However, it is clear that the state has the power and authority to enact reasonable regulations governing these private schools. In *Board of Education v. Allen*, the Supreme Court stated that:

> [A] substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction, [and that the state] has a proper interest in the manner in which those schools perform their secular educational function. [Footnote omitted][10]

Problems have arisen where the religious schools have failed to meet the minimum standards as determined by the state. Some religious schools claim that compliance with the minimum standards outlined by the state would cause them to violate their religious convictions.[11] The religous schools, and the parents of the children attending such schools,

6. In addition to the valid governmental interest of educating its people, the government's interest in eliminating racial segregation can come into conflict with freedom of religion. The issue arises as to whether a sectarian school, on the conviction of sincerely held religious beliefs, may resist governmental demands to integrate and deny admission to its school on the basis of race. This issue, which is unresolved as to date, is an area of sufficient importance that merits a separate discussion apart from this article. For more on this subject, see Note, 53 NOTRE DAME LAW. 107 (1977).

7. *See* State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976).

8. 268 U.S. 510 (1925).

9. *Id.* at 534.

10. 392 U.S. 236, 245-47 (1968).

11. *E.g.*, State v. Whisner, 47 Ohio St. 2d 181, 189, 351 N.E.2d 750, 756 (1976).

argue that the free exercise clause of the first amendment exempts them from submitting to any religiously repugnant state regulations; therefore, the religious school need not comply with objectionable state standards.

The state, on the other hand, insists upon its right to establish the basic minimum standards by which *all* schools must comply. Further, the state contends that since the parents of children within compulsory attendance age are not sending their children to schools that conform to the minimum standards, the parents are therefore in violation of the law.[11] When the above paradox occurs, parents are often arrested for violating the applicable statute, and the resulting actions are criminal in nature. The parents' defense to these charges will inevitably be grounded in the first amendment.

B. Sincerely Held Religious Belief

The authority of the state to regulate a religious school at the expense of valid religious beliefs is a sensitive issue requiring careful attention. However, before seeking to weigh and balance these two competing interests, a threshold consideration must first be satisfied. The defendants, in a case such as the one under consideration, may only raise the first amendment defense if they are, in reality, seeking to freely exercise a religious belief. Otherwise stated, the defendants must be sincere in their religious beliefs. This is, of course, a question of fact and must be decided in each case prior to raising the free exercise argument.[12]

In determining the sincerity of the belief, a court may not look into the merits of the conviction. The government is neither permitted to look into the validity of the belief, nor may it examine the legitimacy of the reasons for holding the belief. The Supreme Court has held that men have a right to believe what cannot be proven and are not required to offer proof for their religious doctrines.[13] However, "while the 'truth' of a belief is not open to question, there remains the significant question whether it [the belief] is 'truly held'."[14] So, a court may examine the facts of a particular case to decide if a person really does adhere to what he claims to believe.[15]

12. *Id.* For an example of a state statute requiring parents to send their children to a school that meets the minimum standards prescribed by a state board of education, *See* OHIO REV. CODE ANN. §3321.03, (Page 1980).

13. 37 OHIO ST. L.J. 899, 903 (1976) (citing United States v. Seeger, 380 U.S. 163, 185 (1965)).

14. United States v. Ballard, 322 U.S. 78, 86 (1944).

15. United States v. Seeger, 380 U.S. 163, 185 (1965).

16. In the case of United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968), the defendant tried to justify her use of illegal drugs by claiming that her religion regarded the use of drugs as a sacrament of the Neo-American church. Although the court did decide this case by utilizing the traditional free exercise analysis, it first stated that the protection of the first amendment would not be afforded to those who sought to abuse their religious liberty. The court held:

> Those who seek the constitutional protections for their participation in an establishment of religion and freedom to practice its beliefs must not be permitted the special freedoms this sanctuary may provide merely by adopting religious nomenclature and cynically using it as a shield to protect them when participating in antisocial conduct that otherwise stands condemned.

Id. at 443. For a further discussion of this point, see Note, *supra* note 6, at 107.

17. The Supreme Court, in *Wisconsin v. Yoder*, noted that a person such as Henry David Thoreau would not be able to raise the free exercise claim because his views were motivated by philosophical and personal reasons, not religious beliefs. 406 U.S. at 216.

18. *Id.* at 215.

19. *Id. See Constitutional Law - Religion - Belief in the Supreme Being is a requirement for a tax exemption for property used exclusively for religious worship*, 56 U. DET. J. URB. L. 610 (1979).

20. Reynolds v. United States, 98 U.S. 145 (1878). In this case, the defendant was a Mormon. He argued that his religion not only permitted, but rather required, that he practice polygamy. *Id.* at 161. In Davis v. Beason, 133 U.S. 333 (1890), the defendant was also a Mormon. However, in addition to prohibiting polygamy, this particular state statute required that, before a person could register to vote, he had to take an oath which stated:

> I do swear (or affirm) that . . . I am not a bigamist or polygamist; that I am not a member of any order, organization or association which teaches, advises, counsels or encourages its members, devotees or any other person to commit the crime of bigamy or polygamy, or any other crime defined by law. . . .

Id. at 334.

21. Reynolds v. United States, 98 U.S. 145, 164 (1878).

22. *See* note 20 *supra*.

Also, in addition to being sincere, a person's belief must be "religious" in nature. If a person's motivation is based on secular reasons and not on religious beliefs, then the person is not entitled to first amendment protection, no matter how sincerely he may subscribe to the philosophy.[16] "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations. . . ."[17] A person raising the free exercise clause of the first amendment as a defense must sincerely subscribe to a religious belief that is "inseparable and interdependent" with his way of life."[18]

C. Compelling State Interest

Once it has been determined that a person's belief is a sincerely held religious conviction, it is then appropriate to examine the problem that arises when a government regulation conflicts with that person's religious belief. Is the truly held belief subordinate to the law of the state or does the free exercise clause exempt the individual from obeying a religiously objectionable statute? The Supreme Court has, in the past, frequently dealt with this question. In such cases, the Court has scrutinized the specific facts of each case.

The early cases confronting this conflict between the two competing interests were usually decided on a "belief versus action" dichotomy.[19] Basically, this view held that while a person could believe anything he wished, the first amendment did not protect those actions motivated by religious beliefs.[20] These early cases[21] often dealt with members of the Mormon religion who sincerely believed in practicing polygamy.

Polygamy, however, was a crime in the states where the Mormons lived. The Mormons argued that since their religion required a male to engage in polygamy, by virtue of the free exercise clause of the first amendment, they should not be subject to the law which prohibited the practice.

The Supreme Court did not extend the protection of the first amendment to the defendants in the polygamy cases. The Court upheld a congressional statute in *Reynolds v. United States*,[22] which prohibited a person from engaging in polygamy, and also validated an Idaho law, in *Davis v. Beason*,[23] which not only forbade polygamy, but also precluded a person from being a member of a group that encouraged or promoted polygamy. The Court reasoned that while the free exercise clause protected a person's personal beliefs or opinions, the government was, nevertheless, free to enact laws designed "to reach actions which were in violation of social duties or subversive of good order."[24]

This apparently clear and simple distinction between belief and action was, in reality, an over-simplification of a difficult problem.[25] The Supreme Court realized the inadequacy of this test and in *Cantwell v. Connecticut*[26] modified its previous decisions. The *Cantwell* Court held that the first amendment guaranteed *both* freedom of belief and freedom to act in accordance with those beliefs.[27] The Court was careful to note one distinguishing feature between the right to believe and the right to act by stating that while the right to hold a particular belief is absolute, all "[c]onduct remains subject to regulation for the protection of society."[28] *Cantwell* evidences the Court's initial shift from the belief/action test to the more workable standard which the Court uses today.

The Supreme Court, in *Sherbert v. Verner*,[29] introduced the "compelling state interest" concept. It was recognized that there were occasions when state regulation legitimately interfered with a person's religious convictions. When such a situation occurred, the state, in order for the regulation to supercede the first amendment protection, would have to

23. 98 U.S. 145 (1878). *See* note 20 *supra*.
24. 133 U.S. 333 (1890). *See* note 20 *supra*.
25. *Reynolds*, 98 U.S. at 164. It could be said that under the view of the Court in these early cases, a person was not free to "practice what they preached."
26. By virtue of "believing in" a certain religion, a follower is naturally compelled to follow the teaching of that religion. Often, a particular religion will require specific conduct from its members. For example, Orthodox Jews must not work on the Sabbath (Exodus 20:8-11). Christians must obey Christ's Great Commission to spread the Gospel (Matt. 23:19-20). It would be impractical to say that a person could "believe" whatever they wanted to, but then could not act in accordance with what their beliefs tell them is right. Belief and action cannot be neatly and categorically separated, and the Supreme Court has recognized this fact. *See* text accompanying notes 30-39 *infra*.
27. 310 U.S. 296 (1940).
28. *Id.* at 303. *See* Note, *supra* note 6, at 112. Also note, *Cantwell* was the first case to apply the free exercise clause to the states. TRIBE, AMERICAN CONSTITUTIONAL LAW 813 (1978).
29. 310 U.S. at 303-04.
30. 374 U.S. 398 (1963).

satisfy two conditions.[31] First, the state would have to establish that there was a "compelling state interest" for the enactment of the regulation.[32] Second, once the compelling interest had been determined, the state would then have to "demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[33] In the wake of *Sherbert*, a state could no longer justify a statute that infringed upon a person's religious liberty by arguing that the statute only regulated conduct, not belief. Those states seeking to regulate religiously motivated conduct would first have to satisfy the two-pronged compelling interest test.

