

# Report and Recommendation of the LEAH Legislative Standing Committee Majority Report

May 17, 2001

Chairman: David R. Callihan, Liverpool, NY  
Members: Laurie Callihan, Liverpool, NY  
Dan Durkee, Livonia, NY  
Elyse Durkee, Livonia, NY  
Paul S. Matte, Lima, NY (ex-officio member and LEAH President)  
Lorraine Matte, Lima, NY  
Rich Stauter, Baldwinsville, NY  
Pam Stauter, Baldwinsville, NY  
MaryAnn Winters, Holland Patent, NY  
Steven W. Winters, Holland Patent, NY

Recommendation: By a vote of 5 to 2, with a confirming agreement by the two members in absentia, the Legislative Standing Committee passed the following recommendation:

"In order to (a) fulfill Art III, #2 and especially #3 of the NYS LEAH by-laws,  
(b) encourage the member families to fulfill their moral obligation as citizens of this republic to be an informed electorate,  
and  
(c) in recognition of the fact that there remains strong dispute as to the efficacy and constitutionality of the proposed legislation, S4767, we hereby move that the LSC recommend to NYS LEAH that **LEAH announce its opposition to S4767**. We also move that this recommendation further contain a call for the **establishment of an immediate plan to educate the member families as to the pros and cons, the various legal opinions, and the historical documents.**"

This recommendation is accompanied by the enclosed set of attachments.

Respectfully Submitted,

David R. Callihan  
Chairman – Legislative Standing Committee  
May 17, 2001

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Exhibit A – LEAH Legislative Committee Report on Senate Education Bill S4767  
Exhibit B – Pro's and Con's 5-16-2001  
Exhibit C – Kranz letter 3-17-2001  
Exhibit D – Miller letter 4-13-2001  
Exhibit E – Callihan letter re PA Law  
Exhibit F – Letter of Scott Perkins  
Exhibit G – Letter from Seth Rockmuller  
Exhibit H – Open letter to LEAH Board re S4767 5-16-2001  
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Exhibit M – Observations on relevance of Packer Case by S Winters 5-12-2001  
Exhibit N – Letter to Paul Matte from SED Director Appleby 3-14-2000  
Exhibit O – Scott Somerville's paper from AREA conference in Seattle in April 2001

# Exhibit A

## LEAH Legislative Committee Report on Senate Education Bill S4767

### **"A Report in Progress."**

#### **[Due to Unrealistic Time Constraints We Reserve the Right to Issue Addendum(s)]**

The Viewpoint of the eight members out of ten who are opposed to endorsement of S4767 within the LEAH Standing Legislative Committee, including the Chairman:

The original directions of this committee over the past two years have focused on legislative influence as we have been dealing with Senator John R. Kuhl, Chairman of the Senate Education Committee in his attempt to increase the compulsory attendance age. We have attempted to work with the Senator and his staff at the Senate Education Committee to utilize alternative language in proposed bills such as "for public schools only" when creating more laws (specifically designed to address problems in the common public school system) that impact and interfere with the other educational choices available to NYS families. We also have offered alternative language to the compulsory education bill itself in an effort to get families of alternative educational approaches removed from the authority of public (common) school laws.

Our effort regarding review of New York State Senate Education Bill, S4767, began long before the bill actually was drafted and presented. It commenced with the announcement by Senator John R. Kuhl, Chairman of the Senate Education Committee of the original draft of what eventually became S4767. A delegation of our committee met with Peter Appleby, SED Director in early April, where we expressed our views and recommendations about the original draft. Some of those recommendations are clearly seen in the bill. However, our real scrutiny began in earnest on Tuesday, April 17, 2001, when the SEC and Senator Kuhl officially released the bill.

Work has been consistent since this time, except for a period of one week, from May 4 through 11, 2001 when the LSC suspended deliberations in order to make a statement to the LEAH Board of our disappointment in meeting our request to know by vote if our work was still required in light of HSLDA's overwhelming endorsement of S4767. We also used this week to take a break for the sake of our families in light of the large amount of work we were expending in analyzing this bill. Once the week passed, we commenced work aggressively to complete this report.

The pressure that was put on this committee by specific Board members to get through this process expeditiously was uncalled for. This committee worked consistently and sacrificially on this bill, spending personal time and money (we understand it is reimburseable) in order to complete our task. Nonetheless, for the record we want it to be stated that we believe there was inappropriate demands for us to hurry our process. These demands were categorically unnecessary and counterproductive. We hope that the Board will work to rectify this type of problem from occurring in the future for the sake of future standing and ad-hoc committees that are assigned tasks by this Board.

As a practical example of how inappropriate the pressure was, consider the following notice that we received from a home school dad on Wednesday, May 16, 2001:

"I contacted the education committee and found out the following (emphasis added):

**"Two members of the committee think that the bill will not even be considered by the end of this session** which ends June 21. Peter Applebee, assistant to Senator Kuhl, said that we should call the committee each Thursday (518-455-2631) to find out if they will meet the following week. **I talked to him Tuesday and at that time he thought that the committee will meet only one more time before this session ends.** If you are interested in attending you can call yourself or watch your email each Friday morning as I will let you know if the committee meets. They confirmed that they are open to the public.

"Monday I called each and every member of the education committee. They said that a lot of people had called in support of the bill. At least four senators said this. **Two senators said they doubted this bill will be considered by the end of this session.** For the life of me I can not remember who said what. I do know that the most helpful ones were Suzi Oppenheimer and Toby Staviski. . .

I also found out that there is another bill [S]1785 about letting homeschoolers participate in government schools sports. . .”

The point is that we have been pushed and pressured to complete work on this bill, and are now learning that it may not even get out of committee! People on this Board need to let committees do their job and not attempt to micromanage the work being asked of them. The members of the Board who have been guilty of this should be officially reprimanded, in the opinion of many of the LSC members. Who these persons are is clearly seen in the correspondence that has been copied to all Board members over the past four weeks.

After lengthy discussion and debate among ourselves during this month-long process, the majority of the committee on May 15, 2001, by a vote of 5-2, with two members in absentia, are recommending to the LEAH Board to oppose this legislation. The reasons for this position are summarized in the following explanation.

Before we list our reasons for opposing this bill, there needs to be a point of clarification made up front. We want to categorically, for the record, make it completely clear that our reasons for opposing this bill have absolutely nothing to do with a highly propagated accusation that is circulating right now among LEAH members in the state and with HSLDA (per David C. discussion with Scott Somerville, May 19, 2001). That accusation is that this committee is hung up on pursuing a “constitutional approach” rather than a legislative one, and that Paul Matte is responsible for holding up the process while trying to convince others of his opinions. This could not be further from the truth. This committee has not focused on the research of Paul Matte, though it has been considered to a small extent in our discussions. Let it be stated very clearly that **our opposition to this bill has to do with the merits of the bill itself and not because we are opposed to pursuing a legislative approach. We believe that the following arguments, in total, make endorsement of this bill a bad decision, and opposition to it a right one.** The only point in this list of thirteen items opposing S4767 that deals at all with constitutionality is the *last* one, and it is viewed in light of the statutory language, not the approach. Furthermore, we want to go on record as stating that we would be in favor of any bill that clearly protects the rights of parents to educate but does not include the inherent risks and objections that we see are in this bill, as outlined in the following points:

First, we have had the opportunity to discuss this bill with many homeschoolers across New York State through various media, including e-mail, letters, phone conversations, personal visits, meetings of LEAH members, meetings of non-LEAH members, and other types of correspondence. One thing is absolutely clear. There is nowhere near a consensus on this bill. Opinions vary widely among even members of individual chapters. **(See Exhibit K)** However, there are some LEAH chapters who are totally in favor of this bill. Conversely, there are LEAH chapters who are totally opposed to it. **(See Exhibits C & D)** In light of this disparity, it is the opinion of the majority of this committee that an endorsement of the bill would not be wise for LEAH to undertake as a whole, and for the Board to do so at this time would be clearly divisive to the organization. We believe that doing so at this time could be incredibly harmful to our future stability as a whole. This bill is encouraging factions within LEAH, and therefore should be opposed.

Second, there is a serious consequence that will take place if S4767 becomes law. It will codify portions of the current S100.10 Education regulations. The committee’s opinion, based on inquiry of a number of sources, including Home School Legal Defense Association, along with respected attorneys here in New York State, as well as documents we have looked at on the issue, is that there is still a valid, yet unanswered question as to whether it is wise to convert these regulations into statute at this time. Passing this bill would move sections of S100.10 from “subordinate law” (Regulation) to “superior law” (Statute). **(See Exhibit I)** The reasons for this concern are varied, including whether there is still a basis for a lawsuit against the State Education Department and the Commissioner for violating statutory authority in creating these regulations. If the homeschool community endorses a statute that becomes law, there are serious questions whether there would then be a basis to sue the State for aspects of the statute that were previously considered improper, when the homeschool community lobbied to pass such a bill. This could be erroneous on our part. Therefore prudence demands caution. **(See Exhibits F, G, & M)**

Third, we believe that our research indicates that there is a clear conflict-of-interest on the part of HSLDA in coming out overwhelmingly in favor of this bill, S4767. **(See Exhibit L)** According to an e-mail sent by Dee Black to Paul Matte in October of 1999, it is clear that HSLDA does not believe they could be involved in challenging the authority of the Commissioner to issue the home instruction regulation or the constitutionality of the regulations. Their only recourse is to assist in revising the regulations, or to work for changes in the compulsory attendance statutes, according to their own words. Therefore, HSLDA is limited in what they can do to assist New Yorkers toward a freer homeschooling environment in the state. Any options that they recommend have to be fenced in by these requirements--to revise the regulations or change the compulsory education statutes. We therefore need to take their recommendations in that light. We may end up agreeing with them, but we need to clearly understand what limitations HSLDA has in endorsing or opposing any particular piece of legislation. This becomes even more important when attorneys in our own state indicate that they are not behind the changes HSLDA is recommending, as is the case with S4767. Therefore, we believe this conflict-of-interest on the part of HSLDA greatly limits their right to influence even their own member families in compelling them (including us) to endorse this legislation based on their recommendation. We respect their opinion in endorsing S4767, however, we believe

other compelling reasons are needed beyond their endorsement for us to do so. Such compulsion was not forthcoming as we pursued understanding of the issues involved.

It is also ironic that every member of this legislative committee is a member of the Home School Legal Defense Association. (One family of the LSC has continued to support HSLDA ten years after no longer needing their services. Two of the member families have adult children who work for the organization!) HSLDA represents us individually as well. Don't they then represent us as a committee too? Thus, if we voted to oppose this bill, before they determine their directions to endorse or oppose this legislation, shouldn't they have been willing to wait to learn what our concerns are? Doesn't it behoove them to understand our objections and help explain to us why they may not be valid, or if they can't, then concur with us, before categorically, hurriedly, and proactively endorsing this bill, as they have already done????!! We believe the answer to these questions is an unequivocal "Yes! Absolutely!" So why isn't HSLDA waiting? And why the undue pressure? This is quite astounding to us.

HSLDA has also worked to pass laws in other states, such as Pennsylvania and Texas, that have had opposition to their positions. We need to be extremely careful in light of some of this history in just categorically accepting their recommendation, even when it is strongly encouraged. **(See Exhibit E)**

Fourth, we found that upon further inquiry of two respected New York-based attorneys, Mr. Scott Perkins and Mr. Seth Rockmuller, who are well versed in the homeschooling regulations, as well as S4767, they indicated that they were opposed to endorsing S4767 in direct conflict with HSLDA's position. **(Again see Exhibits F, G & M)** Furthermore, these two attorneys have been involved with educational law in New York for many years and have themselves homeschooled in New York State. Mr. Perkins, who is a believer, was involved in the Blackwelder trial as a defense attorney, and Mr. Rockmuller worked as counsel for the State Education Department, and continues to defend home schooling families in New York to the present time. They are both friends of LEAH, though admittedly Mr. Rockmuller has not always thought favorably of HSLDA. However, there are compelling arguments being made by both of these attorneys that the current regulations are unconstitutional and should be challenged in court. Before we attempt to endorse the replacement of S100.10 with statutes that would be considered equally as unconstitutional, there is an argument to be made that we should target our efforts toward challenging these unconstitutional impositions of the current State Education Department regulations. To endorse the creation of statutes that contain equivalently unconstitutional positions, could be easily viewed by the courts as hypocritical and unfounded, if we endorse such legislation. It would make litigation difficult or moot in the future.

