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HOME INSTRUCTION: A NATIONAL STUDY OF STATE LAW

by  
Sybil Yastrow

A Dissertation Submitted to the Faculty of the Graduate School  
of Loyola University of Chicago in Partial Fulfillment  
of the Requirements for the Degree of  
Doctor of Philosophy  
May  
1989

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## VITA

Sybil Yastrow was born in Terre Haute, Indiana on March 20, 1936. She was graduated from Wiley High School in Terre Haute, June of 1953 and received the degree of Bachelor of Science from Northwestern University, Evanston, Illinois in December of 1956, and the degree of Master of Science from National College of Education, Evanston, May 1981. Work toward a Doctor of Philosophy in Educational Leadership and Policy Studies was begun January 1985 at Loyola University, Chicago.

She was a teacher in Lincolnwood Elementary District, an administrator at Lake Forest Academy-Ferry Hall High School and has been in the Office of the Regional Superintendent of Schools Office, Lake County since 1975, beginning her tenure as the Regional Superintendent August 1987. Besides her professional work she has been an active volunteer in numerous civic and professional organizations. She received the Phi Delta Kappa Outstanding Educator Award and was the honoree of the Suburban Educators Division of the Jewish United Fund.

Publications include *Situational Leadership in an Educational Setting*, *The Effects of Situational Leadership Training on Principals in Three Public School Districts*, and *The National Staff Development Council: A Resource*.

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## CHAPTER I

### THE RESEARCH PROBLEM

#### INTRODUCTION

There is a growing trend throughout the country for parents to educate their children at home. Although the reasons are varied, most of these parents claim their interest in home education is based on religious views. The issue from both the legal and the educational point of view is whether the state's interest in assuring that children are provided a minimum level of formal education is more compelling than the parents' fundamental right to make choices regarding the manner in which their children are educated. The concern of all of the fifty states in the interest of the children is presented in their compulsory attendance statutes. More succinctly, the central question raised is this: Is the compulsory attendance requirement met by home education and, if so, under what conditions?

In this research the terms "home instruction," "home education," and "home study" are used to describe the educational experience parents provide to their own children in their home and under their own direction.

Following are examples of accomplished people who were schooled at home:

Inventors:	Thomas Edison, Alexander Graham Bell, Orvill and Wilbur Wright
Artists and Writers:	Andrew Wyeth, Pearl Buck, Agatha Christie, Mark Twain
Industrialists:	Andrew Carnegie, Cyrus McCormick
Scientists:	John Burroughs, Fredrick Terman
Entertainers:	Charlie Chaplin, Noel Coward, Brooke Shields
Diplomats:	Patrick Henry, Benjamin Franklin
Explorers:	George Rogers Clark, Robert Peary
Presidents:	George Washington, James Madison, John Quincy Adams, Andrew Jackson, Abraham Lincoln, Woodrow Wilson, William Harrison, Franklin Roosevelt

Military Leaders:

George Patton,  
Douglas MacArthur

Supreme Court Justices:

Sandra O'Conner<sup>1</sup>

Since the early 1970's the press has often featured articles on students entering Harvard and Yale after eleven and twelve years of being educated at home.<sup>2</sup> Newspaper articles throughout the country present to the public case studies of children whose parents have made the decision that home instruction is the best choice for their families. The prevalence of the situation is difficult to measure, but estimates are as low as ten thousand to as high as one million children who are currently receiving instruction from their parents at home.<sup>3</sup> Parents fear being identified because of the possible legal implications and consequences.

Legal ramifications vary from state to state. Each state enacts its own compulsory attendance laws, and each is responsible for establishing the statutory requirements for educating its own student population. Twenty-six states have specific statutory language dealing with home education.<sup>4</sup> There are five states with no statutory language referring specifically to home education or direction from the

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<sup>1</sup>Raymond Moore, *The School at Home*, 84-7 MOODY MONTHLY,(March 1984): 19; James Stronge and Mildred Moser, "Home Schooling: A Trend for the Future, ILLINOIS PRINCIPAL, 8 (May 1987); JOHN WHITEHEAD AND WENDELL R. BIRD, HOME EDUCATION AND CONSTITUTIONAL LIBERTIES 23-24 (Westchester, Il: Crossway Books, division of Good News Publishers, 1984).

<sup>2</sup>WHITEHEAD AND BIRD, *supra* note 1, at 17.

<sup>3</sup>JOHN NASBITT, MEGATRENDS 144 (New York: Warner Books 1982).

<sup>4</sup>Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Louisiana, Minnesota, Mississippi, Missouri, Montana, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming. Alaska's explicit language refers to correspondence programs as part of the public school system.

court, leaving the schools and parents to make choices that may be resolved by the courts.<sup>5</sup>

In many states both school administrators and parents are confused about the rights and responsibilities of each group. Parents interested in home instruction seek information about how to provide this opportunity to their children. School administrators are unclear about their responsibility to meet the compulsory attendance statutes. Too often this gap in the law creates a hostile relationship between parents and school administrators.

### HISTORICAL PERSPECTIVE

Historically education of children has been a matter of personal discretion. Indeed our legal and social structure is based on the English common law where Lord Blackstone wrote that parents have both a right and an obligation to direct the intellectual and moral upbringing of their children.<sup>6</sup> "It is the duty of the parents," he asserts "to give their children an education suitable to their station in life."<sup>7</sup> Since the Civil War states have begun to legislate compulsory attendance.

Since the late Nineteenth Century enforcement of compulsory attendance laws has taken place. One strong impetus has been to "Americanize" the large number of immigrants entering the country. Several court cases supported the

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<sup>5</sup>Alabama, Kansas, Nebraska, New Hampshire, Oklahoma.

<sup>6</sup>J.W. EHRLICH, EHRLICH'S BLACKSTONE PART ONE: RIGHTS OF PERSONS RIGHTS OF THINGS 89-91 (New York: Capricorn Books, 1959).

<sup>7</sup>Id.

constitutionality of compulsory schooling on the grounds of "welfare of the minor" and on the basis that education safeguards the welfare of the community and the safety of the state.<sup>8</sup>

The decisions of the higher level courts in each state have served as the guide for opinions given in other courts regarding home instruction. The courts have attempted to balance the parents' rights with the interest of the state. The state courts make their decisions based on their state statutes; yet the fundamental principle of law is that the federal constitutional law must be observed in all cases. This is true despite the fact that the Supreme Court has made it clear that education is, in the final analysis, a function of the state. In *San Antonio Independent School District v. Rodriguez* the Court held that education is not a fundamental right provided by the United States Constitution, but educating children is a legitimate state function to be carried out in compliance with constitutional safeguards.<sup>9</sup>

Today parents throughout the country are educating their children at home for religious, philosophical, and personal reasons. The courts will continue to deal with the inevitable conflicts between the compulsory attendance laws first developed in the 1800's and the inherent parental rights protected by the Constitution and the state statutes. Proponents of home instruction disclose the underlying issue as that of "[W]hether there is room for diversity in American

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<sup>8</sup>Thomas Carrere, *Legal Aspects of Home Instruction*, paper presented at the Annual Conference of the Southern Regional Council on Educational Administration 2 (Knoxville: November 1983).

<sup>9</sup>*San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973).

room to define what a child's education is to be?"<sup>10</sup> Courts in each state have made decisions based upon the specific regulatory and statutory provisions of that state, especially as these provisions relate to compulsory attendance statutes.

### PURPOSE

The purpose of this research is to examine home instruction from a national perspective. This examination includes an analysis of the applicable statutory and case law, including pertinent data gathered from representative states. The results of the research are directed to states such as Illinois where there is confusion among parents and school administrators regarding their rights and responsibilities in the area of home instruction.

### NEED FOR THE STUDY

Several law review articles have been written regarding the analysis of home instruction statutes and case law. These studies provide an excellent basis for this research but do not provide the direct linkage to specific legislative guidelines for a state such as Illinois that does not have statutory language explicitly establishing regulations for home instruction. In these states judges--not legislators--develop the legal precedent over several cases as to the public policy regarding home instruction. There has been no identified research looking at home

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<sup>10</sup>E. Alice Law Beshoner, *Home Education in America: Parental Rights Reasserted*, 49-2 UMKC LAW REVIEW 205 (1980).

instruction from the national perspective and then relating it to the process a specific state may use in developing statutory law and the attendant policies, rules, and regulations. In 1980 the compulsory attendance statutes of thirty states provided no language about home schooling. During the legislative sessions of 1987 and 1988 thirteen states have amended their laws governing home education.<sup>11</sup> Updated data regarding these amended statutes must be obtained and analyzed as related to case law. It is important to determine what legislative action has followed court action.

### RESEARCH OBJECTIVES

The First Research Objective is to review and analyze the compulsory education/home instruction statutes and rules and regulations in all fifty states with particular scrutiny to the means by which these laws recognize and permit home instruction. Data for this analysis are gathered from several sources:

- The statutes and regulations themselves with an examination of the legislative history in appropriate cases,
- Surveys submitted to the chief school officers in each state, and
- Interviews with educators at the university level and in state departments of education as well as representatives of professional organizations.

The Second Research Objective is to review and analyze the relevant judicial decisions of the federal courts and the higher state courts over the past twenty-five years and the Supreme Court cases since the early Twentieth Century.

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<sup>11</sup>Arkansas, Colorado, Hawaii, Iowa, Maine, Maryland, Minnesota, New York, North Carolina, Pennsylvania, South Carolina, Vermont, West Virginia.

This analysis describes trends and identifies those issues which are most often addressed by the courts' attention:

- Inherent parental rights regarding education,
- Interest of the state regarding education,
- Religious freedom (United States Constitution, first amendment),
- Requirements of non-vagueness in criminal statutes (United States Constitution, fourteenth amendment),
- Burden of proof,
- Equivalency of home instruction, and
- Qualifications of instructor.

The cases are then examined in the context of the statutes and rules and regulations in the respective states to determine what if any legislative action follows the court action.

The Third Research Objective is to trace in seven specific states, through further interviews, the development of home instruction legislation. Specific attention in these case studies is directed to the political or lobbying efforts, if any, that influence such legislation and to identify the most desirable elements of model legislation and/or administrative procedures.

## PROCEDURES

This study is primarily descriptive in nature using appropriate qualitative methods to obtain data. Methodological triangulation, "the use of multiple methods to study a single problem or program," has been used to gain information from



legal sources including data from those involved in regulating home instruction.<sup>12</sup> The three methods are survey, interview, and legal research. This methodology identifies what is currently occurring, past practice, and tabular data. In addition descriptive information has been obtained from several states to validate the data and identify the underlying cause for legislative or regulatory change.

The compulsory education and/or home instruction statutes in the fifty states have been researched, compiled, and categorized. This information has been obtained from a survey sent to the fifty chief state school officers. The content validity of the survey was obtained by submitting the draft of the survey to eleven educators for their input (Appendix C). This group includes state department of education personnel who have worked with home education or nonpublic schools, university personnel, public school personnel, and contacts at professional organizations. As a result of their input a final survey was developed and distributed to the chief state school officers in the fifty states, Guam, and Puerto Rico to get specific information regarding the status of home instruction in their jurisdictions.<sup>13</sup> A letter from the Chief State School officer in Illinois has been included with the survey to support the need for the study (Appendix C). The charts and narratives identified in the review of the literature have been used for input, but the information has been verified by direct examination of the statutes and accompanying laws.

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<sup>12</sup>MICHAEL QUINN PATTON, *QUALITATIVE EVALUATION METHODS* 109 (Beverly Hills, Sage Publications, 1980).

<sup>13</sup>Guam and Puerto Rico were not in the final research because of the lack of supportive documentation.

Legal research tools have been used to uncover appropriate cases which interpreted statutory language concerning the state's responsibility for education and the parents' rights concerning their children's education. Court decisions involving home instruction, as well as the compulsory education statutes and administrative rules and regulations from the states, have been analyzed, compared, and contrasted. Illinois court decisions will receive particular attention to determine if an Illinois "public policy" is identifiable.

Follow-up telephone interviews have been conducted with designated personnel in seven state education departments.<sup>14</sup> The purpose of the interviews is to validate the data already collected and to find information regarding the political forces that have affected the legislative process. The criteria used in identifying these seven states includes:

- a. Significant developments in the past ten years,
- b. Geographic diversity,
- c. Availability of historical materials, and
- d. Availability of current data.

As a result of the research, the most desirable elements of model legislation and/or administrative procedures have been identified. It is the intent that this effort will aid local districts, state agencies, and lawmakers to develop policies and laws about home instruction.

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<sup>14</sup>Iowa, Minnesota, Montana, New York, North Carolina, Pennsylvania, Wisconsin.

## DEFINITION OF TERMS

Against public policy--When the law refuses to enforce or recognize certain classes of acts on the grounds that they have a mischievous tendency, so as to be injurious to the interests of the state, apart from illegality or immorality.<sup>15</sup>

Burden of proof--In the law of evidence, the necessity or duty of affirmatively providing a fact or facts in a dispute on an issue raised between parties in a cause.<sup>16</sup>

Compelling state interest--the interest of the state which over balances a person's religious interest.<sup>17</sup>

Compulsory education--Mandatory instruction as required by law.

Due process--The course of legal proceedings carried out regularly and in accordance with established rules and principles.<sup>18</sup> The fifth amendment provides for due process by the Federal government and the fourteenth amendment provides for due process by the state governments.

Equal protection--The right provided by the fourteenth amendment to the United States Constitution which specifically prohibits a state from denying, "[T]o any person within its jurisdiction equal protection of the laws."

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<sup>15</sup>HENRY CAMPBELL BLACK, BLACK'S LAW DICTIONARY at 603 (St. Paul: West Publishing Co., 1983).

<sup>16</sup>HENRY CAMPBELL BLACK, BLACK'S LAW DICTIONARY at 178 (St. Paul: West Publishing Co., 1979).

<sup>17</sup>KERN ALEXANDER AND M. DAVID ALEXANDER, THE LAW OF SCHOOL, STUDENTS AND TEACHERS 23 (St. Paul: West Publishing Co. 1984).

<sup>18</sup>Id. at 352.

Equivalent education--Same value, effect, importance, and worth, but not necessarily the same form.

Establishment clause--The first amendment provision that Congress shall make no law respecting establishment of religion.

First amendment rights--The prohibition of states from passing laws which deny free exercise of religion.<sup>19</sup>

Home instruction--The educational experience parents provides to their own children in their home and under their own direction.

Home instruction laws--Statutes enacted by the respective state legislatures and rules and regulations promulgated by the state boards of education.

Monitor--To keep watch over; supervise.<sup>20</sup>

Non-school alternatives--Learning arrangements which are not implemented in a physical facility commonly called "school."<sup>21</sup>

Private schools--A school that is established, conducted, and primarily supported by a nongovernmental agency.<sup>22</sup>

Public policy--The principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good. The term "policy" as applied to a statute, regulation, rule of law,

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<sup>19</sup>Joseph C. Beckman, *Legal Challenges to Compulsory Education*, SCHOOL LAW UPDATE 260 (1985).

<sup>20</sup>WEBSTER'S NEW COLLEGIATE DICTIONARY 848 (Springfield, Mass., G. & C. Merriam Co. 1975).

<sup>21</sup>LAWRENCE KOTIN and WILLIAM AIKMAN, *LEGAL FOUNDATIONS OF COMPULSORY ATTENDANCE* 110 (Port Washington, NY: Kennikat Press Corp. 1980).

<sup>22</sup>*Id.* at 916.

course of action, or the like, refers to its probable effect, tendency, or object, considered with reference to the social or political well-being of the state.<sup>23</sup>

Rational basis test--An appellate court will not second guess the legislature as to the wisdom or rationality of a particular statute if there is a rational basis for its enactment. It has been said that the protection of the public from unwise or improvident statutes is to be found at the voting polls or by referendum, not in court.<sup>24</sup>

Regulate--To control or direct according to a rule.<sup>25</sup>

School--An organization that provides instruction.<sup>26</sup>

Three prong test--The determination of whether a state law violates the establishment clause by asking: 1) if the purpose is secular in nature; 2) if the primary effect neither enhances nor inhibits religion; or 3) if it will foster excessive entanglement with religion.<sup>27</sup>

Vagueness doctrine--The requirement that a criminal statute be sufficiently definite to give a person of ordinary intelligence fair notice of the behavior which is prohibited. Under this principle a law which does not fairly inform a person of what is commanded or prohibited is unconstitutional as violative of due process.<sup>28</sup>

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<sup>23</sup>BLACK, *supra* note 15, at 603.

<sup>24</sup>*Id.* at 655.

<sup>25</sup>*Id.* at 1096.

<sup>26</sup>*Id.* at 1034.

<sup>27</sup>*Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971).

<sup>28</sup>BLACK, *supra* note 15, at 803.

### LIMITATIONS

1. Only decisions of the state appellate and supreme courts and United States District, Appellate, and Supreme Court jurisdictions are included in the study.

2. Only cases germane to home instruction and the state's role in education, particularly home education and/or private schools have been studied. Excluded will be cases involving private schools in which the issue has no direct relationship to home instruction.

3. The study does not evaluate the academic effectiveness of home instruction.

4. Only general information regarding home instruction have been obtained. There are no case studies of individual families.

### ORGANIZATION OF THE STUDY

Chapter I includes an introduction to the problem, the historical perspective, the need for the study, the specific research questions, and clarifications of the problem through the establishment of limitations and definitions. In addition Chapter I establishes the methodology utilized to investigate the study.

Chapter II includes a compilation of the review of relevant literature that is divided into dissertations, legal writings and journals, and review of writings regarding litigation.

Chapter III presents the responses to the three research objectives including the unique characteristics of the fifty states regarding the authority for home instruction. The data has been obtained by researching the pertinent statutes and cases and also through a survey and interviews. A comprehensive response has been completed in the form of an analysis of the court decisions and statutes organized by the categories of types of statutory law regarding home instruction. Within each category specific issues and cases have been analyzed as related to the statutes and rules and regulations. Pertinent Supreme Court decisions are also presented.

Chapter IV presents the summary, conclusions, and recommendations of the most desirable elements of model legislation and/or administrative procedures. In addition recommendations for future study are presented.

## CHAPTER II

### REVIEW OF THE RESEARCH AND LITERATURE

Legal researchers and other interested authors have studied the legal aspects of home instruction from a state and national perspective. While this research reviewed these papers, it sought to go further by providing legislative recommendations that could be included in state statutes or rules and regulations. Two law review articles on the subject analyzed the statutes of the fifty states and related that research to one specific state's legal situation.<sup>29</sup> This research, however, reviewed, in addition to legal and educational writings, court cases and all current legislation relating to home instruction and compulsory attendance, proceeding then to relate the results of the research to Illinois.

### DISSERTATIONS

The available research literature in the form of doctoral dissertations included descriptive data of curricula and methods used in home schools,<sup>30</sup> case

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<sup>29</sup> Gerald Lotzer, *Texas Home Schooling: An Unresolved Conflict Between Parents and Educators* 39 BAYLOR LAW REV. 469 (1987); Kara T. Burgess, *The Constitutionality of Home Education* 55 UMKC LAW REV. 55-61 (1986).

<sup>30</sup> Beverly Ann Sollenberger, *Case Studies of Four Families Engaged in Home Education* (Dissertation, Ball State University, 1985).



studies reporting on attitudes of school administrators,<sup>31</sup> case studies of home schooling families,<sup>32</sup> profiles of home school families,<sup>33</sup> and a comparative study of home schoolers and a group of children traditionally educated, to identify differences in social/ emotional areas and academic achievement.<sup>34</sup> One study looked at the activities of the national home school movement since 1970.<sup>35</sup>

The only dissertation closely related to this study was one finished in 1976. Walker analyzed alternatives and exemptions to compulsory attendance provided by statutory and case law throughout the United States. Walker expressed concern over the true meaning of schooling. The Walker study determined, on a state-by-state basis, the provisions of the compulsory attendance laws in 1976. Since that time thirty states have revised their compulsory attendance statutes. Walker's hope for the future was that "[T]he emphasis would shift from required attendance at a certain school, meeting given standards, to a desired product: educated youth."<sup>36</sup>

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<sup>31</sup>Michael Lindley, *The Home Schooling Movement in the State of Indiana as Perceived by Public School Superintendents* (Dissertation, Ball State University, 1985).

<sup>32</sup>Norma Jean Feeman-Linden, *An Investigation of Alternative Education: Home Schooling* (Dissertation, East Texas State University, 1987).

<sup>33</sup>Gunnar Arvid Gustavsen, *Selected Characteristics of Home Schools and Parents Who Operate Them* (Dissertation, Andrews University, 1981).

<sup>34</sup>Mona Maarse-Delahooke, *Home Educated Children's Social/ Emotional Adjustment and Academic Achievement: A Comparative Study* (Dissertation, California School of Professional Psychology, 1987).

<sup>35</sup>Michael Shepard, *The Home Schooling Movement: An Emerging Conflict In American Education* (Dissertation, East Texas State University, 1987).

<sup>36</sup>Barry Dean Walker, Sr., *Compulsory School Attendance: Alternatives and Exemptions Provided by Statutory and Case Law in Each of the Fifty States* p. 270 (Dissertation, University of Cincinnati, 1976).

Walker's research was a comprehensive analysis of all compulsory attendance statutes and the exemption provided by those statutes.

Because of the dearth of recent doctoral literature, it was critical to seek other sources. Therefore, law review articles, journal publications, and surveys were reviewed.

### LEGAL WRITINGS AND JOURNAL ARTICLES

The legal writings and journal articles are presented in terms of the historical perspective of home instruction and the relationship to the compulsory attendance statutes. Although the percentage of students educated at home is small, concern among educators and interested parents is great regarding each group's rights and responsibility regarding home instruction. Each group has a valid interest--and an important responsibility. States such as Illinois that do not have statutory language explicitly establishing reasonable regulations for home instruction have been hotbeds for litigation. Over several cases judges--not legislators--have developed the legal precedent that is expensive, time consuming, and unnecessarily bitter.<sup>37</sup> School administrators are understandably confused and parents are frustrated by the lack in many states of statutory definitions and

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<sup>37</sup>JAMES W. TOBAK AND PERRY A. ZIRKEL, *Home Instruction: An Analysis of Case Law*, 8 UNIVERSITY OF DAYTON LAW REVIEW, 57 (Fall 1982), ERIC S. MONDSCHIEIN AND GAIL PAULUS SORENSON, *Home Instruction in Lieu of Compulsory Attendance: Statutory and Constitutional Issues*, SCHOOL LAW UPDATE 260 (1982); Gerald Lotzer, *supra* note 29.

guidelines.<sup>38</sup> Judges, in turn, have pointed their fingers at legislators' failure to establish regulations on home instruction.

Beckham identifies the results of these concerns:

Legal challenges to state compulsory attendance laws have emphasized four interrelated constitutional claims. Under provisions of the free exercise clause of the first amendment, parents have challenged the state's authority to require public school attendance in lieu of home instruction and private religious organizations have refused to comply with state regulation of nonpublic schools. Alternatively parents and religious organizations have asserted violations of the establishment clause of the first amendment in attacking state regulations of private religious school operations. In those cases in which state compulsory attendance requirements impose criminal penalties for nonconformance, challenges based upon a denial of fifth and fourteenth amendments due process have been addressed. Finally, parents have asserted a right to direct the education of the child under various constitutional theories implicating privacy, equal protection, and due process guarantees.<sup>39</sup>

Statutory enactment is no guarantee that legal ambiguities and litigation will be avoided, as substantiated in New Hampshire. According to Stocklin-Enright, New Hampshire's compulsory education statute is the most strict in the country.<sup>40</sup>

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<sup>38</sup>Joseph C. Beckman, *Legal Challenges to Compulsory Education*, SCHOOL LAW UPDATE 271 (1985).

<sup>39</sup>*Id.* at 260.

<sup>40</sup>Brendan Stocklin-Enright, *New Hampshire's Home Schooling Quandary*, 2 VERMONT LAW REVIEW 265 (1983).

Based upon the author's interpretation of the statute, there are only two choices for the student: public or private school. Home instruction has been discarded because of the burdensome expense of supervision. Ironically in 1980 the state educational agency developed Rules and Procedures pertaining to home education which called for proof of "a manifest educational hardship." Stocklin-Enright has questioned the statutory authority for the State Board of Education to develop these Rules and Procedures, noting:

The senators who approved section 193:3 would have been very surprised if they had been told that their "clarifying amendment" authorized a major change in educational policy. From a clarification of the section 193:3 power to reassign children within the public school system, the Board has wrenched the power to start a home schooling program. The language of the section and its legislative history speak against such a novel and unintended interpretation. Home schooling may be desirable, but so is legality and adherence to the rule of law.<sup>41</sup>

The uncertainty of the parents' constitutional role has been raised once again in an analysis of New Hampshire's statute, case law, and regulations. The legislators, working with parents and other educators, are the ones to remove the contradictions in the "administrative and legal commands."<sup>42</sup>

Before 1987 Illinois was one of the seventeen states having no statutory provisions for home instruction.<sup>43</sup> However, some of these states, including

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<sup>41</sup>Id. at 278.

<sup>42</sup>Id. at 299.

<sup>43</sup>Patricia Lines, *An Overview of Home Instruction*, 68-7 KAPPAN, 510-518 (March 1987).

Illinois, have recognized the validity of home instruction by virtue of court decisions which define such instruction as a form of private school.<sup>44</sup>

The constitutional issues involving religious liberty, separation of powers, and equal protection and balancing of the states' interest against parental rights have been the focus of several scholarly research articles. Burgess<sup>45</sup> identifies the ground swell of interest in home education in the state legislatures and expresses concern regarding statutory language "passing constitutional muster."<sup>46</sup> She also raised the issue of statutory authority for home education being unconstitutionally vague as it is in Missouri. The plaintiffs in the Missouri case, *Ellis v. O'Hara*,<sup>47</sup> argued that the state statutes were unconstitutionally vague and that "neither regulations nor guidelines have been promulgated to assist in the interpretation of this language."<sup>48</sup> The court agreed, finding that the parents were not given an adequate definition of "substantially equivalent" and that the legislature did not provide minimal guidelines for law enforcement. The court concluded that the statute did not comply with due process requirements and was unconstitutionally vague.<sup>49</sup> The court stayed the effective date of the order until the close of the legislative session in 1986 to allow the Missouri legislature to enact new statutory

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<sup>44</sup>Indiana, Illinois, Massachusetts, New Jersey, Oklahoma.

<sup>45</sup>Burgess, *supra* note 29, at 83.

<sup>46</sup>*Id.* at 69.

<sup>47</sup>612 F. Supp. 379 (D.C. Mo. 1985).

<sup>48</sup>*Id.* at 380.

<sup>49</sup>*Id.* at 381.

language. A new statute with more concise language was adopted with the effective date of June 19, 1986.<sup>50</sup>

## HISTORICAL PERSPECTIVE

To have a clear understanding of home instruction, it was necessary to consider the origin of compulsory attendance laws and the early court cases involving parental rights for determining how their children should be educated. In 1642 the Colony of Massachusetts Bay enacted the first compulsory attendance laws.<sup>51</sup> "This statute required all parents and masters to provide an education both in a trade and in the elements of reading to all children under their care."<sup>52</sup> In 1648 the Act was amended to lay the foundation for local taxation to provide support for schools.<sup>53</sup>

The Massachusetts' compulsory literacy law of the 1640's has led to the development of the principles of today's American educational system which are identified in the comprehensive report of compulsory education statutes by Kotin and Aikman:

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<sup>50</sup>MO. ANN. STAT. § 167 031-167.071 (Vernon Supp. 1988).

<sup>51</sup>LAWRENCE KOTIN and WILLIAM AIKMAN, LEGAL FOUNDATIONS OF COMPULSORY ATTENDANCE 11 (Port Washington, NY: Kennikat Press Corp. 1980).

<sup>52</sup>Id.

<sup>53</sup>Id. at 13.

1. The education of children is essential to the proper functioning of the state.
2. The obligation to furnish this education rests primarily upon the parents.
3. The state has a right to enforce this obligation.
4. The state has a right to determine the type and extent of education.
5. Localities may raise funds by a general tax to support such education.<sup>54</sup>

After a flurry of enactment of compulsory attendance laws, interest declined, and by the end of the 19th century these laws were repealed or not enforced. The colonists were preoccupied with the Indian wars, economic problems, and religious debates. In 1852 Massachusetts was once again the leader. The State enacted new general compulsory attendance legislation, "[R]equiring persons having any children under their control who were between the ages of eight and fourteen to send such children to school for twelve weeks annually, six weeks of which had to be consecutive."<sup>55</sup>

The child labor laws in the early 1900's strengthened attendance laws.<sup>56</sup> By 1918 all the states had enacted statutes calling for parents to send their children to school or risk being penalized by imprisonment or fines. The justification for these laws was found in the states' police power to provide for general welfare.<sup>57</sup>

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<sup>54</sup>Id. at 19.

<sup>55</sup>Id. at 25.

<sup>56</sup>Thomas Carrere, *Legal Aspects of Home Instruction*, paper presented at the Annual Conference of the Southern Regional Council on Educational Administration 18 (Knoxville: November 1983).

<sup>57</sup>Mondeschein and Sorenson, *supra* note 36, at 259.

However, after the *Brown v. Board of Education*<sup>58</sup> decision in which the board was found in violation of its duty to desegregate its schools, Mississippi, South Carolina, and Louisiana repealed their compulsory attendance laws and Arkansas, Florida, Louisiana, North Carolina, and Texas exempted children whose parents objected to the child attending an integrated school. New York, Georgia, and Virginia also made changes in their compulsory attendance statutes during the late 1950's and early 1960's which "could conceivably be used as a means whereby to avoid sending a child to racially integrated schools."<sup>59</sup>

At the time of this research, every state has some form of compulsory attendance statute establishing the standards for attendance.<sup>60</sup>

## COMPULSORY ATTENDANCE STATUTES

The report prepared by Kotin and Aikman, discussed above, not only provided a comprehensive analysis of the compulsory attendance laws and their development but also analyzed the relationship between the child labor laws and compulsory attendance.<sup>61</sup>

The Education Commission of the States, *Issuegram*, cites the American Civil Liberties Union's position supporting home instruction, which states:

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<sup>58</sup>*Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686 (1954).

<sup>59</sup>Walker, *supra* note 36, at 58.

<sup>60</sup>TOBAK AND ZIRKEL, *supra* note 37, at 13-14; Walker, *supra* note 36, at 33-35.