The Supreme Court's most recent extensive discussion of the free exercise clause was in the landmark case of *Wisconsin v. Yoder*.[34] The Court, while stating that freedom of religiously motivated actions was not absolute,[35] once again reiterated that the traditional belief/conduct test was not of much value in resolving free exercise clause conflicts. The *Yoder* Court chose to adopt the standard set forth in *Sherbert*,[36] thereby imposing a higher burden on those states seeking to enact laws that interfere with the free exercise of religion.

The "bottom line" in *Yoder* was that: "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[37] *Yoder*, effectively reaffirmed the Court's compelling interest standard. A general reliance by the state on its broad powers will not be sufficient to enact laws which infringe on a person's religious belief or religiously motivated actions.

D. *Application of the Compelling State Interest Standard to Yoder*

The Supreme Court's application of the compelling interest standard to *Yoder* illustrates how the test actually works. In *Yoder*, the defendants were members of the Old Order Amish religion. They believed that complying with the state compulsory education law, by sending their children to school beyond the eighth grade, "would gravely endanger if not destroy the free exercise" of their religious convictions.[38] The defend-

31. In addition to the "compelling state interest" test, *Sherbert* did hold that state regulation could limit religiously motivated conduct if such actions "posed some substantial threat to public safety, peace or order." *Id.* at 403. While this was not the case in *Sherbert*, the Court reasoned that such "threats" had been the basis of previous decisions in this area.
32. *Id.*
33. *Id.* at 407.
34. 406 U.S. 205 (1972).
35. Religiously motivated conduct may be "subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers." *Id.* at 220.
36. 374 U.S. at 403.
37. 406 U.S. at 215.
38. *Id.* at 219. As members of the Old Order Amish faith, the defendants adhered to a literal belief of the Bible. It was their interpretation of the Apostle Paul's Epistle to the

ant parents, therefore, chose not to comply with the Wisconsin compulsory education law and were subsequently arrested.

The state argued that it had a high responsibility to educate its citizens and that it had the power to enact reasonable regulations to carry out this purpose.[39] It tried to emphasize the distinction that, while the defendants had a right to believe whatever they wanted, they did not have a right to act in an unlawful manner just because such conduct was religiously motivated.[40]

The Supreme Court first looked to see if the defendants' beliefs were religious in nature and if they were truly held. Based upon the evidentiary findings of the trial court and the lack of any challenge by the state of the sincerity of the defendants' beliefs, the Court concluded that the defendants' beliefs were sincerely held religious convictions, and therefore, entitled to first amendment protection.[41] The Court next had to decide if the state had any compelling interest which would override the defendants' claim to the free expression of their religion.

The Supreme Court agreed that the state had a strong interest in compulsory education.[42] It could be said that a state even has a "compelling interest" that its populace be educated. However, the question in this case was: "Does the state have a compelling interest that Amish children attend the two additional years of schooling from ages 14 to 16?" Although the state claimed that their interest was of such a magnitude that even the established religious practices of the Amish must submit to its laws, the Supreme Court held otherwise.

The Court stated that:

> Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim [that state interest of educating its populace is superior]; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.[43]

In *Yoder*, the Court believed that the state's interest in educating its children for an additional two years did not outweigh the Amish interest

Roman Church that when he said "be not conformed to this world . . .", he meant that Christians should live a separated life style, rejecting the dominant culture of a particular era. The defendants believed that if their children were forced to go to public school, they could not help but to be influenced and subject to the secular world. This impermissible exposure of their children to worldly influences was in direct contradiction to their religious convictions. *Id.* at 210-11.

39. *Id.* at 219.
40. *Id.* at 219-20.
41. *Id.* at 215-17.
42. *Id.* at 230.
43. *Id.* at 221.

in adhering to their fundamental religious principles.[44] Evidence showed that the Amish had an alternative mode of continuing informal education for their children after the age of fourteen that would prepare and equip them for life in the Amish community.[45]

Had the Amish chosen not to send their children to school *at all*, then the state would have had a much stronger case. Or, if the parents, motivated by a general interest, as opposed to religious conviction, decided that their children would not attend school beyond the eighth grade, the state could require that the children attend to age sixteen.[46] However, in *Yoder*, the state did not have the requisite compelling interest which would require the defendants to compromise their religious beliefs and actions.

II. STATE REGULATION AND CONTROL OF THE SECTARIAN SCHOOL

A. *Presentation of the Problem*

With a basic understanding of the applicable law relating to the free exercise clause firmly established, the following question is posed: "To what degree may the state regulate and control the religious school?" As previously stated, states often establish minimum standards to which all schools must conform.[47] In addition, state statutes also require that

44. The record strongly indicates that accommodating the religious objections of the Amish by foregoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society.

Id. at 234.

45. *Id.* at 224. The Court also held that if the Amish children chose to leave their parents' life style, the skills and habits learned while a member of the community would be an advantage to them in the secular world.

> There is nothing in this record to suggest that the Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today's society. . . . [W]e are unwilling to assume that persons possessing such valuable vocational skills and habits are doomed to become burdens on society should they determine to leave the Amish faith, ...

Id. at 224-25.

46. "[W]here nothing more than the general interest of the parent in the nurture and education of his children is involved, it is beyond dispute that the State acts 'reasonably' and constitutionally in requiring education to age 16. . . ." *Id.* at 233.

47. The Ohio legislature has delegated the authority to establish minimum standards to the state board of education.

> Such standards shall provide adequately for: A curriculum sufficient to meet the needs of pupils in every community; the certification of teachers, administrators, and other professional personnel and their assignment according to training and qualifications; efficient and effective instructional materials and equipment, including library facilities; the proper organization, administration, and supervision of each school, including regulations for preparing all necessary records and reports and the preparation of a statement of policies and objectives for each school; buildings, grounds, health and sanitary facilities and services, admission of pupils, and such requirements for their promotion from grade to grade as will assure that they are capable and prepared for the level of study to which they are

parents of children within the compulsory school age cause their children to attend a school which meets the minimum standards." A problem arises when the religious school which the parents have chosen for their children fails to conform, for religiously motivated reasons, to the minimum state requirements. When this happens, the issue becomes: "May the state dictate the standards to which a private, sectarian school must comply, even if such compliance would cause the religious school (and patronizing parents) to compromise their sincerely held religious convictions?"

It seems to be well established that religiously motivated behavior can be subject to the state's regulation for the purposes of promoting the "health, safety, and general welfare" of its citizens." Therefore, private schools—even religiously oriented ones—would be required to comply with reasonable state regulations regarding such matters as health, safety, and fire control.[48] Also, the state may have a sufficient compelling interest to require that religious schools teach the basic subjects, such as reading, writing, arithmetic, and patriotism.[49] Although the state does possess some regulatory control over the secular aspects of the religious school, difficulties are encountered when the state attempts to expand its control beyond these areas.

B. *The Law in Ohio*

1. *State Control of the Sectarian School Must Yield to Sincerely Held Religious Convictions.*

In *State v. Whisner*,[50] defendant parents were arrested and charged with violating §3321.38 of the *Ohio Revised Code*.[51] The parents were sending their children to the Tabernacle Christian School. This Christian school had neither applied for, nor possessed, a charter from the state of Ohio signifying its compliance with the state's minimum standards for schools.[52]

certified; requirements for graduation; and such other factors as the board finds necessary.

OHIO REV. CODE ANN. §3301.07(D) (Page Supp. 1980).

48. *See* OHIO REV. CODE ANN. §3321.03 (Page Supp. 1980).

49. *Yoder*, 406 U.S. at 220.

50. Kentucky State Bd. for Elementary and Secondary Educ. v. Rudasill, 589 S.W.2d 877 (1979). *See also* Bird, *Freedom from Establishment and Unneutrality in Public School Instruction and Religious School Regulation*, 2 HARV. J.L. & PUB. POL'Y 125 (1979).

51. Hirschoff, *Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused from Objectionable Instruction?*, 50 S. CAL. L. REV. 871, 951 (1977).

52. 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976).

53. OHIO REV. CODE ANN. §3321.38 (Page Supp. 1980) states that: "(A) No parent, guardian, or other person having care of a child of compulsory school age shall violate section . . . 3321.03 . . . of the Revised Code." OHIO REV. CODE ANN. §3321.03 (Page Supp. 1980), requires such above mentioned parties to send their children to schools which conform to the minimum standards prescribed by the state.

54. *See* OHIO REV. CODE ANN. §3301.16 (Page Supp. 1980), which grants the state board of education the authority to classify and charter schools.

The school had not applied for a charter because of minimum standard EDb-401-02(E)(6) of the *Minimum Standards For Ohio Elementary Schools, Revised 1970*, which stated: "A charter shall be granted after an inspection which determines that *all* standards have been met."[55] The school, and defendant parents, maintained that various standards of the state's regulations were violative of their religious beliefs, and that therefore, the school could not comply with *all* the standards.[56] The parents' failure to enroll their children in a school that met the state's minimum standards resulted in their arrest.[57]

The Christian school did permit public officials to enter its building for health, safety, and fire inspection.[58] Also, the school complied with state law by operating six hours a day for 180 days per year, and by reporting daily attendance to public officials.[59] The school, however, felt it could not abide by several of the minimum standards,[60] and it believed that compliance with such standards would constitute unduly burdensome state interference with the free exercise protection afforded by the first amendment.