Fifth, there are sections of S4767 that are disturbing. The probation section is one of them. It is inappropriate. There is no probation for students of public or private school students. Parents are being held to a different standard than parents who send their children to institutional schools. Additionally, the probation section of the bill is badly written with no final consequences being clearly defined for those who end up with unresolved probationary situations. This will leave this section of the bill open to legislative change, which is very risky. The bill also places greater restrictions on home schools than on non-registered private schools. This is discriminatory. It will be challenged in court if it becomes law. Why would we want to endorse a bill that will be immediately challenged in court and could be thrown out once it is enacted? It is reason enough alone to oppose the bill.

Sixth, there are numerous aspects of this bill that are compromising in nature that need to be contemplated seriously. Any "incremental" approach to legislation demands compromises. Such compromise, to many homeschoolers in New York, should only be allowed to occur after a protracted period of time that we can discuss the potential consequences among ourselves in a timely manner. There is a need for a period of discussion and deliberation among ourselves that has not been allowed to occur with this bill. It has only been open to discussion for one month. Communication has not been allowed for a significant period of time.

As we have been working with the Senate Education Committee in seeing legislative change over the past number of years, there has been agreement between us that we will need time to give our constituency a chance to review potential legislation and give feedback. This is clearly seen in a letter that Paul Matte sent to SED Director, Peter Appleby in April, 2000. **(See Exhibit N)** Both Mr. Appleby and his boss, Senator Kuhl have concurred that this time delay required for communication to occur is acknowledged and respected. However, in reviewing of this bill, such a time period for reflection and analysis has not been allowed to occur. To us this is curious and disturbing. Why isn't the same patience being encouraged with this bill? We recommend that such deliberation is imperative. Again, for this reason, we oppose S4767.

We also wish to allow this communication among ourselves in the homeschool community, not just within, but among our friends outside of LEAH. Even Scott Somerville, HSLDA lawyer, in his recent paper (April 2001), *The Politics of Survival: Home Schoolers and the Law* (pp.14-15) agrees: **(See Exhibit O)**

***Kathy Collins, the attorney who used to supervise home education in Iowa, wrote home schoolers off as Christian fundamentalists. Ms. Collins was wrong. The diversity of home schoolers is a great strength of the home school movement.***

The increasing popularity and acceptability of home education has given it a foothold in some communities that might otherwise have never considered it. The first wave of home schoolers was far to the left of the American political spectrum, and the second wave of evangelical home schoolers was well to the right. The new waves of the home school movement are rapidly filling in the vital center of American politics. Each new wave makes it harder for politicians to take away the right to teach a child at home.

**Diversity is especially useful when home schoolers interact with legislators.** There are home schoolers who are very comfortable with the most conservative politicians, and others who are equally at home with the most liberal. **When home school freedoms are genuinely threatened, every faction of this diverse community will quickly join together to fend off government control of home education.**

Legislators must remember the diversity of home education when they consider how (or whether) to regulate it. **A legislative proposal might be perfectly acceptable to most home schoolers, yet fundamentally violate the deepest convictions of others.** Dr. Mary Hood, a home schooler herself, dealt with this issue in her doctoral dissertation: [I]t is important for policy-makers to recognize that no single individual, group or organization, either on a local or a national level, can possibly hope to represent the views of all home educators adequately. **Whenever policy decisions are made, it is important to include representatives of the homeschool movement in the planning process in order to ensure that decisions are fair and plans are feasible. However, the views of minorities should be given consideration and the concerns of those individuals or groups who are most noticeable or vocal in a given area should not be allowed to dominate the discussion completely.** (Hood, 1991, p. 3) (emphasis added)

This committee is convinced that we must work to achieve involvement of all of these diverse homeschooling factions **before** endorsing legislation to make sure that their views are included. In no way can this process occur within the short timeframe that this bill has been allowed to circulate! Once more, we therefore oppose it.

Seventh, as was previously stated, this bill must still pass through both houses of the State Legislature before becoming law. It could, and in the opinion of some, most likely will be changed for the worse in committee. The bill has been written by the more conservative Senate, but must still pass through the very liberal, Democratically-controlled Assembly Education Committee. The Education lobby is very powerful in New York State. They most likely will have objections to the bill as it stands. There are no guarantees that it will pass through untouched. For example, recently there was a Midwife's bill that was altered in committee, despite the assurances of the writers of the bill that it would not be touched. The changes were minor in substance, yet major in impact. A companion bill to S4767 will need to be presented in the Assembly which could conceivably be as bad or worse than the original bill, by reinstating other portions of the current regulations that were supposedly eliminated in the Senate bill. Then the two bills would be subject to negotiation in another compromise education subcommittee, where the resulting compromise may have no homeschoolers' input whatsoever. We believe that such risk is not worth the effort at this time. Senator Kuhl is no champion of homeschoolers either. He is very influenced by the educational establishment of New York. It is clear that we must build a relationship with him for trust to grow to offset the financial and political influence of our opponents. That takes time and effort.

Eighth—and this is a very important consideration in and of itself—the Commissioner of Education has stated to Duane Motley that he is open to considering a reduction in the current S100.10 regulations this year. Before we push for statutory change, we ought to give the Commissioner one last opportunity to keep his word. We may be able to get the relief we desire for now without creating more permanent and binding laws. This allows us to continue to develop relationships among homeschoolers in New York as well as a strategic approach to changing the laws in a manner that is most conducive to success for homeschoolers in New York State.

Some argue that even if the Commissioner changes the regulations to a more favorable set, his tenure is temporary. Another Commissioner could come in and arguably change the regulations again in short order. It is our opinion that this is unlikely if the Commissioner's changes are reasonable. Any new Commissioner will have much larger issues to address than home schooling. This is validated by the fact that the existing regulations have remained unchanged for over twelve years!

Furthermore, it buys us time. We have previously stated that there needs to be time for us to deliberate among ourselves in the homeschooling community. Having the Commissioner work on regulatory change gives us time to work on our objectives further. We now know what class of legislation the Senator is willing to propose. This gives us a reference from which to work among ourselves across the state to put together a bill favorable to all of us that we can then work with the Senator, and other, to enact.

Ninth, there were numerous other reasons given by the LSC members for opposing this bill at this time, including the inappropriate extent of state oversight over our God-given parental responsibility to educate our children. There were specific aspects of the new bill that were unacceptable to some members of the committee such as determination of who was "qualified" to test or score our children, as if the parents aren't. One member pointed out that there is arguable evidence of at least one District Superintendent who is going to challenge this bill in court because of the vagueness of who

the “other person” is who can assess a child’s educational progress or lack thereof. That could have a very deleterious effect on homeschoolers in the state if that Superintendent were to win. And again, why do we want to pass a bill that will be obviously challenged in court if enacted with the existing wording in place? Another point that was presented is that the bill assumes that final authority over our children lies with the State Education Department, the Commissioner, the legislature, and the school district of residence. This is to some on the committee clearly improper. Court cases on the federal level have clearly ruled that parents have “a substantial constitutional right to direct and control the upbringing and development of their minor children.” (Jeffery v. O'Donnell, M.D. PADC, 1988.) The Supreme Court has ruled that it is not the right of the civil government to interfere with the parent’s authority to raise their children. (Troxell v. Granville, USSC, 2000, et.al.) Another argument presented is that this bill doesn’t allow for any type of religious exemption, which should be of tremendous interest to LEAH to see part of any statutory law. Still another is that although the first offensive paragraph of its draft has been removed, this bill’s focus is that the state should be in the driver’s seat and allow prohibition to be placed on families regarding the direction of their children’s education. As in the past, it comes down to who “lawfully” is responsible for the training of children. **This bill also does not attempt to pursue the least restrictive means of addressing the state’s limited interest of literacy and self-sufficiency.** Therefore, we as a committee oppose it **for all of these reasons** as well. (See Exhibits H & J)

Tenth, this bill gives no explicit protection against abuses by Child Protective Services or public school administrators who abuse their authority. Nor are there any penalties for such abuse. We believe this is a dangerous problem inherent in this bill and these protections need to be included in any acceptable statute.

Eleventh, as stated indirectly before, though we clearly do not endorse this bill, it does not mean that every aspect of this bill was inappropriate. Reduction in reporting requirements, testing, and other aspects of accountability to the state educational system is certainly a step in the right direction. However, we believe that there are enough significant problems with this bill, as have already been detailed above, to warrant a rejection of the bill in its entirety. We also believe that we could arguably use this bill as a frame of reference to go back to Senator Kuhl, along with other legislators, to prepare a bill that would receive more positive attention from the entire homeschooling community.

Twelfth, it is clear to us that this bill is not high on Senator Kuhl’s agenda. We also have serious concerns about the Senator’s true reasons for submitting this bill. Some of us think that he is simply “throwing a bone” out there to placate the small community of home schoolers who he knows exist that something is being done to reduce regulations. We think it is arguable that he never intended to give it serious consideration this year. Others of us think that he is flexing his political muscles because Commissioner Mill refused to reduce the regulatory requirements of S100.10 when asked to do so by the Senator on two separate occasions last year. Therefore, he didn’t concern himself with the consequences inherent in some of the effects of this bill on individual homeschooling families. We think there is need for homeschoolers to continue to educate this man about what is best for us and get him to understand more clearly what we think is a good law. We need to work with this very powerful educational influence in our state to help him realize why homeschooling families need to be protected legislatively and what form that protection should take. Before we can do that, however, we need to have unity among ourselves as a constituency as to what that message should be and how to present it. We don’t believe the proper groundwork has taken place to do this so far, and S4767 is indicative of this belief.

Finally, the committee believes that this bill will once again violate the bounds set by the intent of the framers of Article XI Section 1 of the New York State Constitution, as explained by them, that the local public (common) school “does not interfere directly or by implication” with the God-given right of the parent to educate their child(ren).

The intent of the framers, as well as common sense, is violated by existing state oversight. Why do we allow the state to demand that parents who are acting in a responsible manner have to submit to another competing alternative educational entity? This entity is funded by the same citizens who are being regulated (and will be subsequently legislated if this bill passes). Yet as taxpayers, we are disgusted and dissatisfied with the number of illiterate and dependent (welfare) citizenry that it has produced since its inception. The research of this issue is clear and was presented to the Senate Education Committee by this LSC last year. New York State LEAH promotes and protects any family’s right to homeschool, regardless of religious or educational philosophy as outlined in our Bylaws. Many New York citizens, including LEAH members, have chosen a long-standing and successful form of education and vehement objections to the “forced oversight” of the public (common) school system that interferes with their freedom of educational diversity for their family.

For all of these reasons, we as a committee oppose this bill, Senate Bill 4767.

We understand that a minority report is also being submitted to the Board. We want it to be stated, for the record, that the chairman of this committee invited that material being presented by the minority viewpoint (of two members) be included in this report unedited, but such an offer for cooperation was refused. It points to a clear lack of cooperation by the minority members. We believe this is an overt refusal to strive for unity within this committee. It is regrettable and grievous to the majority members, including the chairman.

For these reasons, we humbly submit our recommendation that *the LEAH Board of Directors should not endorse Senate Bill S4767. Furthermore, we recommend that the Board proactively announce and publish your opposition to S4767 and that the Board establish an immediate plan to educate the member families as to the pros and cons, the various legal opinions, and the historical documents.*

Respectfully submitted,

LEAH Legislative Standing Committee  
May 20, 2001

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Exhibit O – Scott Somerville’s paper from AREA conference in Seattle in April 2001

## Exhibit B

Pro's and Con's of Legislative Standing Committee used to determine our decision to recommend against endorsing S4767 to the LEAH Board

### S4767 Pros:

- 1) Would eliminate the requirement of an Individualized Home Instruction Plan (IHIP) and quarterly reports.
- 2) Would eliminate required subjects at all grade levels.
- 3) Would permit the alternative method of evaluation (instead of standardized testing) every year.
- 3) Would permit parents who wish to test their children to choose any nationally-normed standardized achievement test, in addition to a State Education Department test or another approved test.
- 4) Would eliminate the requirement that the local superintendent consent to the person who administers a standardized achievement test or who conducts the alternative method of evaluation.
- 5) Would lower the minimum standardized test score from above the 33<sup>rd</sup> percentile to above the 23<sup>rd</sup> percentile.
- 6) Would eliminate the provision for home visits while a home instruction program is on probation.
- 7) Would reduce disclosure of curriculum by complying families.
- 8) Would cut reporting down to annual notification and evaluation; less paperwork.
- 9) Would reduce the authority of the State Education Department Commissioner over homeschoolers.
- 10) HSLDA does not believe any of the provisions of S4767 are a risk for home schoolers.
- 11) Would provide for alternative assessments by an "other person."
- 12) Would incrementally reduce the burden on home schooling families while allowing us to pursue other means to eliminate civil government intrusion (e.g., litigation, other laws, etc.)