<sup>61</sup>Kotin and Aikem, *supra* note at 51.



We believe that in the interest of parental right to choose an alternative to public education, home instruction with safeguards, such as approval of curriculum testing of the child, should be extended to all jurisdictions because the state's interest in assuring minimum levels of education does not extend to control of the means by which that interest is realized.<sup>62</sup>

The same article raises policy questions which should be considered as changes in compulsory education laws are contemplated. These issues include:

1. Should compulsory attendance laws carry criminal sanctions against parents honestly acting in the best interests of their children?
2. Should regulation of home instruction be left to local law enforcement agencies--or should legislatures provide some rules and give state or local school boards authority in this area?
3. Are children instructed at home receiving what they need for good citizenship and self-sufficiency?
4. Are these children unacceptably insulated from the mainstream of society, or do they have adequate opportunities for gaining social skills and a broader knowledge of society? If social isolation is a problem, what are the best ways to correct it?
5. If home instruction is allowed, to what extent should states provide support?
6. If local officials provide support, should states permit them to count home-tutored children in their enrollment figures?<sup>63</sup>

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<sup>62</sup>Patricia Lines, *Home Instruction*, ESC ISSUEGRAM, Education Commission of the States, Denver (August 1984).

<sup>63</sup>*Id.* at 6.

Kotin and Aikman's comprehensive writings regarding compulsory attendance reviewed the significant debate over the quality and viability of public education. The authors suggested that the repeal of compulsory attendance laws could result only if there was a public policy shift in the public financing of elementary and secondary education.<sup>64</sup>

The Home School Legal Defense Association has summarized--but not analyzed--applicable state statutes. The following note on the cover page of the Defense Association's publication sets forth the intent of the summary:

This chart is not intended to be, and does not constitute, the giving of legal advice. Since many states have unclear compulsory education statutes, the courts vary on their interpretation of those statutes. Therefore, there is no guarantee the state will accept all options for compliance listed under each state. This analysis is not intended to substitute for individual reliance on privately retained legal counsel.<sup>65</sup>

A publication of the Education Commission of the States also included a chart of the various state statutory provisions.<sup>66</sup> The Rutherford Institute had, according to the preface of the publication, "undertaken an exhaustive examination of home education situations in the fifty states."<sup>67</sup>

<sup>64</sup>KOTIN and AIKMAN, *supra* note 51, at 326.

<sup>65</sup>CHRISTOPHER KLUCKA, HOME SCHOOL STATUTE CHART OF 50 STATES (Washington, D.C.: Home School Legal Defense Association, August, 1986).

<sup>66</sup>Education Commission of the States, *Compulsory Education Laws and Their Impact on Public and Private Education-With Suggested Statutory Language*, March 1985.

<sup>67</sup>HOME EDUCATION REPORTER, Rutherford Institute, 1985.

Tobak and Zirkel included a tabular overview of the state statutes and attendant policies/regulations concerning home instruction. The primary source of the data was information obtained before 1980 by the New Hampshire State Department of Education. At that time fourteen states provided no exception for home instruction beyond the possibility of offering it as a private school, fifteen explicitly provided an exception for home instruction, and twenty-one states had an implied exception to public or private schooling based either on broad equivalency language or on narrower, marginal language.<sup>68</sup>

In 1986, Deckar began to survey the states and prepared, in chart format annually, the compilation of the data supplied by the states regarding specific information about home education.<sup>69</sup> His STATE BY STATE HOME SCHOOLING MANUAL included requirements that must be met in each state to fulfill the compulsory education statutes.

Kotin and Aikman also provided a tabular description of "Primary Learning Arrangements Which Meet the Attendance Requirements of the Compulsory Attendance Statutes." They indicated that the intent of the chart published in 1980 was to "address the distinction between permitted school and non-school learning arrangements."<sup>70</sup> Their information provided still another source for analysis of the statutes.

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<sup>68</sup>Tobak and Zikel, *supra* note 37, at 6-12.

<sup>69</sup>STEVEN DECKAR, 1986 FIRST EDITION HOME SCHOOLING LAWS: STATE BY STATE HOME SCHOOL MANUAL (DeKalb, IL 1986).

<sup>70</sup>KOTIN and AIKMAN, *supra* note 51, at 345.

## REVIEW OF ARTICLES RELATING TO LITIGATION

During the past ten years, law review articles and legal journals have included writings about litigation of home instruction cases. Generally, these writings provide (1) comprehensive overview of litigation; (2) categorization of cases and review of the case law; (3) analysis of constitutional issues; (4) impact of political forces; (5) analysis of case law in a specific state; and (6) identification of trends.

### COMPREHENSIVE OVERVIEW OF LITIGATION

Tobak and Zirkel's analysis of the statutes and case law presents an extensive view of the issues surrounding home instruction and ends by recommending a burden shifting approach.<sup>71</sup> This approach involved first placing the burden on the state to show non-attendance and then on the parents to prove the educational equivalence of the home study program. They emphasized that:

[T]he balanced approach takes into account both the state's interest in education and the parent's freedom to choose. In addition, and perhaps most importantly, it permitted a greater focus on the best interests of the individual child.<sup>72</sup>

Any solution such as this must be determined by the one legal entity that can provide both specificity and the power of enforcement--the state legislature.<sup>73</sup>

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<sup>71</sup>Tobak and Zirkel, *supra* note 37, at 6-10.

<sup>72</sup>*Id.* at 59-60.

<sup>73</sup>Carrere, *supra* note 56, at 18.

## IMPACT OF POLITICAL FORCES

Tobak and Zirkel recommended that states should consider providing a limited statutory exception for home instruction while furnishing the proper due process procedural protection.<sup>74</sup> History disclosed the political forces which have influenced the direction home instruction has taken in individual states. And, partly because of a fear of political implications, change has been slow. Carrere pointed to the influence of political forces when attempts were made to strengthen the compulsory attendance laws in Georgia.<sup>75</sup> That examination prompted this current research to analyze the political influences in other states and the resulting legislation.

## ANALYSIS OF CONSTITUTIONAL ISSUES

The United States Supreme Court has not specifically addressed the issue of home instruction. Yet, its decisions in *Pierce*<sup>76</sup> *Yoder*,<sup>77</sup> *Meyer*<sup>78</sup> and

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<sup>74</sup>Tobak and Zirkel, *supra* note 37, at 59.

<sup>75</sup>Carrere, *supra* note 56, at 12.

<sup>76</sup>*Pierce v. Society of Sister*, 268 U.S. 510 (1925).

<sup>77</sup>*Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>78</sup>*Meyer v. Nebraska*, 262 U.S. 390 (1923).

*Farrington*<sup>79</sup> dealing with the states' authority in other areas of education shed light on the home instruction issue in terms of Constitutional guarantees of religious freedom, due process, and liberty interest.<sup>80</sup>

In the 1923 *Meyer* decision, the Supreme Court struck down a Nebraska statute which prohibited the teaching of a modern language other than English in elementary schools.<sup>81</sup> This was the first successful challenge of a state's power to regulate education.

Two years later the Court, using the precedent of *Meyer*, decided in *Pierce v. Society of Sisters* that an Oregon statute recognizing only public education was ruled unconstitutional as unreasonably interfering with parents' rights.<sup>82</sup> *Pierce* protected the property interest of the private school.

Shortly thereafter the Supreme Court heard *Farrington v. Tokushige* which involved a Hawaii statute placing severe regulations on private schools.<sup>83</sup> The Justices acknowledged the right of the state to regulate private schools but held that such regulation cannot be so excessive as to effectively eliminate such schools or the purposes for which they exist. On this reasoning the Hawaii statute was invalidated because it unreasonably sought to "assimilate and indoctrinate a large alien population and to promote Americanism."<sup>84</sup>

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<sup>79</sup>*Farrington v. Tokushige*, 273 U.S. 284 (1927).

<sup>80</sup>Tobak and Zirkel, *supra* note 60, at 14-16.

<sup>81</sup>*Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>82</sup>*Pierce v. Society of Sister*, 268 U.S. 510 (1925).

<sup>83</sup>*Farrington v. Tokushige*, 273 U.S. 284 (1927).

<sup>84</sup>*Id.*

Stocklin-Enright stated in her research, "The *Meyer-Pierce-Farrington* decisions not only set limits to the state's discretionary power but also established that the state is a part of the parent/child educational decision."<sup>85</sup> In *Wisconsin v. Yoder*,<sup>86</sup> the Supreme Court applied the protection of the free exercise clause of the first amendment in determining that the parents' religious interests outweighed the state's interest in the education of high school aged Amish children. The Court was cautious to limit the decision to the facts of the case. The parents were convicted of violating the compulsory attendance statute by refusing to send their children to school after eighth grade. Tobak and Zirkel's summary of the decision identified four criteria established by the judges in making the decision in favor of the parents' constitutional right:

1. The parent's interest must be religious, not philosophical.
2. The religious interest must be long-standing and sincerely held.
3. The continued secular education would pose a real--not merely perceived--threat to the religious interest.
4. The disruption in the children's education should not seriously impair the child's future nor threaten the public order in any significant way.<sup>87</sup>

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<sup>85</sup>Brendan Stocklin-Enright, *The Constitutionality of Home Education: The Role of the Parent, the State and the Child*, 18 WILLAMETTE LAW REVIEW 576 (1982).

<sup>86</sup>*Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>87</sup>Tobak and Zirkel, *supra* note 37, at 44.

Lotzer in his BAYLOR LAW REVIEW COMMENT discusses the need and ways in which to balance the interests of the state, parent, and child.<sup>88</sup> A VERMONT LAW REVIEW article summarizes the four Supreme Court cases but admittedly cannot find a meaningful pattern:

Commentators may differ over the full ramifications of these cases, but most would agree that one principle derived from them is that the state has the power to compel the parent to send his or her child to some school, not necessarily public, and that the state can subject the school to reasonable regulation. The consensus falls apart, however, when an attempt is made to define "school." [T]his section will attempt to answer the central question: Where does parental power end and state power begin in education? It is assumed, and hereafter will be argued, that no definitive constitutional answer to this question exists at present.<sup>89</sup>

Burgess prompted by the decision in *Ellis v. O'Hara*<sup>90</sup> wrote of unconstitutionally vague statutes.<sup>91</sup> She analyzed the statutes addressing home education which she found problematic in passing "constitutional muster," focusing particularly on requirements of teacher certification and student testing.<sup>92</sup>

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<sup>88</sup>Lotzer, *supra* note 29, at 417.

<sup>89</sup>Stocklin-Enright, *supra* note 39, at 281.

<sup>90</sup>*Ellis v. O'Hara*, 612 F. Supp. 379 (D.C. Mo. 1985).

<sup>91</sup>Burgess, *supra* note 29, at 83.

<sup>92</sup>*Id.* at 69.



## CONFLICT OF RIGHTS

Lupa, professor of law at Boston University School of Law, objecting to the focus of most home school litigation, that of the conflict of parent rights and state interest, states, "This view of the matter is objectionable because it reduces children to pawns in a struggle between their parents and the state and thereby devalues children's interests, both constitutional and otherwise."<sup>93</sup>

## IMPLICATIONS OF SPECIFIC DECISIONS

Dillahunty's, legal consul for the Ohio State Board of Education, remarks to the Council of State Education Attorneys in October of 1987 discussed the effect of a recent decision. Ohio's supreme court in the 1987 case *State v. Schmidt*<sup>94</sup> determined that the statute, accepting an approved home instruction program as an exemption from the compulsory attendance requirements, was not unconstitutionally vague.<sup>95</sup> The approval discretion vested in the school superintendent was not an improper delegation of authority. Dillahunty noted that since the *State v. Schmidt* decision was given, at least three other cases on home schooling had been heard. She stated in her presentation that parents were lobbying

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<sup>93</sup>Ira C. Lupa, *Home Education, Religious Liberty, and the Separation of Power*, MASSACHUSETTS LAW REVIEW SPECIAL CONSTITUTIONAL ISSUE 48 (Fall 1987).

<sup>94</sup>*State v. Schmidt*, 505 N.E.2d 627 (Ohio 1987).

<sup>95</sup>Claudia J. Dillahunty, attorney Ohio State Board of Education. Remarks, October 9, 1987, Council of State Education Attorneys.

for guidance from the State Board of Education and for more authority in decisions regarding their children's education. Dillahunt indicated that *Schmidt* might not be the final word regarding home education in Ohio, but instead it might prompt the development of administrative rules and possibly the enactment of new legislation.

*The Special Report: Home Study*<sup>96</sup> states, "[C]ase decisions are disparate, frequently being decided on interpretations of state law."<sup>97</sup> For example, the seemingly incompatible decisions in *Levisen*,<sup>98</sup> *Grigg*,<sup>99</sup> *Sawyer*,<sup>100</sup> and *M.M.*<sup>101</sup> pointed to the danger in viewing home education from a national perspective to make accurate generalization. The *Grigg*,<sup>102</sup> *Sawyer*<sup>103</sup> and *M.M.*<sup>104</sup> decisions did not consider the home instruction programs to be private schools; however, the *Levisen* court agreed with the parents that their home instruction program for their daughter was an appropriate exception to Illinois' compulsory attendance statutes as it was considered a private school. *Levisen* was cited but differentiated in later

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<sup>96</sup>Cheryl Karstaedt and Richard Walker, *The Special Report: Home Study* prepared for the National Association of State Boards of Education provides a short synopsis of pertinent cases and a bibliography for attorneys representing clients involved in home instruction litigation.

<sup>97</sup>*Id.* at 7.

<sup>98</sup>*People v. Levisen*, 404 Ill. 574, 90 N.E.2d 213 (1950).

<sup>99</sup>*Grigg v. the Commonwealth of Virginia*, 224 Va. 356, 297 S.E.2d 799 (1982).

<sup>100</sup>*Interest of Sawyer*, 234 Kan. 436, 672 P.2d 1093 (1983).

<sup>101</sup>*State v. M.M. and S.E.* 407 So. 2d 987 (Fla. App. 1981).

<sup>102</sup>*Grigg v. the Commonwealth of Virginia* 224 Va. 356, 297 S.E.2d 799 (1982).

<sup>103</sup>*Interest of Sawyer*, 234 Kan. 436, 672 P.2d 1093 (1983).

<sup>104</sup>*State v. M.M. and S.E.*, 407 So. 2d 987 (Fla. App. 1981).

cases.<sup>105</sup> The report raises the question: What if these later cases were decided before *Levisen*? Would *Levisen*, in reliance upon them, have then been decided differently? And, if so, was it right that such an important question be decided on the chronology of the individual court cases?

The Special Report summarizes the concern:

While it may seem obvious, it is important to remember that the home study cases, which reach the litigation stage, have as opposing parties, individuals and organizations who do not only have differing legal viewpoints but have basic philosophical differences. On one hand, are local or state school officials whose legal duty is to see that all children within the state receive an education. It is axiomatic that the state has an interest in an educated citizenry whose individuals are self-sufficient and can exercise their rights in a free society. To these ends, state legislatures enact compulsory attendance laws.<sup>106</sup>

In these writings Mondschein and Sorenson assert:

The states where statutes explicitly provide for home education or instruction have witnessed little or no litigation on the issue. In states which do not expressly permit instruction at home, state courts have been involved in determining whether home education would be permissible under the compulsory attendance statutes."<sup>107</sup>

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<sup>105</sup>297 S.E.2d at 801. The Virginia court rejected the precedent because the Illinois statute lacked a comparable reference to home education as was in the Virginia statute.

<sup>106</sup>Karstaedt, *supra* note 96, at 1.

<sup>107</sup>Mondschein and Sorenson, *supra* note 37, at 261.

## IDENTIFICATION OF TRENDS

Lines, a policy analyst for the United States Department of Education, predicts that the new wave of court cases will not be to decide whether home schooling should be permitted but rather to determine the extent to which states may regulate home instruction.<sup>108</sup>

States adopting more permissive home school legislation have increased each year.<sup>109</sup> Since 1985 Arkansas, Minnesota, New Mexico, Maine, Michigan, North Carolina, Iowa, Oregon, Washington, Wyoming, South Carolina, Colorado, New York, Hawaii, Vermont, West Virginia, Missouri, Florida, Tennessee, Maryland, and Pennsylvania have modified their laws to make them more favorable to home schoolers.<sup>110</sup> On the last day of the 1988 session, the Iowa General Assembly established a deferred prosecution procedure for any parent who registered under § 299.4 of the statute, a measure for compromise between the active home school lobbyist and the public education supporters. This may show the trend of removing certification or licensing requirements for home schoolers from the statutes in the remaining states.<sup>111</sup>

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<sup>108</sup>Lines, *supra* note 43, at 510-15.

<sup>109</sup>Lotzer, *supra* note 29, at 472; Klicka, *supra* note 64; EDUCATION WEEK articles May 4, 1988, June 1, 1988, Sept. 30, 1987; Lines, *supra* note 43, at 514.

<sup>110</sup>The revisions have been either through the home school statutes or rules and regulations of the state department of education.

<sup>111</sup>With the present deferred prosecution in Iowa, only Michigan and North Dakota prosecute if this certification requirement was not met.

McHugh in an article in *The Christian Educator* provides his perception regarding the requirements of the home instruction laws:

Laws that call for home schoolers to file an annual letter of intent, maintain simple attendance records, and teach the common branches of learning are truly "reasonable" because they do not require private schools to mimic the goals and stands of one of the poorest educational systems in the civilized world--the American public schools.<sup>112</sup>

#### WRITINGS SPECIFIC TO ILLINOIS

In Illinois there is no statutory authority for home education. A 1950 supreme court case, *People v. Levisen*, considers home education as a type of private school. The court indicates that "[T]he number of persons do not make the place where instruction is imparted any less or more a school,. . . .<sup>113</sup> *Levisen* is considered to have set a precedent for Illinois as a haven for parents wishing to educate their children at home.

Kotin and Aikman described the impact of the *Levisen* decision as the "[L]andmark decision in Illinois provided the fullest judicial articulation to date regarding home instruction as compliance with compulsory attendance laws." Their analysis showed that the decision elaborated on the early *State v. Peterman*<sup>114</sup>

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<sup>112</sup>Michael McHugh, *Home School Achievement Test Requirements: Are We On the Right Track?* THE CHRISTIAN EDUCATOR 2 (1986).

<sup>113</sup>404 Ill. 574 (1950).

<sup>114</sup>*State v. Peterman*, 32 Ind. App. 665, 70 N.E. 50 (1904).

decision yet did not provide guidance regarding the "quality and character" required of home instruction.<sup>115</sup> *Peterman* ruled that a teacher employed by the parent to teach his or her child all subjects taught in public schools during regular school hours was acceptable.

Stronge and Moser state in their 1987 article in *Illinois Principal* that parents are required to submit a statement of assurance for parent-taught home instruction.<sup>116</sup> An opinion from Illinois State Board of Education's legal department contradicting this states:

There is no statutory requirement for either parent or educational service region superintendent to use the assurance statement form. However, the relative success of the use of the assurance statement will undoubtedly be evaluated on the basis of the extent which it is being used plus other criteria. If the educational service region has proof that the child is not receiving an education, the educational service region can, of course, begin truancy proceedings against the parents.<sup>117</sup>

The concern identified in this research was that without clear cut written regulations or statutory authority available to school administrators and the public, any information was accepted as truth.

<sup>115</sup> KOTIN AND AIKMAN, *supra* note 51, at 10-14.

<sup>116</sup>James Stronge and Mildred Moser, *Home Schooling: A Trend for the Future*, ILLINOIS PRINCIPAL 13 (May 1987).

<sup>117</sup>Letter from Sally B. Pancrazio, Manager Research and Statistics Section, Illinois State Board of Education, July 25, 1984.

A series of news articles in the fall of 1987, describing action by the Regional Superintendent of Cook County, heightened the confusion regarding home education in Illinois. The articles described the crackdown on home schoolers and the intent of filing for truancy because "the gray court ruling is not enough; that a law is needed to set down specific guidelines."<sup>118</sup> An article in the *Chicago Tribune* describing this episode stated a legislative task force was being established to study the issue and possible new legislation.<sup>119</sup>

Assistant Legal Advisor for the State Board of Education of Illinois has clarified the legal limits of the office of the Regional Superintendent of Schools for monitoring compliance with the compulsory attendance laws:

In so doing, the regional superintendent may expect that the parents who seek to educate their children at home establish that they are providing an instruction that is at least commensurate with the standards of the public schools. The parents may be expected to document the subjects taught, which must include branches of learning taught in the public school, the time frame in which instruction will be offered, and the competency of the parent or other instructor(s). It is not necessary that the instructor have a teacher's certificate. The parents may also be expected to establish by written examinations or by some other method that the child's level of achievement is comparable to that of his/her peers of corresponding age and grade level.<sup>120</sup>

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<sup>118</sup>Ellen Schmid, *Targeted as Truants*, Daily Herald, December 6, 1987.

<sup>119</sup>George Papajohn, *Parents Put Martwick Under Fire*, Chicago Tribune, Monday, January 25, 1988, at 1-2.

<sup>120</sup>Robin Cona, legal consul, Illinois State Board of Education legal opinion in form of letter, December 14, 1987.

The home school lobby in Illinois was very strong, as was evidenced during the legislative session of 1987. During this session Senate Bill No. 1202<sup>121</sup> was introduced. The bill required that every child of school age be registered in a public, private, or parochial school or, in cases of home instruction, with the regional superintendent of schools. The lobbying interest of parents and nonpublic religious schools was so strong that the bill did not leave legislative committee. A task force comprised of public and private school representatives was established to study the feasibility of a pupil accounting system in Illinois.

In 1975 policies and guidelines for registering and recognizing nonpublic schools in Illinois were adopted. These policies and guidelines were advisory in nature and to this date provide the only guidance regarding the relationship of the State Board of Education and the nonpublic schools. This lack of guidance forces public school administrators in Illinois when confronted by a child being educated at home or in a private school either to (1) file truancy proceedings which might entail lengthy and expensive litigation, (2) cooperate with the families to ensure the students receive a quality education, or (3) ignore the situation completely.

### SUMMARY OF LITERATURE

A historical perspective of litigation and development of statutes regarding home instruction was available in the literature, particularly the law review articles. Many authors examined litigation in individual states and related the determination

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<sup>121</sup>Senate Bill No. 1202, 85th General Assembly, State of Illinois, Introduced April 10, 1987 by Senator Maitland.



of the courts to the changes in the state laws regarding home instruction. Most of the literature looked at home instruction from a religious perspective. Very little was found regarding parents educating their children at home for non-religious reasons.

The literature showed that the home instruction movement is not one to be ignored and that parents believe they should be deeply involved in the education and development of their children. Without the guidance of the United States Supreme Court, each state must establish its own standards to provide public school administrators with the necessary direction to fulfill their legal responsibility, which is meeting the attendance law requirements while acknowledging the parents' concern for their children's education.

## CHAPTER III

### PRESENTATION OF DATA

There is little uniformity among the fifty states as to the legal requirements by which parents may educate their children at home. Although every state has a statute providing for compulsory education, these statutes are by no means uniform. Furthermore, the courts from state to state have applied these statutes inconsistently--even where the statutes are similar.

It was this crazy-quilt of inconsistencies and ambiguities that prompted this research. Three research objectives guided this study.

The First Research Objective was to review and analyze the compulsory education/home instruction statutes and rules and regulations in all fifty states with particular scrutiny to the means by which these laws recognized and permitted home instruction. Data for this analysis were gathered from several sources:

- The statutes and regulations themselves, together with an examination of the legislative history in appropriate cases,
- Surveys submitted to the chief school officers in each state, and
- Interviews with educators at the university level and in state departments of education as well as representatives of professional organizations.

The Second Research Objective was to review and analyze the relevant judicial decisions of the federal courts and the higher state courts over the past twenty-five years and the Supreme Court cases since the early Twentieth Century. This analysis described trends and identified those issues which were most often addressed by the courts' attention:

- Inherent parental rights regarding education,
- Interest of the state regarding education,
- Religious freedom (United States Constitution, first amendment),
- Requirements of non-vagueness in criminal statutes, (United States Constitution, fourteenth amendment),
- Burden of proof,
- Equivalency of home instruction, and
- Qualifications of instructor.

The cases were then examined in the context of the statutes and rules and regulations in the respective states to determine what, if any, legislative action followed the court action.

The Third Research Objective was to trace in seven specific states, through further interviews, the development of home instruction legislation. Specific attention was directed to the political or lobbying efforts that influenced such legislation and to identify the most desirable elements of model legislation and/or administrative procedures.

## RESEARCH OBJECTIVE ONE

The First Research Objective serves the purpose of analyzing compulsory education/home instruction statutes and rules and regulations in all fifty states with particular scrutiny to the means by which these laws recognize and permit home instruction.

### AVENUES FOR HOME INSTRUCTION

The fifty states are grouped into four major categories with respect to their particular recognition of home instruction as a permissible alternative to public school attendance.<sup>122</sup> These four categories are:

- A. "Explicit Language Statute" States--States having statutes which explicitly permit home instruction,
- B. "Equivalency Language Statute" States--States having statutes which simply require attendance in public schools "or their equivalent,"
- C. "Qualifies as Private School" States--States having statutes which do not explicitly mention home instruction, but did permit private school

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<sup>122</sup>Admittedly, such categorization runs the unavoidable risk of over-simplification. There are, to be sure, subcategories and "cusp" situations which will be discussed below. Information for these groupings is based on data obtained from surveys of state agencies as well as from the language of the statutes. Some overlapping of categories is inevitable. An example is Oregon, which is placed in the category of explicit language, where the statute referred to term "equivalent instruction" by a parent or tutor. The two states with rules and regulations and silent statutes do provide explicit requirements for home instruction; yet these rules and regulations do not have for this research the same political impact as statutory language provided through legislation. Consequently, for this research these two states are placed in the grouping of silent states.

attendance, and their courts or state boards of education construed "private schools" to include home instruction, and

D. "Silent Language Statute" States--States having no statutory language at all beyond a bare compulsory attendance law, leaving the permissibility of home instruction--and guidelines for it--entirely to the courts, attorney generals, or the state rules and regulations.

Table I summarizes the state groupings which are used for the analysis of the correlation of the court cases and the laws in this objective. In addition the table indicates the year of the most recent enactment or amendment to the statute. Between the period of 1980 until 1988, changes have been made in the statutes or the rules and regulations in thirty-one states. Twelve of these changes were made in 1987 and 1988. Twenty-six states are explicit language states with statutory authority for home instruction; seven states consider home instruction a form of private schools; twelve states consider home instruction appropriate if it is equivalent to public schools; and in five states there is no statutory authority or case law to provide for home instruction. Although the statutes in these five states are silent regarding home instruction or equivalency, in two of the states, rules and regulations have been promulgated to establish procedures to be used by the appropriate agency in determining if a home instruction program is an acceptable exemption to the specific compulsory education requirement.<sup>123</sup> In three of these states in which the statutes are silent, there is no direction from the legislature or the

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<sup>123</sup>New Hampshire, Nebraska. Other states have rules and regulations but the authority to develop these was specified in the statutes (i.e. Maryland and New York).

**TABLE 1**  
**CATEGORIES OF HOME INSTRUCTION AUTHORITY**

State	Explicit Language	Private	Equivalency	Silent	Year*
Alabama				Y	
Alaska	Y				
Arizona	Y				1982
Arkansas	Y				1987
California		Y			
Colorado	Y				1988
Connecticut			Y		
Deleware			Y		
Florida	Y				1985
Georgia	Y				1984
Hawaii			Y		1988
Idaho			Y		
Illinios		Y			
Indiana			Y		
Iowa			Y		1987
Kansas				Y	
Kentucky		Y			1984
Louisana	Y				1980
Maine			Y		1988
Maryland			Y		1987
Massachuettes		Y			
Michigan		Y			1986
Minnesota	Y				1987
Mississippi	Y				1982
Missouri	Y				1986
Montana	Y				1983
Nebraska				Y	1984
Nevada			Y		1984
New Hampshire				Y	1984
New Jersey			Y		
New Mexico	Y				1985
New York			Y		1988
North Carolina	Y				1988
North Dakota		Y			
Ohio	Y				1976
Oklahoma				Y	
Oregon	Y				1985
Pennsylvania	Y				1988
Rhode Island	Y				1984
South Carolina	Y				1988
South Dakota			Y		
Tennesse	Y				1985
Texas		Y			
Utah	Y				1957
Vermont	Y				1987
Virginia	Y				1984
Washington	Y				1985
West Virginia	Y				1987
Wisconsin	Y				1983
Wyoming	Y				1985

<b>Totals</b>	<b>26</b>	<b>7</b>	<b>12</b>	<b>5</b>
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\* year of most recent change

state board of education regarding the monitoring or requirements of home instruction programs.<sup>124</sup>

For a complete understanding of home instruction requirements in each state, one must analyze the compulsory attendance and home instruction statutes enacted by the respective state legislatures as well as rules and regulations adopted by the state boards of education. The statutory references to these laws are available in the appendices of this research.

## STANDARDS FOR HOME INSTRUCTION AND COMPULSORY ATTENDANCE

Authority to monitor and regulate compulsory attendance and home instruction varies among the fifty states. The survey verifies that at least thirty-seven states have identified such a regulatory authority. Statutes are the source for this authority in thirty-three states, regulations in fifteen states, and in two other states the authority is from other sources such as case law. There is overlapping monitoring authority in twelve states. Table II summarizes the data obtained from the survey regarding the source and the authority used by the states to govern home instruction as described above. Table III indicates that the state boards of education in twenty states are responsible for monitoring compulsory attendance; in ten states the state boards of education monitor home instruction.

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<sup>124</sup>Kansas, Alabama, Oklahoma.