The school and the defendant parents argued that EDb-401-02(G) of the *Minimum Standards For Ohio Elementary Schools, Revised 1970*,[61] violated their religious freedom because the regulation did not provide adequate time for Biblical and spiritual training. Minimum requirement EDb-401-02(O)[61] was objectionable to the defendants and the school because the requirement that all activities of the Christian school conform to the policies adopted by the board of education was viewed as pro-

55. Emphasis added

56. The following standards are the ones that the defendants found to be religiously objectionable, and thereby, impossible to comply with without compromising their religious convictions.

2. EDb-401-02(G)-Based on a minimum five-hour school day or one of greater length, the total instructional time allocation per week shall be:
four-fifths-language arts, mathematics, social studies, science, health, citizenship, related directed study and self help; optional foreign language.
one-fifth directed physical education, music, art, special activities and optional applied arts. . . .

3. EDb-401-02(O)- . . . *All* activities shall conform to policies adopted by the board of education. . . . (emphasis added)

4. EDb-401-07-Efforts toward providing quality education by the school for the community it serves shall be achieved through cooperation and interaction between the school and the community. The understanding of the roles of each and a flow of information are basic to this relationship.

(B) Each elementary school shall demonstrate, through school-community activities, evidence of cooperative assessment of community needs to determine the purposes, program and planning for future educational improvement.

47 Ohio St. 2d at 201-02, 351 N.E.2d at 762-63.

57. *Id.* at 189, 351 N.E.2d at 756.

58. *Id.*

59. *See* note 56 *supra*.

60. *Id.*

61. *Id.*

list of requirements necessary to satisfy the minimum standards is quite extensive for public schools,[73] non-tax supported schools are held to a lesser standard. The law in Ohio states:

> In the formulation and administration of such standards for nonpublic schools the board shall also consider the particular needs, methods and objectives of said schools, provided they do not conflict with the provision of a general education of a high quality and provided that regular procedures shall be followed for promotion from grade to grade of pupils who have met the educational requirements prescribed.[74]

Justice Stern noted that the non-tax supported school only has to meet two requirements. It must give a quality general education and follow a system of promotion from grade to grade.[75] Beyond this, the board of education is to "consider the particular needs, methods and objectives" of a specific school and then formulate the standards for that school accordingly.[76] If one or more of the state's minimum standards would violate a sincerely held religious belief of the school or its patrons, then, as long as avoidance of the standard would not defeat one of the two mandatory requirements, the state board of education should grant the school an exemption.

Utilization of this procedure would mean that all schools would *still have to seek and obtain a charter*. The difference being that sectarian schools could obtain a charter without complying with *all* of the minimum standards. If a particular minimum standard was religiously objectionable, the school would be exempted from that standard. However, the state could still maintain an element of control over the school by requiring compliance with non-objectionable standards.[77]

The majority of the Ohio Supreme Court rejected Justice Stern's rationale. Although Ohio's statute would seem to lend itself to a more "middle of the road" interpretation, the court clearly favored the defendants' free exercise claim, thereby striking a severe blow to state control of the private, sectarian school.

C. *The Law in Other States*

1. *Kentucky*

Other states, in addition to Ohio, have struck down overly burdensome state regulation of religious schools. In *Kentucky State Board for Elementary and Secondary Education v. Rudasill*,[78] the Kentucky State Board of Education tried to exert certain controls over religiously oriented schools. The schools believed that the controls were beyond the

73. OHIO REV. CODE ANN. §3301.07 (Page Supp. 1980).
74. OHIO REV. CODE ANN. §3301.07(D) (Page Supp. 1980).
75. 47 Ohio St. 2d at 220, 351 N.E.2d at 773 (Stern, J., concurring).
76. OHIO REV. CODE ANN. §3301.07(D) (Page Supp. 1980).
77. *See* Note, *supra* note 13, at 901 n.19, for criticism of this view.
78. 589 S.W.2d 877 (1979).

state's authority. The state argued that it had the power to certify teachers in private schools and also to approve the textbooks that were being used.[79] Since the church related schools neither sought approval of their textbooks,[80] nor required their teachers to conform to the state's certification standards,[81] the state maintained that the schools were unapproved and attendance at such unapproved schools did not satisfy the compulsory education statute. Therefore, the children attending these schools had not been exempted from compulsory attendance, and the parents, by failing to send their children to approved schools, were in violation of the law.[82]

The religious schools did not contest the state's authority to establish reasonable health, fire and safety standards for all schools.[83] In fact, the religious schools expressly recognized the state's interest in these matters.[84] Further, the religious schools did not question the state's general interest in educating its populace. The religious schools, however, felt that the state's requirements of specific textbooks and certification for teachers burdened the free exercise of their religion and exceeded the state's authority in this area.[85]

The Kentucky Supreme Court affirmed the authority of a state "to

79. The state claimed that KY. REV. STAT. §156.160 (1979), which instructed the state board of education to "adopt rules and regulations relating to: (7) Approval of private and parochial schools . . . ." and KY. REV. STAT. §158.060 (1979), which directed private schools to "offer instruction in the several branches of study required to be taught in the public schools"; permitted the Commonwealth of Kentucky to apply its standards for accreditation to the religious schools. 589 S.W.2d at 879.

80. Schools were required to use textbooks from the approved state list. 589 S.W.2d at 879.

81. KY. REV. STAT. §161.030(3) (1979) states:
> Certificates shall be issued to persons who have completed, at such colleges and universities as have been approved by the state board for elementary and secondary education for the preparation of teachers and other school personnel, the curricula prescribed by the Kentucky council on teacher education and certification and approved by the state board for elementary and secondary education for the certificates.

82. *See* KY. REV. STAT. §159.030 (1979) for the various exemptions to the Compulsory Education Statute (KY. REV. STAT. §159.010 (1979).

83. The schools' attorneys argued that such regulations were unrelated to the teaching mission of the church schools, and therefore, it was permissible for the state to enact these regulations. 589 S.W.2d at 879. *See also* Comment, *Regulation of Fundamentalist Christian Schools: Free Exercise of Religion v. the State's Interest in Quality Education*, 67 KY. L.J. 415, 421 (1979).

84. 589 S.W.2d at 879

85. The Christian schools objected to the use of approved textbooks because some of the texts from the state's "approved" list omitted materials that had to be taught to satisfy religious conviction, while others included materials that were contrary to the church schools' religion.

Teacher certification, which required a teacher to hold a bachelor's degree from an accredited university or college (*See* KY. REV. STAT. §161.030(3) (1979)), was objectionable for two reasons. First, there were few available teachers who satisfied the state requirements and held the requisite religious beliefs. Second, many of the religious schools could not afford to hire persons with bachelor's degrees. *See* Comment, *supra* note 83, at 422-23.

prepare its children to intelligently exercise the right of suffrage by compelling attendance at a formal school, public, private or parochial, for a legislatively determined period each year."[86] It could be said that a state has a "compelling interest" to make sure that its citizens are educated to the point where they can function satisfactorily in its democratic system. However, the court noted that the question presented in *Rudasill* was: "[T]o what extent does the state's interest in educating its citizens to vote in a democracy permit the Commonwealth to control 'a school' outside of the free public system?"[87]

The court ruled that just because a teacher was not certified under *Kentucky Revised Statute* §161.030(2),[88] this did not mean that that teacher could not instruct the children to become intelligent citizens.[89] While the holding of a bachelors degree from an accredited college would indicate a certain level of achievement, the lack of such a degree would not preclude a teacher from teaching students "to intelligently exercise their elective franchise."[90]

The Kentucky Supreme Court also held that the state board of education did not have the power to determine which textbooks were to be used in the private and parochial schools.[91] The court recognized that conscientious objection to many of the textual materials being used in the public schools was a central reason for the formation of the private, religious schools. For the state to allow an exemption from the compulsory attendance law to students attending private or parochial schools, and then require that these schools use the same basic texts as the public schools, would contravene the "very heart" of the private school's objection to the public system.[92]

The Kentucky Supreme Court's conclusion seems to be consistent with the principles espoused by both *Yoder* and *Whisner*. The state has a high interest in promoting education; however, one's right to the free exercise of their religion is also a matter of paramount importance. In both *Yoder* and *Whisner*, the state's interest in educating its citizens was clearly recognized. However, in those cases, compliance with state regulation would have caused individuals to compromise their faith. Although education could be said to be a "compelling interest" of the state, the procedures associated with carrying it out were not viewed as compelling.

86. 589 S.W.2d at 883.
87. *Id.*
88. *See* KY. REV. STAT. §161.030(3) (1979).
89. 589 S.W.2d at 884.
90. *Id.*
91. *Id.*
92. The court colorfully characterizes the state's position as requiring "that the same hay be fed in the field as is fed in the barn." The court held that the law "protects a diversified diet." *Id.*

In *Yoder*, while education until the age of sixteen was required in the normal situation, some concessions had to be made when this regulation encroached upon religious liberty. Since the state's interest of educating its citizens could still be adequately accomplished by attendance only to the age of fourteen,[93] the additional two years would not be required when they would result in the violation of sincerely held religious beliefs. In *Whisner*, since an "education of a high quality" could be achieved without requiring the defendants to meet the religiously objectionable minimum standards, compliance was not necessary.[94]

If the state's compelling interest (educating its citizens) can be satisfied by an alternative course of action which will not infringe on religious freedom, then this alternate course must be taken. This is so even if the state, absent the free exercise claim, would otherwise have been totally within its authority to pursue the first alternative. It is the conflict with one's religious liberty which requires the state to take the least burdensome route to accomplish its objective.