### S4767 Cons:

- 1) Would place greater restrictions on home schools than on non-registered private schools.
- 2) The probation section is inappropriate. There is no probation for public or private schools. It is also badly written with no final consequence which leaves this open to change by legislators.
- 3) Would retain inappropriate state oversight of a God-given parental responsibility.
- 4) Parents are not allowed to test or score their own children unless "qualified" to do so; this bill defines the parent's qualification by an external standard that was originally meant for public schools, not private or home schools.
- 5) Assumes final authority is the legislature, SED, Commissioner, and school district (including local school board); parents are not allowed to deny school board review of determination of non-compliance at the end of second year.
- 6) Court cases have said that parents have "a substantial constitutional right to direct and control the upbringing and development of their minor children"; it's not the right of the civil government to interfere in the parent's authority to raise their children (per 1988 PA District court decision, and Supreme Court Troxel v. Granville case).
- 7) Would move some sections of CR100.10 from "subordinate law" (Regulation) to "superior law" (Statute).
- 8) The bill could be changed for the worse in committee or in the assembly.

- 9) Does not allow for a religious exemption - religious exemption should be part of any bill supported by religious home schoolers.
- 10) Would create a statutory conflict-of-interest in requiring reporting and oversight by the local public school superintendent. In any other venue conflict-of-interest would be charged if a competitor was arbitrarily authorized to be "quality assurance" over the competition.
- 11) This bill gives no protection from the Child Protective Services or school officials' abuse of the family, nor penalty for that abuse.
- 12) Would continue to impose the local, public school model on diverse and individually-derived educational programs with the assumption that educational quality is determined by arbitrary numbers of hours per day or year, and number of days - "substantial equivalence."
- 13) Would once again violate the bounds set by the intent of Article XI Section 1 as explained by the framers of that section (local public school "does not interfere directly or by implication" with the right of the parent).
- 14) Duane Motley has gone to the SED Commissioner Mills to ask for language to reduce the Regulations; a bill should only be supported if Commissioner Mills declines.
- 15) Home school families and organizations of NY are not agreed on the validity of this bill.

# Exhibit C

March 17, 2001

Dear David,

Thank you for your report on the Legislative situation for LEAH and homeschoolers, in general. We appreciate the continued communication regarding this very important issue for all of us who homeschool in New York. We also read Pam Stauter's synopsis of the regulation history and questions for consideration. Please know that we are praying for the Legislative committee and the LEAH Board on this issue.

We would like to offer our input on behalf of our chapter-Livingston Area LEAH. An overwhelming majority of our families favor and support total emancipation from any State control over our constitutional and scriptural right to direct the upbringing of our children. We have grave concerns if LEAH accepts/endorsees Senator Kuhl's proposal in any form because of the "statute" factor. Accepting some relief now, may indeed come back to hinder greater or complete relief at a later time.

We recognize that pursuing a constitutional argument is considered a "long shot" by some. David and his sling were considered ~ "long shot" as well. Let us not forget who guides the sling! Mighty and powerful is our God! We need to stand on what is right.

Please share this input with the Legislative committee and/or the Board. Thank you for your service to the Lord and homeschoolers.

In Christ,

Tom & Cindy Kranz  
Livingston Area LEAH

# Exhibit D

Mr. Timothy D. Miller

Senator John R. Kuhl, Jr.  
Chairman of the Education Committee  
310 Legislative Office Building  
Albany, NY 12247

April 13, 2001

Re: Proposed homeschool legislation

Dear Senator Kuhl:

We believe it is a constitutional right of parents to direct the education of their children, free from any state or federal regulation. Therefore, we request that you, as our NYS representative and the Chairman of the Education Committee, restore parental authority to those parents who choose not to give up this constitutional right by

a) championing any legislation that would provide a complete exemption to minors whose parents are otherwise providing for their education; and/or

b) opposing any legislation that would continue to give the state authority over the education of minors whose parents are otherwise providing for their education.

Thank you for carefully considering our position and its implications for current and future children and parents who view education as a lifestyle rather than as a set of academic criteria administered by government agencies and who desire to raise up a generation of young people who are trained to produce rather than to consume.

Respectfully submitted,

Timothy D. Miller  
Linda D. Miller

CC: LEAH Legislative Committee

## Exhibit E

Open letter to LEAH members of past experience with HSLDA on legislation being enacted without statewide support.

Dear members,

I have been pondering today about our experience with legislation in PA. In 1988, when we moved to PA home schooling was highly restricted, basically all home schoolers were underground. When we arrived in state we caught up on the details of the process as quickly as was possible and began to get quite involved in the process by which PA's current HS leg was passed. At the time, not unlike in NY, the idea was to "legalize" home schooling therefore taking the danger out of it. HSLDA was quite involved in the process of getting this leg passed - as was a group called PA Homeschoolers (we were members of this group) which was not overtly Christian - in fact the founder/leader was/is Howard Richman who is Jewish.

At any rate, we lobbied Harrisburg, we held rallies, we baked pies, etc. and joyfully passed what is now arguably the (at least) second worst home school law in the country. We thought we were doing the prudent thing . . . after all, so many could not home school under the difficulties before the leg! The home school support group which we were members of that met in a suburb of Philly had meetings once a month. The month before the leg was passed we had about six families in attendance. The month after over 100 families showed up! These were not new home schoolers, but ones that came out from underground when the leg was passed. This demonstrates two converse points 1) that clearly home schoolers got along fine underground but 2) were happy to be "legal" now. We experienced benefits of the law when we were hassled by our school district and the SED chastised the District Superintendent for us. We also only had one child of school age (mandatory reporting is at 8 in PA) at the time - so only had to file one copy of all the required stuff.

However, in hindsight, that law has done much to harm home schoolers in PA. Requirements are actually more strenuous - they must annually provide a full outline of educational objectives by subject for the year for each child, medical and dental records, an affidavit that they are home schooling, a running daily log, a portfolio of work, and a yearly evaluation by an educational professional (incidentally I still am certified as such in PA and will be doing evals for friends there this year), and testing in specified years - than in NY. HSLDA was in large part responsible for this mess because it was "what they could get" at the time. While that was true, HSLDA was also being successful in Federal Court decisions that upheld the constitutional right of the parent to educate their children - "parents have a substantial constitutional right to direct and control the upbringing and development of their minor children" Jeffery v. O'Donnell, M.D. PA, 1988. Note this was in the same year the statute was passed! What if HSLDA had waited a bit, and based on this decision had purposed to see a constitutional amendment or comp attendance exemption passed instead??? Would PA be the burdensome place to home school that it now is? I have two good friends whose families are struggling greatly under the burden of home schooling in PA BECAUSE of BAD legislation. Now, arguably, our regulation is nearly as bad - and again, HSLDA was very much involved in the process of getting it in place. In both the PA and NY situations, the expedient answer was legislation/regulation which "legalized" or gave permission from the state for families to home school, but in the long term it was a bad idea. The point is, going for the short run effect is pragmatic, but not usually wise. Since home schoolers have lived under the leg/reg they have provided the confirmation to the legislative authorities that indeed parents think they should be under the control of the state in the direction of their home school. I refuse to give the state that confirmation. The Federal District Courts agree with me! You also must have figured out by now that any reduction in regs in NY or for that matter ammendment of leg in PA would not help me, nor would it help those individuals in either state that believe in their

"substantial constitutional right to direct and control the upbringing and development of their minor children" and act consistently with their belief. Those folks and us are not complying! So, we are not so concerned about a little loosening of the reigns here and there.

I also found it surprising at the time, and telltale now, that after the law was passed, Howard Richman (PA homeschoolers) spent the next several months trying to convince the home school community to comply with the law!!!! Apparently, (this came as a shock to me at the time) the law was not nearly so desirable to the home school masses as the leaders had indicated it would be! There was then, and I presume there is now, a large amount of non-compliance! Howard became the self appointed spokesperson of the home schoolers to convince them to follow the law. The "experts" made a decision to go for an avenue that was ultimately detrimental.

Please, what is the principle??? I think the court stated it very well! They have "a substantial constitutional right to direct and control the upbringing and development of their minor children!" Any legislation that is inconsistent with this principle, and with this court decision, is unacceptable!

IA, GA, MO, MN, WI, and would you believe PA have ruled that their states compulsory ed laws were unconstitutional for vaguery (in terms of competency of instruction and/or equivalency, as I understand). Well then, an exemption from comp ed would be appropriate. OK has a constitutional amendment that guarantees a right to "other means of education" than the state sponsored schools (which is exactly what was intended in NY according to Paul's research) - why not push for that? NJ and SD also allow for other instruction with very little or no requirements from the state. They have no "home school laws" and are much better for it. By the way, I obtained this info from HSLDA.

David and I had a history teacher in college who would have answered some NY residents belief that we could never get that far (a constitutional amendment or a comp ed exemption) so lets just settle for a loosening of the regs with the statement "spoken like a true slave." In NY many feel they can never overcome the power of the educational and liberal government strongholds. Well, then they clearly never will.

Laurie Callihan

# Exhibit F

Letter of Scott Perkins, NY State Attorney-At-Law, Perkins and Perkins, Saratoga, New York to LSC regarding his views on S4767:

**Subj: Proposed home school legislation**

Date: 5/10/01 10:26:41 PM Central Daylight Time

From: *Scott Perkins*

To: *Paul Matte*

CC: *Seth Rockmuller*

Dear Paul,

I regret being unable to respond more promptly to your previous e-mails, as I have a number of commitments which prevent me from becoming actively involved in the debate over the pending home school legislation. I did, however, want to respond to your most recent communication and add my perspective as you have requested.

I have, since the promulgation of Commissioner's Regulations 100.10, taken the position that the regulations, while binding upon public school administrators, are not binding upon those engaged in nonpublic, home school education ("elsewhere", as defined in the Education Law). The reason I have taken that position is that it is clear to me that the Commissioner of Education, by definition, generally has jurisdiction and authority over the State's system of education and not over private education. There are some areas where the Commissioner does arguably have authority over those engaged in private education, such as the power to dictate the form for attendance records ( Education Law 3204, I believe) and to those who voluntarily submit to his authority (i.e. state chartered private schools). However, such authority must be specifically delegated by the Legislature. Absent such limited and specific authority from the Legislature, the Commissioner has no authority to regulate private, home based education.

I therefore agree with Seth's position that there is indeed a plausible argument that the existing regulations are beyond the Commissioner's statutory authority. I also agree with Seth that the reference to regulations in Education Law 3210 does not empower the Commissioner to regulate generally home education; if that were the case, why would the legislature specifically define those areas where authority was granted the Commissioner?

I was privy to some of the information and negotiations at the time the Part 100 regulations were adopted in the 1980's. I do not think anyone truly believed at that time that the Commissioner actually had the legal right to regulate home instruction. In fact, the lack of legal authority for the regulations was seen by some as favorable to homeschoolers. ( Home school attorneys knew that if there was a significant change in the legal climate involving the regulations, we could always advance a strong argument that the Commissioner exceeded his statutory authority with the regulations.) New York at the time was a hot-spot for truancy related Family Court prosecutions, and the general consensus was that homeschoolers had to call a truce with the State Education Department.

That truce resulted in the Commissioner's regulations which, ironically, homeschool leaders actually helped draft. The regulations were seen at the time as an acceptable and reasonable compromise to the public school superintendents' assault on home education, a view that I did not and do not hold. I am sure that most knowledgeable participants in the process knew full well that the Commissioner could not legally promulgate home school regulations, but they served a purpose for all concerned. As a matter of expedience, most simply pretended that there Emperor indeed had clothes, and New York as a troublesome battleground became relatively quiet.

I cannot speak with any authority as to whether the New York Constitution prohibits governmental control of home-based education. I do believe, however, that the courts will rule that the State has a compelling interest in an educated citizenry and therefore may regulate home school education through compulsory attendance and the teaching of mandatory subjects.