**TABLE II**  
**SOURCE OF REGULATORY AUTHORITY**

State	Statute	Rules	Other
Alabama			
Alaska	√	√	
Arizona	√	√	
Arkansas	√		
California	√		
Colorado			
Connecticut			
Deleware	√	√	
Florida	√		
Georgia	√		
Hawaii	√	√	
Idaho	√		
Illinois	√		√
Indiana			
Iowa	√	√	
Kansas			
Kentucky	√		
Louisiana	√		
Maine	√	√	
Maryland			√
Massachuettes	√		
Michigan	√		
Minnesota	√		
Mississippi			
Missouri			
Montana	√		
Nebraska		√	
Nevada	√	√	
New Hampshire		√	
New Jersey			
New Mexico	√	√	
New York	√	√	
North Carolina			
North Dakota			
Ohio	√		
Oklahoma			
Oregon	√	√	
Pennsylvania	√	√	
Rhode Island	√	√	
South Carolina		√	
South Dakota			
Tennesse	√		
Texas			
Utah	√		
Vermont	√		
Virginia	√		
Washington	√		
West Virginia	√		
Wisconsin	√		
Wyoming	√		
<b>Totals</b>	<b>33</b>	<b>15</b>	<b>2</b>



**TABLE III**  
**STATE AGENCY MONITORING**

State	Home Instruction		Non-Public	
	Yes	No	Yes	No
Alabama				
Alaska	√		√	
Arizona		√		√
Arkansas	√			√
California		√		√
Colorado		√		√
Connecticut				
Deleware		√		√
Florida		√		√
Georgia				
Hawaii	√		√	
Idaho		√	√	
Illinios		√	√	
Indiana		√		√
Iowa		√	√	
Kansas				
Kentucky	√		√	
Louisana		√	√	
Maine	√		√	
Maryland		√		√
Massachuettes		√		√
Michigan		√		√
Minnesota		√		√
Mississippi	√		√	
Missouri		√		√
Montana		√	√	
Nebraska	√		√	
Nevada		√	√	
New Hampshire		√	√	
New Jersey				
New Mexico	√		√	
New York		√	√	
North Carolina				
North Dakota				
Ohio		√		√
Oklahoma				
Oregon		√		√
Pennsylvania		√		√
Rhode Island		√	√	
South Carolina		√		√
South Dakota				
Tennessee	√		√	
Texas				
Utah		√		√
Vermont	√		√	
Virginia		√		√
Washington		√	√	
West Virginia		√	√	
Wisconsin		√		√
Wyoming		√		√

10	30	20	20
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## ELEMENTS OF HOME INSTRUCTION LAWS

Home instruction laws in some states are limited in language and in requirements, yet in some states the laws are quite explicit. Table IV illustrates the common elements of these laws derived from statutes and/or rules and regulations. At the time of this research, only two states require and enforce the statute that home instruction teachers be certified according to the specific state laws.<sup>125</sup> Another state, Iowa, has established a deferred prosecution procedure related to certification and other requirements for home instruction for the 1988-89 school year. In one state if the student is identified as special education, certification is required. Two states require a private tutor to be certified, and two other states including Michigan provide options to the certification requirement. In twenty-six states there are specific qualifications required of parents or tutors who provide home instruction in lieu of public school attendance. The qualification requirement is met by proficiency exams, high school graduation or its equivalent, or by undefined compen-tencies.

In addition to certification, the other elements included in some or all of these statutes or regulations are:

- required days or hours of attendance,
- requirement to submit plans for approval,
- declaration of intent to provide home instruction,
- required subjects and materials,

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<sup>125</sup>Michigan, North Dakota.

# ELEMENTS OF HOME INSTRUCTION AUTHORITY

State	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	V	CODE FOR ELEMENT
Alabama	Y	Y		Y	+	#	Y	Y			LEA	Y											A - File Intent
Alaska	Y					Y	Y					Y	Y		Y				Y				B - Pupil Accounting
Arizona	Y	Y		Y		*					C								Y	Y			C - Submit Plan
Arkansas	Y	Y		Y	##	Y													Y			Y	D - Required Subjects
California				Y	*	Y					LEA		Y						Y				E - Certification
Colorado	Y	Y		Y			Y	Y	Y			Y					Y	Y	Y	Y	Y	Y	*Private tutor **waived
Connecticut	Y		Y	Y			Y	Y			LEA&	Y		Y				Y	Y	Y	Y	Y	#consultant ## special ed
Delaware		Y									LEA								Y	Y	Y	Y	+ options
Florida	Y				+	Y					LEA					Y	Y	Y	Y	Y	Y		F - Qualifications
Georgia	Y	Y		Y		##	Y	Y				Y					Y	Y	Y	Y	Y	Y	*exam **high school eq.
Hawaii	Y		Y		**			Y			LEA							Y	Y	Y	Y	Y	#options ##competent
Idaho	Y						Y				LEA												G - # of Days
Illinois				Y				Y							Y								H - # of Hours
Indiana		Y	Y									Y				Y					Y	Y	I - Materials
Iowa	Y	Y	Y		**		Y				LEA				Y								J - Acceptable Setting
Kansas		Y				##																	K - Approval
Kentucky	Y	Y		Y			Y				LEA	Y	Y						Y		Y		LEA=Local
Louisiana	Y		Y	Y			Y		Y		SEA			Y			Y	Y	Y	Y	Y		C=County
Maine	Y	Y		Y		Y	Y				LEA		Y	Y				Y	Y	Y	Y	Y	S=State
Maryland	Y		Y	Y		#	Y		Y		LEA							Y	Y	Y	Y	Y	L - Attendance Records
Massachusetts		Y	Y	Y		Y	Y	Y			LEA							Y	Y	Y	Y		M - Life Safety
Michigan	Y	Y		Y	**	Y	Y				LEA			Y							Y		N - Immunization
Minnesota	Y	Y		Y		#	Y				LEA			Y				Y	Y				O - Evaluation Plan
Mississippi	Y	Y	Y																				P - Evaluation
Missouri	Y	Y		Y				Y								Y	Y	Y					Q - Proof
Montana	Y			Y			Y				C	Y	Y		Y			Y					R - Testing
Nebraska	Y			Y		Y	Y	Y					Y						Y				S - Progress Reports
Nebraska	Y			Y		Y	Y	Y															T - Equivalency
Nevada	Y		Y	Y	Y		Y	Y			LEA				Y			Y	Y	Y	Y	Y	U - Due Process
New Hampshire	Y	Y		Y		Y	Y				LEA				Y	Y	Y	Y	Y	Y	Y	Y	V - Rules & Regulations
New Jersey				Y							LEA												
New Mexico	Y	Y		Y		#					Y	Y		Y				Y			Y		
New York	Y		Y	Y		##	Y	Y	Y		LEA	Y		Y			Y		Y	Y		Y	
North Carolina	Y					**	Y		Y						Y								
North Dakota	Y	Y		Y	Y		Y	Y			C&S		Y	Y									
Ohio	Y					Y					LEA			Y							Y		
Oklahoma							Y	Y															
Oregon	Y			Y				Y			LEA			Y					Y		Y	Y	
Pennsylvania	Y		Y	Y	*	**	Y	Y			LEA			Y	Y		Y	Y	Y	Y	Y	Y	
Rhode Island				Y			Y	Y			LEA	Y		Y				N		Y			
South Carolina	Y			Y		**	Y	Y		Y	LEA			Y		Y		Y	Y	Y	Y	Y	
South Dakota			Y			##	Y				LEA			Y					Y	Y	Y	Y	
Tennessee	Y			Y		Y	Y	Y				Y			Y				Y				
Texas																							
Utah	Y			Y		##		Y	Y		LEA			Y				Y					
Vermont	Y	Y	Y	Y			Y				SEA		Y	Y			Y		Y	Y			
Virginia	Y		Y			#					LEA			Y					Y	Y		Y	
Washington	Y			Y		#		Y			LEA					Y			Y	Y			
West Virginia	Y		Y				Y				C								Y				
Wisconsin	Y			Y				Y															
Wyoming	Y		Y	Y							LEA												

- evaluation requirements including testing and/or progress reports,
- availability of due process procedures,
- fire, health, life safety requirements,
- reporting of attendance, and
- immunization requirements.

Most states require some type of notification by the parents of the intent to teach their children at home. Reference to number of hours or days of instruction is indicated in the requirements of many states. Specific subjects, similar to those required of the public schools, are also indicated in the requirements. Some type of proof of student progress is also mentioned in the majority of the states. Although the requirements are stated in the laws of many states, the monitoring and enforcement authority regarding compliance is limited.

### RESEARCH OBJECTIVE TWO

The second research objective serves the purpose of reviewing and analyzing relevant judicial decisions of the federal courts and the higher state courts over the past twenty-five years and the Supreme Court cases since the early Twentieth Century. As a result of many of these decisions legislative action has followed. The statutes in each state are examined to identify the impact of these cases and the changes in the laws that have resulted.

This examination is limited to decisions of the United States Supreme Court since the early Twentieth Century and other courts at the state and federal

level over the past twenty-five years.<sup>126</sup> The included cases have had the most significant influences on state legislatures during the past ten years. Of the fifty-one cases researched, seven have been heard in the United States Supreme Court, eight in other federal courts, and the remaining thirty-six in the higher levels of the state courts. The holdings in these cases are included in Appendix B. The cases are described and related to the present statutory language.

The courts have, as the basis for their decisions, considered and balanced several competing positions: (1) That education is not a fundamental right provided by the United States Constitution, but that educating children is a legitimate state purpose.<sup>127</sup> (2) That education is important in preparing students for the future.<sup>128</sup> (3) That a parent has a right in the choices of the child's education.<sup>129</sup> (4) That the first amendment of the constitution guarantees the free exercise of religion.<sup>130</sup> (5) That the state has an interest in developing an educated citizenry that will be self sufficient.<sup>131</sup> and (6) That a statute is void for vagueness if its prohibitions are not clearly defined.<sup>131</sup>

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<sup>126</sup>The research did not attempt to analyze every case during the twenty-five year time frame designated, only those particularly relevant to the subject. This time frame did not apply to Illinois, the state on which this research--and the recommended legislation--was focused. Several circuit court cases were cited in the research, but were not included in the grouping that received more comprehensive examination.

<sup>127</sup>*San Antonio Independent School District v. Rodriguez*, 411 U.S. 137 (1973).

<sup>128</sup>*Brown v. Board of Education*, 347 U.S. 483, 493, 74 S.Ct. 686, 691 (1954).

<sup>129</sup>*Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>130</sup>*Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686 (1954).

<sup>131</sup>Fifth and fourteenth amendment of U.S. Constitution. *State v. Buckner*, 472 So. 2d 1228 (Fla. App. 1985), *State v. Newstrom* 371 N.W.2d 532 (Minn. 1985).

Table V provides data regarding the issues of these cases. Of the twenty-six states at the time of this research that have explicit statutory language allowing home instruction, thirteen have a combined total of twenty court cases construing the language over the past twenty-five years. These cases have been in the higher state courts (appellate and supreme) and in the federal court. Of these twenty cases, twelve were tried as criminal prosecutions and the remaining were civil cases. The issue of unconstitutional vagueness was considered in twelve of the twenty cases. In six of the cases from four of the explicit language states, the statutes were found to be unconstitutionally vague and in six cases from six states, the courts found that the statutes were not vague.

There were eleven cases in four of the twelve states having "equivalency language statutes", that was, where home schooling was accepted as an exemption if it were equivalent to public school education. The courts found the statutes in three cases to be sufficiently clear, and in the remaining case the determination was made on other issues. Two of the cases were tried on criminal charges.

There were nine court cases decided in the seven states grouped at the time of the research in the private school exemption category. None was tried in criminal court. Vagueness of the statute was charged in two cases and the court found the statute to be clearly worded and the vagueness charge unfounded.

The issue of vagueness was not raised in any of the four cases from three "silent statute" states. The holdings were in favor of the state.

As indicated in these fifty-one cases, it was difficult to make generalizations regarding the home instruction litigation. The cause for this was that the courts made decisions based on interpretations of state laws. Because of

## KEY FOR NUMERICAL REFERENCE OF ISSUES

1. UNCONSTITUTIONALLY VAGUE--The requirement that a criminal statute be sufficiently definite to give a person of ordinary intelligence fair notice of the behavior which is prohibited. Under this principle, a law which does not fairly inform a person of what is commanded or prohibited is unconstitutional as violative of due process.

2. EQUIVALENCY--Same value, effect, importance and worth, but not necessarily the same form.

3. PRIVATE SCHOOL--An exemption to compulsory attendance in a school that is established, conducted, and primarily supported by a nongovernmental agency.

4. BURDEN OF PROOF---In the law of evidence, the necessity or duty of affirmatively providing a fact or facts in a dispute on an issue raised between parties in a cause.

5. QUALIFICATIONS--The specific requirements for tutor or parent providing instruction in a home instruction program.

6 FIRST AMENDMENT--The prohibition of states from passing laws which deny free exercise of religion or the provision that Congress shall make no law respecting establishment of religion.

7. FIFTH AMENDMENT--The state may not deprive a person of due process or equal protection of the law.

8. FOURTEENTH AMENDMENT--The right provided which specifically prohibits a state from denying, "[T]o any person within its jurisdiction equal protection of the laws."

9. TESTING--The statutory requirements regarding testing.

10. MINIMAL STANDARDS--The statutory requirements regarding minimal standards for instruction.

11. APPROVAL--The authority to approve a home instruction program.

TABLE V (con't)

Statute	STATE	CASE	1	2	3	4	5	6	7	8	9	10	11		
EQUIVALENT	Indiana	Mazanec v. North Judson-San Pierre School		x				x							
	Iowa	Johnson v. Charles City Comm. School Bd.		x	x		x	x		x		x			
		Fellowship Baptist Church v. Benton	no	x	x		x	x		x					
		State v. Trucke		x	x		x	x		x					
		State v. Moorhead	no	X			x	X	x		x				
	Maine	State v. McDonough								x			x		
	New York	Matter of Adam D.		x								x		x	
		Matter of Andrew "TT"		x			x								
		Matter of Falk													
		Matter of Franz Children			x			x	x	x	x				
		Blackwelder v. Safnauer	no	x				x	x	x	x		x	x	
Count for EQUIVALENT:			11	3	9	3	2	6	7	2	7	1	2	3	
EXPLICIT	Arkansas	Burrow v. State	no		x		x	x					x		
		Murphy v. State			x				x	x	x	x			
	Florida	State v. Buckner	no		x	x	x								
		State v. M.M. and S.E.			x		x								
		F. & F. v. DuVal County			x	x	x								
	Georgia	Roemhild v. State	un		x				x	x					
	Minnesota	State v. Budke	un	x			x	x							
		State v. Newstrom	un	x	x		x	x							
	Missouri	Ellis v. O'Hara	un	x				x		x					
		In re Monnig	un	x			x				x				
		State v. Davis		x			x				x				
	New Mexico	State v. Edgington			x			x	x	x					
	North Carolina	Delconte v. State			x								x		
		Duro v. District Attorney			x				x		x				
	Ohio	State v. Schmidt	no					x	x				x	x	
		State v. Whisner				x	x								
	Oregon	State v. Bowman	no	x	x						x	x		x	
	Virginia	Grigg v. Commonwealth	no	x	x		x	x	x		x			x	
	West Virginia	State v. Riddle	no	x				x	x		x			x	
	Wisconsin	State v. Popanz	un		x										
Count for EXPLICIT:			20	12	8	14	6	9	10	3	10	2	2	5	



TABLE V (con't)

Statute	STATE	CASE	1	2	3	4	5	6	7	8	9	10	11
PRIVATE	Illinois	People v. Levisen		x	x	x							
	Illinois	Scoma v. Chicago Board of Education	no	x	x	x		x		x			x
	Kentucky	Kentucky State Bd., Etc. v. Rudasill			x		x				x		x
	Massachusetts	Care and Protection of Charles	no		x	x	x	x	x	x	x		x
	Michigan	Hanson v. Cushman			x	x	x	x		x			
		Sheridan Road Baptist Church v. Department			x	x	x	x					
	North Dakota	State v. Patzer		x			x	x					
		State v. Shaver			x	x	x	x		x		x	
	Texas	Howell v. State			x	x		x		x			
Count for PRIVATE:													
9	7		9	2	3	8	7	6	7	1	5	2	1 3
SILENT	Alabama	Hill v. State				x		x	x				
	Kansas	Interest of Sawyer			x		x					x	
		State v. Lowry			x		x					x	
	Nebraska	State Ex Rel. Douglas v. Bigelow			x		x	x		x			
Count for SILENT:													
4	3		4	0	0	3	1	3	2	1	1	0	2 0
Count:	4	26	44	17	20	28	16	24	26	7	23	5	7 11

the diversity of statutory language, there was no clear cut precedent governing home instruction litigation.

Equivalency, burden of proof, the definition of private schools, the first, fifth, and fourteenth amendments, minimal standards, testing requirements, approval procedures, and qualifications of instructors were other issues that were also considered in these forty-four cases as indicated in Table V.

Before examining court cases in the states, the Supreme Court cases relating to compulsory public school attendance and home instruction were critiqued.

## U.S. SUPREME COURT

The United States Supreme Court had not specifically addressed the issue of home instruction at the time of this research. Yet, its decisions in *Pierce*,<sup>132</sup> *Yoder*,<sup>133</sup> *Meyer*,<sup>134</sup> and *Farrington*<sup>135</sup> dealt with the states' authority in other areas of education, shed light upon the home instruction issue in terms of Constitutional guarantees of religious freedom, due-process and liberty interest.<sup>136</sup> The holdings

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<sup>132</sup>*Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>133</sup>*Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>134</sup>*Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>135</sup>*Farrington v. Tokushige*, 273 U.S. 284 (1927).

<sup>136</sup>James W. Tobak and Perry A. Zirkel, *Home Instruction: An Analysis of Case Law*. 8 UNIVERSITY OF DAYTON LAW REVIEW 14-16 (Fall 1982).

in *Lemon*,<sup>137</sup> *Rodriguez*,<sup>138</sup> and *Brown*<sup>139</sup> established legal precedent considered in many of the cases concerning the propriety of home instruction.

As early as 1920 the Court limited the power of the state to regulate instruction. In *Meyer*, the court invalidated a Nebraska law prohibiting the teaching of foreign language to children in the early grades, the rationale being there was no clear danger to the state.<sup>140</sup> This was the first successful challenge of a state's right to regulate education. The court then used the precedent of *Meyer* in deciding *Pierce* two years later. An Oregon statute recognizing only public education was ruled unconstitutional as unreasonably interfering with parents' rights.<sup>141</sup> That decision held that the exclusive public school attendance requirement interfered with "[T]he liberty of the parents and guardians to direct the upbringing and education of children under their control."<sup>142</sup>

The Court made it clear that education was a power of the state and, at the same time, recognized the parents' right in decisions regarding their child's education. While looking at the constitutionality of the Oregon statute requiring public education, the Court ruled, "[T]he fourteenth amendment guaranteed appellees against the deprivation of property without due process of law consequent

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<sup>137</sup>*Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971).

<sup>138</sup>*San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973).

<sup>139</sup>*Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686 (1954).

<sup>140</sup>*Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>141</sup>268 U.S. 510, 515 (1925).

<sup>142</sup>*Id.* at 534-535.

upon the unlawful interference by appellants with the free choice of patrons, present and prospective."<sup>143</sup> While protecting the parent's liberty of choice, the court also defended the State's authority.

No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.<sup>144</sup>

Shortly after *Pierce*, the Supreme Court heard *Farrington v. Tokushige*<sup>145</sup> which involved a Hawaii statute that placed formidable regulations on private schools. The Justices acknowledged the right of the state to regulate private schools but held that such regulation cannot be so excessive as to eliminate such schools or the purposes for which they exist. On this reasoning the Hawaii statute was invalidated because it unreasonably sought to "assimilate and indoctrinate a large alien population and to promote Americanism."<sup>146</sup> The court acknowledged, the right of the state to regulate nonpublic schools but the effect of the regulatory activity could not be to eliminate them.

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<sup>143</sup>*Pierce v. Society of Sisters*, 268 U.S. at 534.

<sup>144</sup>*Id.*

<sup>145</sup>273 U.S. 284 (1927).

<sup>146</sup>*Id.*

Chief Justice Burger's 1972 opinion in *Wisconsin v. Yoder*,<sup>147</sup> applying the protection of the free exercise clause of the first and fourteenth amendment, determined that the parents' religious interests outweighed the state's interest in the education of high school aged Amish children. The uniqueness of this decision was based on:

[A] long history as an identifiable religious sect and a successful and self-sufficient segment of society, the Amish have demonstrated sincerity of their religious beliefs, and interrelationship of beliefs with their mode of life, the vital role that beliefs and daily conduct play in continuing survival of Old Order Amish communities, and hazards presented by a state's enforcement of a compulsory education law generally valid as to others; beyond this, they have carried their burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education; in light of this, the state had to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting the Amish an exemption.<sup>148</sup>

The decision was limiting in that it identified that the parents' desire to remove their children from public school after the eighth grade was based on strong religious conviction, not philosophical or personal rationale.

The parent's constitutional interest in their children's education and religious instruction took precedence and overrode the children's constitutional

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<sup>147</sup>406 U.S. 205 (1972).

<sup>148</sup>*Id.* at 235.

rights to a formal education. Later cases<sup>149</sup> attempted to use the Amish exemption, citing *Yoder* as a precedent; yet, the majority of the courts accepted the uniqueness of the Amish religion and the limitations of the Supreme Court decision.

*San Antonio Independent School District v. Rodriguez*,<sup>150</sup> decided in 1973, identified that education was not a fundamental right provided by the United States Constitution but that educating children was a legitimate state purpose.

The Supreme Court decision in *Lemon v. Kurtzman* expands the neutrality test developed in prior cases to determine the constitutionality of statutes involving financial aid to nonpublic schools. This three prong test is now related to the facts in church/state litigation.<sup>151</sup>

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion. . . ; finally, the statute must not foster an excessive government entanglement with religion.<sup>152</sup>

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<sup>149</sup>*Howell v. State*, 723 S.W.2d 755 (Tex. 1986); *Fellowship Baptist Church v. Benton*, 815 F.2d 485 (8th Cir. 1987); *Johnson v. Charles City Comm. Schools Bd.*, 368 N.W.2d 74 (Iowa 1985); *Duro v. District Attorney*, 712 F.2d 96 (4th Cir. 1983), *cert. denied*, 104 S.Ct. 998, 79 L.Ed.2d 230 (1984); *Matter of Franz*, 390 N.Y.S.2d 940 (1977); *Hanson v. Cushman*, 490 F. Supp. 109, 114-115 (W.D. Mich. 1980); *State v. Shaver*, 294 N.W.2d 883 (N.D. 1980); *State v. Riddle*, 168 W. Va. 429, 285 S.E.2d 359 (1981); *Burrow v. State*, 669 S.W.2d 441 (Ark. 1984); *Scoma v. Chicago Board of Education*, 391 F. Supp. 452, 461 (N.D. Ill. 1974).

<sup>150</sup>411 U.S. 1, 35 (1973).

<sup>151</sup>KERN ALEXANDER AND M. DAVID ALEXANDER, *THE LAW OF SCHOOLS, STUDENTS, AND TEACHERS* 101 (West Publishing Co.: St. Paul, 1984).

<sup>152</sup>*Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).

Reference to *Brown v. Board of Education*<sup>153</sup> was included in this research to highlight the language of the decision relative to the importance of education in preparing students for the future and the state's interest in developing an educated citizenry that is self sufficient. The state's compelling interest in the education of its citizens was considered in numerous cases when the court was identifying which party had the burden of proof.

These Court decisions have made it clear that the state and the parent both have a right to be part of the decision regarding a child's education but there are limits regarding this right. The *Yoder* Court summarizes this by stating, "Having a high responsibility for the education of its citizens, a state has the power to impose reasonable regulations for the control and duration of basic education."<sup>154</sup>

## STATE AND FEDERAL COURT CASES AND RELEVANT LAWS

While the Supreme Court established guidelines and parameters applicable for private and home instruction, the states, acting through the courts and legislatures, applied these guidelines to matters of litigation and to legislative enactment.

The remaining forty-four federal and higher level state court cases were examined in the context of the laws of the specific state. Court cases in each state must be analyzed in terms of the statutory language--or absence of such language--

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<sup>153</sup>347 U.S. 483, 74 S.Ct. 686 (1954).

<sup>154</sup>*Wisconsin v. Yoder*, 406 U.S. 205 (1972).

in that state and, further, how that language may have been previously interpreted by the courts. States were grouped into four major categories with respect to their particular recognition of home instruction as a permissible alternative to public school attendance.

A. "Explicit Language" Statute States--States having statutes which explicitly permit home instruction.

B. "Equivalency Language" Statute States--States having statutes which simply require attendance in public schools "or their equivalent."

C. "Qualifies as Private School" States--States having statutes which do not explicitly mention home instruction but do permit private school attendance, and their courts or state boards of education construe "private schools" to include home instruction.

D. "Silent Language" Statute States--States having no statutory language at all beyond a bare compulsory attendance law, leaving the permissibility of home instruction--and guidelines for it--entirely to the courts, attorney generals, or the state rules and regulations.

Table I on page 46 indicates the diversity of the home instruction regulations for all fifty states. Significantly no state--either by statute or court decision--flatly disallows home instruction. Although the grouping is based on statutory law at the time of the research, many of the court cases analyzed were decided under earlier statutes which have been modified. This organization demonstrates trends and also helps predict how other states having statutes similar to the one repealed in the decision state might construe their laws.



## "EXPLICIT LANGUAGE" STATUTE STATES

At the time of the research, twenty-six states had statutory wording that specifically allowed for home instruction.<sup>155</sup> One might assume that such clear legislative mandated language would clarify the home instruction issue to the point where the vagaries of judicial interpretation would be unnecessary. However, seemingly unambiguous words--either in the statutes or in the regulations promulgated thereunder--were susceptible to whatever shadowy nuances that litigants, lawyers, and judges could read into them.

There was great diversity in the form and the intent of these statutes. Even among these states considerable variance was found in the requirements for a home instruction program; consequently, the court decisions within these twenty-six states followed no pattern. These states produced a total of nineteen court decisions within the time frame covered. The allegation of unconstitutional vagueness was considered eleven times. In five cases<sup>156</sup> the statutes were found to be unconstitutionally vague while the language in six<sup>157</sup> was found to be sufficiently clear.

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<sup>155</sup>Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Louisiana, Minnesota, Mississippi, Missouri, Montana, New Mexico, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming. Statutory language that explicitly allows for home instruction was normally drafted as an exemption to the compulsory attendance requirements of a state.

<sup>156</sup>*Roemhild v. State*, 308 S.E.2d 154 (Ga. 1983); *State v. Newstrom*, 371 N.W.2d 525 (Minn. 1985); *State v. Budke*, 371 N.W.2d 533 (Minn. 1985); *State v. Popanz*, 332 N.W.2d 750 (Wis. 1983); *Ellis v. O'Hara*, 612 F. Supp. 379 (D.C. Mo. 1985), *In re Monnig*, 638 S.W.2d 782 (Mo. App. 1982).

<sup>157</sup>*State v. Riddle* 168 W. Va. 429, 285 S.E.2d 359 (1981); *State v. Bowman*, 653 P.2d 254 (Or. App. 1982); *State v. Buckner*, 472 So.2d 1228 (Fla. App. 1985); *State v. Schmidt*,

Test of vagueness of a statute is whether language conveys sufficiently definite warning as to proscribed conduct when measured by common understanding and purpose. The statute must give reasonable notice that a person's conduct is restricted by the statute.<sup>158</sup>

Stricter standards regarding vagueness are applied when criminal liability is charged as compared to a state that finds a parent guilty of a misdemeanor for non-compliance of the compulsory attendance statutes. "When the state imposes criminal penalties,. . .citizens are constitutionally guaranteed that the offense be defined in the statute with sufficient clarity to permit them to understand the nature of the conduct prohibited."<sup>159</sup> These constitutional guarantees were found to be lacking in the *Budke*,<sup>160</sup> *Newstrom*<sup>161</sup>, *Roemild*<sup>162</sup>, *Ellis*<sup>163</sup> and *Popanz* <sup>164</sup> decisions in which criminal penalties would have been placed on the parents if the home instruction statutes had not been determined to be unconstitutionally vague. The Arkansas, Florida, Ohio, Oregon, and West Virginia statutes which also had

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29 Ohio 3d 32, 505 N.E.2d 627 (1987); *Grigg v. Commonwealth of Virginia*, 224 Va. 356, 297 S.E.2d 799 (1982); *Burrow v. State*, 669 S.W.2d 441 (Ark. 1984).

<sup>158</sup>*State v. Buckner*, 472 So. 2d at 1229 (Fla. App. 1985). See also, *Reynolds v. State*, 383 S.2d 228, 229 (Fla. 1980).

<sup>159</sup>*State v. Newstrom*, 371 N.W.2d 525, 532 (Minn. 1985).

<sup>160</sup>*State v. Budke*, 371 N.W.2d 533 (Minn. 1985).

<sup>161</sup>*State v. Newstrom*, 371 N.W.2d 525 (Minn. 1985).

<sup>162</sup>*Roemhild v. State*, 308 S.E.2d 154 (Ga. 1983).

<sup>163</sup>*Ellis v. O'Hara*, 612 F. Supp. 379 (D.C. Mo. 1985).

<sup>164</sup>*State v. Popanz*, 112 Wis. 2d 166, 332 N.W.2d 750 (1983).

criminal penalties for non-compliance stood the test of clarity in *Burrow*,<sup>165</sup> *Buckner*,<sup>166</sup> *Schmidt*,<sup>167</sup> *Bowman*,<sup>168</sup> and *Riddle*.<sup>169</sup>

## Arkansas

As a result of the Arkansas Supreme Court<sup>170</sup> ruling that educating children at home did not meet the requirements for school attendance set forth in the compulsory attendance laws, their statutes were amended in 1985 to provide that parents could educate their children at home.<sup>171</sup> Additional changes were made in the regular session of the Arkansas 76th General Assembly to clarify the language. The statutory language was explicit in terms of the requirements for parents or guardians desiring to educate their own children at home.<sup>172</sup> A 1988 decision by the Eighth U.S. Circuit Court of Appeals tested the new statutory language requiring the same standardized achievement tests for students taught at home as that given the students in public schools. It was held by the courts that this form of

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<sup>165</sup>*Burrow v. State*, 669 S.W.2d 441 (Ark. 1984).

<sup>166</sup>*State v. Buckner*, 472 So.2d 1228, 1229 (Fla. 1985).

<sup>167</sup>*State v. Schmidt*, 29 Ohio 3d 32, 505 N.E. 2d 627 (1987)

<sup>168</sup>*State v. Bowman*, 653 P.2d 254 (Or. App. 1982).

<sup>169</sup>*State v. Riddle*, 285 S.E.2d 359 (W. Va. 1981).

<sup>170</sup>*Burrow v. State*, 669 S.W.2d 441 (Ark. 1984).

<sup>171</sup>Act 42, section 2, 75th General Assembly, First Extraordinary Session, Section 11, Emergency Clause.