In the *Rudasill* case, the state regulations requiring certified teachers and approved textbooks had to yield to the free exercise claim.[95] Due to the fact that the state's compelling interest of educating its people could be accomplished without forcing compliance with the above two requirements, these otherwise valid regulations had to "give way" to the freedom of religion charge. The court did emphasize, however, that the state may monitor the private or parochial school to insure that it is "accomplishing the constitutional purpose of compulsory education."[96] As long as the religious school continues to satisfactorily accomplish the compelling state interest, it should not be forced to comply with religiously objectionable state regulations.

2. *Vermont*

In *State v. LaBarge*,[97] parents of school age children were arrested and charged with violation of *Vermont Statutes Annotated*, title 16

93. The children in *Yoder* did not attend school past the eighth grade. This would place most students at approximately fourteen years old when they left school.
94. In both *Yoder* and *Whisner*, because the state could achieve its compelling interest without enforcing the regulations in the respective cases, the free exercise claim of the defendants had to take priority over the state regulations.
95. It should be noted that the Kentucky Constitution is more restrictive of the power of the state to regulate private and religious schools than is the first amendment to the Federal Constitution. Section 5 of the Kentucky Constitution states "... nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; ..." *See* 589 S.W.2d at 879. However, the findings of fact that children could receive a sufficient education without certified teachers or approved texts should dictate the same result even absent the added protections afforded by the Kentucky Constitution.
96. 589 S.W.2d at 884. The court noted that use of standardized achievement tests would be an appropriate means of checking to see if the schools were accomplishing the constitutional purpose of compulsory education. *Id.*
97. 134 Vt. 270, 357 A.2d 121 (1976).

over the Christian schools did not infringe upon the free exercise of one's religion.

The North Carolina superior court decided this case contrary to the result that the rationale of this article would mandate. However, the case never made it to North Carolina's highest court. Prior to any ultimate judicial determination of this issue by the North Carolina Supreme Court, the case was effectively reversed by the North Carolina Legislature. In 1979, the state legislature repealed all state regulation of religious schools with the exception of matters relating to health, safety and attendance reporting requirements.[110] Consistent with previous discussion, the legislature stated that the religious schools must annually administer nationally standardized achievement tests to their students.[111]

Although North Carolina's law in regard to the religious school is now very similar to the other states discussed above, the situation in North Carolina presents one notable difference. The other states had their policies formulated by the judicial process. In North Carolina, rather than letting *Columbus Christian Academy* reach a judicial determination, where the possibility of an adverse decision to the Christian school existed,[112] the legislature pre-empted any court decision. This is significant because a legislative approach may prove to be an attractive alternative to groups advocating the religious school movement in some states.[113] While it is not within the scope of this article to discuss the propriety of seeking a legislative determination to this issue, it should be noted that such an approach is certainly viable and may be utilized in future controversies in other states.[114]

CONCLUSION

State regulation of religious schools presents difficult first amendment problems. The large increase in the number of such schools over the last decade has made it inevitable that the two competing interests would collide. Although this conflict may only be in its initial stages of development, some conclusions may be drawn based upon what some states have done thus far.

110. N.C. GEN. STAT. §115-257.7 (Supp. 1979).

111. *Id.* §115-257.8. Such standardized tests give the state an adequate device for measuring the student's progress, and thereby, inform the state if the religious school is effectively discharging the state's responsibility of educating its citizens.

112. Although the position espoused by this article purports that the free exercise clause grants the religious school freedom from all but minimal state regulation, this position has not been universally accepted. A state supreme court could conceivably adopt the reasoning of the superior court in *Columbus Christian Academy*, and thereby, rule against the private, sectarian school. Rather than risk such a result, groups in support of the religious school may shy away from seeking a judicial determination to this issue.

113. Not only may a legislative approach prove attractive for the reasons stated in footnote 112, religious schools existing in states where their own state constitutions do not afford the added protections for religious liberty as some state constitutions do (*e.g.*, Ohio, Kentucky), may also find the legislative approach more appealing. *See* notes 67 & 95 *supra*.

114. It is a likely possibility that groups supporting the religious school will seek a legislative solution, especially when one considers the recent increased pressure that Fundamentalist Christian groups have begun to exert on the American political process. *See* NEWSWEEK, Sept. 15, 1980, at 28.

It is indisputable that a state has a high interest in educating its citizens. Also, it would seem that a state may enact reasonable rules and regulations for the accomplishment of this task. However, a problem arises when these rules and regulations cause a person to compromise his religious beliefs. When this occurs, it is necessary to seriously explore the conflict.

Before any free exercise claim will be considered, it must first be established that the party is truly seeking to exercise a sincerely held religious belief. Once this threshold question has been satisfied, it is then appropriate to balance and weigh the two competing interests.

The state's compelling interest is that its populace be educated sufficiently to function in society. To accomplish this goal, a certain amount of formal schooling will be necessary. If, for example, a religious group sincerely believed that all education and formal schooling was wrong, their beliefs would most likely have to yield to the state compulsory education law.

However, it must be clearly stated that the state's compelling interest is in preparing its citizens for life in society. Education is deemed necessary to accomplish this task. The procedure and methods by which this education is accuired, while legitimate concerns of the state, are not, in themselves, the compelling interests of the state. A state rule or regulation relating to education which would be otherwise valid, may have to yield if enforcement of such would violate a person's free exercise of their religion.

A state may require that a child attend school. It may require that the student attend a certain amount of days per year and a specific amount of hours per day. The state also has the authority to require that the sectarian school keep attendance records. The state probably has the authority to declare that such basic subjects as reading, math, English, and history be taught. Also, the courts and legislatures hold that the state may inspect the school in regard to health, safety, and fire matters. Beyond the above mentioned regulations, the states appear to have little control over the religious school when state regulations interfere with sincerely held religious convictions.

Textbook selection, qualifications of teachers, choice of curriculum, compliance with minimum standards, and other regulations governing "how" the religious school is to discharge the state's interest of offering a high quality education have been invalidated by the courts and legislatures. The states have an interest in the "finished product", that being whether the child has received a sufficient education to equip him to function in a democratic society.

It has been pointed out by the courts and legislatures that the states may require religious school students to take national achievement tests to monitor their progress. As long as the students perform satisfactorily on these tests, the state's concern for the proper education of these children has been fulfilled.

Exhibit 10
SB 445

COMMENTS

Cessation of the Excessive Entanglement Test And The Establishment of Religion

I. INTRODUCTION

The establishment clause of the first amendment[1] has been interpreted by some as the "high and impregnable" wall which separates church and state and guards against the governmental establishment of religion.[2] More pragmatically, the Supreme Court has used the establishment clause as a gate, rarely opened to proposed state aid for nonpublic sectarian schools. For example, prior to 1977, the Court had allowed only two types of state-funded aid to nonpublic sectarian schools—refunds to parents of nonpublic school children for bus transportation[3] and the loan of state-purchased secular textbooks to the nonpublic school children or their parents.[4]

In essence, the only way to pass through the gate is to fulfill the requirements set out by the Court in its current establishment clause test: (1) the statute must have a secular purpose, (2) the statute must not advance or inhibit religion, and (3) the statute must not result in excessive entanglement between church and state.[5] Although the Court relies on all three parts of the test to decide establishment clause cases, the third prong or excessive entanglement test has been consistently utilized by the Court in recent cases to deny numerous types of state aid to nonpublic schools.[6] Accordingly, the Court has raised a presumption that any church-state interaction, no matter how slight, will result in excessive entanglement.[7]

In *Committee for Public Education and Religious Liberty v. Regan*,[8] the Court made a major policy change concerning the excessive entanglement prong of the establishment test. Previously, the Court followed a presumption of excessive entanglement if any church-state interaction

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1. U.S. CONST. amend. I, provides that "Congress shall make no law respecting the establishment of religion. . . ." The establishment clause is applicable to the states through the fourteenth amendment. *E.g.*, Meek v. Pittenger, 421 U.S. 349, 351 (1975); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).
2. Committee for Pub. Educ. & Religious Liberty v. Regan, ___ U.S. ___, 100 S.Ct. 840, 856 (1980) (Stevens, J., dissenting).
3. Everson v. Bd. of Educ., 330 U.S. 1 (1947).
4. Bd. of Educ. v. Allen, 392 U.S. 236 (1968).
5. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
6. *Id.* at 614. *See* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973).
7. *Id.*
8. 100 S.Ct. 840 (1980).

The effectiveness of these films (or tapes) in securing a favorable verdict certainly will offset any corresponding costs associated with the development of this form of evidence.[78] In fact, a "day in the life" film may assist attorneys in their efforts to "present the decision in a dramatic [and persuasive] way."[79] It is with great anticipation that Missouri attorneys await the decision of the courts as to whether or not this new type of "celluloid witness" will be adopted.[80]

James R. Hobbs

"day in the life" films).

78. *See* note 67 *supra*.

79. Harbinger, *Trial by Drama*, 55 JUDICATURE 122 (1971) (quoting United States Circuit Judge Hutcheson).

80. It should be noted that civil cases are becoming more complex with regard to both liability and the nature of the injuries sustained. "Day in the life" films may constitute a viable technique to keep pace with this development. *See generally* R. GOODMAN, AUTOMOBILE DESIGN LIABILITY (1970); Johnson, *Physical Medicine and Rehabilitation*, 1980 MED. & HEALTH ANN. 299.