I have read Sen. Kuhl's proposed bill and while I like the elimination of the IHIP and quarterly reports, who is to say that the statute will not simply be in addition to Commissioner's regulations? This bill simply codifies and legitimizes a portion of the existing regulations. I also have concerns over possible implications with the notification requirements. As I read the bill, a prospective home school family must notify the district superintendent of their intention to home school by July 1. What if they have home schooled for several years, intended to again homeschool for the coming year, but failed to make the July 1 deadline? What if they provide notice on the fifteenth day after commencing home instruction? Are they legally precluded from home

schooling for that year? I would prefer a deletion of any language which refers to an intention to home school and instead, simply require home school families to provide attendance records to the superintendent. I would also like to see language asserting that the Commissioner of Education possesses only that authority to regulate home education as is specifically granted to him by the legislature. (As an aside, why must New York homeschool families notify the State of their intentions and supply attendance records, when New York families who educate their children at nonpublic schools not chartered by the State, i.e. out of state boarding schools, have no such requirement? Why don't New York families who send their minor children to Exeter, for instance, have to supply an annual assessment to the local superintendent? If it is just assumed that parents who would go to the time and expense of choosing a boarding school for their children must be selecting "substantially equivalent" education, why are not homeschool families afforded the same presumption, especially in light of the uncontroverted proof over the years of the superiority of home-based private tutorial to that of the public school? Keep in mind, it is actually the parent or guardian of a minor of compulsory school age who is being regulated, not the type or place of education. It is in my opinion discriminatory for the State to select one class of parents for strict regulation while allowing others to essentially be exempt.

I am uncertain whether the above will be of any value as homeschoolers discuss the appropriate response to the proposed legislation. I did want you nevertheless to have my thoughts on the subject in any event.

Scott Perkins

# Exhibit G

Seth Rockmuller's legal viewpoint on S4767 as requested by the LSC

Paul Matte asked Seth:

>David wanted me to ask that you respond as quickly as possible to this  
>question as he is struggling with pressure to accept HSLDA's position on >S4767.  
>  
>One of the comments we have received is that we need "strong evidence from  
>equally competent legal authority indicating that we should not follow the  
>specific recommendations of HSLDA"  
>  
>We (David Callihan as LEAH Legislative Committee Chairman) and (I as  
>President of LEAH) place strong confidence in New York Resident Lawyers  
>especially those who have been in and understand many aspects of home  
>education. Therefore we would greatly value your opinions on how S4767 would  
>affect the possibility of presenting a constitutional argument.

[Highlighted parts are added for emphasis]

**At the present time, we would be challenging a regulation of the Commissioner of Education. There is a plausible argument that the regulations promulgated by the Commissioner are beyond the authority granted him by law. I believe I've already provided an outline for such an argument. This is not a question of constitutional authority but rather one of statutory authority.**

**There is, of course, a related constitutional argument similar to the one relied upon by the court in Packer.** In that case a law was passed authorizing the Board of Regents to adopt regulations for the mandatory registration of nonpublic schools. The court indicated that looking at the subdivision challenged, the section in which it was contained, the entire article, or the entire Education Law, it could not figure out what the regulations were to contain. It did not say that, looking at the compulsory education requirements generally, the Regents could do certain things. Rather, the court could not ascertain what areas the Regents could regulate and what areas were beyond their authority. **Here, the Commissioner has no specific general authority to promulgate regulations regarding home instruction. Arguably, this would give him less authority, not more, than the Regents were found to have in Packer. I continue to have a real problem with the notion that the reference to regulations in Education Law section 3210(2)(d) provides an adequate basis for the general regulation of home education programs. By its terms, it applies only to attendance for a shorter school day and/or for a shorter school year; it would certainly be a tail wagging the dog argument to expand this provision to general authority to regulate home education.** Additionally, authorizing regulation of the "quality" of a private program would seem to me to be as objectionable (based on lack of specificity) as the language found unconstitutional in Packer.

**Once you have a law in effect, you can no longer make the argument that the regulations are beyond the statutory authority of the Commissioner or the argument that the legislature has unconstitutionally delegated its legislative power.**

Clearly, you could still raise the issue that the statute is unconstitutional on its face once it is enacted; in fact, there would be nothing to challenge prior to its enactment. As has been discussed, there are two primary ways in which a constitutional argument could be raised. One is to challenge the law judicially once enacted. The second is to make a constitutional argument to the legislature. This could be done by arguing against the enactment of the statute or by arguing in favor of a statute that explicitly recognizes the

constitutional limitations on the authority to regulate home education. **Practically speaking, the second route would no longer be available once the law is in place; I don't think you would be able to get the legislature to reconsider the issue of home education once they had acted in the area.** Thus, you would be limited to a judicial challenge. **I think that a judicial challenge to a statute such as the one proposed by Senator Kuhl would be difficult. (I'm not saying that any constitutional or statutory challenge would be easy, but I think this one would be more difficult.)** The legislature has broad authority to legislate; generally speaking, its authority is broader than that of an administrative officer such as the Commissioner. **It is also possible that a court could be influenced, in looking at the process of legislation, by the fact that the bill was suggested and supported by home educators.**

Paul and David, it is not inconceivable to me that the home education community may eventually decide that a bill is the proper way to go. There has been a great deal of excellent discussion of the issue - thanks in large part to your efforts. I really believe we're building a stronger home education community in this state. It would be counterproductive to our long-term well-being to let someone else, be it Senator Kuhl or CHELA or whoever, dictate our timetable. A primary message of home education is taking responsibility for our children and the way we live. We should decide what we want to do and then go to the Commissioner and/or legislature only if they can, in some way, be of assistance or if they prove to be a necessary step in attaining our goals.

>

>Also upon what authority S4767 is based?

You would have to ask Senator Kuhl this one. As you know, there is no requirement that the legislature cite its authority in enacting laws (as there is when the Commissioner want to adopt regulations). Unless the proposed law violates some constitutional provision, it is not unconstitutional. No 10th amendment here.

>You will note the word, "including" what does this mean as part of statutory law?

>does that give the district carte blanche to dispute anything they think is disputable and put the parents at odds?

I'm not entirely sure what you're referring to here. **In proposed section 3229(3), the term "include" is used, perhaps implying that there should be more in the assessment than just the test results or the written narrative.** Paragraph c of that subdivision uses the term "including." It is, however, unclear about what disputes are covered. It's in a subdivision relating to assessment only, but seems to imply that other disputes are included. **Putting these two provisions together, I guess you could have a dispute about whether the superintendent can require something more than the test or written narrative in the annual assessment.**

From a strictly drafting point of view, there are several places in which the proposed law suffers from being adapted from the regulation. Another example is that **there seems to be no step beyond probation** if a program is "out of compliance." Here there seems to be no repercussion to going through probation unsuccessfully. The part of the regulation requiring some other form of education was deleted. **While this does not offend me, it does make me wonder whether Kuhl is serious about this bill or is simply putting it out there full of holes so that it can be rejected.**

*[Note: We just heard from one homeschooler who contacted Kuhl's office and was told that the bill will not be able to be heard from the Senate Education Committee because they ran out of time. This seems to parallel Seth's final statement above. Ultimately, who knows?]*

# Exhibit H

Dear LEAH board,

I have noted several times that board members have said that S4767 is an incremental step toward "constitutional freedom" and that it won't preclude pursuing "constitutional freedom" and that Paul should continue his work on researching our constitutional freedoms, etc. It has been apparent that some of you have thought that the Legislative Committee has been working on Constitutional Research. I know Paul has worked on this, but no time of this committee has been spent on that.

The only issue this committee has spent time on is whether S4767 was a good and appropriate bill for home school families in NY. Within this discussion, discussion as to whether S4767 is constitutional has come up, but that is different from researching our constitutional freedoms in general. The constitution is the highest law of the land (U.S. and state), laws that are enacted that are unconstitutional are challenged every day and the courts decide whether they limit "constitutional freedom" or not - The point is that there are some who are not willing to promote a law that is unconstitutional. This is VASTLY different from supporting a concept of "constitutional freedom"--it is to NOT support something that is unconstitutional. There are many (including all but two members of the legislative committee) who feel S4767 is unconstitutional.

Obviously, there is difference of opinion on that, starting of course with Kuhl - who clearly either doesn't think it is unconstitutional or doesn't care.

I have a real concern that because the home school families in this state are not united on this issue that even if this bill succeeds it will be challenged in court - it may even be challenged by school district superintendents! As a matter of fact, two families in our support group are dealing with a particular superintendent who would certainly challenge the idea of "who" the "other person" who can do evaluations would be. It is not clear in S4767 that this might include the parent, and both families want it to be a parent - I am quite sure this super would push the vaguery until it is in court. His school board backs him, and I think the SED would as well, considering the negative way this bill has come about with the Kuhl/Mills rivalry. And, by the way, HSLDA has already dealt with him, his response to their legal arguments is "I don't agree" and he moves on.

The bill will also be challenged by home schoolers who are not willing to give up their constitutional rights to raising and educating their children (see Federal District Court decision, 1988)

Kuhl's office will hear, (and I am sure already has heard) from both sides - though I am also not sure Kuhl cares at all what anyone says. I think the home schoolers at large will be split (even LEAH, regardless of how LEAH's official position comes out and what HSLDA says). We had a meeting of our local support group the other night - and it was not a case where our members just said - "WOW, look at this - no more quarterlies and IHIPS!" In fact, it was mentioned that the quarterlies and IHIPS are really no big deal (because we have worked together as a group to get those down to the bare minimum). [You don't need to mention to me that some districts are harder to please and that families with lots of kids find quarterlies and IHIPS very time consuming - I brought this up to them.] Our members have gone home to consider the issue - and I am sure they will come out on both sides (they all think for themselves).

So, in the end, we are, and will be divided. S4767 will not fix that - the controversy will go on and if S4767 goes through, it is my opinion that we have only seen the beginning of the controversy - it will be fought in court - from one side (home schoolers not willing to give in) or the other (school districts outraged with our "freedom").

As far as the "incremental" argument goes - it's not a little bit wrong to me that the state would have jurisdiction over private/home/religious education - it is WRONG. And it just isn't in me to say, "Thanks Senator Kuhl for allowing us to live under a system that's a little less wrong."

Also, I believe in a God who regularly does exceedingly, abundantly above all we ask, think, or even imagine (Eph 3:20) - yet I hear an attitude from those who have pushed to get this bill passed that 1) it's the best we can do AND 2) God is in it. This makes no sense to me. I DO think we can do better. If I didn't I wouldn't bother spending time on this at all - and yes, even in NY!

Laurie Callihan

# Exhibit I

Definition of regulations and statutes from law.com

This is about as "official" as you can find regarding definitions of Regulation and Statute. Perhaps before giving an "expert" opinion as to the definition of legal terms one should consult the law dictionary.

## [law.com Law Dictionary](#)

### regulations

n. rules and administrative codes issued by governmental agencies at all levels, municipal, county, state and federal. Although **they are not laws**, regulations **have the force of law, since they are adopted under authority granted by statutes**, and often include penalties for violations. One problem is that regulations are not generally included in volumes containing state statutes or federal laws but often must be obtained from the agency or located in volumes in law libraries and not widely distributed. The regulation-making process involves hearings, publication in governmental journals which supposedly give public notice, and adoption by the agency. The process is best known to industries and special interests concerned with the subject matter, but only occasionally to the general public. Federal regulations are adopted in the manner designated in the Administrative Procedure Act (A.P.A.) and states usually have similar procedures.

### statute

n. a federal or state written law enacted by the Congress or state legislature, respectively. Local statutes or laws are usually called "ordinances." **Regulations**, rulings, opinions, executive orders and proclamations **are not statutes**.

# Exhibit J

Reasons to oppose S4767 stated by Dan and Elyse Durkee

After reading and considering we find the following items to be reason to recommend that NYS LEAH oppose S4767:

1. Given the complete e-mail of Dee Black to Paul Matte 10/13/99 conflict of interest is definitely apparent.
2. The legal evaluation of this proposed bill by Scott Perkins and Seth Rockmuller specify areas of difficulty with the bill that are in direct conflict with HSLDA .
3. As "amateurs" in this business in reading law, we also see areas in the bill where the home school is treated with prejudice as compared to the public school. ie. probation (see our previously posted pro and con evaluation)
4. The regs are already considered "bad" and even unconstitutional. Making them statutory law would bring about a bad unconstitutional NEW section of law.
5. Establishing a NEW section of law specifically detailing homeschooling provides the commissioner a platform from which to promulgate further regulation which would not then be unconstitutional for lack of legal standing. And there is no prohibition in the bill to prevent further regulation.
6. A companion bill will need to be entered in the assembly which could conceivably be as bad or worse than this one by reinstating portions of the regs supposedly eliminated here.
7. In agreement with Steve W. and David C. , we can do much better than this. We need to uphold the standard of freedom and promote an informed electorate that continues to be tenacious in their efforts to call for legislation that would meet scriptural standards of parent directed education in regards to oversight by the **rule** of LAW.
8. If we support unconstitutional legislation as we believe this to be, we do as Laurie suggests create a dead end or a trap from which there is no escape.