<sup>172</sup>ARK.STAT. ANN. § 80-1503.4 -.11 (1987).

monitoring was "the least restrictive system to assure its goal of adequately educating its citizens."<sup>173</sup>

## Florida

Florida's statutes provides flexible provisions to allow parents to teach their children at home. If the parent is not certified, the parent submits to the district superintendent a certified teacher's evaluation of the child's progress, or the parent submits the result of an achievement test administered by a certified teacher.

Prior to 1985 the Florida administrative Code Rule 6A-1-951 stated that a private tutor must have a valid Florida teacher's certificate. Three different district courts of appeals in Florida, from the period of 1973 to 1985,<sup>174</sup> dealt with the same basic issue of parents claiming that their tutoring at home constituted a private school, thus avoiding the requirements established for a private tutor.

The rationale provided by the parents of T.A.J. and E.M.F. for not enrolling their children in the public school concerned race mixing. The court determined that the program at home did not comply with the statutory requirements regarding instruction by a qualified tutor, nor did it qualify as a private or denominational school.<sup>175</sup>

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<sup>173</sup>*Murphy v. Arkansas*, 852 F.2d 1039 (8th Cir. 1988).

<sup>174</sup>*F. and F. v. Duval County*, 273 So. 2d 15 (Fla. 1973); *State v. M.M. and S.E.*, 407 So. 2d 987 (Fla. App. 1981); *State v. Buckner*, 472 So. 2d 1228.

<sup>175</sup>*F. and F. v. Duval County*, 273 So. 2d 15 (Fla. 1973).

Parents of M.M. and S.E., knowing that a child cannot be truant if attending a private school, established a private school in their home.<sup>176</sup> The court stated that the legislature distinguished between private schools and home instruction with a qualified private tutor. The mother of the children was the tutor, and the home school did not fit the statutory definition of private schools; consequently, the court determined that the children were dependent children within the jurisdiction of the court, and the parents were found guilty.<sup>177</sup>

Although the Florida statute did not at the time of the *M.M.*<sup>178</sup> decision regulate the establishment of private schools, the court declared, "Florida parents, unqualified to be private tutors, cannot proclaim their home to be private schools and withdraw their offspring from public school."<sup>179</sup>

The Florida decisions of the courts have been consistent. Thus, as recently as 1985 in *State v. Buckner* it was held that "The statute clearly prohibits an unqualified parent from teaching a child at home under the guise that a private school has been established."<sup>180</sup>

Effective July 1, 1985, and subsequent to the *M.M.* and *Buckner* cases, the Florida legislature defined home education and established criteria for home education programs.<sup>181</sup> The new language stated, "A home education program is

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<sup>176</sup>*State v. M. M. and S. E.*, 407 So. 2d 987, 990 (Fla. App 1981).

<sup>177</sup>*Id.* at 991.

<sup>178</sup>*Id.*

<sup>179</sup>*Id.* at 990.

<sup>180</sup>*State v. Buckner*, 472 So. 2d 1228, 1229 (Fla. 1985).

<sup>181</sup>FLA. STAT. ANN. § 228.041 (West Supp. 1988).

a sequentially progressive instruction of a student in his or her home by his or her parent or guardian in order to satisfy the requirements of §232.01."<sup>182</sup> The exemptions under these statutes were clearly written to include private schools and home education, each with specific limitations.<sup>183</sup> Alternate requirements were provided if the parent was not certified by the state agency.

## Georgia

Georgia's compulsory attendance law was amended in 1984 to allow parents or guardians to teach their children in a home study program that met specific requirements set forth in the statutes.<sup>184</sup> The authority for home schools was clearly stated: "Every parent, guardian, or other person residing within this state, having control or charge of any child or children between their seventh and sixteenth birthdays shall enroll and send such child or children to a public school, a private school, or a home study program."<sup>185</sup> Anyone found guilty of the misdemeanor of non-compliance with these requirements listed in the statutes was subject to a fine of one hundred dollars.<sup>186</sup> Enforcement of the statute was vested in the local superintendent although the superintendent was not given power to

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<sup>182</sup>Id. § 232.01 contains the compulsory school attendance language.

<sup>183</sup>FLA. STAT. ANN. § 228.041(34) §232.01 (West Supp. 1988).

<sup>184</sup>GA. CODE ANN.. § 20-2-690(c)(1-8) (1987).

<sup>185</sup>Id.

<sup>186</sup>GA. CODE ANN. § 20-2-690(d) (1987).

require the parents to produce evidence of their compliance with the law. The only action the superintendent might take was to request the information and, if appropriate, initiate legal proceedings.

In 1983 Terry and Vickie Roemhild, parents of three school-aged children in Georgia, were arrested for failing to enroll their children in either a public or private school as required by the state statutes. Their choice was based partly on religious beliefs. After researching the issue, they notified the local school and the state agency of their decision to provide home instruction for their children. Lacking the definition of private schools, the Supreme Court of Georgia found that Georgia's compulsory school attendance law was not sufficiently definite. "[W]e find OCGA § 20-2-690(A) (Code Ann. § 32-2104) fails to establish minimum guidelines for the exercise of such judgment, and is, therefore, unconstitutionally vague."<sup>187</sup> In making their decision, the judges made it clear that they were not passing judgment on the propriety of home instruction, the power of the legislature to exclude it, or the power of the legislature to approve it with or without restriction. Instead their decision focused upon the application of the "[B]asic principle of due process that an enactment is void for vagueness if prohibitions are not clearly defined."<sup>188</sup>

The action of the court prompted the adoption of new statutory language in 1984, as well as supporting rules and regulations, to define private schools and

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<sup>187</sup>*Roemhild v. State*, 308 S.E.2d 154, 159 (Ga. 1983).

<sup>188</sup>*Id.* at 157. See also, *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 294, 298, 33 L.Ed.2d 222 (1972).

to establish the requirements for home study programs.<sup>189</sup> With the adoption of the requirements contained in *Private Schools and Home Study Programs*,<sup>190</sup> the concerns raised by the Supreme Court of Georgia were resolved.

## Minnesota

The 1986 Minnesota legislature established a special task force, comprised of both public and nonpublic representatives, to develop recommendations for a new compulsory attendance law after a portion of the previous law was declared unconstitutional. One of the unique features of the legislation, passed in the 1987 legislative session, was that if a nonpublic school or home school was recognized by an approved accrediting agency, the program was exempt from the statutory requirements except that of reporting the name, age, and address of each child receiving instruction.<sup>191</sup>

During the time frame of twenty-five years designated for review in this research, two cases questioned the constitutionality of the Minnesota compulsory attendance statute. The decisions of these cases were the cause of the new legislation.

Jeanne Newstrom, a Minnesota mother of two school aged children, was convicted in a trial court of a violation of the state's compulsory attendance law

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<sup>189</sup>GA. CODE ANN. § 20-2-690 32-9914 (a) (c) (1987).

<sup>190</sup>GA. CODE ANN. § 20-2-690.1-8 (1987).

<sup>191</sup>MINN. CODE ANN. § 120.102 (4) (West 1987).



because she was educating her children at home and she was not a certified teacher. The statute required that the teacher's qualifications be "essentially equivalent" to the minimum standards for teachers of the same grades or subjects. The school's and the trial court's interpretation of "essentially equivalent" was to require certification although the statute was silent on the point. The Minnesota Supreme Court held that the statute which imposed criminal penalties was unconstitutionally vague.<sup>192</sup>

Donald and Kathleen Budke were likewise convicted of violating Minnesota's compulsory school attendance law. On appeal the conviction was reversed because the court found that the Budke's first amendment rights had been infringed. The Supreme Court of Minnesota affirmed the reversal, referring to the *Newstrom* decision handed down the same day.<sup>193</sup> Having found that the "essentially equivalent" requirement was void for vagueness, the court never reached the issue of whether the statute violated the Budke's religious freedom protected by the first amendment.

Following these two decisions, a temporary home school law was enacted requiring all home schools in Minnesota to report to their local superintendent the names, addresses, and ages of all children taught at home. In addition the law established a twelve-member task force to make recommendations to the legislature by February 1, 1987, for a permanent home school law. Language of the new law,

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<sup>192</sup>*State v. Newstrom*, 371 N.W.2d 525 (Minn. 1985).

<sup>193</sup>*State v. Budke*, 371 N.W.2d 533 (Minn. 1985).

adopted on May 21, 1987, was explicit regarding definitions and responsibilities.

The section on compulsory instruction states:

The parent of a child is primarily responsible for assuring that the child acquires knowledge and skills that are essential for effective citizenship.<sup>194</sup>

The definition of "school" included public school, nonpublic, church-related, or home instruction. If a "school" was accredited by one of the six recognized accrediting agencies, its only responsibility to the state was to report to the appropriate school district superintendent the names, addresses, and ages of the students. Therefore, at the time of this study in Minnesota, parents assuming the responsibility for their children's education have the legal right to educate them at home.

## Missouri

According to the new language adopted in 1986 a "home school" was defined in the Missouri statutes as a school that had as its primary purpose the provision of private or religious-based instruction.<sup>195</sup> The parent was required to maintain specified evidence that the child was receiving regular instruction. In addition to the description of the purpose, the language included the specific course requirements, the required number of hours of instruction, and the required student

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<sup>194</sup>MINN. STAT. ANN. § 120.101, Subdivision 1 (West 1987).

<sup>195</sup>MO. STAT. ANN. § 167.031 (Vernon 1988).

records. There was no monitoring procedure established to verify that the requirements were fulfilled. In fact, the statute stated:

For the purpose of minimizing unnecessary investigations due to reports of truancy, each parent, guardian, or other person responsible for the child who causes his child to attend regularly a home school may provide within thirty days after the establishment of the home school and by September first annually thereafter to the recorder of deeds of the county where the child legally resides, or to the chief school officer of the public school district when the child legally resides, a signed, written declaration of enrollment stating their intent for the child to attend a home school.<sup>196</sup>

In Missouri three cases were adjudicated, all involving different legal issues, but all decided in favor of the parents providing home instruction. In *State v. Davis*<sup>197</sup> the court held that unless the state could prove that the parents failed to provide their child with proper home instruction, the criminal conviction could not stand. The state has the burden of proving that the parents violated the statutes and, since it was a criminal proceeding carrying a jail sentence and fine, the proof had to be beyond a reasonable doubt. This decision was based on the due-process clause of the United States Constitution requiring that the defendant be proved guilty beyond reasonable doubt of every element necessary to constitute the crime. The dissenting opinion reasoned that the burden of showing home instruction to be

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<sup>196</sup>MO. STAT. ANN. § 167.042 (Vernon 1988).

<sup>197</sup>598 S.W.2d 189 (Mo. App. 1980).

equivalent should fall on the parents, the rationale being that requiring the state to make such proof might prevent the state from enforcing the school attendance law.

The parents appealed the decision of *In re Monnig* that their children were neglected because they failed to provide the children with an education as required by law.<sup>198</sup> Although the same statute was involved, the proceedings here were civil, not criminal. No penalties were sought against the parents; rather, it was a juvenile court proceeding to determine if the children were neglected. On appeal it was again held that even in a civil suit the state had the entire burden of proof, i.e., not only that the parents failed to enroll their children in school, but also that they failed to provide an equivalent home instruction program. However, because no criminal sanctions were sought, the burden could have been met on each issue by a preponderance of the evidence and that it need not be beyond a reasonable doubt as in *Davis*. The Court of Appeals reversed and remanded the case because in the juvenile court, which held against the parents, the state failed to produce evidence that the home instruction program provided the children was not sufficiently equivalent to public education.<sup>199</sup>

The vagueness of the earlier Missouri statute was raised in *Ellis v. O'Hara* by the plaintiffs stating, "[N]either regulations nor guidelines have been promulgated to assist in the interpretation of this language."<sup>200</sup> The case began in the same mode as *Monnig*--a criminal proceeding in the juvenile court against the

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<sup>198</sup>*In re Monnig*, 638 S.W.2d 782 (Mo. App. 1982).

<sup>199</sup>*Id.*

<sup>200</sup>*Ellis v. O'Hara*, 612 F. Supp. 379 (D.C. Mo. 1985).

parents for neglect. However, the parents brought a separate civil action seeking to have the compulsory attendance statute declared unconstitutional on the grounds that "substantially equivalent" requirement was unconstitutionally vague. The parents prevailed, the court holding that as the legislature provided no guidelines by which to measure "equivalence," nor had any rules or regulations been adopted to provide such a measure, "persons of common intelligence must necessarily guess at its meaning and differ as to its application."<sup>201</sup> Since the Missouri statute provided criminal penalties for educational neglect and affected the exercise of constitutionally protected rights, a more stringent vagueness test was held to apply. The court agreed with the parents and found that the parents were not given an adequate definition of "substantially equivalent" and that the legislature did not provide minimal guidelines for law enforcement. The court's determination was based on the facts that the statute did not comply with due process requirements and was unconstitutionally vague.<sup>202</sup> Significantly the court stayed the effective date of the order invalidating the statute until the then current term of the Missouri legislature ended, thereby giving the state the opportunity to cure the vagueness either by statutory amendment or the promulgation of rules and regulations. In the interim parents were allowed to educate their children at home. A new statute with explicit wording was adopted and the effective date was June 19, 1986.<sup>203</sup>

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<sup>201</sup>Id. at 380.

<sup>202</sup>Id. at 381.

<sup>203</sup>MO. STAT. ANN. § 167.031-167.071 (Vernon 1988).

## New Mexico

In 1985 the New Mexico compulsory school attendance statute was amended by inserting "home school" in the introductory paragraph: "Any qualified student and any person who because of his age is eligible to become a qualified student, as defined by the Public School Finance Act [22-81-1 to 22-8-42 NMSA 1978] until attaining the age of majority shall attend a public school, a private school, a home school or a state institution."<sup>204</sup> The statute also provided the following definition: " 'Home school' means the operation by a parent, guardian or other person having custody of a school-age person of a home study program which provides a basic academic educational program including but not limited to reading, language arts, mathematics, social studies and science."<sup>205</sup> The requirements for a home school were established in NMSA 22-1-2.1.

Prior to the 1985 amendment, the standard used by the New Mexico courts to review alternatives to the state's earlier compulsory attendance statute was "[W]hether it bears some rational relation to a legitimate state interest."<sup>206</sup> This was illustrated in *State v. Edgington* where the higher court held that the disapproval of home instruction by a parent, guardian, or custodian of a child did not violate equal protection. Since the court refused to apply the strict scrutiny test to the statute, it

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<sup>204</sup>N.M. STAT. ANN. § 22-12-2 A (1986).

<sup>205</sup>N.M. STAT. ANN.. § 22-1-2 U (1986).

<sup>206</sup>*State v. Edgington*, 663 P.2d 374, 377 (N.M. App. 1983).

fell upon the defendant to show that the statute served "no valid governmental interest."<sup>207</sup>

## North Carolina

The General Assembly of North Carolina, in the 1987 session, ratified a bill to permit home instruction as a means to comply with the compulsory attendance statutes. Amendments in the language of the compulsory attendance statutes included the definition of home instruction. Additional language to implement the new home instruction exemption contained the qualifications for the instructor, testing and immunization requirements, and the waiver of sanitation and safety inspection. The Governor's office was named as the responsible agency for the collection of data regarding home instruction programs.

Prior to 1988 North Carolina's general statutes made no provisions for home instruction. The statutes defined a nonpublic school as having one or more of the following characteristics: (1) It was accredited by the State Board of Education; (2) it was accredited by the Southern Association of Colleges and Schools; (3) it was an active member of the North Carolina Association of Independent Schools; or (4) it received no funding from the State of North Carolina.<sup>208</sup> In 1979 the North Carolina General Assembly amended the prior law by eliminating any reference to qualified tutors for nonpublic schools, reporting requirements and

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<sup>207</sup>Id.

<sup>208</sup>N.C. GEN. STAT. § 115C-555 (1983).

approval of curricula. The requirements to comply with attendance, health and safety standards, and administering tests were included in the amended statutes, but the term 'school' was not defined.<sup>209</sup>

In a 1983 U.S. Court of Appeals decision, *Duro v. District Attorney*, the parent initiated action against the district attorney in North Carolina alleging that their religious beliefs were infringed upon by the North Carolina compulsory attendance laws.<sup>210</sup> The lower court, referring to *Yoder*, found there was no compelling state interest in preventing parents from educating their children at home.<sup>211</sup> The Court of Appeals reversed the decision, indicating the court's chief concern was for the children. The decision stated that "North Carolina has maintained a compelling interest in compulsory education for the children of the state."<sup>212</sup> The implications of this appellate decision was the state's interest in education of its citizens outweighs the religious interest of the parents' desire to educate their children at home.

In 1985, in the *Delconte v. State of North Carolina* decision, the North Carolina Supreme Court interpreted the 1979 amendments to permit greater latitude for children to be educated at home, thus upholding the parent's right to provide

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<sup>209</sup>Id. at 646.

<sup>210</sup>712 F.2d 96 (4th Cir. 1983), *cert. denied*, 104 S.Ct. 998, 79 L.Ed.2d 230 (1984).

<sup>211</sup>Edward Knox Proctor, *Delconte v. State: Some Thoughts on Home Education*, 64 NORTH CAROLINA LAW REVIEW 1316 (1986).

<sup>212</sup>712 F.2d at 99 (N.C. 1983).



home instruction.<sup>213</sup> This decision was similar to *Levisen*<sup>214</sup> in that the home instruction program provided by the Delcontes was an acceptable exemption to the compulsory attendance statutes. The decision was based on the fact that since the parent's home did not receive state funds, it was considered a nonpublic school.<sup>215</sup> Reversing the Court of Appeals decision that the Delconte's home did not qualify as a nonpublic school, the higher court expressed the following interpretation of the legislative purpose: "Indeed, the evident purpose of these recent statutes is to loosen, rather than tighten, the standards for nonpublic education in North Carolina. It would be anomalous to hold that these recent statutes were designed to prohibit home instruction when the legislature obviously intended them to make it easier, not harder, for children to be educated in nonpublic school settings."<sup>216</sup>

An interesting twist to the *Delconte* decision involved *Duro*. The *Delconte* decisions at the lower court providing latitude to parental rights relied on *Duro*'s lower court rulings before *Duro*'s reversal. Fortunately the courts evaded the problem by calling the home a nonpublic school, thereby avoiding the constitutional issue, stating:

We do not, of course, purport to decide on this constitutional issue. We rely, instead, on the familiar canon of statutory

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<sup>213</sup>*Delconte v. State*, 313 N.C. 384, 329 S.E.2d 636, 646 (1985).

<sup>214</sup>*People v. Levisen*, 404 Ill. 574, 90 N.E.2d 213 (1950).

<sup>215</sup>At the time this case was heard, one of the requirements to qualify a school as nonpublic in North Carolina was that it receive no funding from the state.

<sup>216</sup>329 S.E.2d. 636, 646.

construction that (w)here one of the two reasonable constructions will raise a serious constitutional question, the construction which avoids this question should be adopted.<sup>217</sup>

The court continues in its reference to *Nova University v. Board of Governors*:

The cardinal principle of statutory construction is to save and not destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. *Even to avoid a serious doubt the rule is the same.*<sup>218</sup>

The justices stated that it was an issue of public policy as to whether home instruction should be permitted and the legislature should make the determination whether it would be good public policy.

Ohio

A parent was able to obtain an exemption from Ohio's compulsory attendance laws from the district superintendent when the student in question was to be taught by "a person qualified to teach the branches in which instruction was

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<sup>217</sup>Id. at 647. The constitutional issue was whether the statute can prohibit home instruction and whether the states prove it has a compelling interest in the issue.

<sup>218</sup>*Nova University v. Board of Governors*, 305 N.C. 156, 287 S.E.2d 872 (1982), as cited in *Delconte v. State*, 329 S.E.2d 648 (N.C. 1985). Another case dealing with home instruction, following this traditional approach of avoiding constitutional issues whenever possible, was *State v. Trucke*, 410 N.W.2d 242 (Iowa 1987).

required, and such additional branches, as the advancement and needs of the child may, in the opinion of such superintendent, require."<sup>219</sup>

Although the State Board of Education in Ohio had the authority to adopt rules setting forth the conditions for home education, they did not do so, leaving the ultimate decision to the local superintendent. The Ohio statute has been in effect since the late 1970's and has held up to judicial scrutiny.

Citing religious beliefs, Richard and Pamela Schmidt refused to seek the approval of the local superintendent to educate their daughter Sara at home. "Appellants claim an impermissible infringement of their religious beliefs because the approval requirement was not the 'least restrictive means' that Ohio could have employed to achieve its interest."<sup>220</sup> The court used the three-prong test developed in *Lemon v. Kurtzman*<sup>221</sup> and found that the statutes did not infringe upon the right of the parents to exercise their religious beliefs freely.<sup>222</sup> The court upheld as reasonable the Ohio statute which required approval from the local school district superintendent in order for a student to be excluded from the requirements of compulsory attendance laws. The issues of vagueness challenges and religious infringement were raised and rejected in this 1987 Ohio Supreme Court, "[T]hat

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<sup>219</sup>OHIO REV. CODE ANN. § 3321.04 (Anderson 1985).

<sup>220</sup>*State v. Schmidt*, 29 Ohio 3d 32, 505 N.E.2d 628 (1987).

<sup>221</sup>403 U.S. 602, 619 (1971).

<sup>222</sup>*Wisconsin v. Yoder*, 406 U.S. 205 (1972); *State v. Whisner*, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976). The three-prong test: (1) Are the religious beliefs truly held? (2) Does the statutory language infringe upon the appellant's constitutional right to the free exercise of religion? (3) If both (1) and (2) have been satisfied by the appellant, has the state demonstrated that its compelling interest in the education of its citizens cannot reasonably be achieved by means that would impose a lesser infringement upon appellant's right to the free exercise of religion?

parents must seek the approval of the local superintendent for their home education program in order to obtain excuse from compulsory attendance laws reasonably furthers the state's interest in the education of its citizens and does not infringe upon free exercise of religion."<sup>223</sup>

The dissenting opinions, however, questioned giving the superintendent "the unbridled discretion to determine if a home-schooling teacher is qualified." The justices stated that the statute should be considered void for vagueness because of this requirement.<sup>224</sup> The United States Supreme Court declined to review this Ohio Supreme Court holding, thus allowing the decision to stand, tacitly upholding the requirement of seeking prior approval.<sup>225</sup>

An earlier decision found that the state's required minimum standards for the operation of all schools, including nonpublic schools, was an infringement on the first amendment free exercise of religion guarantees.<sup>226</sup> The only reference to this case in *Schmidt* was the use of the three-prong test. These two decisions, made eleven years apart, indicate the confusion that may arise if the specific issues of the case are not considered.

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<sup>223</sup>*State v. Schmidt*, 505 N.E.2d 627, 631-32 (Ohio 1987).

<sup>224</sup>*State v. Schmidt*, Dissenting opinions of Locher and Brogann, J. J., 505 N.E.2d 627, 630 (Ohio 1987).

<sup>225</sup>*State v. Schmidt*, Dissenting opinions of Locher and Brogann, J. J., 505 N.E.2d 627, 630 (Ohio 1987).

<sup>226</sup>*State v. Whisner*, 351 N.E.2d 750, 751 (Ohio 1976).

## Oregon

An equivalent education by a parent or a private tutor is an acceptable exemption to public school attendance in Oregon: "In the following cases, children shall not be required to attend public full-time schools: . . . Children being taught for a period equivalent to that required of children attending public schools by a parent or private teacher the courses of study usually taught in grades one through twelve in the public school."<sup>227</sup> The specific means to implement an acceptable home instruction program are listed in §581-21-026 of the Oregon Administrative Rules. Included in the rules are options for evaluating the child's progress and a requirement of notification to the superintendent of the intent to educate a child at home.<sup>228</sup>

Oregon's statute was interpreted in *State v. Bowman*.<sup>229</sup> Kay Bowman had applied for and received approval to teach her children at home in one Oregon community, but found when moving to another community within the state that the requirements to receive approval from the superintendent in the new community were more comprehensive. She continued to educate her children at home notwithstanding that her approval to do so was revoked. Criminal prosecution followed, and Mrs. Bowman defended herself by asserting that the exemption provisions were unconstitutionally vague and improperly delegated legislative

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<sup>227</sup>OR. REV. STAT. § 339.030 (5) 339.035 (2) (3) (b) (1987).

<sup>228</sup>581-21-026 of the Oregon Administrative Rules.

<sup>229</sup>653 P.2d 254 (Or. App. 1982).

power to the local superintendent. The courts disagreed and affirmed the lower court decision that Mrs. Bowman acted with criminal negligence. The defendant did not enroll or register the child in school as required and criminal prosecution resulted.<sup>230</sup>

## Pennsylvania

In the closing hours of the 1988 legislative session action was taken to rectify the order of the federal district court in the *Jeffrey*<sup>231</sup> case. The court declared the previous compulsory attendance language to be unconstitutionally vague because the statute did not define a properly qualified "private tutor." The court ordered that either the Secretary of Education promulgate rules and regulations or the legislature enact legislation remedying the vagueness of the statute. In addition the legislative imitative, established explicit language to govern home instruction. Prior to the beginning of a home instruction program, the parents are to provide affidavits to the local superintendent assuring their intent to comply with the requirements of the statutes. The affidavit is to indicate that the parent or legal guardian is the supervisor of the program and has as a minimum a high school diploma.

Although there was no higher court opinion for the time frame of this research, according to HOME SCHOOL COURT REPORT federal civil action, similar

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<sup>230</sup>*Id.*

<sup>231</sup>*Jeffrey v. O'Donnell*, No. CV 86-1560 (D.C.M.D. Penn. August 1988.)

to the *Jeffrey* case, has been taken against approximately eleven local superintendents whose home policies allegedly either infringed on parents' constitutional rights or prohibited them from exercising those rights altogether.<sup>232</sup>

Prior to *Jeffrey*, each approval agency established its own criteria for determining the acceptability of such a program. As a result of Act 169,<sup>233</sup> if the superintendent believes that appropriate education is not taking place, the supervisor of the program may be asked to provide the portfolio of the child's work and the evaluation.

## Virginia

The 1984 Virginia General Assembly amended the compulsory attendance language in the code to provide for home instruction as an alternative to compulsory school attendance and expanded the choices that parents had in providing an acceptable home education program.<sup>234</sup> A new section was enacted setting forth the requirements for such a program. Of the four alternatives presented for a home instruction program to be an acceptable alternative, the most liberal required that the parent "provides a program of study or curriculum which, in the judgment of the division superintendent, includes the standards of learning objectives adopted by

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<sup>232</sup>*Pennsylvania Under Fire*, 3:1 HOME SCHOOL COURT REPORT 2 (Washington Jan.-Feb. 1987).

<sup>233</sup>PA. CONS. STAT. § 13-1327.1.

<sup>234</sup>VA. CODE ANN. § 22.1-254.1 (1988).

the Board of Education for language arts and mathematics and provides evidence that the parent is able to provide an adequate education for the child."

The preceding amended statute resulted from *Grigg v. The Commonwealth of Virginia*.<sup>235</sup> In 1982 Robert and Vicki Grigg contended they had established a private school and cited *People v Levisen*,<sup>236</sup> but the Virginia court stated, "Unlike our school attendance law, however, the Illinois statute did not provide for home instruction as a separate category of exemption in addition to attendance at a private school."<sup>237</sup> Thus, the court reasoned that while home instruction could qualify as a private school where there was no other statutory authority for home instruction, it could not qualify where a statute expressly provides for home instruction. The Griggs did not meet the qualifications for a tutor or a teacher prescribed in the statute.

The Griggs also attacked the statute for vagueness. The court rejected the argument, stating that this attack diverted the attention of the court from the heart of the case; namely, the statutory language dealing with home instruction. The court acknowledged the interest of the parents to be sincere but legally insufficient.<sup>238</sup> Also since the court found the case to be civil in nature, it held that a stricter standard of proof than was necessary was applied at the trial court level.

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<sup>235</sup>224 Va. 356, 297 S.E.2d 799, 801 (1982).

<sup>236</sup>The Illinois Supreme Court determined that the term "private school" in the context of *People v. Levisen*, 404 Ill. 574, 90 N.E.2d 213 (1950), includes home schooling if the teacher is competent, the required subjects are taught, and the student receives an education at least equivalent to public schooling.

<sup>237</sup>*Grigg v. Commonwealth of Virginia*; 224 Va. 356, 297 S.E.2d 799, 801-02 (1982).

<sup>238</sup>*Id.* at 805.



## West Virginia

On July 1, 1987, the West Virginia compulsory education laws were amended to provide additional stipulations to the process of approval and due-process procedures for the home instruction exemption. The statute established the options available to qualify to provide home instruction and the procedures required to evaluate student progress.

The Supreme Court of Appeals in West Virginia in 1981 ruled against Bobby and Esther Riddle, who refused to send their children to school for religious reasons.<sup>239</sup> When criminally prosecuted for failing to send their children to school, they claimed they had been deprived of their first and fourteenth amendment rights. The court pointed out the difference between this case and *Yoder*.<sup>240</sup> Although the Riddle's religious beliefs were sincerely held, as in *Yoder*, an "inappropriate vehicle for presentation of their first amendment claim"<sup>241</sup> was utilized. The West Virginia statute allowed for home education and provided for an approval process. The Riddles chose not to utilize the process. The court stated: "[I]t is not appropriate for a person entirely to disregard the statute, await criminal prosecution, and then assert a first amendment defense."<sup>242</sup>

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<sup>239</sup>*State v. Riddle*, 285 S.E.2d 359 (W. Va. 1981).

<sup>240</sup>*Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>241</sup>*State v. Riddle*, 285 S.E.2d 359, 362 (W. Va. 1981).

<sup>242</sup>*Id.* at 364.

## Wisconsin

In 1983 the Wisconsin statute was amended to provide that a "home-based private educational program," meeting specified criteria, may be substituted for attendance in a public or private school.<sup>243</sup> The new language defines a "'[H]ome-based private educational program' as a program of educational instruction provided to a child by the child's parent or guardian or by a person designated by the parent or guardian. An instructional program provided to more than one family unit does not constitute a home-based private educational program."<sup>244</sup>

The statutory change was a result of the decision reached in *State v. Popanz*. In this 1983 decision the Wisconsin Supreme Court held that the compulsory attendance statute was void for vagueness due to the lack of a definition of "private school."<sup>245</sup> The earlier statute was found to be "singularly silent on what constitutes a private school."<sup>246</sup> The court's opinion also stated, "In any event the legislature or its delegated agent should define the phrase 'private school'; citizens or the courts should not have to guess at its meaning."<sup>247</sup> Violation of Wisconsin's compulsory attendance statute is a criminal offense, and therefore strict standards are established for clarity. "A criminal statute must be sufficiently

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<sup>243</sup>WIS. STAT. § 118.15 (4) (Supplement 1987).