Home Education in America: Parental Rights Reasserted

After 100 years of favoring institutional learning through both public and private schools, many parents now are rejecting this tradition in favor of "schooling" in the home. This is not as radical a departure from tradition as one might think. It is actually the closing of a circle, a return to the philosophy which prevailed in an earlier America, a culture which changed with the industrial revolution and concurrent immigration and was tempered further by the zenophobia following World War I.

What this earlier tradition was, how and why it was transformed, and the growing rejection of institutionalized learning are the subjects of the first part of this comment. The comment subsequently reviews the case law of some of those states which have adjudicated the conflict arising from the compulsory education laws and analyzes four Supreme Court cases that bear directly upon the issue of parental constitutional and common law rights involving home education. Finally, the author proposes a model, or constitutional rubric, for the assertion of the parental right of home education as a fundamental right in light of more recent Supreme Court cases.

It is the thesis of this comment that parents do have this right. The parental right should include not just the determination of where children will learn, but should be recognized to include substantial control over the actual content of the education. Recognition of a fundamental parental right will result in the limitation of what regulations and controls the state can impose upon those parents who choose to assert this right.

HISTORICAL EVOLUTION OF THE CONCEPT OF HOME EDUCATION

Historically, the belief that parents had both a right and an obligation to direct the intellectual and moral upbringing of their children was as firmly rooted in Anglo-American common law as the right and duty to feed, clothe and otherwise tend to the basic needs of offspring.[1] As early as 1642, the Massachusetts' theocracy enacted a law setting down certain basic skills which must be taught,[2] and the other New England colonies followed suit.[3] These early enactments were concerned with the basic education of children, not to be confused with today's compulsory education statutes which require classroom attendance. In New England, the rest of the colonies, and states admitted later which had no comparable "education" statutes, the responsibility for the child's education was left solely up to the parents.[4] The state assumed the

1. 1 W. BLACKSTONE, COMMENTARIES *450-52.

2. E. KNIGHT, EDUCATION IN THE UNITED STATES 100 (3d ed. 1951). These early basic skills included reading and knowledge of a trade, capital laws and religious catechism.

3. M. ROTHBARD, EDUCATION, FREE AND COMPULSORY 41 (1971).

4. J. MILLER, THE FIRST FRONTIER: LIFE IN COLONIAL AMERICA 224-25 (1966).

role of aiding the parents in the task of preparing their offspring for adulthood by providing state-supported "free" schools to which the parents could, if they chose, delegate some portion, or all, of this parental responsibility.[5] Thus, the important issue in the first half of the nineteenth century was not whether the state could compel school attendance, but whether or not parents could demand that the state aid them in their duty at public expense.[6] This issue was resolved in favor of the parental demand and resulted in the rise of large tax-supported systems of elementary schools in the North.[7] Although viewed as an "aid" to the parent, the establishment of public education in the North, and, after the Civil War, in the South, had the ultimate effect of eroding the common law parental right over a child's education.

During this transition period, the case law shows a stubborn adherence to the common law doctrine of the parental right to provide a child's education. As previously indicated, the early public "free" schools existed for the benefit of the parent, not for the state or the child.[8] Early court decisions elevated parental rights in this area above any possible interest of the state; the parents' right to educate their own children was equated with a democratic freedom.[9] This abstract "democratic ideal" coincided with what this early American culture believed was sound educational policy. Thus, a court, as it did in *Trustees of Schools v. People*,[10] could give all due credit to a parent's ability to effect a satisfactory education by stating:

> [T]he policy of our law has ever been to recognize . . . that the [parent's] natural affections and superior opportunities of knowing the physical and mental capabilities and future prospects of his child, will insure the adoption of that course which will most effectively promote the child's welfare.[11]

States began enacting compulsory education (attendance) statutes after the Civil War, and nearly all the states outside the South had compulsory education laws by 1900.[12] Two important and symbiotic developments contributed to this gradual shift of power to the states to compel attendance in schools,

5. Wolfe, *Compulsory Education at School*, 20 Law & Contemp. Prob. 1, 4 (1955).

6. T. Finegan, Free Schools, A Documentary History of the Free School Movement in New York State 53 (1921).

7. The southern colonies were too poor, the wealth too concentrated and distances too great to follow the North's pattern. Traveling tutors for the poor and English educations for the rich were the practice.

8. Board of Educ. v. Purse, 101 Ga. 422, 28 S.E. 896 (1897).

9. "Law-givers in all free countries, and, with few exceptions, in despotic governments, have deemed it wise to leave the education and nurture of the children of the State to the direction of the parent or guardian. This is, and ever has been, the spirit of our free institutions." Rulison v. Post, 79 Ill. 567, 573 (1875).

10. 87 Ill. 303 (1887).

11. *Id.* at 308. *See also* State *ex rel.* Sheibley v. School Dist. No. 1, 31 Neb. 552, 48 N.W. 393 (1891).

12. J. Garraty, The American Nation 536 (3d ed. 1975). Southern schools lagged behind because the region was poor and predominantly rural.

public and private.[13] One development was the industrial revolution which, by the late 1800s, was in full swing in the North. The growth of cities provided the concentrated populations necessary for economical mass education, and the increased industrial productivity produced the huge sums necessary. Efficiency, uniformity, conformity and standardization, the anathema of modern day critics,[14] became the virtues to pass on to the up-coming generations and were the natural by-products of mass education.[15] The second development, related to the first, was the wave of immigration to America in the post-Civil War years. In the states' minds, these immigrants had to be acculturated, melted into a more homogeneous society. Schools provided the means to socialize immigrants.[16]

Today, all fifty states have enacted statutes regulating the quality and quantity of education necessary to fulfill the old parental obligation.[17] Indeed, the public schools have usurped this role almost completely.[18] But the pendulum is beginning to swing back as perhaps as many as 20,000 parents in this country, believing the public schools are not properly educating their children, have removed their children from the schools and have attempted to re-assert their right to educate them at home.[19] This trend has been the result of, and the cause of, a great controversy concerning the shortcomings of schools and institutionalized education. The notion that home education is a desirable and legal alternative is one that is rapidly gaining reputable followers.[20] While in the past parents frequently based their decision on religious considerations, this increasingly is no longer the case. In support of the parental right to educate children at home is the argument that conscientious and informed parents are the most aware of their children's needs and are best qualified to integrate learning materials with their family's own philosophy and values.[21] Many feel

13. 2 Encyclopedia of Education 376 (L. Deighton ed. 1971).

14. *See, e.g.*, J. Holt, The Underachieving School (1969); J. Holt, How Children Fail (1967); I. Illich, Deschooling Society (1971); E. Reimer, School Is Dead (1971); V. Smith, Alternative Schools (1974).

15. *See* L. Cremin, The Transformation of the School: Progressivism in American Education 1876-1957 (1961).

16. *Id.*

17. Five states provide generally for compulsory education in their constitutions: Colo. Const. art. IX, § 11; Idaho Const. art. IX, § 9; N.C. Const. art. IX, § 11; Okla. Const. art. XIII, § 4; Va. Const. art. IV, § 138. Uniformly, all state compulsory education statutes set minimum and maximum ages between which attendance at school is required, impose a legal obligation upon parents and guardians to have their children in regular attendance, provide penalties for noncompliance and list certain classes of children who are exempt from attendance.

18. "[Parents find their] children drawn off to great schools of unprecedented magnitude and efficiency, conducted by a new caste of 'educators' who seem every year to absorb a larger share of [their] income, and to play a larger part in the direction of [their] children's lives." Gardner, *Liberty, the State and the School*, 20 Law & Contemp. Prob. 184, 189 (1955).

19. *See* J. Holt, The Underachieving School (1969); *Why Our Schools Aren't Making the Grade*, McCalls, Sept. 1973, at 48.

20. *See* J. Holt, Why Children Fail (1967).

21. *Should Parents Be Allowed to Educate Their Kids at Home?*, 89 Instructor 30 (1979)

home education is the best way to provide a safe environment for their children and to keep them away from the multiplying problems of assaults, drugs and vandalism.[21] Critics in the field of education argue that schools have flattened cultural diversity and personal individuality in setting up strict programs of learning which are identical on each grade level throughout the nation. These critics view the present system of mass education as promoting conformity, anti-intellectualism, passivity, alienation, classism and hierarchy.[22] Many parents cite academic failure alone. Contributing to the dissatisfaction of parents are declining scores on the Scholastic Aptitude Tests (SAT), little or no assigned homework, inflated grades, automatic promotion, below-level text books and objective, rather than essay, examinations.[23]

Those who maintain that home education has no place in today's society believe the state's interest in the development of its citizens is paramount to any parental right. They see the earlier roles as reversed. Instead of the school being an aid to parents, the parents are simply an "aid" to the institutionalized learning process. To critics of the home education concept, schools are necessary to ensure a literate populace, which is essential to a democratic society. Schools are the most convenient and inexpensive place for children to learn. Society has the responsibility to ensure its citizens the minimal competency necessary to function in an increasingly complex economy. They stress that schools provide a central place where standards and quality of instruction, facilities, supplies and equipment can be monitored by community school boards and that the parent is no substitute for experienced classroom instruction.[24] In the past, these arguments were accepted by some courts,[25] and generally, parents have deferred to educators as to the best means of teaching what the educators consider the best curriculum.

Most states today expressly or impliedly allow the option of home education to fulfill the compulsory education statutes.[26] This can be considered a step in the right direction. However, home education is an available alternative under most state laws only when it mimics the academic pattern found in the public schools. If a fundamental, constitutional right of parents to educate their children at home exists, it must include the right to control what will be taught or the right is rendered meaningless.[27]

HOME EDUCATION: STATE CASE LAW TO DATE

There have been numerous state adjudications concerning the right of a

(citing Ed Nagel of the National Association for the Legal Support of Alternative Schools).