# Exhibit K

Interview of a LEAH Chapter Leader's perspective by Steven Winters 5-12-2001

[Emphasis was added by the editor - DRC]

Mary ran into one of the women in our LEAH support group at a book sale (Where else?) today. She asked what she thought of the bill S4767 and what was brought up at a recent meeting where the bill would be discussed. This woman appeared to have real reservations about the bill. BTW, she also echo'd the statement that LEAH is a top down organization and until recent years she had had a negative impression of LEAH. (Sorry, but until recently, that was not something I'd heard from people).

Anyway, I decided to call our chapter leaders (No, not the Callihans! ;- ) tonight and ask them for feedback. I want you to understand that we have not been good LEAH members as we have been very nominally involved in our group since we've moved down here. :-( The reason I say that is that we have had absolutely no influence on the group or the leaders. Until tonight, I hadn't talked with anyone in our group about S4767. (Too busy with LSC meetings, I guess ;- ) In fact, I got the impression that the leader was being a little cautious about telling me his opinion for **fear that I might not understand if they were NOT dripping with enthusiasm for it.** (I assured him that he could say nothing to offend me.)

But it appears that our leaders are following this issue pretty closely as are several other members who are also on the NYHSForum list. (The group size is about 75 families). Their recent meeting, which discussed this, sounds to have echoed a lot of the issues that have been bantied about on the list, so I won't repeat all of them here. **Their assessment is that several are paying close attention, there is a significant amount of uncertainty about the bill, but the majority haven't given it much thought and tend to think that if HSLDA says it's good, it must be good.**

Our chapter leaders attended the Binghamton forum (last fall, I think?) where they heard Seth Rockmuller among others. They would like to see a **similar "town hall" type meeting where Dee Black could be present for question and answers.** They have some **serious reservations about whether S4767 is really what is best for New Yorkers.** They offered the skepticism that while it may be helpful in reducing HSLDA's 30% NY workload, it may not necessarily be in the best interest of New Yorkers. And, that HSLDA lives in VA, not NY... (I did NOT prompt any of this, honest! I only listened. Only at the end, because he asked, did I say that I personally had some concerns about the bill.) They feel very strongly about a religious exemption, but understand that that doesn't fit well for the secular homeschoolers and so **a broader parental rights position is better.**

One thing brought up was the question as to how the Amish could get away with so little regulation and why we couldn't be treated like them. If they do have school houses, they certainly don't follow all the codes. Interestingly, he told of one family who moved into a district and told the principle they would be homeschooling. He replied, "Oh, like the Amish?" and they never heard from the school district again...

Also mentioned, was their **concern that Duane Motley, who is believed to be the connection point with Kuhl, could not adequately represent home educators.** They felt that, when in a small group setting where Motley was questioned, he revealed a real lack of understanding about home education.

There was some **concern about last minute changes to the bills before becoming law** (midwifery law mentioned as example). Also, that while homeschoolers might take the position that it was an incremental change, Kuhl & co. would believe they had done their duty for us and move on leaving us locked in for another 12 or more years. **Concern that once in law, it would be difficult and/or long in changing again.**

That's about it. They seemed genuinely glad to talk about it. I know I'm glad I called. We'll be having dinner with them next Friday night, so if there anything else comes up, I'll be sure to report back...

Steven

# Exhibit L

Email from Dee Black to Paul Matte re. Views on oversight of Private Education 10-13-1999

Observations made by Steven Winters and David Callihan of Dee's comments:

HSLDA's position is that **if the regs are challenged successfully, we are back in court, with the Blackwelder decision left standing.**

While **HSLDA** recently argued that we can always make a constitutional challenge, **they clearly do not think it is supportable nor would they apparently be willing to lead the charge.**

**HSLDA cannot be involved in challenging the authority of the Commissioner to issue the home instruction regulation or the constitutionality of the regulation, due to conflict of interest.**

The last sentence is their strategy for change in NY. **As far as HSLDA is concerned, the remedy to the restrictive law is to revise the regulation or, if this fails, to change the compulsory attendance statute through the Legislature.**

Steven...

=====  
Subj: Re: Where is oversight of Private Education Authorized?  
Date: 10/13/99 12:36:49 PM Eastern Daylight Time  
From: Dewitt@hsllda.org (Dewitt Black)  
To: [PSMatte@aol.com](mailto:PSMatte@aol.com)  
CC: Chris.HSLDAPO.EMPL@hsllda.org (Chris Klicka), Darren.HSLDAPO.EMPL@hsllda.org (Darren Jones), Scott.HSLDAPO.EMPL@hsllda.org (Scott Somerville)

Paul,

Like you, I am not able to find any statute specifically granting the Commissioner of Education the authority to promulgate rules governing education which is "elsewhere than at a public school." However, there are statutes authorizing the Regents, the Commissioner, and the State Education Dept. to issue rules governing education. Some of these are found in the preamble to the home instruction regulation, Section 100.10, namely, Sections 207, 3204, 3210, 3212, and 3234. In my opinion, there is enough in these statutes to authorize the Commissioner to issue the home instruction regulation. Apparently Mike Farris was of the same opinion, because he supported issuance of the regulation and was the chief drafter of the language of Section 100.10.

Even if there were no authority for Section 100.10 and some court ruled that they were null and void, then our legal position would be back where it was before the regulation was promulgated. This is the Blackwelder decision which said that the parents could be required to "submit a proposed calendar, curriculum, list of textbooks, syllabus and standardized testing schedule (if appropriate) for review by a representative of the school district. That representative must also be apprised of the credentials and life and occupational experiences of the instructor or instructors who are to conduct the homeschooling program. Final approval of a homeschooling program ... is contingent upon the results of a scheduled visit to the home where the alternative instruction is to be given by a team of representatives of the local [BOCES]. Ordinarily, one or two scheduled on-site inspections are conducted during the school year." Blackwelder v. Safnauer, 689 F.Supp. 106, 113 (1988).

As I have previously discussed with you, **HSLDA cannot be involved in challenging the authority of the Commissioner to issue the home instruction regulation or the constitutionality of the regulation, because of Mike Farris' involvement in writing the regulation. He could hardly argue before the court that what he wrote was unauthorized or unconstitutional and should be struck down.**

**As far as HSLDA is concerned, the remedy to the restrictive law is to revise the regulation or, if this fails, to change the compulsory attendance statute through the Legislature.**

Dee

# Exhibit M

Observations on Packer by Steven Winters 5-12-2001

Packer is not an argument for the unconstitutionality of state oversight. That is not what the case was about. **The case was about the promulgation of regulations by the Commissioner of Education without specific direction from the legislature. Packer can clearly be used to argue that the regs s100.10 are without statutory authority, and hence unconstitutional.** The reference to the state's authority to regulate non-public education is called a "limited right". Other sources would be necessary to argue that the state has \*no\* right.

As home schoolers, we should be working for the least restrictive means of accommodating that limited right of the state. As others have stated, there should be no more oversight on home educators than there is on private education...

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## *Packer Decision - Court of Appeals of New York - 07/16/1948*

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This is no small or technical matter we deal with here. Private schools have a constitutional right to exist, and parents [\*192] have a constitutional right to send their children to such schools (Pierce v. Society of Sisters, 268 U.S. 510). **The Legislature, under the police power, has a limited right to regulate such schools in the public interest (Pierce v. Society of Sisters, supra; Meyer v. Nebraska, 262 U.S. 390). Such being the fundamental law of the subject, **it would be intolerable for the Legislature [\*\*\*18] to hand over to any official or group of officials, an unlimited, unrestrained, undefined power to make such regulations as he or they should desire, and to grant or refuse licenses to such schools, depending on their compliance with such regulations.****

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## *Dee Black to Paul Matte - 04/24/2000 Memo*

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I have also read the 1948 decision of the New York Court of Appeals in Packer Collegiate Institute v. The University of the State of New York which you sent us. Unfortunately, this case does not support your position that the State has no authority to regulate private education. In that case the court declared unconstitutional a statute authorizing the Commissioner of Education to regulate private schools without any standards or limitations in the statute. **The statute in question was unconstitutional because it delegated legislative power to the Commissioner of Education.** The court said that the Legislature must formulate standards to govern the exercise of discretion by the Commissioner. Citing the Pierce v. Society of Sisters case, the court said that the Legislature, under the police power, has a limited right to regulate private schools in the public interest.

**It is also well settled that even though a state may regulate through a state agency or official, it cannot do so without express authority from its legislature. In this case, there must be some statutory basis for the Commissioner of Education's promulgation of Section 100.10, or this regulation of home instruction programs in New York is invalid. I believe the required statutory authority is present in Section 3210 of the New York Statutes.**

Section 3210, from which the Packer case arose, also has language in a different subsection which is part of the basis for the home school regulation. The home school regulation cites this statute as part of its authority to regulate home instruction. Subsection (2)(d) of 3210 authorizes the State Education Department to promulgate regulations approving instruction elsewhere than at school which are "substantially equivalent in amount and quality to that required by the provisions of part one of this article." Part one has to do with compulsory attendance, instruction by competent teachers, and instruction in prescribed courses. **I believe this is sufficient statutory authority for the home instruction regulation, although I suppose a legal argument could be made to the contrary.**

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## *Scott Perkins to Paul Matte - 05/10/2001 Email*

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I have, since the promulgation of Commissioner's Regulations 100.10, taken the position that the regulations, while binding upon public school administrators, are not binding upon those engaged in nonpublic, home school education ("elsewhere", as defined in the Education Law). The reason I have taken that position is that it is clear to me that the Commissioner of Education, by definition, generally has jurisdiction and authority over the State's system of education and not over private education. There are some areas where the Commissioner does arguably have authority over those engaged in private education, such as the power to dictate the form for attendance records ( Education Law 3204, I believe) and to those who voluntarily submit to his authority (i.e. state chartered private schools). However, **such authority must be specifically delegated by the Legislature. Absent such limited and specific authority from the Legislature, the Commissioner has no authority to regulate private, home based education.**

I therefore agree with Seth's position that **there is indeed a plausible argument that the existing regulations are beyond the Commissioner's statutory authority.** I also agree with Seth that the reference to regulations in Education Law 3210 does not empower the Commissioner to regulate generally home education; if that were the case, why would the legislature specifically define those areas where authority was granted the Commissioner?

I was privy to some of the information and negotiations at the time the Part 100 regulations were adopted in the 1980's. I do not think anyone truly believed at that time that the Commissioner actually had the legal right to regulate home instruction. In fact, the lack of legal authority for the regulations was seen by some as favorable to homeschoolers.

**(Home school attorneys knew that if there was a significant change in the legal climate involving the regulations, we could always advance a strong argument that the Commissioner exceeded his statutory authority with the regulations.)** New York at the time was a hot-spot for truancy related Family Court prosecutions, and the general consensus was that homeschoolers had to call a truce with the State Education Department. That truce resulted in the Commissioner's regulations which, ironically, homeschool leaders actually helped draft. The regulations were seen at the time as an acceptable and reasonable compromise to the public school superintendents' assault on home education, a view that I did not and do not hold. I am sure **that most knowledgeable participants in the process knew full well that the Commissioner could not legally promulgate home school regulations, but they served a purpose for all concerned. As a matter of expedience, most simply pretended that there Emperor indeed had clothes, and New York as a troublesome battleground became relatively quiet.**

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*Seth Rockmuller to Paul Matte - 05/01/2001 Email*

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There is, of course, a related constitutional argument similar to the one relied upon by the court in Packer. In that case a law was passed authorizing the Board of Regents to adopt regulations for the mandatory registration of nonpublic schools. **The court indicated that looking at the subdivision challenged, the section in which it was contained, the entire article, or the entire Education Law, it could not figure out what the regulations were to contain. It did not say that, looking at the compulsory education requirements generally, the Regents could do certain things. Rather, the court could not ascertain what areas the Regents could regulate and what areas were beyond their authority.**

**Here, the Commissioner has no specific general authority to promulgate regulations regarding home instruction. Arguably, this would give him less authority, not more, than the Regents were found to have in Packer. I continue to have a real problem with the notion that the reference to regulations in Education Law section 3210(2)(d) provides an adequate basis for the general regulation of home education programs. By its terms, it applies only to attendance for a shorter school day and/or for a shorter school year; it would certainly be a tail wagging the dog argument to expand this provision to general authority to regulate home education. Additionally, authorizing regulation of the "quality" of a private program would seem to me to be as objectionable (based on lack of specificity) as the language found unconstitutional in Packer.**

Exhibit N

# NYS Loving Education At Home

Office of the President  
6628 Woodruff Road  
Lima, NY 14485-9427  
[President@leah.org](mailto:President@leah.org)

March 14, 2000

Peter Applebee  
Director, Senate Education Committee

Dear Mr. Applebee,

I apologize and accept full responsibility for the length of time that it has taken for me to respond to you. I have been researching New York Constitutional Law for the explicit or implicit provisions which authorize the legislature to direct the Commissioner of Education to write regulations regarding home instruction.