<sup>244</sup>WIS. STAT. § 118.15 (Supplement 1987).

<sup>245</sup>*State v. Popanz*, 112 Wis. 2d 166, 332 N.W.2d 750, 756 (Wisc. 1983).

<sup>246</sup>*Id.* at 750.

<sup>247</sup>*Id.* at 755.

definite to give person of ordinary intelligence who seeks to avoid its penalties fair notice of conduct required or prohibited."<sup>248</sup>

#### Other States<sup>249</sup>

The remaining thirteen states with explicit statutes have had no litigation of substance regarding home instruction during the past twenty-five years.

Accredited home correspondence programs are provided by the State Department of Education in Alaska or through the respective local districts.<sup>250</sup> This statutory provision is responsive to the unusual geography of the state.

The requirements for approval of an exemption to compulsory attendance in Arizona are set forth in the Arizona statute.<sup>251</sup> There is a clear distinction made in the definition of "home instruction" and "private school." "For the purpose of this paragraph, private school means a nonpublic institution other than the child's home where instruction is imparted."<sup>252</sup> The requirements for home instruction are more explicit, including curriculum and conditions for accountability. The county school superintendent is given the power to approve regularly organized private schools and home instruction programs.

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<sup>248</sup>Id. at 750.

<sup>249</sup>Alaska, Arizona, Colorado, Louisiana, Mississippi, Montana, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, Wyoming.

<sup>250</sup>ALASKA STAT. § 14-30.010 (1984).

<sup>251</sup>ARIZ. REV. STAT. ANN. § 15-802 (B)(1) (Supp. 1987).

<sup>252</sup>ARIZ. REV. STAT. ANN. § 15-802 (B)(2) (Supp. 1987).

Passed in April of 1988, the Colorado statute on home instruction declares that the choice of education is a primary right of parents and home-based education is a legitimate alternative to classroom instruction. " 'Nonpublic home-based educational program' means the sequential program of instruction for the education of a child which takes place in a home, which is provided by the child's parent or by an adult relative of the child designated by the parent, and which is not under the supervision and control of a school district. This educational program is not intended to be and does not qualify as a private and non-profit school."<sup>253</sup>

The definition of a school in the Louisiana statutes for compulsory attendance purposes included the home study exemption. The language states: "Solely for purposes of compulsory attendance in a nonpublic school, a child who participates in a home study program approved by the Board of Elementary and Secondary Education shall be considered in attendance at a day school; a home study program shall be approved if it offers a sustained curriculum of quality at least equal to that offered by public schools at the same grade level."<sup>254</sup>

Legitimate home instruction programs in Mississippi are "[T]hose not operated or instituted for the purpose of avoiding or circumventing the compulsory attendance law."<sup>255</sup>

The definition of a "home school" in the Montana statutes is simply stated as the instruction by a parent of his child, stepchild, or ward in his residence.<sup>256</sup> To

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<sup>253</sup>COLO. REV. STAT. Section 1 Article 33 tit. 22 22-33-104.5 (Supp. 1987).

<sup>254</sup>LA. REV. STAT. Ann. § 17-236 (West Supp. 1982).

<sup>255</sup>MISS. CODE ANN. § 37-13-91(20)(i) (Supp. 1987).

<sup>256</sup>MONT. CODE ANN. § 20-5-102 (1985).

qualify in Montana for exemption from compulsory attendance, a home school must notify the county superintendent of schools of their intent.<sup>257</sup>

The school committee in a Rhode Island community where a child resides had the authority to approve a course of "at-home instruction." The requirements set forth in the Rhode Island statutes are the same for a private school as they are for a program of instruction provided at home. Any decisions made by the school committee may be appealed to the State Board of Education.<sup>258</sup>

The South Carolina school board in the district where the student resides has the authority to approve a home instruction program, provided the requirements for approval are met.<sup>259</sup> This explicit language is a result of the 1988 South Carolina legislature amending the 1976 statutes.

In Tennessee a home school that is associated with an organization that conducts church-related schools is exempt from the requirements of the section of the statutes on home schools.<sup>260</sup> Other "home schools" must provide notice to the local superintendent and fulfill other specified requirements.<sup>261</sup>

The Utah Code stipulates that :

[O]n an annual basis, a minor may receive a full release from attending a public, regularly established private, or part-time

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<sup>257</sup>MONT. CODE ANN. § 20-5-109 (5) (1985).

<sup>258</sup>R.I. GEN. LAWS § 16-19-1 (Supp. 1987).

<sup>259</sup>S.C. CODE ANN. § 59-65-40 (Law Co-op 1988).

<sup>260</sup>TENN. CODE ANN. § 49-6-3050 (a) (2) (Supp. 1987).

<sup>261</sup>Id.

school or class if: . . .the minor is taught at home in the branches prescribed by law for the same length of time as minors are required by law to be taught in district schools.<sup>262</sup>

The local board is charged with the responsibility of approving home instruction programs and making every effort to resolve attendance problems.<sup>263</sup>

A home study program is defined in the Vermont statutes as "[A]n educational program offered through home study which provides a minimum course of study . . ."<sup>264</sup> An approved program of home instruction is an exemption to the compulsory attendance laws.<sup>265</sup> The law specifies the particular information that must be provided with the enrollment notice to the State Department of Education. A child must be enrolled in a public or private school until the home study program is approved by the State Board or its designee.<sup>266</sup>

The requirements for the exemption of home instruction in Washington are explicitly stated as "Instruction shall be home-based if it consists of planned and supervised instructional and related educational activities, including a curriculum and instruction in the basic skills of occupational education, science, mathematics, language, social studies, history, health, reading, writing, spelling, and the development of an appreciation of art and music, provided for a number of hours equivalent to the total annual program hours per grade level established for

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<sup>262</sup>UTAH CODE ANN. § 53-24-1.3 (b) (ii) (Supp. 1987).

<sup>263</sup>Informal Opinion No. 83-20, Attorney General Utah, June 8, 1983. Local School Board Authority Regarding Home Instruction, at 13.

<sup>264</sup>VT. STAT. ANN. tit. 16 § 1 16 11 (21) (Supp. 1987).

<sup>265</sup>VT. STAT. ANN. tit. 16 § 1121 (2) (Supp. 1987).

<sup>266</sup>VT. STAT. ANN.. tit. 16 § 166b (Supp. 1987).

approved private schools under RCW §§ 28A.02.201 and 28A.02.240. . ."267 The parents instructing their children are to be supervised by a certified person.<sup>268</sup> The statute clearly indicated that the parents "shall be subject only to those minimum state laws and regulations which are necessary to insure that a sufficient basic educational opportunity is provided to the children receiving such instruction."<sup>269</sup>

Wyoming statutes have been amended(1985) to add language referring to home instruction.

A home-based educational program means a program of educational instruction provided to a child by the child's parents or legal guardian or by a person designated by the parent or legal guardian. An instructional program provided to more than one family unit does not constitute a home-based educational program."<sup>270</sup>

The curriculum requirements provide that there is no requirement to include any material that is in conflict with religious doctrines. "Basic academic educational program is one that provides a sequentially progressive curriculum of fundamental instruction in reading, writing, mathematics, civics, history, literature and science."<sup>271</sup> The home-based educational program must be submitted to the

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<sup>267</sup>WASH. REV. CODE § 28A.27.010 (4) (Supp. 1987).

<sup>268</sup>Id.

<sup>269</sup>WASH. REV. CODE § 28A.27.320 (Supp. 1987).

<sup>270</sup>WYO. STAT. § 21-4-101 (v) (1985).

<sup>271</sup>WYO. STAT. § 21-4-101 (vi) (1985).

local district each year to show that it is in compliance with the requirements of the statute.<sup>272</sup>

## SUMMARY OF STATUTES AND CASES FOR "EXPLICIT LANGUAGE"

### STATES

Reviewing the cases in states that currently have explicit language allowing home instruction demonstrated the difficulty of predicting the results of the specific cases in the state or federal courts. However, there was clearly a trend for courts and legislatures to extend more tolerance for parents wishing to educate their children at home. Wisconsin, Georgia, Missouri, Pennsylvania and Minnesota courts found the statutes of their states void for vagueness. Georgia passed a new home school law in 1984 after the 1982 *Roemhild*<sup>273</sup> decision in which the state's compulsory attendance statute was struck down as "impermissibly vague" and in violation of the due process clause of the fourteenth amendment. The 1981 *Popanz*<sup>274</sup> decision was followed by the passage of explicit home school legislation in Wisconsin. The lack of definition of "private school" caused the court to find the prior Wisconsin statute to be void for vagueness. In 1985 the legislatures in Minnesota and Missouri passed explicit legislation following the "void for vagueness" decisions in *Newstrom*,<sup>275</sup> *Budke*,<sup>276</sup> and *Ellis*.<sup>277</sup> New Mexico's

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<sup>272</sup>WYO. STAT. § 21-4-102 (b) (1985).

<sup>273</sup>*Roemhild v. State*, 308 S.E.2d 154 (Ga. 1983)

<sup>274</sup>*State v. Newstrom*, 371 N.W.2d 525 (Minn. 1985).

<sup>275</sup>*State v. Newstrom*, 371 N.W.2d 525 (Minn. 1985).



home school requirements became effective in 1985, following the 1983 *Edgington*<sup>278</sup> decision against the parents. The *Jeffrey*<sup>279</sup> court set aside the previous statute because its vagueness. The legislature in the closing hours of the 1988 session established very specific language governing home instruction. West Virginia passed new home school laws in 1987 as a result of lobbying efforts, not to correct any decisions by the courts. Ohio has protected its current statutory language that was found reasonable and upheld in the *Schmidt*<sup>280</sup> case. The courts in North Carolina agreed that home instruction was a form of private school because of the definition of nonpublic schools in the statutes. The justices agreed that it was the responsibility of the legislature to determine if home instruction was good public policy. The legislators in North Carolina accepted the direction of the courts and adopted explicit language legislation after the *Delconte*<sup>281</sup> and *Duro*<sup>282</sup> decisions.

These decisions indicate that the courts have been reluctant to evaluate home instruction and are willing to act only upon the compliance with the present

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<sup>277</sup>*Ellis v. O'Hara*, 612 F. Supp. 379 (D.C. Mo. 1985).

<sup>278</sup>*State v. Edgington*, 663 P.2d 375, 377 (N.M. App. 1983).

<sup>279</sup>*Jeffrey v. O'Donnell*, No. CV-86-1560 (D.C.M.D. Penn. August 24, 1988).

<sup>280</sup>*State v. Schmidt*, 505 N.E.2d 627 (Ohio 1987).

<sup>281</sup>*Delconte v. State*, 329 S.E.2d 636, (N.C. 1985).

<sup>282</sup>*Duro v. District Attorney*, 712 F.2d 96 (4th Cir. 1983), *cert. denied*, 104 S.Ct. 998, 79 L.Ed.2d 230 (1984).

laws. The legislature in numerous states has taken action to clarify the standards as a result of such decisions.

The explicit language in the other states in this group was quite varied. States such as Minnesota, Virginia, Colorado, and Louisiana indicate only that home instruction was an exemption from the compulsory attendance requirement, and in other statutes the language included details regarding the specific requirements for a program to be an acceptable alternative to public schools.<sup>283</sup> The other major difference between the states was the approval process. In Utah the local school board or its designee had that authority of approval. In Vermont the process was directed to the State Board of Education; and in Georgia there was no language indicating who was responsible for the approval process. In Montana only notification to the proper authority was required. The varied language and requirements of the statutes in this grouping of states had no rational basis.

#### "EQUIVALENCY LANGUAGE" STATUTE STATES

Equivalent instruction language was included in the statutes of twelve states.<sup>284</sup> The implication in these states was that home instruction was an acceptable alternative to the required attendance in public schools if the program was equivalent. Parents and school administrators were confronted with the

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<sup>283</sup>An example of this is Missouri.

<sup>284</sup>Connecticut, Delaware, Hawaii, Idaho, Iowa, Indiana, Maine, Maryland, Nevada, New Jersey, New York, South Dakota.

problem of knowing and agreeing upon the criteria that should be utilized to determine equivalency.

## Connecticut

Parents of children over seven and under sixteen were required by the Connecticut General Statutes to cause these children "[T]o attend a public school regularly or to show that the child is elsewhere receiving equivalent instruction in the studies taught in public schools."<sup>285</sup> The State Board of Education adopted a policy in 1976 which states "[W]hen a parent wishes to educate a child at home, the board of education of the district in which the child resides will determine whether the instruction is equivalent to that offered by the public schools, and the Secretary of the State Board of Education will review and approve the decision." The State Board developed suggested procedures to assist and direct local boards and parents.<sup>286</sup>

No higher level court decision was identified in Connecticut during this research's designated time frame of twenty-five years. *State v. Corcoran*<sup>287</sup> was mentioned to identify the direction taken in lower courts in matters such as this. The Superior Court case was heard in 1982 as a result of parents, members of the

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<sup>285</sup>CONN. GEN. STAT. § 10-184 (1986).

<sup>286</sup>Connecticut State Department of Education, *Suggested Procedures Concerning Requests from Parents to Educate Their Child at Home*, August 24, 1982.

<sup>287</sup>*State v. Corcoran*, CR15-068413 Superior Court, G.A.15 Hartford/New Britain, Conn. (April 27, 1982).

Seventh Day Adventist faith, who applied for permission to educate their son Noah at home. The parents felt that their sincerely held religious belief would be violated if they were to enroll Noah in public school. The judge stated that the parties were in conflict over a philosophical principal and that further criminal sanctions were unlikely to deter future reoccurrences. His recommendation was to decriminalize the proceedings and for the defendants to be given an opportunity to disprove the Board's charge that they were not providing an equivalent education to their son, Noah.

#### Indiana

Indiana law required parents to provide an education equivalent to that given in public schools.<sup>288</sup> Failure to do so was a class B misdemeanor. In Indiana a 1984 memorandum from the prosecuting attorney defined the term "equivalent instruction." The intent of this definition was to clarify for the staff of the prosecuting attorney's office what should constitute compliance with the compulsory attendance statute.

Instruction is 'equivalent' to public school instruction and therefore constitutes compliance with the Indiana compulsory attendance statute when it is provided as part of a written instructional plan which includes:

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<sup>288</sup>IND. CODE ANN. §20-8.1-3-34 (West 1987).

1. Student performance objectives including development of reading, writing and computation skills;
2. The method to achieve the performance objectives;
3. The time period (1 calendar year or less) in which the performance objectives are to be accomplished and a schedule for achieving each objective;
4. The method of evaluation to be utilized to determine progress toward the objectives and to summarize and periodically report the results of the evaluation;
5. The adult responsible for discipline and super-vision of the children and achievement of each instructional objective; and
6. The instruction is provided in a school day of reasonable length and results in significant progress toward the performance objectives stated.<sup>289</sup>

The Indiana Supreme Court *State v. Peterman* had, in 1904, ruled that a teacher employed by the parent to teach their child all subjects taught in public schools during regular school hours was acceptable. "We do not think that the number of persons, whether one or many, make a place where instruction is imparted any less or more a school."<sup>290</sup> A more recent decision in the U.S. District Court for the Northern District of Indiana found that plaintiff's home education program was sufficient to constitute instruction equivalent to that given in the public schools.<sup>291</sup>

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<sup>289</sup>Steven Goldsmith, Memorandum from the Office of the Prosecuting Attorney of Marion County Indiana, February 17, 1984.

<sup>290</sup>*State v. Peterman*, 32 Ind. App. 665, 70 N.E. 550, 551 (1904).

<sup>291</sup>*Mazanec v. North Judson-San Pierre School Corp.* 798 F.2d 233 (7th Cir. 1986). Evidence was produced that the original prosecution of the Mazanecs was because they continued to frustrate state officials in gathering evidence of the equivalency of the program, not that they were incapable of meeting the requirements of the law. At the time of the litigation, the children were being educated in Illinois for reasons apart from the case.

## Iowa

Equivalent instruction standards were defined in the Iowa statutes.<sup>292</sup> The purpose of these standards was, "[T]o give guidance to parents, guardians, local school boards, and teachers providing private instruction outside the traditional school setting with respect to equivalent instruction for children of compulsory school age."<sup>293</sup> The controversial standard was the requirement of the equivalent instruction being provided by a certified instructor.

The Iowa Supreme Court in 1981 found that use of the terms "equivalent instruction" and "certified teacher" did not render the Iowa compulsory attendance statute unconstitutionally vague.<sup>294</sup> Finding the other issues presented by the defendants without merit, the court went on to affirm that Norman and Linda Moorhead were guilty of a misdemeanor for violating the law since neither of the Moorheads were certified teachers.

In a 1987 supreme court decision, *State v. Trucke*,<sup>295</sup> reference was made to precedent set forth in two cases,<sup>296</sup> which held the undefined term "equivalent instruction" unconstitutionally vague when applied to persons who seek to operate a

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<sup>292</sup>IOWA CODE ANN. § 299 (West 1988).

<sup>293</sup>*Id.*

<sup>294</sup>*State v. Moorhead*, 308 N.W.2d 60 (Iowa 1981).

<sup>295</sup>*State v. Trucke*, 410 N.W.2d 242 (Iowa 1987).

<sup>296</sup>*Fellowship Baptist Church v. Benton*, 815 F.2d 485 (8th Cir. 1987); *Johnson v. Charles City Comm. Schools Bd.*, 368 N.W.2d 74 (Iowa 1985).

religious school for their own and other people's children. *Fellowship* was remanded to District Court, where the court held that the statute was no longer unconstitutionally vague as the state regulations were amended to define "equivalent instruction."<sup>297</sup> Iowa promulgated regulations entitled "Equivalent Instruction Standards," which became effective in 1986. The purpose of the standards was "to give guidance to parents, guardians, local school boards, and teachers providing private instruction outside the traditional school setting with respect to equivalent instruction for children of compulsory school age."<sup>298</sup> The certification requirement for the instructor was still included in the law. In the spring of 1988 the legislative session placed a moratorium for one year on any action against parents educating their children at home if they fulfilled the registration requirement.

## Maine

One acceptable alternative to attendance at a public day school was "(1) . . . if the person obtains equivalent instruction in a private school or in any other manner arranged for by the school board and if the equivalent instruction is approved by the commissioner."<sup>299</sup> Effective November 1, 1988, the *Rules for Equivalent Instruction Through Home Instruction* defined the approval procedures

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<sup>297</sup>*Fellowship Baptist Church v. Benton*, 678 F.Supp. 213, 214 (S.D.Iowa 1988).

<sup>298</sup>Equivalent Instruction Standards, Chapter 63, at 1.

<sup>299</sup>ME. REV. STAT. ANN. tit. 20 § 5001-A 3. A (1) (1987).

for home instruction programs that would fulfill the equivalency requirement of the statutes.

In *State v. McDonough*,<sup>300</sup> the parents claimed the denial of their guaranteed fourteenth amendment rights provided by the United States Constitution as the basis in defense of their civil statutory violation of the compulsory attendance statutes in Maine. The Maine statute provided that home education was the equivalent instruction if approved by the commissioner and if denied, an appeal process was available. The court's defense of the state's position asserted:

In short, where the state has provided a reasonable procedure whereby the defendants may vindicate their asserted right to educate their children at home, they may not ignore that procedure and then appeal to this court claiming that their right has been denied.<sup>301</sup>

New York

The Regulations supporting the statute governing instruction in New York were amended July 1988. Prior to this, guidelines had been prepared by the state educational agency to assist public school officials and parents to recognize what constitutes equivalent instruction in New York.<sup>302</sup> The amended regulations were more specific in establishing procedures to assist school authorities in fulfilling their

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<sup>300</sup>*State v. McDonough*, 468 A.2d 977 (Me. 1983).

<sup>301</sup>*Id.* at 980.

<sup>302</sup>Joan Arnold, *Guidelines on Home Instruction*, September 1985.



responsibility under statute. The local superintendent, acting as an agent for the school board, generally evaluated the equivalency of a program to decide if it was a legitimate exception to the compulsory attendance requirements.<sup>303</sup>

If parents did not receive approval of the local superintendent or the school board, there was an appeal process established. During the appeal period the parents were required to send their children to public school. If parents refused to send their children to school when their home instruction program was not approved, the public school authorities could refer the matter to family court as a matter of educational neglect on the part of the parents.<sup>304</sup>

At least five major court cases in such child protective proceedings have been heard in New York during the twenty-five year period designated for this research.<sup>305</sup> In one case the appellant, Barbara Franz, removed her three children from school and was convicted of neglect in the Family Court, Queens County, New York. Mrs. Franz pleaded that the compulsory features of the Education Law were unconstitutional and impinged upon the fundamental guarantee of privacy. The Supreme Court, Appellate Division upheld the conviction.<sup>306</sup> The court held

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<sup>303</sup>N.Y. EDUC. LAW § 3204 (1986). Instruction given to a minor elsewhere than at a public school shall be at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides. The local board of education has the responsibility under law to assure that every pupil in its district is provided with an appropriate educational program that is substantially equivalent to that provided in the public schools of the district of residence.

<sup>304</sup>*Id.*

<sup>305</sup>*Matter of Adam D.*, 505 N.Y.S.2d 809 (N.Y. Fam. Ct. 1986); *Matter of Falk*, 110 Misc. 2d 104, 441 N.Y.S.2d 785 (1981); *Matter of Lash*, 92 Misc. 2d 643, 401 N.Y.S.2d 124 (1977); *Matter of Franz*, 55 A.D.2d 424, 390 N.Y.S.2d 940 (1977); *Blackwelder v. Safnauer*, 689 F. Supp. 106 (N.D.N.Y. 1988).

<sup>306</sup>*Matter of Franz*, 390 N.Y.S.2d 945 (1977).

the statutory requirements that minors attend public school was constitutional and it was appropriate to determine what was a permissible replacement for public school education.

The child protection proceedings regarding Adam D. were to determine "[W]hat, if any, Family Court intervention is necessary to enable the State in carrying out its role as *parens patriae* to insure that Adam D. receives an adequate instruction?"<sup>307</sup> Adam D.'s educational best interest was the focus of the hearing. When Adam was interviewed, he stated that he didn't mind learning at home, but he thought he might prefer going to school with friends.<sup>308</sup> The court found that Adam's best educational interest required that he be placed under the supervision of the court. The terms and conditions of the supervision were listed in the opinion.

These two cases point out the court's reluctance to define "substantially equivalent." That evaluation belongs to those with the "expertise to evaluate the teacher, the curriculum, and the student--through standardized testing."<sup>309</sup>

In *Blackwelder v. Safnauer* evidence was presented that the parents refused on site visits of the home instruction program they were providing their

<sup>307</sup>*Matter of Adam D.*, 505 N.Y.S.2d 809, 810 (N.Y. Fam. Ct. 1986).

<sup>308</sup>Supreme Court Justice Douglas in *Wisconsin v. Yoder*, in his dissenting opinion, expressed concern for the rights of students regarding decisions on education. Also see Debra McVicker, *The Interest of the Child in the Home Education Question: Wisconsin v. Yoder Re-examined*, 17 INDIANA LAW REV. 728 (Summer 1985), focused on a child being deprived of the standard the state legislature has deemed necessary for a quality education.

<sup>309</sup>*Matter of Adam D.*, 1986, 505 N.Y.S.2d 809, 813 (N.Y. Fam. Ct. 1986). It should be noted that standardized testing was not required under the 1985 guidelines, only that the parent should submit a plan for evaluation of the pupil's progress. The 1988 amended Regulations requires an annual assessment to include the results of a commercially published norm-referenced achievement test.

children.<sup>310</sup> The parents' claims regarding privacy, due-process, and the establishment clause were unfounded and the statute and regulations were found not to be vague. the day after the judgement was entered , the New York Board of Regents adopted regulations to implement § 3204.<sup>311</sup> Prior to the adoption of these regulations, local schol districts implemented § 3204 using advisory guidelines issued by the state Education Department which were developed in 1985. Appeals made to the District Court and to the U.S. Appealate Court were rejected.<sup>312</sup>

### Other States

Nevada provides specific exemptions from compulsory attendance if the child receives equivalent instruction. Although the statutory language does not use the terms "home instruction" or "home education," it does require that the parents instructing their child at home be qualified for a teaching certificate for the grade level to be taught or the parents should consult with a person who possesses a teaching certificate.<sup>313</sup> The term "consultation" is clarified in the statute. In addition the language indicates what should be included in the request for a child to

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<sup>310</sup>*Blackwelder v. Safnauer*, 689 F. Supp. 106, 113 (N.D.N.Y. 1988)

<sup>311</sup>8 A N.Y.C.R.R. 100.10

<sup>312</sup>*Blackwelder v. Safnauer*, 689 F. Supp. 106, 113 (N.D.N.Y. 1988), motion for reconsideration denied, August 15, 1988: U.S.C. OF Appeals for Second Circuit, dismissed Jan. 23, 1989.

<sup>313</sup>NEV. REV. STAT. § 392.015 (2) (Michie 1980).

be excused from compulsory attendance on the "[G]rounds that the child will be given equivalent instruction outside the school. . . ."314

One of the six exceptions to Hawaii's compulsory attendance requirements is, "Where the child is enrolled in an appropriate alternative educational program as approved by the superintendent in accordance with the plans and policies of the department of education."<sup>315</sup> The policies and plans of the Department of Education are set forth in the form of regulations. The State Board of Education amended the regulations in July of 1988. The new regulation defines home schooling, listed the educational objectives and subjects that are to be addressed, and also lists the testing and reporting requirements. These regulations are less stringent than the previous ones in that there is no longer an educational qualification for parents who are educating their own children at home.<sup>316</sup>

Idaho's statute is mute regarding home instruction. Parents are to cause their children to be instructed in subjects commonly taught in the public schools in the state of Idaho. The only additional language that provides any guidance states:

Unless the child is otherwise comparably instructed, as may be determined by the board of trustees of the school district in which the child resides, the parent or guardian shall cause the child to attend a public, private or parochial school during a

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<sup>314</sup>NEV. REV. STAT. § 392.025 (1) (Michie 1980).

<sup>315</sup>HAW. REV. STAT. § 298-9 (6) (1985).

<sup>316</sup>Hawaii Compulsory Attendance Exception, Regulations, 4140.1.1 (July 1988).

period in each year equal to that in which the public schools are in session . . . <sup>317</sup>

In Delaware, the compulsory attendance requirement does not apply:

[I]f it can be shown, and witnessed by written endorsement, to the satisfaction of the superintendent of the school districts, to the satisfaction of an official designated by the State Board of Education, and by a written examination, that a child is elsewhere receiving regular and thorough instruction in the subjects prescribed for the public schools of the State, in a manner suitable to children of the same age and stage of advancement.<sup>318</sup>

The local school district has the authority to monitor and regulate home instruction according to the requirements of the statutes.

General regulations for home instruction are promulgated under the authority of the Education Article of the State of Maryland in July of 1987.<sup>319</sup> The new Bylaw eliminates the requirement that anyone teaching at home either be certified by the state or be a college graduate with expertise in teaching.

The goal for educating public school students in New Jersey is to provide them with a "thorough and efficient" education. Students receiving an education in a setting other than public schools are to receive instruction equivalent to that provided in public schools for children of the similar grades. Parents bear the burden of introducing evidence that there is compliance with the equivalency

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<sup>317</sup>IDAHO CODE § 33-202 (1981).

<sup>318</sup>DEL. CODE ANN. tit. 14, § 2703 (a) (Supp. 1986).

<sup>319</sup>Bylaw Comar 13A. 10.01-05 (1987).

language, but the ultimate burden of proving lack of equivalency rests with the state or local district.<sup>320</sup>

The South Dakota statutes excuse children from compulsory attendance if "[P]rovided with competent alternative instruction for an equivalent period of time as in public schools." The State Board of Education has promulgated regulations to support the statutory language.

### SUMMARY OF STATUTES AND CASES IN STATES WITH "EQUIVALENCY LANGUAGE"

The courts in New York are reluctant to define "equivalency"; yet they do not find the statute and the state regulations to be unconstitutionally vague. The legal and political issues in Iowa at the time of this research involve the issue of certification, not equivalency. Indiana has guidance from the prosecuting attorney as to the interpretation of equivalency that will be used at the judicial level. Maine's equivalency statute has been upheld in court as a reasonable procedure. New Jersey and Delaware use the terms "thorough and efficient" education for all schools. This research considered states with the "thorough and efficient" language in the equivalent grouping.

The phrase "equivalent elsewhere" provides latitude as well as confusion to many parents and school administrators. The questions that continue to be raised are who and what determines and/or approves the equivalency and what are the

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<sup>320</sup>State of New Jersey, Department of Education, *Commonly Asked Questions Relating to Home Schooling*, March 10, 1982.

due-process provisions to question the approval or lack of same. States such as Hawaii, New York, and Maine have promulgated regulations or guidelines to govern the approval authority in the determination that a student is receiving an equivalent education as required by the statute.

## HOME INSTRUCTION QUALIFIES AS A PRIVATE SCHOOL

Court interpretation, language in the statutes, and general practice have allowed home instruction to qualify as a private school, thereby falling within that exemption to the compulsory attendance laws.<sup>321</sup> *Webster's New World Dictionary* defines "private" as not open to, or controlled by, the public.<sup>322</sup> *Pierce v. Society of Sisters*,<sup>323</sup> protects the property interest of the private school. The 1925 Supreme Court ruling holds that the Oregon statute requiring public school attendance interferes with the parents' liberty to bring up their children as provided by the fourteenth amendment. Pertinent court cases referring to private schools as well as home instruction are included in this analysis of private school states.

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<sup>321</sup>Illinois, Michigan, California, Kentucky, Massachusetts, North Dakota, Texas.

<sup>322</sup>DAVID B. GURALNIK, Editor, WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 453 (New York: Popular Library 1973).

<sup>323</sup>268 U.S. 510 (1925).