22. *Id.*

23. *Conformity in the Classroom*, SATURDAY REV., Nov. 1978, at 20.

24. *See* V. SMITH, ALTERNATIVE SCHOOLS (1974); *Why Our Schools Aren't Making the Grade*, McCALLS, Sept. 1975, at 48.

25. *Should Parents Be Allowed to Educate Their Kids at Home?*, 89 INSTRUCTOR 30 (1979).

26. *See, e.g.*, Shoreline School Dist. No. 412 v. Superior Ct., 55 Wash. 2d 177, 346 P.2d 999, *cert. denied*, 363 U.S. 814 (1960); State v. Counort, 69 Wash. 361, 124 P. 910 (1912).

27. *Should Parents Be Allowed to Educate Their Kids at Home?*, 89 INSTRUCTOR 30 (1979).

parent to remove a child from public or private schools and to educate him within a home environment. Each case has been decided by careful, and sometimes tortured, analysis of the state compulsory education statute involved. In those states not expressly providing for the alternative of home education, two issues predominate. First, can an education within the home be construed as fulfilling the requirement of attendance at a "school"?[28] Secondly, can home education be considered "equivalent" to that received in a public or private institution?[29] Both of these issues were indirectly addressed by the United States Supreme Court in 1925 in *Pierce v. Society of Sisters*.[30] Yet, state case law has not approached either of these questions within a constitutionally-based framework. Even those cases which couch their holdings in terms of administrative convenience[31] avoid the constitutional model of balancing fundamental rights against the state's interest. Deciding issues on a statutory basis whenever possible is an established judicial principle, but in the case of compulsory education statutes, this principle results in failure to address the underlying parental rights.

The central issue in most home instruction cases is whether children educated at home are receiving an education in a "school" as intended by the state statute involved. In *People v. Levisen*,[32] the Illinois Supreme Court adopted a liberal and common sense approach to this question. The relevant Illinois statute is typical of most state compulsory education statutes, requiring that whoever has custody or control of children between the ages of seven and sixteen shall cause the children to attend public schools, except that children may attend "private or parochial" schools.[33] The defendant parents in *Levisen* were unlicensed teachers and were convicted of violating the statute for refusing to send their seven-year-old daughter to an acceptable school. They did, however, provide their daughter with five hours of home instruction per day, and there was no question that the home atmosphere was satisfactory.[34] On appeal, the state supreme court reversed the conviction and held that the child indeed was being educated in a "private school." The statute did not, as the court read it, require that a certain number of students attend in order to find that a school existed. Despite the fact that the Illinois legislature had recently repealed a

28. People v. Levisen, 404 Ill. 574, 90 N.E.2d 213 (1950); State v. Counort, 69 Wash. 361, 124 P. 910 (1912).

29. State v. Massa, 95 N.J. Super. 382, 231 A.2d 252 (Morris County Ct. 1967); Knox v. O'Brien, 7 N.J. Super. 603, 72 A.2d 389 (Cape May County Ct. 1950).

30. 268 U.S. 510 (1925). *See* notes 56-64 *infra* and accompanying text for a full discussion of the *Pierce* case.

31. People v. Turner, 121 Cal. App. 2d 861, 263 P.2d 685 (1953), *appeal dismissed*, 347 U.S. 972 (1954); State v. Hoyt, 84 N.H. 38, 146 A. 170 (1929).

32. 404 Ill. 574, 90 N.E.2d 213 (1950).

33. ILL. REV. STAT. ch. 122, § 26-1 (1967).

34. The father was a college graduate, and the mother had two years of college. Upon examination, the girl showed a proficiency comparable to the average third grade student, even though she was only seven years old. 90 N.E.2d at 214.

provision expressly allowing home education,[35] the court stated:

> The object [of the statute] is that all children shall be educated, not that they shall be educated in any particular manner or place. . . . We think the term "private school," when read in the light of the manifest object to be attained, includes the place and nature of the instruction given to this child.[36]

Commenting further on the intent of the legislature, the court said: "The law is not made to punish those who provide their children with instruction equal or superior to that obtainable in public schools. It is made for the parent who fails or refuses to properly educate his child."[37]

A contrary approach to this issue was taken in Washington. In 1912, the Washington Supreme Court held in *State v. Counort*[38] that a father could not teach his children at home because he was not operating a "school" within the meaning of the state's compulsory education statute.[39] Although Mr. Counort was a qualified and experienced teacher, the court stated that the defendant's program was not sufficiently "institutional."[40] The court defined "school" as a "regular, organized and existing institution, making a business of instructing children of school age in the required studies and for the full time required by the laws [of Washington]."[41] Washington again addressed the issue in *Shoreline School District No. 412 v. Superior Court*,[42] with an even more ominous result. Following a lower court conviction of the parents for violating the compulsory education statute,[43] the child was declared to be delinquent and dependent, and the parents were adjudged to be contributing to this delinquency. Although the lower court conceded that the state's requirement infringed upon the parents' religious liberty,[44] the court held this to be no defense. The court took little notice of the adequacy of the home instruction and held that a "school" requires a teacher and that a "qualified" teacher must possess a teaching certificate from the state. "The Wolds had the place and the pupil, but not a teacher qualified to teach in the state of Washington."[45] Thus, it appears the Washington court wields a double-edged sword against home education. In *Counort* it held a home not "institutional" enough; in *Shoreline* it held a parent not "certified" enough.

35. 1883 Ill. Laws § 2, at 167 (repealed 1929) (current version at ILL. REV. STAT. ch. 122, §§ 26-1 to -9 (1967) (amended 1973, 1977)). *See* 18 U. CHI. L. REV. 105 (1950). In State v. Lowry, 191 Kan. 701, 383 P.2d 962 (1963), and State v. Garber, 197 Kan. 567, 419 P.2d 896 (1966), the parents' claims were denied on this ground alone.

36. 404 Ill. at 575, 90 N.E.2d at 215.

37. *Id.*

38. 69 Wash. 361, 124 P. 910 (1912).

39. WASH. REV. CODE § 28A.27.010 (1974) (amended 1979, 1980).

40. 69 Wash. at 363-64, 124 P. at 911-12.

41. *Id.* The court did soften the blow somewhat by allowing that the purpose, intent and character of the endeavor is what is important, not the place where the school is maintained or the number of the pupils who attend it. However, this reasoning did not lead them to a different holding.

42. 55 Wash. 2d 177, 346 P.2d 999, *cert. denied*, 363 U.S. 814 (1960).

43. WASH. REV. CODE § 28A.27.010 (1974) (amended 1979, 1980).

44. 55 Wash. 2d at 179, 346 P.2d at 1000.

45. *Id.* at 182, 346 P.2d at 1002.

Some courts decide the issue of home education by suggesting that while non-institutional education may be equivalent or superior to institutional education, it is too great a burden on state inspectors to determine whether the children are being taught adequately and are making satisfactory progress at home. In *People v. Turner*,[46] the court took the position that a private school within the meaning of the compulsory education statute[47] was a formal or established type of institution. The court pointed out that the state could not be burdened with the expense and difficulty of supervising "schools" where the parents instructed their own children at home.[48] In *State v. Hoyt*,[49] the court said that parents could not place their children in units of education so small that supervision by the state would be difficult, noting that the state could require that facts concerning children's progress could be ascertained without unreasonable cost to the state.[50]

Most states,[51] including Missouri, have no published case law[52] on the issue of home education simply because their compulsory education statutes explicitly allow for this alternative. Typical of such statutes is Missouri's[53] which states that home education fulfills the state's requirement, provided that the course of instruction is daily and "substantially equivalent" to that given in the public schools. Submission to the school board of a daily schedule of instruction like that used in the public schools and a list of materials used corresponding to those materials and texts used or approved by the schools or the National Education Association suffices to show "equivalency."[54]

Few of the cases reviewed have discussed the parent's belief that his child's full potential for development is not being realized in the public school system and that the parent could do a better job of educating the child at home. In those cases which have addressed this as a basis for the parent's action, the court generally has taken the position that an honest belief by the parent that his or her method of instruction is superior to that offered in the public schools and evidence that the child has in some respects advanced well in a home atmosphere are irrelevant to the issue of whether the home qualifies

46. 121 Cal. App. 2d 861, 263 P.2d 685 (1953), *appeal dismissed*, 347 U.S. 972 (1954).

47. CAL. EDUC. CODE §§ 48200-48324 (West 1977 & Supp. 1980).

48. 121 Cal. App. 2d 861, 263 P.2d 685 (1953), *appeal dismissed*, 347 U.S. 972 (1954).

49. 84 N.H. 38, 146 A. 170 (1929).

50. *Id.* at 40, 146 A. at 171.

51. *Should Parents Be Allowed to Educate Their Kids at Home?*, 89 INSTRUCTOR 30 (1979).

52. *But see* State v. Pilkinton, 310 S.W.2d 304 (Mo. Ct. App. 1958), where the court reversed a prosecution for violation of the statute for lack of any evidence that the parents did not provide the child with regular daily home instruction "substantially equivalent" to that given in public schools. *Id.* at 308.

53. MO. REV. STAT. § 167.031 (1978).

54. *See* Cline v. Buchanan County, JU379-195J, JU379-196J, JU379-197J (Buchanan County Juv. Ct. Oct. 23, 1979) (petition of juvenile office dismissed).