As you will recall there was a group of representatives from LEAH of which I was a part who met with you last October. We mentioned to you that we have serious reservations regarding the basis in the New York Constitution for regulation of pupils receiving instruction outside of institutionalized schools. While we continue to explore Constitutional provisions we are providing to you the changes that must be made in the current regulations to address the major recurring sources of conflict with local district superintendents.

Since our visit there has been an effort to consider the perspectives of all home schooling families, we have been working to bring as much statewide consensus as possible. An e-mail listserve was begun in late November last year where parents could discuss their views regarding state oversight of education conducted in the privacy of the family. It has taken considerable time to monitor as many good ideas were presented. From this a meeting is anticipated for as many groups to meet together for further dialog and consensus before proceeding with any action towards regulatory relief. We will keep you updated.

Thus we reserve the right to make additions to these items and to present needed changes in areas of the law other than Education Law as it adversely impacts the family who elects to instruct their child outside of institutionalized school settings. Below you will find some changes in NY CR100.10 that will bring New York families a friendly climate more in line with the freedoms enjoyed by those in other states and reduce paperwork for both parent and superintendent. This will also further the goals of the Governor to reduce unnecessary regulation of the citizens of the state and will extend the regulation free environment experienced by pupils in Charter Schools.

Until we are able to settle the constitutional issue we will need to provide relief especially in the area of assessments. As any educator knows, the test drives the curriculum. This inherently restricts the diversity and creativity. Additionally sequential testing referencing age and respective grades (K-12) places a rigid burden on the very purpose of parent directed education in that each child is treated as an individual whose progress is determined by their personal abilities. This is one of the greatest deficits in institutionalized education and it places unrealistic expectations on the slow learner and restrains the progress of the gifted pupil.

As per our understanding please contact Duane Rennells, who was with the NYS LEAH group at the meeting in October, so he can accompany you to the meeting(s) with the Commissioner and/or his staff. He can be reached at his office 518-474-2784 or his home 518-283-2702.

Thanks,

Paul S. Matte, President, Loving Education At Home, Inc.

Included below are the minimum changes required to Section 100.10 of the Regulations of the Commissioner of Education:

1. Eliminate the "double notice" requirement under the current regulation, so that parents need only provide the child's name, age, and grade level, in addition to the name of the individuals providing instruction. There would be no curriculum information provided as part of the notice, thus no IHIP. Section 100.10 already prescribes what courses must be taught at the various grade levels. Given this, there is no reason for parents to tell public school officials that they are going to teach what the regulations already require them to teach.
2. Eliminate quarterly reports. These are an administrative burden to both parents and public school officials and are not used to determine whether a student has made adequate academic progress.
3. Lower the minimum composite score on a standardized achievement test to the 23rd percentile to conform to the beginning of the average range established for standardized achievement tests. The Psychological Corporation, publisher of the Stanford Achievement Test and the Metropolitan Achievement Test, publishes a chart indicating that the average range on standardized tests is the 23rd through the 76th percentile.
4. Eliminate the requirement that parents submit results of the annual evaluation to the local public school superintendent. If a child's academic progress is not adequate as indicated by the results of a standardized achievement test or an alternative form of evaluation, the parents should take remedial action to correct any deficiencies. Two states having similar provisions are Washington and Georgia.
5. Eliminate language in Section 100.10 authorizing the local superintendent to consent to the person who may conduct the annual evaluation. If a person is qualified according to the requirements of the publisher of a standardized achievement test to administer the test, there is no need for a local superintendent to make an independent assessment of the person's qualifications. With respect to the alternative evaluation methods, we believe the parent is qualified to prepare the narrative report of the child's progress.
6. In the area of special education, the regulation should provide that students with an IEP be evaluated in accordance with the methods prescribed in the IEP, not what the regulation now provides. (The State Education Department now agrees with this, but it's not in the regulation.) This should apply not only to students with an IEP developed through the school district but also to students who have been identified as needing special education services through private evaluations and who are receiving services from qualified individuals in accordance with a privately-developed plan. Students with a privately-developed plan should be evaluated for adequate academic progress in accordance with the plan, not by what the regulation now says. The problem here is local districts refuse to recognize privately-developed plans and insist that the student be tested at the grade levels specified in the regulation, although testing of these students may be entirely inappropriate. Students who fail to score at the 33rd percentile may be placed on probation.

## Exhibit O

The following is a copy of a paper delivered at the AERA conference in Seattle in April 2001. Any comments can be sent directly to Scott Somerville: [scott@hslida.org](mailto:scott@hslida.org).

Footnotes appear at the end of the article.

# The Politics of Survival: Home Schoolers and the Law

Scott W. Somerville, Esq. (1)

## I. Introduction

Twenty years ago, home education was a crime in almost every state. Today, it is legal all across America, despite strong and continued opposition from many within the educational establishment. How did this happen? This paper traces the legal and sociological history of the modern home school movement, and then suggests factors that led to this movement's remarkable success.

## II. Why Home Schooling Should Have Failed

### A. *Limited Resources*

Home schooling never should have succeeded in the modern era. It may have been adequate for the agricultural setting of our colonial ancestors, but who would have thought that untrained parents could throw together a homemade curriculum that would actually prepare a child for life in the twenty-first century? In the early days of the modern home schooling movement (c. 1965), there were no support groups or newsletters for parents who taught their children at home. Many parents who taught their children at home never knew that there were any other people doing the same thing. Every family had to invent home education from scratch. They did not even have a name for what they were doing.

### B. *Legal Penalties*

The school officials had a name for what they were doing, however — criminal truancy. Each time parents pulled a child out of public school, the unexcused absences began to accumulate. Some open-minded school officials were willing to look the other way, but others insisted on enforcing the law. The only safe way to start home schooling was to start before the child reached school age, or to move to a new school district where no one knew the child existed. When parents got caught, they had no legal excuses, no useful precedents, and usually, no money to hire the kind of lawyer who would fight for an unwritten freedom. Parents were arrested, jailed, or fined until they put their children back in school. The only sure way to avoid legal trouble was to hide. This kept the authorities from finding out about home schooling, but it kept everyone else from finding out about it, too.

### C. *Powerful Opponents*

The school officials who prosecuted home schoolers strongly believed that they were protecting innocent children from serious harm. Certified teachers and highly trained school administrators had no reason to believe that parents could cover the basic academic subjects, much less provide the social interactions that were offered in the public schools. To many public school teachers, home education seemed to be child neglect, at best.

The public school officials who were charged with enforcing the truancy laws had every reason to be thorough. Their professional training was founded on the assumption that teaching was not a job for laymen or amateurs. School officials had powerful and selfless reasons to oppose home education. They were not merely motivated by the fact that school budgets were based upon a certain number of dollars for every child in attendance. (In the early days of home education, few school officials ever imagined that home education could ever have a real financial impact on the schools.) But each home schooler did undoubtedly cost the district some small amount in lost revenues. All these factors added up to a solid wall of opposition to home schooling within the public school establishment.

### D. *Social Disapproval*

Home schoolers also faced a wall of opposition from their neighbors. The general public believed that children need a rich set of interactions with other children if they are ever to succeed in later life. Whenever a home schooler tried to explain what he was doing to some other person, he could always count on two questions: Is that *legal*? And what about *socialization*?

There was a deeper sense that home education was somehow un-American. Graduates of the public school system had been consistently taught that public schools bring together rich and poor and male and female to teach children to be true Americans. After the Supreme Court ended legal segregation in *Brown v. Board of Education*, 347 U.S. 483 (1954), the schools finally brought together black and white, and then, with the school prayer cases, even Jews, Catholics and nonbelievers gained equal standing within the schools. Home schoolers seemed to turn their back on the preeminently democratic institution of America.

## I. A History of Home Schooling

Home schoolers started out as scattered individuals with little or no resources who faced powerful enemies as they violated the law in a climate of social disapproval. How did these people get from where they were then to where they are now? The history of modern home schooling shows that this journey took wave after wave of different kinds of people educating their children at home for very different reasons. Without this diversity, home schooling would still be a marginal movement.

### A. *Left-Wing Intellectuals*

Growing Without Schooling

Patrick Farenga is the president of Holt Associates and the publisher of the magazine *Growing Without Schooling*. He worked with the late John Holt from 1981 until Holt's death in 1985. Farenga writes:

The sixties and seventies were times of great ferment for new ideas about education. Some education and social critics, like John Holt, became popular writers by questioning methods of schooling. The battles over look-say reading methods versus phonics, training teachers to be gentle facilitators or drill instructors, whether to encourage hands-on learning or test-taking skills, were well-worn battles to these writers even in the sixties. Many school reformers, such as Herbert Kohl, noted that it is a wide variety of methods, materials, schedules, and techniques that help children learn, and that the teacher should have the freedom to use any combinations of things and ideas to help students. Further, some writers, such as A.S. Neill and Holt, suggested that the student should have complete freedom to choose how, when, and from whom they wanted to learn. In the early sixties, Paul Goodman, in *Compulsory Miseducation* and *Growing Up Absurd*, argued that compelling children to attend school is not the best use of their youth, and that education is more a community function than an institutional one. This idea was developed and amplified over the years by many authors, but most forcefully by John Holt. (Farenga, 1999, p. 34)

John Holt began his career as a fifth grade teacher in a private school. He thought deeply about what worked and what didn't in modern American education, and recorded his observations in *How Children Fail* in 1964. *How Children Learn* soon followed, in 1967. The two books, which are still in print, have sold a total of one and one half million copies and have been translated into 14 languages. Other educational thinkers were working on similar issues during the same time period. According to Farenga, none influenced Holt as much as Ivan Illich, who published *Deschooling Society* in 1971. After *Deschooling Society* appeared, Holt studied and corresponded with Illich at length, and was deeply influenced by Illich's analysis, particularly with his analysis that school serves a deep social function by firmly maintaining the status quo of social class for the majority of students. Further, schools view education as a commodity they sell, rather than as a life-long process they can aid, and this, according to Illich, creates a substance that is not equally distributed, is used to judge people unfairly, and—based on their lack of school credentials—prevents people from assuming roles they are otherwise qualified for.

By the late seventies Holt had given up on the possibility that schools would welcome and assist the sorts of changes he and others were suggesting. He sought ways to make these changes as individuals and communities, thus bypassing, rather than confronting, school resistance to these ideas. (Farenga, 1999, p. 35)

Holt's thinking led him to an ever-deeper critique of modern compulsory education. In *Instead of Education*, he wound up suggesting a new "Underground Railroad" to help children escape from traditional schools. In Holt's own words:

Some may say that such a railroad would be unfair, since only a few children could get on it. But most slaves could not escape from slavery, either, yet no one suggested or would suggest that because all the slaves could not be freed, none should be. Besides, we have to blaze a new trail if only so that others may follow. The Children's Underground Railroad, like all movements of social protest and change, must begin small: it will grow larger as more children ride it. (Holt, 1976, p. 218)

*Instead of Education* is one of the landmarks of the modern home school movement. Pat Farenga explains:

In this book, Holt proposed removing children from school legally or as an act of civil disobedience. While the education establishment barely recognized this particular book of Holt's, it struck a chord with some parents. Some wrote to Holt explaining that they were teaching their children at home legally, others that they were doing so underground. Some were rural families, some city dwellers, others were in communes. Intrigued, Holt corresponded with them all and decided to create a newsletter that would help put these like-minded people in touch with one another. In August of 1977, the first issue of *Growing Without Schooling* (GWS) was published, and the nation's, and probably the world's, first periodical about homeschooling was born. (Farenga, 1999, p. 36)

*Growing Without Schooling* finally made it possible for like-minded but widely-scattered people to communicate with one another. This included people like Dr. Pat Montgomery, a Catholic educator who had no children of her own but soon became a strong supporter of unschooling. She formed the Home Based Education Program at the Clonlara School in Michigan. Michigan law, at that time, required every child to be taught by a certified teacher, but the law did not specify how much time that teacher had to spend with each child. Clonlara made it possible to comply with the letter of the law while keeping the spirit of unschooling. (2)

## B. **Organic Education**

The unschoolers of the late '60s were as political as their era, but the next wave of home educators had a different set of priorities. The '70s saw the rise of "delayed schooling" as an alternative to "unschooling." Dr. Raymond Moore, the spokesman for this new movement, was more concerned with children's health than social change. His book, *Better Late Than Early* suggested that parents should keep children out of formal education for the first few grades. His research indicated that a healthy child could start formal schooling at fourth grade without any harm.