## California

In California there have been no identifiable court cases during the twenty-five years designated for this study. Home schooling is not specifically addressed in the California statutes. A memo from the California State Department of Education identifies three options which are available to parents who wanted to teach their children at home.<sup>324</sup>

One alternative available to parents is to enroll the students in a private school. The law does not establish minimum standards for private schools, requiring only that private schools file a Private School Affidavit with the State Department of Education.<sup>325</sup> Private tutoring by a certified teacher or Independent Study through the public school are the other two options.<sup>326</sup>

## Illinois

There is no statutory language in Illinois regarding home instruction. One exemption, to the compulsory attendance statute provides:

Any child attending a private or parochial school where children are taught the branches of education taught to children of corresponding age and grade in the public schools, and where

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<sup>324</sup>L. Fred Fernandex, Non-Public Schools Unit, California State Department of Education, undated memo.

<sup>325</sup>CALIFORNIA EDUCATION CODE § 48222 (1987).

<sup>326</sup>CALIFORNIA EDUCATION CODE § 48224 (1987).



the instruction of the child in the branches of education is in the English language.<sup>327</sup>

A 1950 Illinois supreme court decision *People v. Levisen*,<sup>328</sup> established the precedent in the state to allow parents to educate their children at home. The Levisen's home school was considered by the supreme court to be a private school.

A mother with strong religious convictions taught the same subjects at home to her third grade daughter as were taught in the public school. The stipulations accepted by all included the child had regular hours for study and five hours of instruction. In addition it was stipulated that she showed proficiency comparable with an average third grade student. Mrs. Levisen and her husband believed their child should not be educated in competition with other children. They argued:

[A] school, in the ordinary meaning of the word, is a place where instruction is imparted to the young, that the number of persons being taught does not determine whether the place is a school, and that by receiving instruction in her home in the manner shown by the evidence the child was attending a private school.<sup>329</sup>

The Illinois Supreme Court in 1950 ruled in *Levisen* that the "[O]bject of section 26-1 of the School Code, requiring children to attend school, is that all

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<sup>327</sup>Ill. Rev. Stat. ch. 122 § 26-1 (1987).

<sup>328</sup>404 Ill. 574, 90 N.E.2d 213 (1950). This case did not occur in the twenty-five year time frame established for this research. It was included because of the precedent it established in Illinois. Moreover, it was a case often used by parents in other states to establish their homes as private schools.

<sup>329</sup>*Id.* at 576-77.

children shall be educated, not that they shall be educated in any particular manner or place."<sup>330</sup> The court placed the burden upon the parents by stating:

Those who prefer this method as a substitute for attendance at the public school have the burden of showing that they have in good faith provided an adequate course of instruction in the prescribed branches of learning. No parent can be said to have a right to deprive his child of educational advantages at least commensurate with the standards prescribed for the public schools, and any failure to provide such benefits is a matter of great concern to the courts.<sup>331</sup>

The *Levisen* court held that the parents sustained their burden by proving that their home instruction was adequate to qualify as a private school. Having thus found that the parents were not in violation of the Illinois compulsory attendance law, it was unnecessary for the court to consider their secondary argument that the statute was unconstitutional.

In a more recent case, *Scoma v. Chicago Board of Education*,<sup>332</sup> a federal court was directly confronted with the question of whether the Illinois compulsory attendance law was unconstitutional. In *Scoma* the parents contended that the statute abridged their constitutional right to educate their children "as they see fit" and "in accordance with their determination of what best serves the family's interest and welfare." The parents sought pre-approval for their program, but the court

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<sup>330</sup>Id. at 577.

<sup>331</sup>Id. at 578.

<sup>332</sup>391 F. Supp. 452, 461 (N.D. Ill. 1974).

found there was no precedence for such approval. The court observed that the *Yoder* decision, cited by the parents, did not apply because *Yoder* involved a claim of religious freedom. The Scomas were not asserting a religious right but only "a personal or philosophical choice" which was not within the bounds of Constitutional protection. "Thus the state need not demonstrate a 'compelling interest'; it must act only 'reasonably' in requiring children to attend school."<sup>333</sup> Since the state met this lesser burden, the court held the Illinois compulsory attendance law to be constitutional as applied to the Scomas.<sup>334</sup> The court, referring to *Levisen*, emphasized that the burden of proof rest with the parent to show that a plan of home instruction qualifies as a private school.

*Scoma* and *Levisen* have been quoted in legal settings throughout the country. In many courts the justices have rejected the reference, as the language in the statutes in other states was not comparable nor were the stipulations in the case.

## Kentucky

There is no language in the Kentucky statutes referring to home instruction. The exemptions to public school attendance includes private schools. As a result of the 1984 amendments to the Revised Statutes, the Department of Education is no longer authorized by statute to approve private, parochial, or church schools.

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<sup>333</sup>Id.

<sup>334</sup>Id.

In Kentucky the board of education of the district in which the child resides has the authority to exempt from attendance every child of compulsory attendance age "who is enrolled in regular attendance in a private, parochial, or church regular day school."<sup>335</sup>

The court in *Kentucky State Bd. Etc. v. Rudasill*<sup>336</sup> has held that the state may not require a teacher in a nonpublic school to be certified under statute. The case also states that no parent may be compelled to send his/her child to any school to which he/she may be conscientiously opposed. "If the legislature wishes to monitor work of private and parochial schools in accomplishing the constitutional purpose of compulsory education, it may do so by an appropriate standardized achievement testing program."<sup>337</sup>

## Massachusetts

The compulsory attendance statute of Massachusetts delegates school committees in local communities to approve private schools.<sup>338</sup> The advisory opinion of the Department of Education legal counsel interprets the statute to allow for home education if the local official approved of the program.<sup>339</sup>

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<sup>335</sup>KY. REV. STAT. §159.30(b) (Michie/Bobbs Merrill 1987).

<sup>336</sup>589 S.W.2d 877, 884 (Ky. 1979).

<sup>337</sup>*Id.*

<sup>338</sup>MASS. ANN. LAWS ch. 119, § 24.

<sup>339</sup>Massachusetts Department of Education, Memorandum of the Department of Education General Counsel Re: Advisory Opinion on Home Education, January 4, 1980.

An unpublished opinion in *Perchemildes v. Frizzle*<sup>340</sup> has been cited nationally as a case in which the court established criteria to determine if a home education program was equivalent to the public school. The case produced a great deal of publicity, yet "its judicial acceptance has been markedly limited."<sup>341</sup> A more recent opinion, *Care and Protection of Charles*,<sup>342</sup> condoned home education if the program were approved locally. The court validated the constitutionality of the statute and remanded the case to the lower court for the judge to assist the parties to come to agreement regarding Charles' educational program. Both the lower court and the Supreme Judicial Court found Charles to be in need of care and protection. The Supreme Judicial Court provided the following direction: "However, because we remand this case to the lower court, we offer some guidance on the extent to which approval of a home school proposal may be conditioned on certain requirement without infringing on the liberty interests of the parents under the fourteenth amendment."<sup>343</sup> The decision provided direction regarding curriculum, length of program, competency of the parent to teach their children, subject matter, and processes to evaluate the progress of the children.

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<sup>340</sup>*Perchemildes v. Frizzle* Civil No. 16641 (Hampshire Superior Court, Mass. Nov. 13, 1978).

<sup>341</sup>Tobak and Zirkel, *supra* note 136, at 27.

<sup>342</sup>*Care and Protection of Charles*, 504 N.E.2d 592, 600 (Mass 1987).

<sup>343</sup>*Id.*

## Michigan

The Nonpublic School Act of Michigan says, "A private, denominational or parochial school within the meaning of this act shall be any school other than a public school giving instruction to children below the age of 16 years. . . ." <sup>344</sup> One of the exemptions to the compulsory attendance requirements is,

A child who is attending regularly and is being taught in a state approved nonpublic school, which teaches subjects comparable to those taught in the public schools to children of corresponding age and grade, as determined by the course of study for the public schools of the district within which the nonpublic schools is located. <sup>345</sup>

Michigan is one of the few states that has a statutory requirement regarding the qualifications of a teacher of a private, denominational or parochial school. The statute was adopted in the early 1920's and has withstood court scrutiny.

No person shall teach or give instruction in any of the regular or elementary grade studies in any private, denominational or parochial school within this state who does not hold a certificate such as would qualify him or her to teach in like grades of the public school in the state. <sup>346</sup>

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<sup>344</sup>MICH. COMP. LAWS.ANN. § 388.552 (West 1988).

<sup>345</sup>MICH. COMP. LAWS.ANN. § 80.1561 (West 1988).

<sup>346</sup>MICH. COMP. LAW ANN. § 388.553 (West 1988).

Non-certificated parents claimed the right to educate their children at home, free from the certification requirements in *Hanson v. Cushman*. The United States District Court determined that, "[S]tate need not demonstrate a 'compelling interest' but only that it acted 'reasonably' in requiring children to attend school and that children be taught only by certified teachers."<sup>347</sup>

The parents and clergy of the Sheridan Road Baptist Church and the First Baptist Church of Bridgeport brought action against the Department of Education, seeking a declaration that the requirements of the nonpublic statute requiring state certification was unconstitutional. The Court of Appeals found the certification requirements "[V]iolated neither the Free Exercise nor the Establishment Clauses of the first amendment of the United States Constitution."<sup>348</sup> In an equal division, the Supreme Court of Michigan affirmed the decision of the Court of Appeals, based on their judgment that the goal of the state requirement of certification prevented children from being exposed to unqualified teachers.<sup>349</sup> The judges who did not concur indicated that the state had the burden to show that the exemption would : "[U]nduly impair its interest in compulsory education and that enforcing the requirement was the least intrusive means by which to accomplish the objective." The dissenting judges stated that the state failed to meet that burden.<sup>350</sup>

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<sup>347</sup>490 F. Supp. 109, 114-115 (W.D. Mich. 1980).

<sup>348</sup>*Sheridan Road Baptist Church v. Department of Education*, 426 Mich. 462, 396 N.W.2d 373 (1986), *cert.denied*, 107 S.Ct. 2183, 95 L.Ed.2d 839 (1987).

<sup>349</sup>*Id.*

<sup>350</sup>*Id.*

## North Dakota

North Dakota is one of two states that enforces certification requirements for the instructors in private schools. The compulsory attendance statute addresses the requirements of public and private schools. The State Board document describing the policies and procedures adopted by the Department of Public Instruction includes home instruction with the criteria for private schools.<sup>351</sup> The requirement was questioned in the Supreme Court of North Dakota case, *State v. Shaver*,<sup>352</sup> by a group of parents, none of whom were certified to teach. These parents were convicted of violating the compulsory attendance statute. The parents held that seeking certification would violate their religious convictions. The state supreme court upheld the lower court decision, holding that, "Teacher certification appears to us to be among the least personally intrusive methods now available to satisfy the state's prime interest in seeing that its children are taught by capable persons."<sup>353</sup>

## Texas

Texas Education Code describes the course of study for children in attendance at a private or parochial schools. There is no specific language referring

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<sup>351</sup>*North Dakota Statutory Requirements for Funding of Public Schools and the Approval of Private and Parochial Schools*, 5 August 1987.

<sup>352</sup>*State v. Shaver*, 294 N.W.2d 883 (N.D. 1980).

<sup>353</sup>*State v. Patzer*, 382 N.W.2d 639 (N.D. 1986).



to home instruction. Language in the statutes does not provide the adequate direction to avoid litigation. Two cases have resulted in conflicting positions.

The Court of Appeals of Texas in 1986 held that the parents failed to demonstrate that the compulsory school attendance laws substantially burdened their exercise of religious beliefs, and consequently the State did not need to prove its compelling interest.<sup>354</sup> As a rule the courts, if possible, avoided dealing with the issue of whether their statutes violated the constitution when they denied the parents their right to teach their children at home.<sup>355</sup>

The following year a class action suit in the Tarrant County 17th Judicial Court resulted in a favorable decision for home schoolers.<sup>356</sup> The interpretation of this case was that home schools could legally operate as private schools in Texas. There were no specific guidelines for these programs, and it was at the local superintendent's discretion to determine if the program was a legitimate program.

#### SUMMARY OF COURT CASES AND STATUTES STATES IN WHICH HOME INSTRUCTION QUALIFIES AS A PRIVATE SCHOOL

Although the intent of this research was to examine only cases at the United States Supreme Court level and the higher courts at the state and federal

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<sup>354</sup>*Howell v. State*, 723 S.W.2d 755 (Tex. 1986).

<sup>355</sup>*T.M.L. Case Notes*, 24 JOURNAL OF FAMILY LAW 552 (1985-86).

<sup>356</sup>*Leeper v. Arlington Independent School District*, No. 17-88761-85 Tarrant County, Texas 17th Judicial Ct., Apr. 13, 1987 as reported in C. KLINKA, HOME SCHOOLING IN THE UNITED STATES: A STATUTORY ANALYSIS 47 (Great Falls, Va. : Home School Legal Defense Association 1988).

level over the past twenty-five years, an exception was made in presenting the 1950 *Levisen*<sup>357</sup> decision from Illinois and lower court decisions in Texas and Massachusetts. Litigation in the states that allowed home instruction programs to qualify as private schools provided greater flexibility to the parents. Illinois was an example of this flexibility. Unless there was blatant educational neglect, the educational program provided to the child was without restriction.

The *Perchemildes* decision in Massachusetts stated that once the right to home instruction was recognized by state law, the parents had the constitutional right to be given:

[A] high level of procedural due-process protection from arbitrary, capricious, or even malicious conduct on the part of the authorities who were authorized to evaluate and decide on the equivalence of a given program.<sup>358</sup>

The issue decided was the procedural means to determine the propriety of a home instruction program. The later case of *Care and Protection of Charles* validated the local school district's authority to approve a home instruction program. The 1987 lower court decision in Texas has established the direction that home instruction be considered a private school. There were no rules to provide guidance to the administrators in approval of such programs.

The statutory language in North Dakota and Michigan required certification of the instructor of a private school or an acceptable alternative.

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<sup>357</sup>*People v. Levisen*, 404 Ill. 574, 90 N.E.2d 213 (1950).

<sup>358</sup>*Perchemildes v. Frizzle* Civil No. 16641 (Hampshire County, Mass. Superior Court, Nov. 13, 1978).

Kentucky and California had no language requirement for home instruction. Home instruction programs have generally been accepted in these two states by the authorities to be private schools.

## "SILENT STATUTE" STATES

The last grouping of states was those having no statutory language at all beyond a bare compulsory attendance law, leaving the permissibility of home instruction--and guidelines for it--entirely to the courts, the state rules and regulations, or, if neither of the previous were available, to an individual school's discretion.<sup>359</sup>

## RULES AND REGULATIONS PROMULGATED BY STATE BOARDS OF EDUCATION

Although the statutes are silent regarding home instruction or equivalency, in two states rules and regulations have been promulgated to establish procedures to be used by the appropriate agency in determining if a home instruction program is an acceptable exemption to the specific compulsory education requirements.<sup>360</sup> No

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<sup>359</sup>New Hampshire, Nebraska, Kansas, Oklahoma, Alabama.

<sup>360</sup>New Hampshire, Nebraska. These states were placed in the "silent statute" grouping rather than "explicit language" or "equivalent language" groupings because the rules and regulations do not have the same impact as does specific language in the statute that directly refers to home instruction or equivalent instruction.

cases have been identified in the twenty-five years designated for this research in these two states.

## Nebraska

The powers and duties of the Nebraska State Board of Education as established in the statutes, includes, "(c) establish rules and regulations which govern standards and procedures for the approval and legal operation of all schools in the state and for the accreditation of all schools requesting state accreditation."<sup>361</sup> Title 92, Nebraska Administrative Code, contains three sections for school system approval and curriculum. Rule 13, effective date August, 1984, applies to schools operated by parents and religious "monitors" who indicate to the Department of Education that their deeply and sincerely held religious beliefs do not permit them to comply with the approval or accreditation standards. The school is considered an "exempt school" which is defined as, "[A] school which has elected not to meet approval or accreditation requirements and has complied with the state law and regulations relating to such exemptions."<sup>362</sup> Rule 13 covers any private religious school, whether operated at home, in a school building, or in a church. Rule 14, effective June, 1986, includes the regulation and procedures for approving public schools; and Rule 15, effective February, 1985, establishes the regulations and procedures for accreditation of public and nonpublic schools.

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<sup>361</sup>NEB. REV. STAT. § 79-328 (c) (1987).

<sup>362</sup>Title 92, Nebraska Department of Education, Ch. 13, at 1 (1984).

The parents of Dawn Bigelow were enjoined from operating a school that was in violation with the compulsory attendance laws. The state regulations provided for approval and required reports and inspection. The court agreed Dawn's parents could supplement her education, but could not cause her to be truant.<sup>363</sup>

## New Hampshire

Home instruction regulations were developed in New Hampshire in 1984. The authority to do so was under the provisions of RSA 193:3<sup>364</sup> and adopted by the procedures of RSA 541-A.<sup>365</sup> The recommended standards for a home instruction program were stated in the "[F]orm of competencies which the required instruction should be reasonably expected to develop in all citizens regardless of where they receive their education."<sup>366</sup> The parents were encouraged to seek assistance from the local districts and the state agency in the development and/or selection of materials.

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<sup>363</sup>*State ex rel. Douglas v. Bigelow*, 334 N.W.2d 444, 447 (Neb. 1983).

<sup>364</sup>Brendan Stocklin-Enright, *New Hampshire's Home Schooling Quandary*, 2 VERMONT LAW REVIEW, 278 (1983). Stocklin-Enright questioned the use of this statutory authority since it was intended to provide for the reassignment of students.

<sup>365</sup>N.H. CODE ADMIN. R. EDUC. 315, Regulations and Procedures for the Approval of Home Education Programs, Section ED 315.01 (1984).

<sup>366</sup>*Id.* Appendix A (1984).

## NO RULES AND REGULATIONS PROMULGATED BY STATE BOARDS OF EDUCATION

There was no authority for home instruction in the remaining four states.<sup>367</sup> The legislature had provided no language in the statutes; the state boards of education had developed no regulations; and only in Kansas had the court recently provided any guidance.

### Alabama

The Alabama statutes made no specific reference to home instruction. Children might be instructed by a private tutor who holds a certificate issued by the State Superintendent of Instruction, or they might attend a private school.<sup>368</sup> Jerry Hill and Kenneth Downing were charged and convicted in separate actions at the trial level for failing to cause their children to receive an education that would be an acceptable form of compulsory attendance. The parents contended their religious freedoms were violated by the Compulsory School Attendance Law. The cases were consolidated on appeal. The judgments were affirmed.<sup>369</sup>

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<sup>367</sup>Alabama, Kansas, Oklahoma, Pennsylvania.

<sup>368</sup>ALA. CODE § 16-28-1, 16-28-5 (1987). Requirements for a private school are listed in the statute, including the requirement of teacher certification.

<sup>369</sup>*Hill and Downing v. State*, 410 So. 2d 431 (Ala. App. 1981).

## Kansas

There was no language available in the Kansas statutes to provide for home instruction:

Home instruction was entirely proper at one time in the history of our state (Gen.Stat.1901, § 6420); but a later act of legislature deleted the home instruction proviso as a reason for not attending school (Laws 1903, ch. 423, Gen. Stat.1909, § 7736, et. seq.). The present truancy act (G.S. 1949, 72-4801) still omits the home instruction proviso.<sup>370</sup>

Since 1919 the legislative directive has been to establish minimum course requirements for all schools. There are two alternatives to satisfy the Kansas compulsory education statutes, attendance in public schools or attendance at "a private, denominational or parochial school taught by a competent instructor for a period of time substantially equivalent to the period of time public school is maintained. . ." <sup>371</sup> Subsection (e) of the compulsory school attendance section provides a special provision applicable to Amish. Approval may be granted for a regularly supervised program of instruction to a recognized church or religious denomination that objects to a regular high school education.

In 1983 the Supreme Court of Kansas took the stand that the compulsory attendance laws of Kansas had a rational relationship to the legitimate state purpose of educating its children and that the home education program provided to the

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<sup>370</sup>*State v. Lowry*, 383 P.2d 962, 963-64 (Kan. 1963).

<sup>371</sup>KAN. STAT. ANN. § 72-1111 (1980).

Sawyer children did not satisfy the compulsory attendance laws.<sup>372</sup> The Sawyer children were identified as "children in need of care" because they did not attend school. The parents had organized their own private school.<sup>373</sup> The Kansas statutes stated:

[A] private, denominational or parochial school taught by a competent instructor for a period of time which is substantially equivalent to the period of time public school is maintained in the school district in which the private, denominational or parochial school is located.<sup>374</sup>

The court found, in agreement with the trial court, that Longview School was the Sawyer's home, not an accredited private school. In addition it was stated that:

The standard of review, to be applied then, is whether the state's system had some rational relationship to a legitimate state purpose. . . . The Kansas system of compulsory school attendance embodied at K.S.A. 72-1111, which allows alternatives to public school, had a rational relationship to the legitimate State purpose of educating its children.<sup>375</sup>

The case notes of the statutes indicated that *Sawyer* determined that home instruction did not meet compulsory attendance requirements in Kansas.

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<sup>372</sup>*Interest of Sawyer*, 672 P.2d 1093 (1983).

<sup>373</sup>*Id.* at 1094.

<sup>374</sup>KAN. STAT. ANN. § 72-1111(2) (Supp. 1982).

<sup>375</sup>*Interest of Sawyer*, 672 P.2d 1093, 1098.



An earlier 1963 case, *State v. Lowry*,<sup>376</sup> found the parents guilty of violating the truancy act. The parents claimed their method of educating their children was a private school. The court disagreed, finding that in order to be classified as a private school the courses of instruction must include those required by statute and the children must be taught by a competent instructor for the prescribed time as required in the statute.<sup>377</sup>

## Oklahoma

The compulsory attendance statute of Oklahoma provides that it is unlawful for a parent of a school aged child "[T]o neglect or refuse to cause or compel such child to attend and comply with the rules of some public, private or other school, unless other means of education are provided for the full term the schools of the district are in session."<sup>378</sup>

## SUMMARY OF STATUTES AND CASES IN STATES WITH "SILENT STATUTES"

Of this grouping of states with no statutory reference to home instruction, three state educational agencies had developed rules and regulations to provide

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<sup>376</sup>383 P.2d 962 (Kan. 1963).

<sup>377</sup>*Id.* at 965.

<sup>378</sup>OKLA. STAT. ANN. tit 70, § 10-105(A) (1979).

direction to families and school administrators.<sup>379</sup> The states with no language, either through the statutes or rules and regulations, provided an atmosphere of uncertainty for the parents regarding their rights and for the schools regarding their responsibility. This uncertainty invited inconsistent interpretations.

### SUMMARY OF COURT CASES AND STATE STATUTES

Every state had a form of compulsory attendance statute requiring that all children of a prescribed age must attend a public or private school. These questions were raised in states where there was no reference to home instruction in the statute: Does home instruction meet the requirements of the compulsory education statute? And if so, under what circumstances? As the justices in North Carolina stated, it was an issue of public policy as to whether home instruction should be permitted and the legislature should make that determination.<sup>380</sup>

The courts have looked for a balanced approach when weighing the state's legitimate interest and the parents' legitimate freedom of choice. The majority of the decisions during the twenty-five year period specified for this research were concerned with the issue of whether the home instruction program was a legitimate exemption under the compulsory attendance law in the designated state. In addition to the exemption issue, some home school parents claimed their state statutes to be

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<sup>379</sup>These states with statutes with no reference to home instruction statutes were referred to in this research as states with "silent statutes," even if there were rules and regulations promulgated by the state boards of education.

<sup>380</sup>*Delconte v. State*, 313 N.C. 384, 329 S.E.2d 636, 646 (1985).

unconstitutionally vague although courts have generally resisted deciding the cases on a constitutional issue such as this. The burden of proof issue was also a concern in a number of cases though this question was most often resolved on the subtleties of the particular statutory language.

The monitoring and approval process varies throughout the country. Some states do not require any supervision or approval; however, at the opposite extreme, two states go so far as to require the parents to be certified. This inconsistency adds to the confusion, particularly for families in our mobile society moving from state to state.

### RESEARCH OBJECTIVE THREE

The Third Research Objective served the purpose of tracing the development of home instruction in seven states.<sup>381</sup>

#### SPECIFIC CASE STUDIES

In order to trace the development of home instruction legislation for the Third Research Objective, telephone interviews were conducted with administrative personnel in seven state educational agencies. It was intended that these in-depth interviews would verify and amplify information derived from the earlier written survey. These interviews were based on fourteen open-ended questions. The

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<sup>381</sup>Iowa, Minnesota, Montana, North Carolina, New York, Pennsylvania, Wisconsin.

responses to these questions led to a summary of the development of home instruction in these seven states, the political forces if any that brought about change, and the current status of home instruction, and, finally, recommendations for attributes of a model home instruction statute or rules and regulations. In identifying the seven states for the in-depth interviewing, the historical background of the home instruction laws was considered in order to identify diversity among these states. The Objective was to study the process in the development of the various statutes and the political influences effecting that development.

As a result of verifying the information from the original survey, it was found there had been legislative changes in North Carolina, Pennsylvania, and Iowa. The name and citation of the statutes in Minnesota had been changed because of new codification in that state. Another change identified was action taken by the New York Board of Regents to promulgate regulations to establish procedures to assist local school authorities to determine whether a home instruction program was essentially equivalent.

## DEVELOPMENT OF THE HOME INSTRUCTION STATUTES

One of the important segments of the interviews of the personnel of the seven state departments of education was to identify any series of events that led to modification in the laws of the state. Recent changes have been made in the procedures to evaluate a home instruction program in New York, North Carolina, Iowa, Pennsylvania, and Minnesota.

There has been an increase of federal and state litigation throughout the country challenging home instruction statutes. In New York the courts upheld the statutes, but the suits raised critical issues such as the discretion of the local superintendents in approving programs and the means to measure the skills of the students educated at home. The State Board and other lobbying groups, including the state school board association and various parent groups, were looking for regulations that had the force of law--not merely the guidelines previously in effect--that would clarify the standards in determining if a program were substantially equivalent. The regulations adopted by the Board of Regents July 1, 1988, were a compromise to protect the rights of all who work with home instruction. The perception of the interviewed attorney for the State Board was, "It seems to be working at this point. I mean there are bumps and bruises along the way that we need to work out, but, for the most part, it is doing what we intended it to do."<sup>382</sup> Another attorney for the State Board identified the unresolved issues the Board of Regents was planning to address if the regulations were to be amended. These issues included provisions for handicapped children, procedures to allow the local school district and parents to agree on alternate methods of assessing student growth, and listing which services provided by the state to the private schools should also be provided to home programs.

In 1979 the North Carolina General Assembly passed regulations that radically deregulated the operation of all nonpublic schools and transferred the supervisory authority from the State Board of Education to the Governor's office.

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<sup>382</sup>Attorney, New York State Board of Education.

Many parents taught their children at home after this new monitoring authority was established. A subsequent attorney general's opinion stated that a home program was not a school within the meaning of the Compulsory Attendance Law. A court decision at the federal level then concluded that the state's interest was of sufficient magnitude to override the parents' religious interest.<sup>383</sup> At approximately the same time, the North Carolina Supreme Court ruled that the state statute did not prohibit home instruction as an alternate means of complying with the compulsory attendance statute. The court reasoned that North Carolina could regulate home instruction, prohibit it, or permit it; but the present statute did not contain language to do any of these. As a result of these decisions, together with the transfer of the authority from the State Board, there were virtually no provisions to meaningfully enforce the compulsory attendance law. The court urged the legislature to act. In addition the North Carolina State Board of Education saw the obvious need to clarify the regulations for home instruction. Legislative action resulted in the 1988 session. The State Board's initial proposal was for the home instruction teachers to be college graduates. Results of the final legislation included (1) a definition of home schools; (2) the requirement that the teachers have at least a high school diploma or its equivalent; and (3) language that established an annual achievement test be administered. Still unresolved were the issues of (1) the acceptable level of test scores; (2) specificity of the courses taught and at which grade level; and (3) a monitoring system to validate that the children were receiving an adequate education. The representative from the State Board reported that for the first time

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<sup>383</sup>*Duro v. District Attorney*, 712 F.2d 96 (4th Cir. 1983), *cert. denied*, 104 S.Ct. 998, 79 L.Ed.2d 230 (1984).

the state has put some real requirements on the public school systems; for example, they mandated the length of school day and a basic curriculum. "If we try to get a basic education throughout the state, one that equalizes opportunities for all students, then it ought to be the same for kids in home schools as well as regular schools."<sup>384</sup>

For several years prior to 1985, Minnesota educators sought the imposition of regulation for private instruction. Then in that year the Minnesota Supreme Court held in the *Newstrom* and *Budke* cases that the compulsory education law was unconstitutionally vague regarding the requirements of staff qualifications.<sup>385</sup> As a result, the legislature called for the establishment of a task force composed of six representatives of private education and six representatives from public education to develop recommendations for a new compulsory instruction law. Compromise legislation provided nonpublic schools with the option of going through approved accrediting agencies or following the explicit standards established in the statute.

In 1983 the General Assembly in Wisconsin established criteria for defining private schools and home-based private educational programs. The impetus for this action was the Wisconsin Supreme Court ruling in *State v. Popanz*<sup>386</sup> that the lack of definition of "private school" caused the statute to be unconstitutionally void for vagueness. The statute, enacted after the *Popanz* ruling,

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<sup>384</sup>Staff member, North Carolina Department of Public Instruction.

<sup>385</sup>*State v. Newstrom*, 371 N.W.2d 525 (Minn. 1985); *State v. Budke*, 371 N.W.2d 533 (Minn. 1985).

<sup>386</sup>332 N.W.2d 750 (Wis. 1983).

clearly established the difference between a home-based private educational program and a private school. The administrator of a home-based program or private school must make a statement of enrollment to the public school in his or her jurisdiction. There were criteria established for private schools, including a sequentially progressive curriculum in six content areas. There were no administrative rules to monitor or implement the legislation nor an approval process at the local level. However, an option which was rarely used was available under § 118.167 for approval of a private school by the state superintendent.<sup>387</sup>

Pennsylvania's 1988 legislature adopted explicit language in the statutes as a result of a federal district court declaring the previous language was unconstitutionally vague. Prior to this change, the Pennsylvania compulsory education laws had not been amended since 1949. The 1949 statute required daily instruction in English language by a qualified private tutor.<sup>388</sup> The regulations promulgated by the State Board did not define the qualifications for the private tutor, but did set forth the required courses for the student and the minimum amount of instructional time. The superintendent's approval of the tutor was to be acceptable evidence of the tutor's ability to teach the program, and the parents were required to furnish written assurance that the instructional requirements were met.<sup>389</sup> Based on the interview, the best features of the earlier legislation were the local control over the approval and the parental responsibility to consider the

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<sup>387</sup>WIS. STAT. § 118.167 (1984).