American history and institutions, and know[ing] how to read, write and speak the English language."[70] The applicant was required to sign a pledge to "direct the minds and studies of pupils in such schools as will tend to make them good and loyal American citizens."[71] The regulations further provided for "suitable textbooks"[72] and inspections of buildings, equipment, records, teachers and textbooks.[73]

As in *Pierce*, the Court quashed this form of jingoistic isolationism common to the 1920s and defined more fully that degree of regulation permissible by state education authorities. Again, Justice McReynolds delivered the Court's opinion. Enforcement of these regulations would "deprive parents of fair opportunity to procure for their children instruction which they think important,"[74] he wrote. These constitutional rights guaranteed to parents and children by the fourteenth amendment in *Pierce* applied to the territory of Hawaii under the fifth amendment[75] in *Farrington*.

Board of Education v. Allen,[76] decided in 1968, is difficult to reconcile with any argument that home education could be a liberty included within the general language of the preceding cases. *Allen* involved a New York education law which required local public school authorities to lend textbooks free of charge to all students in grades seven through twelve, including those in private schools.[77] The Court held the statute to be non-violative of the first amendment and stated that the lending of textbooks was a measure which could help ensure that private schools were meeting state standards.[78] The Court then expressly addressed the issue of home education and the state's interest, stating:

> Since *Pierce*, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. Indeed, the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes.[79]

Allen must be considered in any discussion of the concept of home education as a fundamental parental right. Its language, as that of all the Supreme Court cases prior to *Allen*, must be interpreted as rejecting home education on the

70. *Id.* at 293.
71. *Id.* at 294.
72. *Id.* at 295.
73. *Id.*
74. *Id.* at 298.
75. *Id.* at 299.
76. 392 U.S. 236 (1968).
77. *Id.*
78. *Id.* at 246.
79. *Id.* at 245-46 (citations omitted).

basis of administrative convenience, that is, the burden of the state in supervising education outside the classroom. If parental rights in this area are truly fundamental, the state's regulation of education necessarily would be minimal and attainable through something less than institutionalized schooling.

That the Supreme Court is recognizing parental rights can be seen in the most recent case to delineate the limits of governmental control over education. In *Wisconsin v. Yoder*,[80] members of the Old Amish religion and the Conservative Amish Mennonite Church were convicted of violating Wisconsin's compulsory attendance law which required a child's school attendance until age sixteen. The parents claimed that application of the statute violated their rights under the first and fourteenth amendments. The trial court found that the state compulsory education statute did interfere with the Amish religious freedom, but it did not dismiss the charges, holding that the statutory requirements were a reasonable and constitutional exercise of the state's power.[81] The reversal by the Wisconsin Supreme Court[82] was affirmed by the United States Supreme Court on the grounds that the religious freedom of the Amish parents, *and their common law parental rights*, had been infringed and that the state had failed to prove an overriding interest in keeping these children in school.[83] Thus, the *Yoder* Court decision was based on two rights, religious and parental:

> [T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.[84]

Parental rights with respect to the education of one's children are expressed as "fundamental" in *Yoder*. "[A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests . . . of parents,"[85] maintained the Court. The *Yoder* case involved a fact situation where the parents were satisfied to send their children to the public schools during the elementary years.[86] The language of the holding, however, is as relevant to parents of young children as it is to these Amish parents. In light of *Yoder*, the next logical progression is a constitutionally-based challenge to those state statutes

80. 406 U.S. 205 (1972).
81. *Id.* at 213.
82. State v. Yoder, 49 Wis. 2d 430, 182 N.W.2d 539 (1971), *aff'd sub nom.* Wisconsin v. Yoder, 406 U.S. 205 (1972).
83. 406 U.S. at 232.
84. *Id.*
85. *Id.* at 214.
86. The parents in *Yoder* did not question the authority of the state to educate their children until the eighth grade. But, the Amish parents insisted on the right to direct the education of their children from age 14 or 15.

that require institutionalized learning at any age. It certainly is possible that the decision in *Yoder* would have been the same even if the children involved had not been Amish and had not been fourteen. The Supreme Court was satisfied that the children in *Yoder* would be "educated" in the values and knowledge of the Amish community; this fact is as significant as the religious aspect of the case.

THE RIGHT TO PRIVACY: A CONSTITUTIONAL MODEL FOR HOME EDUCATION

The term "privacy" connotes a variety of related interests, all of which are at odds with the social controls exerted over the individual by society. Privacy is the value in our society that challenges and balances the social engineering taking place in American institutions. Taken as a claim of the individual citizen against the government, it is, simply, a "right to be let alone."[87] The authority for the privacy doctrine can be found in the fifth and fourteenth amendments to the United States Constitution which forbid the federal and state governments to deny due process.[88] These amendments have taken the Supreme Court into the realm of substantive due process, and the holdings in the privacy cases evince an expansion of the doctrine to cover more areas of individual and family existence. The decisions can be seen to implicitly, if not explicitly, encompass the parental right to educate children at home and to control to a greater extent than is now possible what kind of education the child will receive.

Substantive due process[89] was applied in the area of non-economic governmental restrictions[90] on personal autonomy as early as 1923 in *Meyer v. Nebraska*.[91] Two years later, *Pierce v. Society of Sisters*[92] was decided, relying heavily on *Meyer*. *Pierce*, addressing the question of parental rights in education, was decided in terms of a privacy doctrine. These two cases have provided the foundation for the more recent privacy cases. Although the concept of "privacy" is difficult to define, several modern cases have analyzed the issues involved in terms of balancing fundamental rights against compelling state interests.

87. Olmstead v. United States, 277 U.S. 438, 478 (1927) (Brandeis, J., dissenting).
88. U.S. CONST. amends. V & XIV.
89. The Supreme Court has stated that substantive due process is included in those fundamental privileges which "may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923).
90. Substantive due process cases with regard to economics are Jay Burns Baking Co. v. Bryan, 264 U.S. 504 (1924); Adkins v. Children's Hosp., 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915); Lochner v. New York, 198 U.S. 45 (1905).
91. 262 U.S. 390 (1923). *Meyer* dealt specifically with the personal freedom to raise one's children. This case also involved economic substantive due process in which the Court was concerned with the right of Meyer to earn his living teaching German.
92. 268 U.S. 510 (1925); *see* notes 56-64 *supra* and accompanying text.

In *Griswold v. Connecticut*,[93] marital privacy was established as a fundamental right in a case involving statutes which made it a crime to use or to advise the use of any method of contraception.[94] In the majority opinion, Justice Douglas, employing sweeping language, articulated the right to privacy as follows: "[The] specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy."[95] The Connecticut statutes were declared to be unconstitutional because they invaded the fundamental right to marital privacy in a destructive and impermissible way.

Roe v. Wade[96] also concerned the issue of personal decisions regarding marriage and family. In a challenge to the Texas criminal abortion statute, the Court stated: "[D]ecisions make it clear that only personal rights that can be deemed 'fundamental' . . . are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage . . . *child rearing and education* . . . ."[97]

In his concurring opinion in *Doe v. Bolton*,[98] a companion case to *Roe*, Justice Douglas specifically listed the education of children among fundamental rights: "[the] freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception and the education and upbringing of children."[99]

Other cases recognizing that autonomous decision-making merits constitutional protection do not mention the right to privacy, but they use the same analysis. One such case is *Skinner v. Oklahoma*.[100] There, the Court held that an Oklahoma law which authorized sterilization of persons convicted of certain felonies violated the equal protection clause. Justice Douglas (who also wrote the *Griswold* opinion) found no compelling state interest[101] which would allow interference with such a fundamental right as an individual's procreative capacity. Similarly, in *Cleveland Board of Education v. LaFleur*,[102] the Court did not mention a privacy right when it held unconstitutional a school board determination that teachers could not teach after four months of pregnancy. In *LaFleur*, the Court again found no compelling state interest to justify the state's interference with the right of a woman to make a personal decision to have a child, even such an indirect interference.[103] In *Loving v. Virginia*,[104] the

93. 381 U.S. 479 (1965).
94. *Id.* at 480.
95. *Id.* at 484 (citations omitted).
96. 410 U.S. 113 (1973).
97. *Id.* at 152-53 (citations omitted; emphasis added).
98. 410 U.S. 179 (1973).
99. *Id.* at 211. Justice Douglas also asserted that any statute infringing upon these fundamental rights must be drawn narrowly and precisely and that a "compelling state interest" must be shown to support the infringement.
100. 316 U.S. 535 (1942).
101. *Id.* at 542.
102. 414 U.S. 632 (1974).
103. *Id.* at 640.
104. 388 U.S. 1 (1967).

Court held the right to choose one's marriage partner to be fundamental and struck down a statute which forbade interracial marriages. The Court also overturned a statute which defined "family" for the purposes of determining who could permissibly live in a dwelling in a residential housing area in *Moore v. East Cleveland*.[104] What relationships constitute a "family" is a fundamental decision not to be unreasonably infringed upon by the state, according to the Court.[105]

All of these Supreme Court cases demonstrate that once a fundamental right is determined and afforded constitutional protection, the state may be prevented from directly or indirectly infringing upon this right. Thus, if education is a fundamental right of parents protected by the Constitution, any regulation of this right must be viewed with strict scrutiny. If the state is to infringe upon such a right, a rational relation between the state's interest and the regulation of the right is not sufficient. The state's interest must be *compelling* in order to invade a protected privacy zone,[107] and any invasion must be by the least restrictive means.