Dr. Moore's educational and medical conclusions were shaped, to some degree, by religious concerns. Like other Seventh-Day Adventists, Dr. Moore believed that health, nutrition, and exercise are important to a person's overall spiritual well-being. The Moores had taught their own children at home as far back as 1944. This holistic emphasis found ready acceptance within the existing home school community, and soon broadened its appeal to less politically-oriented families. The second wave of modern home education was underway.

Dr. Moore's holistic approach to education made home schooling acceptable to some conservative religious families who would have been repelled by the left-leaning politics of most unschoolers. Dr. Moore began to attract attention in evangelical circles. He appeared on *Focus on the Family*, an evangelical radio show with a huge national audience. Many of the early Christian home schoolers date their exposure to home schooling to that interview, including J. Michael Smith, the current President of the Home School Legal Defense Association.

As a developmental psychologist with extensive experience in traditional education, Dr. Moore soon proved to be a

credible expert witness in home school cases. He had been a public school teacher, a principal, a superintendent, a college dean, and a college president. He was a prolific writer and speaker who wrote or contributed to more than 60 books. Dr. Moore's tireless efforts advanced home education far beyond its original left-wing base, and his frequent appearances in court helped the fledgling movement survive. According to Dr. Moore's newsletter, he and his wife interceded with school officials on behalf of hundreds of parents over the years. (Moore, 1986)

### C. **Evangelical Objectors**

One evangelical Christian, in particular, was attracted by Dr. Moore's message on *Focus on the Family*. This was Gregg Harris, who soon took a job working for Dr. Moore. Harris viewed home education as an effective means to a specific religious end. He believed home schooling could lead to a renewal of traditional Christian family living. Harris's desire to present an explicitly Christian message to Christian audiences soon led to tensions with his employer and an eventual split. Harris began promoting home education to explicitly evangelical audiences through his "Christian Life Workshops." His message came at an opportune time. "The Christian Schools Movement" (3) of the 1970s was running out of churches that were willing and able to start schools, but individual families were still looking for alternatives to the secular public schools. Harris's evangelical message made sense to parents who could not afford or could not find a local Christian school. It energized a new wave of Christian home schoolers who left the schools for religious rather than pedagogical reasons.

Harris's Christian Life Workshops were complemented by a new magazine devoted to evangelical home schooling called *The Teaching Home*, which began publication in 1983. Just as *Growing Without Schooling* had created an unschooling movement, *The Teaching Home* sparked a visible Christian home school movement. The number of home schoolers surged as one church after another discovered home education.

The new wave of evangelical home schoolers created friction with many local school districts. The first wave of unschoolers were convinced that they had a better educational alternative, and many of them were usually willing to work to persuade skeptical school officials that they had a better mousetrap. Open-minded superintendents were usually willing to let them try. The evangelicals had a whole different reason for leaving the public schools. Some rejected public education as "godless" and thought of school officials as secular humanists who were bent on godless mind-control. Parents like these asserted that the Bible required them, not the school system, to raise their own children. They were often not willing to seek "permission" from the schools.

The Christian home schoolers brought new legal problems to the home school movement, but they also brought some Christian attorneys who were willing to dedicate their time to protecting home schoolers. These included Michael P. Farris and J. Michael Smith, who founded the Home School Legal Defense Association (HSLDA) in 1983. Membership in HSLDA was open to any home schooler regardless of religious affiliation or lack thereof, but HSLDA employees were required to sign a Christian statement of faith. Home schooling had become legal for some families in some states; but HSLDA shouldered the task of making home education legal for every family in every state. By 1989, there were only three states (Michigan, North Dakota, and Iowa) that still outlawed home education. By 1993, home education was legal in all 50 states.

HSLDA was open to all home schoolers, but the rising tide of evangelical home schoolers began to change the face of home education. The original state home school organizations had always been willing to accept any home schooler, regardless of his reason for teaching a child at home. Christian parents who fled the public schools to escape secular humanism were understandably shocked by the lifestyles of some of their fellow home schoolers. As home education began to spread through local churches, explicitly Christian support groups began to spring up at the local level.

In one state after another, Christian home schoolers formed statewide organizations. *The Teaching Home* was a national magazine for Christian home schoolers that "co-published" newsletters for state home school organizations. At first, *The Teaching Home* published anything a state organization put out, but as some of the larger states began to produce rival home school organizations, *The Teaching Home* had to choose which newsletter to publish. This caused friction in states where older organizations that included all home schoolers saw no need for the explicitly Christian start-ups. The new organizations grew quickly, however, and by the early 1990s evangelicals so dominated the visible face of home schooling that many of the original home schoolers feared the movement would be "written off" as a fundamentalist phenomenon.

### D. **Home Schooling Takes Off**

These fears seemed reasonable at the time, but no one imagined how quickly *legal* home education would catch on with the general public. No longer did families need to be compelled by ideological or religious reasons to embark on homeschooling. Once the legal barriers to home education fell, a whole new wave of home schoolers appeared. Soon no informed person could dismiss home schooling as a right-wing reaction to secular humanism.

The Florida Department of Education used to ask parents why they chose to teach their children at home. Religious and/or moral concerns were the primary reason for home schooling in Florida until 1993, but "dissatisfaction with public schools" moved into the lead in the 1993-94 school year. Florida discontinued this survey the next year, and no other government agency has been able to gather similar information. (Florida Dept. of Ed., 2001, personal communication)

For the first time, large numbers of families began to choose home education for purely academic reasons. Home education had long been a way to protest the military-industrial establishment, or to seek a more holistic lifestyle, or to flee the secularized schools. These earlier families tended to view home schooling as a moral necessity, rather than a personal choice. With the new legality and social acceptability of home education however, many newer home schoolers viewed it as just one more choice on the academic menu.

There were ample positive academic reasons to consider home schooling, but, in the late 1990s, there were more ominous reasons. A wave of shootings at public school culminated at Columbine High School on April 20, 1999. Many observers thought Columbine

would lead to a massive exodus to home schooling. There was some justification for this, at first. A month after the Columbine shootings, the Associated Press reported:

Educators say more parents are looking into home-schooling in the aftermath of the Columbine High School shootings.

Suzu Parker, program assistant for the Colorado Department of Education, said she has been receiving five calls a day, about twice as many as normal. Many of the calls have come from the Littleton area, she said.

"One woman who lives right near Columbine called me the day of the shooting and told me, 'We're not doing this anymore,'" Parker said last week.

The department reported 68 inquiries from parents on home-schooling in the month since Eric Harris and Dylan Klebold killed 12 students and a teacher before committing suicide.

Christian Home Educators of Colorado, the state's largest advocate organization, has received 400 inquiries since the tragedy, Executive Director Kevin Swanson said.

On average, the organization receives 60 in a month.

("Columbine spurs interest in home schools," *Associated Press*, May 25, 1999.)

Any expectations that Columbine would be the end of public education died away quickly. A number of people considered home schooling, but most of them abandoned the idea when they realized how much work was really involved. According to the *Rocky Mountain News*, the overall impact on the Denver-area public schools was minimal.

The deadly shooting rampage at Columbine High School has not sparked an exodus from public schools in favor of home-schooling, Denver-area school officials said.

After an initial flurry of interest in home-schooling in the month after the April 20 tragedy, inquiries have returned almost to normal.

"I don't see a big influx, or any big change from years past," said Sandy Campbell of student information services at Jefferson County Schools. She said she sent many packets in May to parents interested in home-schooling, but got few back.

"I got a lot more phone calls, but they didn't follow through," she said.

("No rush to home schools in wake of Columbine," *Rocky Mountain News*, Aug. 2, 1999.)

Columbine did not end public education as we know it, but it did have a profound impact on the home school movement. One reason for this is the relative size of the two educational communities. If 50,000 public school students started home schooling because of Columbine, that would be less than one-tenth of one percent of the public school population. A nationwide loss of 50,000 students would hardly even register as a noticeable blip for the public schools, but it would be a huge increase for the relatively small home school movement.

There have been more school shootings since Columbine, and one of the more recent tragedies has a special significance for home schooling parents. One of the two victims at Santee, California, was taught at home for a number of years. According to the *New York Post*:

One of the teens slain in the Santee, Calif., rampage had been home-schooled for years because his parents feared public school was unsafe, but they relented when he begged to attend high school with his friends, it was reported today.

Bryan Zuckor, 14, was a freshman at Santana HS despite his parents' misgivings, the *Los Angeles Times* reports. The boy was schooled at home for five years, but when he insisted he wanted to go to classes with friends, his parents reluctantly gave in, the newspaper said.

("Victim's folks feared HS wasn't safe," *New York Post*, March 7, 2001.)

Home schooling parents who have pulled their children out of the public schools are already very cautious about putting them back. Bryan Zuckor's death will make them doubly cautious.

## I. **New Home School Strata**

Modern home schooling was launched by left-wing intellectuals and legalized by the religious right, but home schooling is not just for the ends of the political spectrum anymore. Home schooling today consists of an ever-more-diverse array of American families. Although there is little in the way of reliable statistical data on the changing face of home schooling, it is not hard to identify several new streams that are flowing into the home school movement. Three of the more significant new layers of home schooling are "soccer moms," Roman Catholics, and African-Americans.

### A. **"Soccer Moms"**

So-called "soccer moms" are suburban mothers of school-aged children. Politicians know these are important "swing voters" who are not locked into either political party. Bill Clinton strategically deployed a number of bite-sized policy initiatives (school uniforms, daytime curfews, etc.) that were designed to win the votes of these mothers. But home schooling is proving to be an even bigger success with these highly motivated mainstream mothers.

Soccer moms are not political radicals. When homeschooling was still a fringe activity, they were not interested. Now that it is acceptable and produces good results, they are willing to try it out. These parents have undoubtedly been influenced by the good press that homeschooling is receiving. Journalists have pumped out a steady stream of articles exploring this intriguing new educational phenomenon, noting the advantages of one-on-one instruction, mastery learning, and parental involvement. When a home schooler won the Scripps-Howard National Spelling Bee in 1997, parents of children in traditional schools began to wonder if their children were really getting the best education possible. By the time home schoolers won first, second, and third place in the 2000 Spelling Bee, and the winner also took second place in the National Geographic Bee, the rush was on.

It is still too soon to tell whether the surge in "soccer mom" home schooling will be more than a fad. Suburban schools

have a lot going for them, and home schooling is very hard work. It is possible that these new home schoolers will be teaching their children at home for years to come, but it is just as likely that they will return their children to a more traditional setting. But even a brief experience home schooling tends to change people. Charlene Mabie-Gamble writes about one woman's brief experience of home schooling:

Joshua will be re-enrolling in school next semester. I have chosen not to return him to the same school he left, because I still feel his education is compromised in that setting. We are currently looking into other options. I feel that home schooling is still a valuable way to educate children, but it also takes a commitment that we, unfortunately, were not able to make. I do not regret my decision to home school my son. Though we learned it is not as easy as we had planned, we also learned a lot about each other and ourselves that we could not have known otherwise; if for no other reason, that learning has made this experience worthwhile. After all, not all of life's lessons are learned in school. (Mabie-Gamble, 2001, p. 55)

#### B. **Catholic Home Schools**

Roman Catholic families were initially turned off by the common stereotype of white fundamentalism, but home schooling has finally taken root in Catholic circles. Catholic home schooling may be about 15 years behind the evangelical home school movement, but it is gaining ground at extraordinary speed. Four mutually reinforcing factors appear to contribute to the rate of growth in Catholic circles.

First, the more observant Catholics have been quick to notice that evangelical home schoolers put Catholics to shame when it comes to matters of human sexuality. The Catholic teachings that most offend secular America (regarding abortion, contraception, divorce) are enthusiastically practiced by many Protestant home schoolers. Protestant home schoolers are some of the most committed pro-life activists, and can often be found side-by-side with Catholic pro-lifers at crisis pregnancy centers or anti-abortion rallies. Instead of seeing home schoolers as an especially threatening kind of Protestant extremist, the more observant Catholics increasingly view them as kindred spirits.