<sup>388</sup>PA. STAT. ANN. tit.24 § 13-1326 (1988).

<sup>389</sup>Chapter 11, Regulations of State Board of Education of Pennsylvania, § 11.31(b).



qualifications of the tutor as well as the quality of the educational program. The disadvantage cited was that the state agency had no knowledge of the student's progress. According to the interviewee, the recent unreported federal district court case, *Jeffrey v. O'Donnell*,<sup>390</sup> held the statute to be unconstitutionally vague, absent the definition of "private tutor." The court ordered that either the State Board must develop new regulations or the legislature must adopt a new statute. At the time of this research, a bill had just been adopted by the Pennsylvania legislature spelling out the required courses, hours of instruction, notification procedure, and immunization requirements,. It also provided that a private tutor may be a parent if he or she has at least a high school diploma and four more years of education than the student.

In 1983 the Montana statutes were changed to allow home instruction to be an exception to compulsory attendance. Prior to that time there was no accountability for the education of children taught at home. The county superintendents, as elected officials not directly attached to local districts, proposed legislation to include periodic testing of students educated at home. The 1983 legislation was a compromise between strong language proposed by the county superintendents and looser requirements advanced by private and home school parents who were opposed to the recommended restrictions.

Iowa was one of the three states which required that instruction in any educational program be provided by a certified teacher.<sup>391</sup> Rules and regulations

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<sup>390</sup>No. CV-86-1560, (D.C.M.D. Penn. August 24, 1988).

<sup>391</sup>IOWA CODE ANN. § 299.1 (West 1988).

were promulgated in 1986 to define more clearly the requirements of the statute. The court cases have upheld the compulsory attendance statute, but the legislature, after approximately five years of intense lobbying on the part of parents, took action in the spring of 1988 to make some changes in the statutory language. In addition an interim study committee made up of representatives and senators was established to conduct a comprehensive study of the existing compulsory education law. The Iowa statute set forth specific criteria for compliance and for criminal prosecution of the parents who violated the statute. However, as a result of the 1988 legislative action, prosecution may now be deferred as long as the parent meets the requirement of reporting that his or child is receiving home instruction.<sup>392</sup> One of the tasks of the study committee was to determine if the deferred prosecution should continue beyond the June 30, 1989 deadline.

## POLITICAL FORCES

The political forces that brought about changes in the seven states targeted for the interviews included strong parent groups, particularly those with national leadership and a religious base. Others including parent advocacy groups, teacher unions, National Parent Teachers Association, National Association of School Boards, state organizations such as the County Superintendents in Montana, and the state departments of education have become visible in the state capitols to lobby for their point of view.

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<sup>392</sup>IOWA CODE ANN. § 1. § 279.10 (1987).

Teacher qualifications seemed to be the issue throughout the country that coalesced supporters of home instruction even if they had disparate religious and/or philosophical perspectives. If parents were educating their children at home for philosophical or religious reasons, they were equally as concerned that teacher certification or a baccalaureate degree not be a requirement of the state home instruction laws.

The consensus of the interviewees regarding local and national trends for home education was that it was evident that there has been an increase in the number of parents educating their children at home--particularly those who were doing it for religious reasons. One of the interviewees believed this to be a cyclical movement, declining within the next ten years.

Many states have legislated outcome based on accountability or performance objectives in the public school system. The interviewees questioned if the same accountability would be required for all children, even those in private schools and those educated at home.

Further perceptions of the interviewees indicated that the status of home education throughout the country depended a great deal on the elections of state legislators and the lobbying efforts of teachers unions. These two activities could reverse the present trend of home instruction legislation favoring the parents.

## CURRENT STATUS

The following is a sampling of the responses regarding the unique characteristics of home instruction in their states:

- North Carolina is becoming a haven for people who want to educate their children at home because of the liberal nature of their statute.
- New York regulations are in place, providing a consistent procedure to implement the Education Laws.
- Montana statute provides that no direct or indirect appropriation of payment from any public funds or monies are to be used for any sectarian purpose.
- Montana has home study programs under public supervision in isolated areas of the state.
- Minnesota's statute establishes an accrediting procedure for nonpublic schools; and if a school is accredited by one of the recognized accrediting agencies, the only information submitted to the local superintendent is name, age, and address of the child of compulsory school age.
- Iowa's new statute has placed a moratorium on the prosecution of any parent who has reported his program appropriately to the local superintendent but is not complying with the other requirements of the law.
- Wisconsin's compulsory age for school attendance is extended to eighteen year olds. There is a strong possibility some families may choose to establish a home-based program for older students who do not fit into the traditional public school setting.
- The statutes in Pennsylvania at the time of the research have just been amended regarding home instruction. A bill provides for parents to file

an affidavit giving assurances they are complying with the requirements of the statute.

To identify the current status of home instruction in each individual state, the interviewees were asked to list the best and the most troublesome features of the authority for home instruction in their state. The respondent from Montana identified the best features as (1) the requirement to keep attendance and immunization records and (2) inclusion of the requirement to have school for one hundred and eighty days. Troublesome features included (1) the lack of required qualifications of the person providing the instruction and (2) a concern regarding the misconception that students can apply and automatically be accepted to the state colleges, as was the case with graduates from accredited high schools, after completing a home instruction program with no high school diploma. The interviewee summarized his concern in the statement, "We have cases where people who didn't even get out of eighth grade are teaching their children at home."<sup>393</sup>

Clarification of the responsibilities of the parties involved in home-based programs in Wisconsin was viewed as a positive feature of the current Wisconsin statute. A troublesome feature was school census language which did not require the parent or private school administrator to indicate the name, address, or birth date of the students. Consequently it was impossible to collect accurate information regarding all students within the compulsory age group. In addition there was no authority to follow up if a complaint was presented regarding a home-based program.

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<sup>393</sup>Legal Department Staff, Montana Office of Public Instruction.

In Pennsylvania the language allows for review after one year by the local superintendent and consequently contains some elements of local control.

The individual interviewed in Minnesota stated:

What this compromise language does is enable the state to assure that we do have an educated citizenry in that people are going to schools that meet certain minimum qualifications for being a school. It ensures first of all that children are in something called a school and that that school meets certain minimum qualifications. The statute spells out those qualifications much more explicitly than the old law did.<sup>394</sup>

Local districts and the nonpublic schools identified record-keeping as one of the troublesome features of the new legislation in Minnesota. The large nonpublic schools that enroll students from throughout the state found it cumbersome to report the required pupil accounting information. After the first year of the implementation of the new laws, computerized systems were developed to assist in the process. Another weakness was the omission of some subjects in the minimal curriculum requirements, an example being the omission of economics from the social studies curriculum. The concern raised was that once the statute was explicit (i.e. social studies includes history, geography, and government), it eliminated other areas that might come under the rubric of that curriculum area. The qualifications for teachers included the option of successful completion of a teacher competency examination, yet such an exam had not been defined in the law.

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<sup>394</sup>Assistant Director, Office of Governmental Relations, Minnesota Department of Education.

The clarification in the 1988 Iowa statutory language of a required one hundred twenty days of school attendance fulfilled by thirty days per quarter, eliminated the problem of having to wait the one-hundred and twenty days to determine if the statutory requirements were being met. It was the prior requirement of the one hundred and twenty days that caused the *Trucke*<sup>395</sup> case to be remanded and the conviction dismissed.

Troublesome language included (1) the lack of a definition of what constitutes a lesson plan in the reporting requirement; (2) the compliance and reporting of the immunization requirements;<sup>396</sup> (3) the requirement that parents instructing their children at home are mandated child abuse reporters; (4) the removal of the imprisonment and fine penalties from the criminal prosecution of parents found guilty of not meeting the requirements of the compulsory attendance laws §299 leaving only unpaid community service as the penalty;<sup>397</sup> and (5) the requirement to file an affidavit as to the physical or mental condition of the child who was unable to attend school.<sup>398</sup>

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<sup>395</sup>*State v. Trucke*, 410 N.W.2d (Iowa 1987).

<sup>396</sup>It is questionable if an immunization requirement is as much in the state's interest in a program at home, as it would be in a public setting.

<sup>397</sup>IOWA CODE ANN. § 299.1(1987).

<sup>398</sup>IOWA CODE ANN. § 299.5(1987). There is no requirement that the affidavit be given by a physician.

## RECOMMENDATIONS FOR MODEL LEGISLATION

Each of the interviewees was asked, "If you were to write model legislation regarding home instruction, what would be the components of such legislation?" There was consensus that the child's interest should be considered and the options not be limited for the child. One interviewee stated, "I think legislation should strike a balance and that is what this whole thing is about, the balance between the interest in the state in assuring an educated citizenry and maintaining private control, private education, and parental responsibility."

Opinion was divided regarding the benefit of simple statutory language supported by extensive regulations or comprehensive statutory language that would stand alone. The positive side of regulations was the flexibility in modifying any necessary changes that are identified. One respondent indicated that if the requirements were not in the statutes they would not be taken seriously. Another stated:

That is more a philosophical issue than a practical issue. I think that perhaps the general authority for home instruction should be statutory but that the specific mode of implementing it probably should be regulatory because I think that the education agency of any state is a better place to determine how to implement that kind of program. It probably should be initially the legislature's judgment whether home instruction should be allowed. It would ultimately make the most sense if the particular aspects of implementation be by regulation. There are obviously particularly sensitive issues that the legislatures will want to deal with. In most cases regulations make the most sense because



the state education department is going to be aware of how the schools are structured, what kinds of relationships normally exists between the superintendents, the pupils, and how best to actually institute the program."

A concern raised was that educational judgments should be made by educators, not legislators. The clear consensus of the interviews was that requirements, whether in the statutes or regulations, should not be overly restrictive. It was also agreed that the laws should allow for parents to provide an alternative to public education and the state's responsibility to develop an educated citizenry should not be compromised.

The interviews indicated that the following issues should be considered in the development of home instruction legislation. Measuring the child's progress by testing or by some alternate method was considered to be important. There was consensus that there should be some stipulation regarding the amount of instruction required. A concern was raised regarding the establishment of a set number of days or hours since a parent could provide instruction for five minutes and consider that one full day of the required number of days. It was an accepted premise that a comparable length of a normal school day to the required public school day was not necessary, for a parent could do more in a shorter period of time. There was a strong feeling that a specified number of hours per year should be required and that those hours should be fewer for home education than for public school.

One state department official summarized his thoughts regarding model legislation to include (1) clarification of specific pupil accounting information assuring accountability of all students; (2) specific time lines as to when the program should be registered; (3) limitations as to when in the school year a parent

may use the private school/home-based instruction exemption; (4) a means of accountability to measure the child's progress; and (5) a procedure to follow if a complaint was filed. He also stated that there needs to be cooperation between the state department and the strong advocacy groups if the interests of all groups are to be satisfied.

The interviews with the representatives of the seven state departments of education verified and amplified information from the surveys. More importantly, the interviews provided a means to gain deeper insight into the variety of political ramifications involved in the issue of home instruction.

## ADDITIONAL DATA

Since 1980 over thirty states have adopted home instruction legislation or have clarified the requirements for such a program. The majority of these changes are considered by the research to be more favorable for the parents. To obtain additional insight into this home instruction movement, the Chief State School Officers were asked on the survey that was sent to them about their perception of the home instruction statute in their state. The following choices were provided to describe the statute: restrictive, limiting, flexible, adequate, unenforceable, needs revision, and other.<sup>399</sup> As indicated in Table VI several respondents checked more than one description. Forty-two per cent (n-17) of those who responded found the present laws to be flexible, yet another thirty per cent (n-12) felt the present laws

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<sup>399</sup>As indicated in Table VI only twenty-three states responded to the question regarding perception of the statute.

needed revision. None felt the law to be restrictive; one responded that the statute was limiting; five felt the laws to be adequate; two found that the law was unenforceable; and the remaining three responded "other."

Several coalitions have formed to lobby in opposition to home instruction requirements that were favorable to parents. Professional educational groups, including National School Board Association, National Association of State Boards, Association of Curriculum and Supervision, National Parent Teachers Association, and the National Education Association have either adopted resolutions, have issued position papers or have researched the issue. Essentially their concerns are the growing number of children educated at home and the effectiveness of the lobbying efforts of the parent groups. According to the responses to the survey, in seventeen states there has been active political and/or lobbying activities; many of these activities have resulted in the passage of flexible home school legislation. Table VII lists the specific lobbying groups identified by the respondents to the survey.

TABLE VI

## PERCEPTION OF LAW

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State	Restrictive	Flexible	Limiting	Adequate	Unenforceable	Needs Rev.	Other
Alabama							
Alaska				Y			
Arizona		Y				Y	
Arkansas						Y	
California							
Colorado						Y	
Connecticut							
Deleware							
Florida		Y					
Georgia							
Hawaii				Y			
Idaho		Y		Y			
Illinios							
Indiana							
Iowa						Y	
Kansas							
Kentucky							
Louisana						Y	
Maine		Y					Y
Maryland		Y					
Massachuettes							
Michigan							
Minnesota		Y		Y			
Mississippi		Y				Y	
Missouri		Y			Y		
Montana		Y					
Nebraska							
Nevada						Y	
New Hampshire							
New Jersey							
New Mexico		Y		Y			
New York							
North Carolina							
North Dakota							
Ohio		Y				Y	
Oklahoma		N					
Oregon		Y				Y	
Pennsylvania		Y					
Rhode Island		Y					
South Carolina						Y	
South Dakota							
Tennesse			Y				
Texas							Y
Utah						Y	
Vermont		Y					
Virginia		Y					
Washington					Y		
West Virginia		Y				Y	
Wisconsin							Y
Totals	0	17	1	5	2	12	3

## TABLE VII

## STATEWIDE LOBBYING EFFORTS

Identified Groups

Alaska	Parents of Centralized Correspondence Study
Illinois	Ad Hoc Committee for Home Education Legal and Legislative Matters
Iowa	Parent groups
Louisiana	Citizens for Home Education
Maryland	Walkersville Christian Fellowship Satellite School System, Maryland Home Education Association, Alliance for Organic Learning
Mississippi	Home School Association
Missouri	Families for Home Education
New Mexico	Home School Association
Tennessee	Home Education Association
Texas	Texas Home School Coalition
Utah	Home School Association
Virginia	Home Educators Association of Virginia
Wisconsin	Wisconsin Parents Association

Informal Groups

Arkansas, Colorado, Florida, Hawaii, Minnesota, Nebraska, Nevada,  
Oregon, Vermont, Washington, West Virginia, Wyoming, Virginia

## CHAPTER IV

### SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

#### SUMMARY

The dictionary definition of a school is broad, and the courts and the legislatures differ among themselves as to the proper organization to provide instruction. The state has a compelling interest in assuring that children are provided a minimum level of instruction while parents have the right and responsibility to provide for their children's education and to determine the suitable forum for their education.

Every state at the time of the research had a form of compulsory attendance statute requiring children of a prescribed age to attend a public or private school. The question raised in states where there was no statutory reference to home instruction was "does home instruction come under the requirements of the compulsory education statute?"

Parents, school administrators, and the public were understandably confused about their rights and responsibilities. This confusion lead to ill will, resentment, and ignorance.

Parents were becoming a vocal force, working either through litigation or through lobbying efforts, to liberalize the statutes. Litigation efforts were becoming better organized, and parents were receiving more sophisticated legal counsel to avoid prosecution and possible arrest.

Was the compulsory attendance requirement met by home education, and if so under what conditions? Yes, home instruction was an acceptable alternative to compulsory education and the conditions to fulfill that choice were identified in each state. The courts have continued to uphold legislation that clearly prescribed the requirements and provided for proper monitoring to insure children received an adequate education.

The necessity of continuing to search for better and clearer answers to the questions in this study is the right and obligation of all involved in the education of the children of this country.

## RESEARCH OBJECTIVES

The research objectives of this study covered general areas of both statutory and case law of the fifty states related to home instruction plus an in-depth study of seven states. The specific language of the objectives was as follows:

The First Research Objective was to review and analyze the compulsory education/home instruction statutes and rules and regulations in the fifty states with particular scrutiny to the means by which these laws recognized and permitted home instruction. Data for this analysis were gathered from several sources:

- The statutes and regulations themselves, with an examination of the legislative history in proper cases
- Surveys submitted to the chief school officers in each state, and
- Interviews with educators at the university level and in state departments of education, and representatives of professional organizations.

The Second Research Objective was to review and analyze the relevant judicial decisions of the federal courts and the higher state courts over the past twenty-five years and the Supreme Court cases since the early Twentieth Century. This analysis described trends and identified those issues which were most often addressed by the courts' attention:

- Inherent parental rights regarding education,
- Interest of the state regarding education,
- Religious freedom (United States Constitution, first amendment),
- Requirements of non-vagueness in criminal statutes (United States Constitution, fourteenth amendment),
- Burden of proof,
- Equivalency of home instruction, and
- Qualifications of instructor.

The cases were then examined in the context of the statutes and rules and regulations in the respective states to determine what if any legislative action had followed the court action.

The Third Research Objective was to trace in seven specific states, through further interviews, the development of home instruction legislation. The intent was for these interviews to amplify and verify the information obtained from



the written surveys. Specific attention in these case studies was directed to the political or lobbying efforts, if any, that influenced such legislation and to identify the most desirable elements of model legislation and/or administrative procedures.

## PROCEDURES

This study was primarily descriptive in nature using appropriate qualitative methods to obtain data. The three methods used were survey, interview, and legal research. This methodology, the presentation that included tabular data and narrative documentation, disclosed historical development, current practice, and future trends.

The compulsory education and/or home instruction statutes in the fifty states were researched and categorized. These statutes and supporting laws were identified by independent research and through the information obtained from the survey sent to the fifty chief state school officers.

Cases at the federal and state level were studied primarily for their interpretation of statutory language regarding both the state's interest and the parents' rights. Court decisions involving home instruction and the compulsory education statutes and administrative rules and regulations from the states were analyzed, compared, and contrasted. Particular attention was given to Illinois court decisions to determine if an Illinois "public policy" was identifiable. Such a policy was established by the Illinois supreme court in the Levisen decision.

Follow up telephone interviews were conducted with designated personnel in seven state education departments. The purpose of the interviews was

to validate the already collected data and to gather information regarding the political forces that affected the legislative process.

As a result of the research, recommendations were made for the development of legislation in the states in which there was no explicit authority for home instruction. The recommendation included elements that should be in statutes or regulations for home instruction.

### CONCLUSIONS

The central question raised in this research was this: Is the compulsory attendance requirement met by home instruction, and if so under what conditions? The following conclusions demonstrate that this requirement is satisfied under a variety of circumstances. These circumstances vary throughout the fifty states. In some cases home instruction is permitted by specific statutory enactment while in other cases it is permitted by court decisions. Additionally in a limited number of jurisdictions home instruction is practiced by default, that is, with neither legislative nor judicial sanction.

1. Parents may choose educational alternatives for their children, but the state has a right to regulate these choices within certain limits. Parents believe it is their right and responsibility to provide for their children's education and to decide what is the proper forum for that instruction. However, the state has a compelling interest in assuring that children are provided a minimum level of instruction. The amount of litigation and the extensive lobbying efforts over the past twenty-five years is evidence of this dichotomy. The research has confirmed that the parents

have judicially protected rights in this area. The dual roles of the state and the parents are not free from conflict.

2. State and federal courts generally agreed that home instruction is a public policy issue that should be decided by the particular state. The Supreme Court has ruled that education is the responsibility of the state. Where such a public policy was found to exist, the state legislature may recognize it through appropriate legislation.

3. All fifty states have compulsory attendance statutes which provide for private school attendance but do not necessarily allow home instruction as an exemption to the compulsory attendance statute. Over fifty years ago the Supreme Court established both the propriety of private schools as an acceptable alternative to public schools and that the state could not deny this choice because of the Equal Protection Clause of the fourteenth amendment. However, other federal court and state court decisions have held that the denial of home instruction as an alternative to public education does not violate the Constitution.

4. Most court cases have rejected religious claims as reasons for parents to provide their children with home instruction. The only Supreme Court decision dealing with home instruction recognized the firm and long established religious beliefs of the Amish. It was believed by most authorities that only where the religious interest is of such unique strength will it receive sufficient constitutional recognition to qualify as an exemption to the compulsory attendance statute.

5. Sincerity of beliefs and quality of a program are not enough if the parents do not comply with the statutes. The courts will not accept programs that violate the requirements of the state laws or that deprive children of their rights to an

adequate education. The role of the courts is to interpret and enforce the laws of the states, not to evaluate the value of a home instruction program or the religious convictions of the parents.

6. Home instruction will not qualify as a private school if the compulsory attendance statute clearly establishes separate requirements for home instruction and private schools. To avoid the specific requirements of home instruction, parents often call their program a "private school." Courts have found this tactic to be unacceptable if home instruction is defined and provided for in the statutes.

7. The number of states that have statutory authority or regulations for home instruction has increased in the 1980s. Most of these legislative actions have been a reaction to court decisions and lobbying efforts. At the time of the research, twenty-six states have explicit statutory language to allow for home instruction. The statutory or case law in seven states allows for home instruction to fulfill the private school exemption of compulsory attendance. In twelve states, home instruction is an acceptable exemption if the program is equivalent, comparable, or regular and thorough. In five states there is no statutory authority or case law to provide for home instruction as is the condition in the other forty-three states. Three of these five states with "silent statutes" rules and regulations have been promulgated to establish procedures to be used by the appropriate agency in determining if a home instruction program is an acceptable exemption to a specific compulsory attendance requirement. In the four remaining states, there is no direction to determine the acceptability of such a program.

8. The state's utilization of its authority to regulate education by monitoring and approval of home instruction programs varies throughout the

country. The approval process happens when the parents indicated their intent to educate the child at home. Monitoring activities include home visitation, testing, and other means of evaluating the student's progress. The compelling interest of the state in adequate education for its citizens has met the constitutional test for allowing governmental regulations. The state's authority to regulate home instruction, either through monitoring or approval, is a point of contention between the state and the parents. The issue raised in many court cases is how much regulatory control the state has over the education of the children. An analysis of the cases showed that if the procedural requirements for approval of a home instruction program are reasonable and clear and there are due-process opportunities, the state's interest persists over the parents.

9. The burden of proof is on the parents to show that they are providing their children with a proper education and are following the requirements of the state laws. The burden of proof for verification of non-attendance is on the state. Tobak and Zirkel describe in their writings the importance of this conclusion of the sharing of the burden of proof stating; "[T]he balanced approach considers both the state's interest in education and the parent's freedom to choose. In addition, and perhaps most importantly, it permits a greater focus on the best interests of the individual child."<sup>400</sup>

In analyzing statutes and judicial decisions, three principles must be kept in mind: (1) regulating education is the responsibility of the respective states; (2) each state should determine whether its public policy should permit home

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<sup>400</sup>TOBAK AND ZIRKEL, *supra* note 136, at 6-10.

instruction; and (3) it is up to the legislature of each state to codify that public policy into proper legislation. In *San Antonio Independent School District v. Rodriguez* the United States Supreme Court held that education is not a fundamental right provided for in the United States Constitution; but educating children is a legitimate state function, to be carried out in compliance with constitutional safeguards.<sup>401</sup> The legislature in each state must determine if home instruction tends to be injurious to the public or against the public good. If not, then it is proper public policy. The courts have continued to recognize that if home instruction is proper public policy, it is the legislature's responsibility to provide for this form of education in the laws of the state.

### RECOMMENDATIONS

A structure for alternatives to public education, particularly that of home instruction, is imperative.<sup>402</sup> The more clearly the structure is defined the less likely litigation will happen. A structure does not necessarily imply state control. Ambiguity in the statutes and other laws in the states have resulted in litigation and unnecessary expense and frustration. In states where there is no explicit authority for home instruction, legislation is needed and that legislation should be a balance to

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<sup>401</sup>*San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973).

<sup>402</sup>Nanette Barrett has developed a suggested "Home Education Act" for the American Legislative Exchange Council. The act would exempt students from compulsory attendance if he or she was provided a program at home. The student's skills would be assessed annually. Nancy Barrett, EDUCATION SOURCE BOOK: THE STATE LEGISLATORS' GUIDE FOR REFORM 11 (Washington: American Legislative Exchange Council 1985).

protect the interest of the state and the parents' rights. Home instruction should be a specific exemption identified in the compulsory attendance statute. It should not be included under the private school exemption, nor should implied equivalency language be used. The legislation may take the form of explicit comprehensive language in the statutes or explicit language in the statutes to provide authority to the state board of education to develop regulations regarding home instruction. At a minimum statutes and/or regulations should not be overly restrictive. The laws should be flexible but clearly stated. There should be options for compliance. The law should include

- clearly stated definition of terms including home instruction, private schools, instruction, course of study, and equivalency;
- an accounting procedure to identify all students of compulsory attendance age;
- a procedure to file statement of intent;
- options to evaluate the competency of the instructor;
- a statement of minimum academic standards;
- a minimum number of hours of instruction per year or a clearly stated definition of a school day;
- provisions for support to the parent by a certified teacher or an accredited institution;
- accountability procedure for identifying the student's progress;

- a monitoring procedure to verify if the child is receiving an adequate education;<sup>403</sup>
- a clearly established authority for enforcement of the laws;
- due process procedure; and
- a means to protect the child from educational neglect.

Parents in an increasingly mobile society who choose to educate their children at home should not be subjected to different standards, tests, and criteria simply because their address changes. A child's education should not be a function of geography. A uniform home instruction law adopted by all states would solve that problem and reduce the uncertainty about home instruction. Indeed at least one expert, attorney David A. Splitt, has written:

Differences in home schooling legislation from state to state reflect our long standing tradition of local control of public education. But, they also give home schoolers and their lawyers plenty of opportunity to haggle over the wording of state laws that basically are constitutionally sound. Some uniformity in home schooling laws might reduce the legal wrangling simply by giving more weight to legal language that already has been tested in courts. . .

It would help if someone went a step further and recommended a uniform home schooling law based on state statutes that have passed judicial muster. A uniform policy might look like a spot of tarnish on the holy grail of local control, but it would go a

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<sup>403</sup>Original approval of a home instruction program was purposefully excluded from the list. Monitoring was to verify compliance.



long way toward reducing confusion and litigation over home schooling.<sup>404</sup>

In many states public school administrators and parents are uncertain of their legal rights and responsibilities regarding home instruction because of ambiguity in laws or recent decisions in courts. School administrators grope for guidance in their dealings with families who are interested in educating their children in the non-traditional setting of home instruction.

Schools and their administrators and parents should be aware of their rights and responsibilities. Cooperation between the two would be in the best interest of the students. The desirable end goal of education should be agreed to by all parties. That goal should be stated broadly in terms of the ultimate product, the student.

### RECOMMENDATIONS FOR FUTURE STUDY

1. This study has concentrated on the laws of the states and the rights of the parents. Future study should explore the rights of children and their input into the means by which they are educated. Justice Douglas, in his dissenting opinion in *Yoder*, stated: "These children are 'persons' within the meaning of the Bill of Rights"<sup>405</sup> and "On this important and vital matter of education, I think the children should be entitled to be heard."<sup>406</sup>

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<sup>404</sup>David Splitt, *School Law*, EXECUTIVE EDUCATOR 8 (Dec. 1988).

<sup>405</sup>*Wisconsin v. Yoder*, 406 U.S. 205, 243 (1972).

<sup>406</sup>*Id.* at 244.

2. According to the results of the survey, thirteen states have laws establishing the requirements for home instruction for special education students.<sup>407</sup> Future study should research these laws and their relationship to the federal and state legislation protecting the rights of handicapped students. As a part of this future study, a definitive position should be found regarding the responsibilities of the public school if the parents of a handicapped student choose the alternative of home instruction.

3. A follow-up study looking at the court decisions in the late 1980s, as related to the statutes and regulations enacted in the late 1970's and 1980's, would be profitable to determine if requirements of new laws are less arbitrary and vague in the minds of the courts.

4. As more states develop outcome-based accountability or performance objectives for the public school students, future study could seek to identify the educational outcome requirements placed on nonpublic educational alternatives.

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<sup>407</sup> Arizona, Arkansas, Hawaii, Iowa, Louisiana, Maine, Massachusetts, Michigan, New Hampshire, North Dakota, Oregon, Vermont, Wyoming.

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- Care and Protection of Charles*, 504 N.E.2d 592 (Mass. 1987).
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*Fellowship Baptist Church v. Benton*, 815 F.2d 485 (8th Cir. 1987), *remanded to* 678 F.Supp. 213 (S.D. Iowa 1988).

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- State ex rel. Douglas v. Bigelow*, 334 N.W.2d 444, 447 (Neb. 1983).
- State v. Bowman*, 653 P.2d 254 (Or. App. 1982).
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- State v. M.M. and S.E.*, 407 So. 2d 987 (Fla. App. 1981).
- State v. McDonough*, 468 A.2d 977 (Me. 1983).

*State v. Moorehead*, 308 N.W. 2d 60 (Iowa 1981).

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*State v. Patzer*, 382 N.W.2d 631 (N.D. 1986).