What is the Compelling State Interest in Education?

Historically, the compelling state interest in education has been not so much the welfare of the individual child as the welfare of the collective state. An early case dealing with the application of the compulsory attendance law stated: "That education of the citizen is essential to the stability of the state, is a proposition too plain for discussion . . . . The constitution declares that 'knowledge and learning, generally diffused through a community,' are essential to the preservation of a free government."[108] Ten years later, the same court again asserted: "While most people regard the public schools as the means of great personal advantage to the pupils, the fact is too often overlooked that they are governmental means of protecting the state from the consequences of an ignorant and incompetent citizenship."[109] It may be that the ultimate justification for state-compelled school attendance is no less than that the whole population must have training adequate to enable it to defend the boundaries of this country and to sustain society economically and morally.

If, then, it be conceded that the state does have a compelling interest in the child's education, is the state fulfilling its interest in the least restrictive manner? The state may be able to require that its populace grow up literate, but it should not be able to mandate a day-by-day, hour-by-hour directive of

105. 431 U.S. 494 (1977).

106. Wisconsin v. Yoder, 406 U.S. 205 (1972), provides an excellent example where the Court found no state interest sufficient to override the parents' fundamental rights. *See* notes 80-86 *supra* and accompanying text.

107. Roe v. Wade, 410 U.S. 113, 154 (1973) (compelling state interests include health maintenance of medical standards and the protection of potential life).

108. State v. Jackson, 71 N.H. 552, 53 A. 1021, 1022 (1902) (citation omitted).

109. Fogg v. Board of Educ., 76 N.H. 296, 299, 82 A. 173, 173-74 (1912).

what a child's education should consist of and where his education should take place. Institutionalized schooling is not the least restrictive means, and it may not even bear a reasonable relation to the state's objective.

CONCLUSION

The issue of state control over any aspect of child-rearing touches the deepest feelings and values of American families. Even though most states allow parents to educate their children at home, it is under the strictest controls. Ultimately, the question is not whether a child can be taught at home; home is merely a place. The underlying issue involves whether there is room for diversity in American education. Is there room to define what a child's education is to be? So far, the "equivalency" requirements of home education have not been challenged by those seeking to meet the standards of the state statutes. But, as the public confidence in public school instruction wanes, the likelihood increases that those innovative parents who choose to educate their own children will begin to deviate from conformity to grade level courses. They may insist upon not only the right to educate their own child but also upon the right to determine what it is that their child shall learn. Even the most ardent supporter of home education might cringe to think what it might mean for some children of parents who are themselves educationally handicapped. It is the educated elite who have taken the standard of home education from those who traditionally opposed institutional education on religious grounds; but the parental right, if it exists, extends to all parents. It seems reasonable to assume a valid state interest in assuring a proficiency in such basic skills as reading and mathematics; beyond this, parents may begin to pick and choose from a variety of other skills and bodies of knowledge not now taught in the public schools and to discard much of what *is* taught.

Education encompasses more than academics. In *Yoder*, members of the Amish community of Wisconsin refused to send their children to any school after the eighth grade, claiming that the worldly, competitive, materialistic values of school undercut the communal religious values embodied in the Amish society's living church. The Court upheld the Amish parents' act of conscience. The Amish values were as important an aspect of this case as was religion. Other parents may not claim a strictly religious basis for their convictions, but, like the Amish, they have a right to imprint their own values on their children.[110]

The thesis of this comment is that control over a child's education should be returned to parents. In the state case law, the parental prerogatives are being found in the interpretation of the statutory language,[111] but an analysis of Supreme Court decisions shows that the right has a constitutional basis.

110. Since "religion" may include the totality of man's experience and relationships to the world and others, parental rights to pass these on to one's children may involve a first amendment right as well as a due process privacy right. *See* United States v. Seeger, 380 U.S. 163 (1965).

111. Albeit upon a showing of "equivalency."

WITNESS STATEMENT

Name William T. Johnson Committee On Education

Address Star Route, Boulder Date 03/07/83

Representing Independent Support ✓

Bill No. 445 Oppose

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1. Thank you For your WORK

2.

3.

4.

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

WITNESS STATEMENT

Name Jay Wilson Committee On Education

Address 1233 N. 8th Date 3/7/83

Representing Christian Education Association Support

Bill No. SB 445 Oppose X

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1. Intro: Certain comments are ignored by media

2. Communist Manifesto

3. John Dewey

4. NEA

5 Values Clarification

6. Conclusion

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

WITNESS STATEMENT

Name Doug Kelley Committee On Education

Address Helena, Mont Date 3/7/83

Representing MACS Support

Bill No. SB 445 Oppose

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1. Support with Reservations which are:
   A. Record keeping:
2. B. interpretation of the Statute
3.
4.

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

STANDING COMMITTEE REPORT

March 9, 19 83

MR. SPEAKER:

We, your committee on EDUCATION AND CULTURAL RESOURCES

having had under consideration SENATE Bill No. 159

Third reading copy (Blue color)

A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE THE LAW GOVERNING THE MONTANA SCHOOL FOR THE DEAF AND BLIND; AMENDING SECTIONS 20-8-101, 20-8-102, 20-8-104 THROUGH 20-8-107, 20-8-109 THROUGH 20-8-113, AND 20-8-116, MCA; REPEALING SECTIONS 20-8-114, 20-8-115, AND 20-8-117 THROUGH 20-8-119, MCA."

Respectfully report as follows: That SENATE Bill No. 159

~~DO PASS~~ BE CONCURRED IN

FRITZ DAILY, Chairman.

STATE PUB. CO.
Helena, Mont.

COMMITTEE SECRETARY

STANDING COMMITTEE REPORT

March 9, 19 83

MR. SPEAKER:

We, your committee on EDUCATION AND CULTURAL RESOURCES

having had under consideration SENATE Bill No. 445

Third reading copy (Blue color)

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING EXEMPTIONS TO COMPULSORY ENROLLMENT IN PUBLIC SCHOOLS BY PROVIDING THAT A CHILD MAY BE EXEMPT IF ENROLLED IN A PAROCHIAL OR CHURCH SCHOOL WHICH KEEPS ATTENDANCE AND IMMUNIZATION RECORDS, PROVIDES 180 DAYS OF PUPIL INSTRUCTION OR THE EQUIVALENT, PROVIDES AN ORGANIZED COURSE OF STUDY, AND IS HOUSED IN A FACILITY MEETING FIRE AND HEALTH STANDARDS; PROVIDING THAT, FOR COMPULSORY ENROLLMENT EXEMPTIONS FOR STUDENTS IN PRIVATE OR HOME SCHOOLS, THE REQUIREMENTS FOR PAROCHIAL AND CHURCH SCHOOLS MUST BE MET AND IN ADDITION THAT NOTIFICATION OF ATTENDANCE MUST BE MADE TO SCHOOL AUTHORITIES; AMENDING SECTION 20-5-102, MCA."

Respectfully report as follows: That SENATE Bill No. 445

be amended as follows:

(SEE ATTACHED SHEETS)

XXXXXXX

FRITZ DAILY, Chairman.

STATE PUB. CO.
Helena, Mont.

March 9, 19 83

1. Title, line 8.
Strike: "PAROCHIAL OR CHURCH"
Insert: "NONPUBLIC OR HOME"

2. Title, lines 12 through 15.
Strike: "THAT" on line 12 through "AND" on line 15

3. Title, line 15.
Following: "THAT"
Insert: ", FOR STUDENTS IN HOME SCHOOLS,"

4. Title, line 17.
Following: "MCA"
Insert: "; AND PROVIDING AN EFFECTIVE DATE"

5. Page 2, lines 12 through 17.
Strike: subsection (a) in its entirety
Renumber: subsequent subsections

6. Page 3, line 10.
Strike: "private"
Insert: "nonpublic"

7. Page 3, line 11.
Strike: "section 2(2)"
Insert: "[section 2]"

8. Page 3, line 12.
Following: "subsection"
Strike: "(g)"
Insert: "(f)"

9. Page 3, line 13.
Following: "residence"
Insert: "and a nonpublic school includes a parochial, church, religious, or private school"

10. Page 3, line 24.
Strike: "(1)"

11. Page 4, line 1.
Strike: "parochial or church"
Insert: "nonpublic or home"

12. Page 4, line 2.
Strike: "(a)"
Insert: "(1)"

FRITZ DAILY, Chairman.

STATE PUB. CO.
Helena, Mont.

March 9, 19 83

13. Page 4, line 5.
Strike: "(b)"
Insert: "(2)"

14. Page 4, line 7.
Strike: "(c)"
Insert: "(3)"

15. Page 4, line 8.
Following: "regulations;"
Strike: "and"

16. Page 4, line 9.
Strike: "(d)"
Insert: "(4)"

17. Page 4, line 11.
Following: "20-7-111"
Strike: "."
Insert: "; and"

18. Page 4, lines 12 through 16.
Strike: lines 12 through 16 in their entirety

19. Page 4, line 17.
Strike: "(b)"
Insert: "(5) in the case of home schools,"

20. Page 4, line 18.
Following: "school"
Strike: "; and"

21. Page 4, lines 19 and 20.
Strike: line 19 through "20-7-111" on line 20

22. Page 4, line 24.
Following: line 23
Insert: "NEW SECTION. Section 4. Effective date. This act is effective July 1, 1983."

AND AS AMENDED
BE CONCURRED IN

FRITZ DAILY, Chairman.

STATE PUB. CO.
Helena, Mont.