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## APPENDIX A

# STATUTES

STATE	STATUTORY COMPILATION	YEAR	COMPULSORY	HOME INSTRUCTION	REGULATIONS
Alabama	Code of Alabama	1987	§16-28-3	§16-28-5 (certified private tutor)	
Alaska	Alaska Statutes Supplement	1986	§14.30.010	§14.30.010(b)(11) (private) §14.45.14 (religious or other private)	§14.45.1000
Arizona	Arizona Revised Statutes Annotated Supplement	1987	§15-802(A)	§15-802(B)(1) (explicit)	State Bd. Guidelines
Arkansas	Arkansas Statutes Annotated Supplement	1987	§80-1503.6	§80-1503.4-8 (explicit)	
California	Deering's Annotated California Code	1987	§48200	§48224 (private tutor) §51745 (independent study with public school curriculum)	
Colorado	Colorado Revised Statutes Supplement	1987	§22-33-104	§22-33-104.5 (explicit)	
Connecticut	General Statutes of Connecticut	1986	§ 10-184	§10-184 (elsewhere equivalent)	
Delaware	Delaware Code Annotated Supplement	1986	§tit. 14, §2702-2704	§tit. 14, §2703(a) (regular and thorough instruction)	State Bd. Regulations
Florida	Florida Statutes Annotated (West Supplement)	1988	§232.01	§228.041 (34) §232.02(4) (explicit)	
Georgia	Official Code of Georgia Annotated (Michie)	1987	§20-2-690.1	§20-2-690(c) (explicit)	
Hawaii	Hawaii Revised Statutes	1985	§298-9(b)	§298-9(6) (appropriate alternative programs)	Dept. of Education Regs. 4140.2 revised 1988
Idaho	Idaho Code	1981	§33-202	§33-119 (accreditation) and §33-202 (comparable instruction)	
Illinois	Illinois Revised Statutes	1988	ch. 122, para. 26-1	ch. 122, para. 26-1 (school age exemptions)	

# STATUTES (con't)

STATE	STATUTORY COMPILATION	YEAR	COMPULSORY	HOME INSTRUCTION	REGULATIONS
Indiana	West's Annotated Indiana Code	1987	§20-8.1-3-17	§20-8.2-3-34 (equivalent)	
Iowa	Iowa Code Annotated (West)	1988	§299.1	§299.1 (equivalent exception)	State Bd. Regulations
Kansas	Kansas Statutes Annotated	1980	§72-1111(a)		
Kentucky	Kentucky Revised Statutes Annotated, Official Edition (Michie/Bobbs Merrill)	1987	§159.010	§159.30 (b) (exemptions)	
Louisiana	West's Louisiana Revised Statutes Annotated Supplement	1988	§17:221(A)	§17:236 (explicit)	
Maine	Maine Revised Statutes Supplement	1987	tit. 20-A §5001-A	tit. 20-A §5001-A (3)(A)(1) (equivalent)	Chapter 130
Maryland	Annotated Code of Maryland	1985	§7-301(A)	§7-301(A) (regular and thorough)	ByLaw ComarTitle 13A.10.01
Massachusetts	Annotated Laws of Massachusetts (Law Co-op)	1978	ch. 76, §1	ch. 76, §1 (thoroughness and efficiency)	
Michigan	Michigan Compiled Laws Annotated (West)	1988	§380.1561	§380.1561(3)(a)	
Minnesota	Minnesota Statutes Annotated (West) Supplement	1988	§120.101	§120.101 subdivisions 4-9 (explicit)	
Mississippi	Mississippi Code Annotated (Supp)	1987	§37-13-91	§37-13-91(2)(i),(3)(c)(iv) (explicit)	
Missouri	Vernon's Annotated Missouri Statutes Supplement	1988	§ 167.031	§167.031.2, §167.042 (explicit)	
Montana	Montana Code Annotated	1985	§167.031.2	§167.031.2(2)f (explicit)	

# STATUTES (con't)

STATE	STATUTORY COMPILATION	YEAR	COMPULSORY	HOME INSTRUCTION	REGULATIONS
Nebraska	Revised Statutes of Nebraska	1985	§79-201	§79-328(c) (exemptions)	Title 92, Nebraska Administrative Code, Ch13,14, 15
Nevada	Nevada Revised Statutes Annotated (Michie)	1986	§392		
New Hampshire	New Hampshire Revised Statutes Annotated Supplement	1987	§193:1	§193:1 (exemptions)	N.H. Code of N.H. Code of Administrative Rules Ed. 315.01(d)
New Jersey	New Jersey Statutes Annotated (West)	1968	§18A:38-25	§18A:38-25 (equivalent)	
New Mexico	New Mexico Statutes Annotated	1986	§22-1-12-2	§22-1-12-2, §22-1-2(U) (explicit)	State Procedure
New York	Consolidated Laws Service	1985	§3201, 3204, 3205, 3210,	§3204(1) (equivalent)	Official Compilation of Codes, Rules & Regulations of the State of New York tit. x 8, § 100.10
North Carolina	General Statutes of North Carolina Supplement	1985	§115 C-378	§115 C-563-565 (explicit)	
North Dakota	North Dakota Century Code Supplement	1985	§15-34.1-01	§15-34.1-03 (same length of time and approval)	
Ohio	Ohio Revised Code Annotated (Anderson)	1985	§3321.03	§3321.04(2) (explicit)	
Oklahoma	Oklahoma Statutes Annotated (West) Supplement	1988	§ tit 70, § 10-105(A)	§ tit 70, § 10-105(A) (exemptions)	
Oregon	Oregon Revised Statutes	1987	§339.010	§339.030(5)	Administrative Rules 581-21-026
Pennsylvania	Purdon's Pennsylvania Statutes Annotated Supplement	1988	tit.24 §13-1327	tit.24 §13-1327 (private tutor)	Chapter 11 of Regulations of State Board of Education of Pennsylvania 11.31
Rhode Island	General Laws of Rhode Island Supplement	1987	§16-19-1	§16-19-1, §16-19-2 (explicit)	State Bd. Regulations



# STATUTES (con't)

STATE	STATUTORY COMPILATION	YEAR	COMPULSORY	HOME INSTRUCTION	REGULATIONS
Soth Dakota	South Dakota Codified Laws Annotated Supplement	1988	§13-27-1	§13-27-3 (equivalent)	
South Carolina	Code of Laws of South Carolina 1976 Annotated (Law Co-op) Supplement	1987	§59-65-20	§16-19-40(A) (explicit)	State Bd. Regulations
Tennessee	Tennessee Code Annotated Supplement	1987	§49-6-3001	§49-6-3001(B), §49-6-3050	
Texas	Texas Education Code Annotated (Vernon)	1987	§21.032	§21.033(a)(1)	
Utah	Utah Code Annotated Supplement	1987	§53-24-1	§53-24-1.3(1)(b)(ii) (explicit)	
Vermont	Vermont Statutes Annotated Supplement	1987	tit. 16, § 1121	tit. 16, §166b (explicit)	
Virginia	Code of Virginia Annotated Supplement	1988	§ 22.1-254	§22.1-254.1 (explicit)	
Washington	Washington Revised Code Supplement	1988	§ 28A.27.010	§§28A.27.010(4)(a), 27.310, 27.320 (explicit)	
West Virginia	West Virginia Code Supplement	1988	§ 18-8-1	§18-8-1(a) (explicit)	
Wisconsin	Wisconsin Statutes Supplement	1987	§ 118.15.	§118.15.01(1r) (explicit)	
Wyoming	Wyoming Statutes	1986	§ 21-4-102	§21-4-101 (explicit)	

## APPENDIX B

# CASE LISTINGS

CASE	CITATION	STATE	LEVEL
Blackwelder v. Safnauer	689 F.Supp. 106 (N.D.N.Y. 1988), app. dismissed (1989, CA 2).	New York	U.S.District Court, Northern District New York
Brown v. Board of Education of Topeka	347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed.873 (1954)		United States Supreme Court
Burrow v. State	669 S.W.2d 441 (Ark. 1984)	Arkansas	Supreme Court of Arkansas
Care and Protection of Charles	504 N.E.2d 592 (Mass. 1987)	Massachusetts	Supreme Judicial Court of Massachusetts
Delconte v. State	329 S.E.2d 636 (N.C. 1985)	North Carolina	Supreme Court of North Carolina
Duro v. District Attorney	712 F.2d 96 (4th Cir. 1983), cert. denied 104 S.Ct. 998, (1984)	North Carolina	United States Court of Appeals, 4th Circuit
Ellis v. O'Hara	612 F.Supp 379 (D.C.Mo. 1985)	Missouri	U.S. District Court, E.D. Missouri, E.D.
F. & F. v. DuVal County	273 So.2d 15 (Fla. 1973)	Florida	District Court of Appeal of Florida, First District
Farrington v. Tokushige	273 US 284		United States Supreme Court
Fellowship Baptist Church v. Benton	815 F.2d 485 (8th Cir. 1987), remanded to 678 F.Supp. 213 (S.D. Iowa 1988)	Iowa	United States Court of Appeals, Eighth Circuit

CASE LISTINGS (con't)

CASE	CITATION	STATE	LEVEL
Grigg v. Commonwealth	297 S.E.2d 799 (Va.1982)	Virginia	Supreme Court of Virginia
Hanson v. Cushman	490 F.Supp. 109 (1980)	Michigan	U.S. District Court, W. D. Michigan, S.D.
Hill v. State	Ala.Cr.App., 410 So.2d 431	Alabama	Court of Criminal Appeals of Alabama
Howell v. State	723 S.W.2d 755 (Tex.App.-Texarkana)	Texas	Court of Appeals of Texas, Texarkana
In re Monnig	638 S.W.2d 782 (Mo. App. 1982)	Missouri	Missouri Court of Appeals, Western District
Interest of Sawyer	672 P.2d 1093 (Kan. 1983)	Kansas	Supreme Court Kansas
Johnson v. Charles City Comm. School Bd.	368 N.W.2D 74 (Iowa 1985)	Iowa	Supreme Court of Iowa
Kentucky State Bd., Etc. v. Rudasill	589 S.W.2d 877 (Ky. 1979)	Kentucky	Supreme Court of Kentucky
Lemon v. Kurtzman	403 U.S. 602, 91 S.Ct. 2105		United States Supreme Court
Matter of Adam D.	505 N.Y.S.2d 809 (Fam.Ct. 1986)	New York	Family Court, Schoharie County

CASE LISTINGS (con't)

CASE	CITATION	STATE	LEVEL
Matter of Andrew "TT"	504 N.Y.S.2d 326 (A.D. 2 Dept. 1986)	New York	Supreme Court, Appellate Division, Third Department
Matter of Falk	110 Misc. 2d 104, 441 N.Y. S.2d 785 (1981)	New York	United States District Court
Matter of Franz Children	390 N.Y.S.2d 940 (1977)	New York	Supreme Court, Appellate Division, Second Department
Mazanec v. North Judson-San Pierre School Corporation	798 F.2d 230 (7th Cir. 1986)	Indiana	United States Court of Appeals, Seventh Circuit
Meyer v. Nebraska	262 US 390		United States Supreme Court
Murphy v. State	852 F.2d 1039 (1988)	Arkansas	U.S. Court of Appeals for Eighth Circuit
People v. Levisen	404 Ill. 574 (1950)	Illinois	Supreme Court of Illinois
Pierce v. Society of Sisters	268 US 510		United States Supreme Court
Roemhild v. State	308 S.E.2d 154 (Ga.1983)	Georgia	Supreme Court of Georgia
San Antonio School District v. Rodriguez	411 U.S. 1, 93 S.Ct. 1278		United States Supreme Court

CASE LISTINGS (con't)

CASE	CITATION	STATE	LEVEL
Scoma v. Chicago Board of Education	391 F. Supp. 452 (1974)	Illinois	United States District Court, N.D. Illinois, E.D.
Sheridan Road Baptist Church v. Department of Education	426 Mich. 462, 396 N.W. 2d 373 (1986), cert. denied, 107 S.Ct. 2183 (1987)	Michigan	Michigan Supreme Court
State Ex Rel. Douglas v. Bigelow	334 N.W.2d 444 (Neb. 1983)	Nebraska	Supreme Court of Nebraska
State v. Bowman	Or.App., 653 P.2d 254 (1982)	Oregon	Court of Appeals of Oregon
State v. Buckner	472 So.2d 1228 (Fla.App.2 Dist. 1985)	Florida	District Court of Appeal of Florida, Second District
State v. Budke	371 N.W.2d 533 (Minn. 1985)	Minnesota	Supreme Court of Minnesota
State v. Davis	Mo.App., 598 S.W.2d 189 (1980)	Missouri	Missouri Court of Appeals, Southern District
State v. Edgington	663 P.2d 374 (N.M.App. 1983)	New Mexico	Court of Appeals of New Mexico
State v. Lowry	383 P.2d 962 (Kan. 1983)	Kansas	Supreme Court of Kansas
State v. M.M. and S.E.	Fla.App., 407 So.2d 987 (1982)	Florida	District Court of Appeal of Florida, Fourth District

# CASE LISTINGS (con't)

CASE	CITATION	STATE	LEVEL
State v. McDonough	468 A.2d 977 (Me. 1983)	Maine	Supreme Judicial Court of Maine
State v. Moorhead	308 N.W.2D 60 (Iowa 1981)	Iowa	Supreme Court of Iowa
State v. Newstrom	371 N.W.2d 525 (Minn. 1985)	Minnesota	Supreme Court of Minnesota
State v. Patzer	382 N.W. 2d 631	North Dakota	Supreme Court of North Dakota
State v. Popanz	332 N.W.2d 750 (Wis. 1983)	Wisconsin	Supreme Court of Wisconsin
State v. Riddle	285 S.E. 2d 359 (W.Va. 1981)	West Virginia	Supreme Court of Appeals of West Virginia
State v. Schmidt	505 N.E.2d 627 (Ohio 1987), cert. denied 108 S.Ct. 327	Ohio	Supreme Court of Ohio
State v. Shaver	N.D., 294 N.W.2d 883 (N.D.1980)	North Dakota	Supreme Court of North Dakota
State v. Trucke	410 N.W.2d 242 (Iowa 1987)	Iowa	Iowa State Supreme Court
State v. Whisner	351 N.E.2d 750	Ohio	Supreme Court of Ohio

# CASE LISTINGS (con't)

CASE	CITATION	STATE	LEVEL
State v. Yoder	406 U.S. 205, 92 S.Ct. 1526 (1972)		United States Supreme Court



## CASE HOLDINGS

CASE	HOLDING
Blackwelder v. Safnauer	There is no constitutional violation by setting minimum standards of instruction as required by the Education Law. Compulsory education statute is not unconstitutionally vague.
Brown v. Board of Education of Topeka	Required all public schools to desegrate.
Burrow v. State	The language of the statute was clear and there was no 1st amendment violation.
Care and Protection of Charles	Remanded to lower court, pre-approval of curriculum, teacher competence, textbook adequacy and pupil progress appropriate. Did not violate parents constitutional rights.
Delconte v. State	Amendments to compulsory attendance statutes were to loosen standards for nonpublic education. Case did not deal with constitutional issue. Without clear legislative intent court would not hold that home instruction is prohibited by statute.
Duro v. District Attorney	States compelling interest overrides parents religious interest.
Ellis v. O'Hara	Limited holding on vagueness issue. Stayed order until legislature enacted new statutes.
F. & F. v. DuVal County	Mother doesn't qualify as tutor and program not a parochial or denominational school.

# CASE HOLDINGS (con't)

CASE	HOLDING
Farrington v. Tokushige	Limited state's authority to excessively regulate private schools which set limitations on state power.
Fellowship Baptist Church v. Benton	Certification requirement and denial of "Amish exemption" upheld. Remanded to lower court for definition of "equivalent instruction."
Grigg v. Commonwealth	Unapproved home instruction does not constitute a private school. Requirement of qualified tutors is acceptable and not vague.
Hanson v. Cushman	Statute requiring certification is constitutional, rejected that parents had a fundamental non-religious right in the choice of education for their children.
Hill v. State	No merits on freedom of religion claim.
Howell v. State	Sincerely held religious convictions are not 1st amendment defense. Howells failed to show reversible error.
In re Monnig	Essentially equivalent qualification was unconstitutionally vague. Juvenile court bears the burden of proof to show equivalency.
Interest of Sawyer	Home school not private school as defined in statute, state standards are appropriate and have rational relationship to state purpose. Education is not a fundamental right.

# CASE HOLDINGS (con't)

CASE	HOLDING
Johnson v. Charles City Comm. School Bd.	Upheld reporting and teacher certification requirements. Remand to district court for definition of equivalent instruction.
Kentucky State Bd., Etc. v. Rudasill	Appropriate monitoring of private schools such as testing is acceptable, requiring certification or determining appropriate textbooks is not acceptable.
Lemon v. Kurtzman	Developed three-prong test to determine state's neutral position when Church/State cases are litigated.
Matter of Adam D.	Upheld the local schools responsibility to determine the equivalency of the home instruction program.
Matter of Andrew "TT"	Parents, found guilty of neglect, failed to provide school officials with proof that the instruction the children received at home met equivalency requirement.
Matter of Falk	Parents met burden of proof that they were providing instruction that is substantially equivalent.
Matter of Franz Children	Statute is constitutional. One and one-half hours per day of instruction is not substantially equivalent.
Mazanec v. North Judson-San Pierre School Corporation	Plaintiffs denied relief in civil rights claim because they frustrated attempts to verify compliance with law.

## CASE HOLDINGS (con't)

CASE	HOLDING
Meyer v. Nebraska	Invalidated state law prohibiting teaching of a modern language other than English to students.
Murphy v. State	Courts upheld law that students taught at home take same standardized test as public school students as it established the least restrictive system to assure its goal of adequately educating its citizens.
People v. Levisen	Statute does not determine the manner and place a child should be educated. Parents have burden of showing an adequate course of instruction is provided. This particular program is a private school.
Pierce v. Society of Sisters	State statute recognizing only public education interfered with parents liberties. The state did not have the power to regulate, inspect, supervise and examine all schools.
Roemhild v. State	Statute was unconstitutionally vague in lack of defining "private school."
San Antonio School District v. Rodriguez	Education is not a fundamental constitutional right protected by Equal Protection. Education is the responsibility of the state.
Scoma v. Chicago Board of Education	Statute is not vague, burden of proof is on the parents. Home instruction could qualify as public school as long as it was commensurate with public school standards.
Sheridan Road Baptist Church v. Department of Education	Certification requirement upheld, does not alone violate Establishment Clause.

## CASE HOLDINGS (con't)

CASE	HOLDING
State Ex Rel. Douglas v. Bigelow	Non-certified parent is enjoined from operating a school in violation of law.
State v. Bowman	Statute is not unconstitutionally vague and approval authority was acceptable.
State v. Buckner	Clear prohibition of unqualified parent from teaching a child at home under guise of private school. Remanded for determination if private school was established.
State v. Budke	Essentially equivalent qualification was unconstitutionally vague.
State v. Davis	State failed to prove parents didn't provide equivalent education. Urged legislature to make necessary changes in the law.
State v. Edgington	Statute rationally related to state interest in compulsory attendance and does not violate the 14th amendment Equal Protection Clause.
State v. Lowry	Parents claim they operated a private school. Court found it did not meet statutory requirements.
State v. M.M. and S.E.	Private school not established because mother was not a qualified tutor as required by the statute.

## CASE HOLDINGS (con't)

CASE	HOLDING
State v. McDonough	Parents refused to submit plan. 14th amendment claim unfound.
State v. Moorhead	Equivalency and curriculum requirements are clear. Free exercise burden on party challenging.
State v. Newstrom	Essentially equivalent qualification was unconstitutionally vague for purpose of imposing criminal penalties.
State v. Patzer	Teacher certification is the least personally intrusive method to satisfy state's prime interest.
State v. Popanz	Term "private schools" in compulsory attendance statute is vague and thus is unconstitutional as applied to prosecutions involving private schools.
State v. Riddle	1st and 14th amendment violations denied. Sincerity, dedication and competency are excuse for non-compliance with statute. Statute not vague, instead considered flexible.
State v. Schmidt	Statute is not vague, it reasonably furthers the state's interest in education of its citizens, requirement to seek local superintendent approval is appropriate and doesn't infringe on free exercise of religion.
State v. Shaver	Minimal requirements for state approval are in best interest of state.

## CASE HOLDINGS (con't)

CASE	HOLDING
State v. Trucke	Reversed because conviction based on crimes not yet committed (120 day attendance requirement).
State v. Whisner	Minimum standards for private schools were too restrictive. Required state to show compelling interest.
State v. Yoder	Court placed burden of proof on state to show compelling interest. Narrow ruling applied to Amish due to strong religious conviction.

## APPENDIX C



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State Dept. of Public Instruction  
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WILLIAM L. THOMPSON

Regional Superintendent of Schools  
County Building A904, Waukegan, Illinois 60085

Telephone (312) 360-6313

June 25, 1987

!FIRSTNAME! !LASTNAME!  
!ADDRESS!  
!CITYSTZIP!

Dear !FIRSTNAME!:

Thanks so much for the information you have provided me regarding home instruction. It seems as if I am becoming acquainted via the phone and mail with an interesting group of people in state agencies and in a variety of other educational positions that are all concerned with home instruction.

I am finalizing my survey for the chief state school officers and would appreciate your input before I send it out. My primary goal in distributing the survey is to obtain any information that will not be readily available through normal research. An example of this is information regarding rules and regs developed to implement the statutes. It seems as if the statutes are secondary in terms of local and state administration. Another example of information I hope to obtain is the process states used to develop and influence legislation.

As I have begun my research I have come across several charts documenting state statutes, but I am fearful they are no longer accurate. One of my final goals is to develop an up to date chart such as this from an unbiased perspective.

My last favor to ask of you is do you have any idea how I can be certain my survey is acted on in the state agencies. I know they receive so many of these. Chris Phipo from the Education Commission of the States recommended I identify 2 or 3 chief state school officers to endorse the research project and to cosign the cover letter. Do you think your chief would consider doing this?

Thanks in advance for your cooperation. I am enclosing a stamped return envelope for your convenience. I'd appreciate your input by July 15th if possible.

Sincerely,

Sybil Yastrow  
Assistant Superintendent

LAKE COUNTY

## Regional Superintendent of Schools

18 North County • A904 • Waukegan, Illinois 60085-4362  
312-360-6313

**Sybil Yastrow**  
Regional Superintendent

**Edward Gonwa**  
Assistant Regional Superintendent

### MAILED TO CHIEF SCHOOL OFFICERS

October 30, 1987

As you are aware, there is a growing trend throughout the country of parents educating their children at home. As the Regional Superintendent of Lake County, Illinois, I have watched the numbers increase in our county. Illinois has no statutory provisions for home instruction. The confusion as to the rights and responsibilities of both the parents and school administrators has become more evident each year.

It is my intent to research this issue. The purpose of the research is to examine home instruction from a national perspective in terms of the applicable statutory and case law, as well as rules and regulations. Based on this analysis, I will propose model criteria for home instruction legislation and regulations. The goal is to provide information to local districts, state agencies and lawmakers in Illinois to assist them in the development of policies, rules and regulations and laws relating to home instruction.

Ted Sanders, the Superintendent of Illinois State Board of Education, has lent his support to this research as indicated in the enclosed letter. I would appreciate your support by completing the enclosed questionnaire. The law books cannot provide all of the information. I am certain the most meaningful information I can obtain will be from state educational agencies that deal with the situations on a regular basis.

Thank you in advance for your cooperation. Please feel free to call me collect if you have any questions.

Sincerely,

Sybil Yastrow  
Regional Superintendent of Schools  
Lake County



**Illinois  
State Board of  
Education**

100 North First Street  
Springfield, Illinois 62777-0001  
217/782-4321

Thomas Lay Burroughs, Chairman  
*Illinois State Board of Education*



Ted Sanders  
*State Superintendent of Education*

September 25, 1987

Ms. Sybil Yastrow  
Regional Superintendent of Schools  
County Building A904  
Waukegan, Illinois 60085-4362

Dear Sybil,

I am happy to cooperate with you in obtaining information you need in preparing your doctoral dissertation.

The topic you have chosen to examine on home instruction is an important and timely one. I hope my colleagues will give their cooperation in completing the survey to assist you in this important endeavor.

Best personal wishes on your project.

Sincerely,

Ted Sanders  
State Superintendent of Education

Southern Illinois Regional Office  
First Bank and Trust Building  
Suite 214, 123 South 10th Street  
Mt Vernon, Illinois 62864-4013  
618/242-1676

Telecommunications Device for the Deaf (TDD)  
217/782-1900

State of Illinois Center  
Suite 14-300  
100 West Randolph  
Chicago, Illinois 60601-3405  
312/917-2220

*An Equal Opportunity/Affirmative Action Employer*

### HOME INSTRUCTION SURVEY

1. Does your state have a compulsory attendance/education statute?

Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please send a copy of statute.

2. Does your state have a statutory requirement for reporting all students covered by compulsory attendance/education?

Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please send a copy of the statute.

If yes, to whom is the reporting done?

If yes, does it require that all students in all educational settings be included in the data?

Public School Yes \_\_\_\_\_ No \_\_\_\_\_

Non-public School Yes \_\_\_\_\_ No \_\_\_\_\_

Home Instruction Yes \_\_\_\_\_ No \_\_\_\_\_

If no, is there a state educational department procedure used to gather these data?

Yes \_\_\_\_\_ No \_\_\_\_\_

(If yes, please send a copy of the procedures).

3. Does your state have specific statutory language referring to home instruction?

Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please send a copy of the statute and answer the following.

The statute is: (mark as many as appropriate)

restrictive \_\_\_\_\_ flexible \_\_\_\_\_ other \_\_\_\_\_

limiting \_\_\_\_\_ adequate \_\_\_\_\_

unenforceable \_\_\_\_\_ needs revision \_\_\_\_\_

4. Does your state have a statute dealing with non public (private) schools which include home instruction as a form of non public school?

Yes \_\_\_\_\_ No \_\_\_\_\_

IF YOU RESPONDED POSITIVELY TO 3 OR 4 - PROCEED.  
IF NOT, PLEASE GO TO # 11.

5. Does the statute referring to home instruction in your state fall under any of the three following categories:

1. Specifically provides for home instruction.

Yes \_\_\_\_\_ No \_\_\_\_\_

2. Allows for home instruction if the home qualifies as a private school.

Yes \_\_\_\_\_ No \_\_\_\_\_

3. Allows for home instruction, by implication, with statutory language (e.g. "equivalent education elsewhere.")

Yes \_\_\_\_\_ No \_\_\_\_\_

4. Other (please specify) \_\_\_\_\_

6. Has your agency developed any rules, regulations and/or procedures to implement the home instruction statutes?

Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please send a copy.

7. Are you aware of any political or legislative activities that resulted in the passage of home school legislation (for example: lobbying groups)?

Yes \_\_\_\_\_ No \_\_\_\_\_

Please describe.

8. Who has the authority to regulate home instruction in your state?

(Select as many as appropriate)

State agency \_\_\_\_\_ Intermediate Agency \_\_\_\_\_ Local School District \_\_\_\_\_

Other (please specify) \_\_\_\_\_

9. What is source of this authority? (Select as many as appropriate)

Statute \_\_\_\_\_

Rules & Regulations \_\_\_\_\_

Other (please specify) \_\_\_\_\_

10. Does your agency monitor home instruction programs? Yes \_\_\_\_\_ No \_\_\_\_\_

Does your agency monitor non public schools? Yes \_\_\_\_\_ No \_\_\_\_\_

If your response was yes to either of above, describe the monitoring process (i.e., all reporting forms, testing, on site monitoring, other).

11. Please list the most important court cases (federal or state) in your state dealing with home instruction? (any descriptor will be sufficient)

12. Is there any pending litigation in the state or federal courts in your state relating to home instruction?  
Yes \_\_\_\_\_ No \_\_\_\_\_

13. Has your attorney general or state educational agency legal department provided legal opinions regarding home instruction?  
Yes \_\_\_\_\_ No \_\_\_\_\_  
If your response was yes, please include copies or describe.

14. Does your agency provide support to the local educational agency administrators for dealing with the home instruction of students?

Yes \_\_\_\_\_ No \_\_\_\_\_

If your response was yes, please describe (i.e., seminars, guidelines, reporting forms).

15. Are there any specific requirements in your state regarding special education students (as defined in Public Law 94-142) who are educated at home?

Yes \_\_\_\_\_ No \_\_\_\_\_

16. Would you like a compilation of data gained from this survey? Yes \_\_\_\_\_ No \_\_\_\_\_

State \_\_\_\_\_

Person completing survey \_\_\_\_\_

Position \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_ Zip \_\_\_\_\_

Phone \_\_\_\_\_

*Any documents (statutes, rules and regulations, court cases, task force reports) to support this survey would be appreciated. If there are any duplicating or postage costs please include with the materials a bill for reimbursement.*

**PLEASE RETURN TO:** SYBIL YASTROW  
REGIONAL SUPT. OF SCHOOLS  
ROOM A904 COUNTY BUILDING  
18 N. COUNTY STREET  
WAUKEGAN, ILLINOIS 60085

## APPENDIX D

## CONTACTS FOR CASE STUDY INTERVIEWS

STATE	CONTACT	CATEGORY OF HOME INSTRUCTION AUTHORITY
Iowa	Kathy Collins Legal Consultant Department of Public Instruction	Equivalent
Minnesota	Barry Sullivan Government Relations Department of Education	Explicit
Montana	Bob Stockton, Executive Assistant to Legal Services, Office Of Public Instruction	Explicit
New York	Carl Friedman, Bureau of Pupil Support Services; Richard Troutwein, David Steever, Legal Department; The State Education Department	Equivalent
North Carolina	Kay Oney, North Carolina Department of Public Instruction	Explicit
Pennsylvania	Joe Bard, Department of Education	Explicit
Wisconsin	Marvin Berg, Consultant Department of Public Instruction	Explicit



## QUESTIONS FOR PHONE SURVEY

201

November, 1988

The purpose of the phone survey to five state offices of education is to gain a clearer insight into the statutory authority and its development in the area of home instruction.

Verify information from original survey:

1. The year of the most recent change in the compulsory education statutes in your state.

Pertinent information from the statute.

2. Cite authority if any for home instruction in state.

Pertinent information from the statute. Verify grouping.

3. Important court cases over the past 20 years.

### Questions:

1. Is your state unique in terms of home instruction, i.e., strong language, large population with religious sentiment directed to home instruction, court precedent?
2. Best features in statutory language.
3. Most troublesome language.
4. Are there any state funds available to support any part of the home school statutory language, i.e., state aid to districts for students, testing, monitoring, etc.?
5. Chronological sequence of changes in legislations.
6. Describe the outside forces if there were any that precipitated these changes.
7. Predict any trends in your state regarding home instruction.
8. What would be the forces that would cause these?
9. Predict any national trends regarding home instruction.
10. What would be the forces that would cause these?
11. If you were to write the model legislation regarding home instruction, what would be the components of it?

## APPROVAL SHEET

The dissertation submitted by Sybil Yastrow has been read and approved by the following committee:

Dr. Max A. Bailey, Director  
Associate Professor, Educational Leadership and Policy Studies,  
Loyola University of Chicago

Dr. L. Arthur Safer  
Associate Professor, Educational Leadership and Policy Studies,  
Associate Dean, School of Education  
Loyola University of Chicago

Dr. Philip M. Carlin  
Associate Professor, Educational Leadership and Policy Studies,  
Loyola University of Chicago

The final copies have been examined by the director of the dissertation and the signature which appears below verifies the fact that any necessary changes have been incorporated and that the dissertation is now given final approval by the Committee with reference to content and form.

The dissertation is therefore accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy.

April 10, 1989

Date

Max A. Bailey  
Director's Signature