Second, many parochial schools have lost their Catholic distinctives. This article will not attempt to catalog the many different pressures that affect parochial school systems as they try to serve an increasingly diverse population, but the net result is that traditional Catholics sometimes feel the parochial schools are becoming more and more like the secular public schools. This is particularly true in the sensitive area of sex education. Home education provides Catholic families a way to guarantee a distinctively Catholic education.

The growth of Catholic home schooling has brought this trend to the attention of the Vatican, which has responded favorably. This constitutes a third factor in the explosive growth of Catholic home education, since the most devout Catholic families are usually those who are most influenced by the opinion of the Pope.

Finally, parish priests have begun to notice the distinctive lifestyle of the Catholic home schoolers. When a mother attends daily Mass with all her children, including children of school age, her priest is bound to pay attention. Though there are some exceptions, the reaction to home schoolers at the parish level has been quite positive. This fourth factor also helps spread Catholic home education.

This is not to say that Catholic home schoolers encounter no opposition within their church. They are supported at the highest level of the hierarchy, and are usually encouraged at the parish level, but there is significant resistance to home education at the middle levels of the church structure. In general, parochial school administrators are far from sympathetic to home schooling, and few American bishops are openly supportive of the movement. Home schoolers are a dynamic new force within American Catholicism, and it is too early to tell whether they will become "mainstream" or "marginal" within that church.

#### C. **African-American Home Schools**

It is riskier for African-Americans to start home schooling than it is for other families. Grace Llewellyn is a teacher-turned-unschooler who wrote *The Teenage Liberation Handbook: how to quit school and get a real life and education*. She was surprised by an invitation to talk about it at a public high school. Llewellyn writes:

The final bell rang, and most of the students hoisted their textbook-filled backpacks and went home. But several stayed and clustered around me, their eyes intense. Among them stood a young man whose voice wavered between resignation and longing. He told me his name was Michael. "I totally see what you're saying about school, how it's a waste of time," he said, "And I know there's a lot more I could learn and do on my own. But I can't do it, because I'm black. I walk into some business to get a job, they want to see my diploma. I tell them I educated myself according to my own interests, and it's over. They say, 'Right. Another dropped out-nigger.'" (Llewellyn, 1996, p. 12)

Yet black families are choosing home education in increasing numbers. Llewellyn suggests several of the reasons why African-American home education is on the rise:

While I've worked on this book, people have often asked me why black people homeschool. Having only communicated with about twenty families in the process of editing this book, I'm hardly the expert. What I do know is that homeschoolers, in general, are an extremely diverse bunch. People, in general, homeschool so that children can learn more naturally and develop their unique talents. They homeschool to lessen the possibility of children being shot with a gun at school. They homeschool to maintain close family relationships. They homeschool to avoid the brutal school socialization process, which often turns thoughtful, unique children into rude conformists. They homeschool to honor their children's individual learning styles, which are not always compatible with sitting in a desk and shutting up. They homeschool to provide more challenging and thorough academic educations. They homeschool because they are tired of the racist, sexist propaganda that masquerades as truth in history textbooks. They homeschool to break down artificial barriers between life and learning. They homeschool for other reasons too, concerning health, religion, geography, and self-esteem.

As the writers in this book show, African Americans homeschool for all these reasons and then some. Some homeschool because they see that racial integration in the schools has not always worked for their benefit. (Among other things, they feel that it has disrupted community life and thrust children into hate-filled classrooms where few people encourage or hope for their success.) Some homeschool because they see that schools perpetuate institutionalized racism. Some homeschool because they are tired of curricula emphasizing Europe and excluding Africa. Some homeschool because their children are overwhelmingly treated as problems in schools, and quickly labeled Attention Deficit Disordered or Learning Disabled. Some homeschool because black kids drop out of school at much higher rates than white kids. Some homeschool because they want to continue the Civil Rights struggle for equal educational rights, and they feel that they can best do so by reclaiming their right to help their own children develop fully—rather than by working to get them equal access into conventional schooling. (Llewellyn, 1996, pp. 14-15)

Black families have many reasons to consider home schooling, but they face opposition from inside the African-American community. Black grandparents remember all too well what it cost to get their children into the public schools, and they are not eager for those children to pull their grandchildren out.

Despite this, home education is catching on within the black community, and each new African-American home schooler opens the door for many more. As Grace Llewellyn puts it:

Later I thought back to the conversation, and I wished that I had also been able to say, simply, "Well, Michael, black people homeschool too." But at the time I didn't know whether that was even true.

Now I know that it is true, and that many black people homeschool to save themselves from a system which limits and destroys them, to reclaim their own lives, families, and culture, *to create for themselves something very different from conventional schooling*. I also know that the numbers of these people increase every year, and—especially when I remember my first year of teaching—I hope the numbers will continue to increase, by hundreds and thousands. I remember the horrifying smell of human energy and talent rotting in all schools, any schools, but especially in the mostly black, badly funded schools where I substitute taught in Oakland, California. I remember a Friday when the school secretary told me to plan on coming back Monday because the chemistry teacher liked to take Fridays and Mondays off. I remember walking past vice principals' offices that were bulging with young men who had been kicked out of class. I remember the soft eager eyes of preschoolers and the hard cynical eyes of high school seniors. I remember the principal who introduced me as a long-term sub for a choir teacher, telling the class it didn't matter what they thought of my teaching, the state had given me a certificate (though in English, not music) and that's all they needed to know. (Llewellyn, 1996, pp. 13-14)

If governments don't fix the problems with predominantly black schools, families will. They will pull their children out and teach them at home.

## I. **Legalizing Home Education**

The modern home school movement has many sociological layers, as we have seen. But every stratum of the home school community is subject to the same laws. In this section, we examine the legal developments that took home schooling from an act of civil disobedience to a statutory right.

### A. **Underground Education**

Truancy is a crime in every state, but the truancy laws only work if the government knows that a child is out of school. The home schoolers of the 1960s discovered that it is not all that hard to keep a child out of school and out of court. No one knows how many "underground home schoolers" there were in the late 1960s and early 1970s, but in many states, the only way to home school was to hide. Thousands of families did so successfully.

### B. **In Search of Freedom**

There were a few states where home education was legal. Oklahoma, for example, has a constitutional provision that refers to home education. The Oklahoma Constitution requires the legislature to provide for compulsory attendance at some public or other school, "unless other means of education are provided of all children in the State who are sound in mind and body, between the ages of eight and sixteen, for at least three months each year." The "other means of education" language was added for the specific purpose of protecting the right of parents to choose home schooling. In 1907, during the Oklahoma Constitutional Convention, one of the delegates, Mr. Buchanan, proposed that the phrase "unless other means of education be provided" be added to Article 13, Section 4. Favorably responding to Mr. Buchanan's proposal, another delegate, Mr. Baker stated, "I think Mr. Buchanan has suggested a solution. A man's own experience sometimes will teach him. I have two little fellows that are not attending a public school because it is too far for them to walk and their mother makes them study four hours a day." As a result of this discussion on home schooling, the "other means of education" language was added to Article 13, Section 4.

The Supreme Judicial Court of Massachusetts permitted home education (as opposed to child labor) in *Commonwealth v. Roberts*, 34 NE 402 (Mass. 1893). The court emphasized that the object of the statute is that "all children shall be educated, not that they shall be educated in a particular way."

An Indiana court permitted home schools as far back as 1904 in *State v. Peterman*, 32 Ind. App. 665, 70 N.E. 550 (1904). The court defined a school as "a place where instruction is imparted to the young.... We do not think that the number of persons, whether one or many, make a place where instruction is imparted any less or any more a school." (*Peterman*, at 551.) Quoting the *Roberts* decision in Massachusetts, the Indiana court said: "[T]he object and purpose of a compulsory educational law are that all the children shall be educated, not that they shall be educated in any particular way."

(*Peterman*, at 551.) The Court concluded; "The result to be obtained, and not the means or manner of attaining it, was the goal which the lawmakers were attempting to reach. The [compulsory attendance] law was made for the parent who does

not educate his child, and not for the parent who ... so places within the reach of the child the opportunity and means of acquiring an education equal to that obtainable in the public schools...." (*Peterman*, at 552.)

The Illinois Supreme Court recognized a right to teach a child at home in 1950 when it decided *People v. Levisen*, 404 Ill. 574, 90 N.E.2d 213 (1950). This landmark case held that a "private school" is "a place where instruction is imparted to the young ... the number of persons being taught does not determine whether a place is a school." (404 Ill. at 576, 90 N.E.2d at 215.) The Illinois Supreme Court emphasized the right of parents to control their children's education: "Compulsory education laws are enacted to enforce the natural obligations of parents to provide an education for their young, an obligation which corresponds to the parents' right of control over the child. (*Meyer v. Nebraska*, 262 U.S. 390, 400.) The object is that all shall be educated, not that they shall be educated in any particular manner or place." (*Levisen*, 404 Ill. at 577, 90 N.E.2d at 215.)

Virginia was a haven for home schoolers after it enacted an exemption from compulsory attendance for conscientious objectors in 1954. There were Amish and Mennonite communities that refused to send their children to the public high schools, so Virginia took the conscientious objector language from the federal draft code and adapted it to the school setting. Virginia Code section 22.1-257(B) requires school boards to exempt from compulsory attendance "any child who, together with his parents, by reason of religious training or belief, is conscientiously opposed to attendance at school." Virginia home schoolers tell the legend of "Mario the Amish Guy," who started off as an unschooler in New York City but then moved to the Shenandoah Valley, put on Amish garb, grew a beard, and successfully claimed Virginia's religious exemption.

### C. **Early Skirmishes**

John Holt was as much of a pioneer in home school law as he was in the field of education. In his book *Teach Your Own*, first published in 1981, Holt told families how to present a legal defense of home education. Holt wrote:

Most judges in family or juvenile courts, where many unschooling cases will first be heard, probably don't know this part of the law either, since it is not one with which they have had much to do.

This means that when we write up home schooling plans, we are going to have to cite and quote favorable rulings. The more of this we do, the less schools will want to take us to court, and the better the chances that if they do we will win. (Holt, 1981, p. 272)

Holt then spells out a number of early cases that home schoolers could use in their defense in court. (Holt, 1981, pp. 273-294) Most of these were trial court decisions, which never appear in any published legal reporting service. Holt cites *State of Iowa v. Sessions*, (Winniesheek County District Court, 1978); *Commonwealth of Virginia v. Geisy* (Norfolk Juvenile and Domestic Relations Court, 1979); and *Michigan v. Nobel* (57th Dist. Ct., Allegan County, Mich. 1979). The early issues of *Growing Without Schooling* were filled with citations of trial court rulings home schoolers had won. These cases gave parents confidence and helped the home school movement grow.

The first significant reported (4) case of the modern home school movement came in New Jersey. According to New Jersey law, a child must attend a public school "or a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades ... or receive equivalent instruction elsewhere than at school." Home schoolers argued that they satisfied the "elsewhere than at school" portion of the statute in *State v. Massa*, 95 N.J. Super. 382, 231 A.2d 252 (Morris County Ct. Law Div. 1967).

The *Massa* court agreed. "This court agrees with the above decisions that the number of students does not determine a school and further, that a certain number of students need not be present to attain an equivalent education." (*Massa* at 256.) The court reiterated *Roberts*, emphasizing that the object of the statute is that "all children shall be educated, not that they shall be educated in a particular way." (*Id.*)

### D. **The Absent ACLU**

Home schoolers did win some cases, but it was hard to find a lawyer who knew anything about home schooling except that it was illegal. As John Holt wrote:

For some time, we unschoolers are not likely to find many lawyers, anywhere in the country, who know as much about the law on unschooling as we know *or can easily find out*. This is not an issue about which most lawyers have concerned themselves. We cannot rely on them to work out good strategies and write good briefs for us—at least, not at a price that most of us can afford. We are going to have to do much of the research, decide what legal action we want to take, what kind of decision we hope to get from the courts, and put together all our necessary supporting evidence, citations, quotes from rulings, etc. Only after we have prepared the strongest possible case should we think about hiring a lawyer to polish it for us and steer it through the courts. (Holt, 1976, p. 297)

Holt was writing about filing suit against a local school district, which gave a family a choice between going to court or not going to court. Families did not have the luxury of such a choice when they found themselves defending against criminal charges. In those cases, they needed a good lawyer and they needed one fast.

Many of the early home schoolers were well to the left of the political spectrum, and some assumed the American Civil Liberties Union would rise to defend them.(5) They were sadly mistaken. The ACLU's absence was a critical but often overlooked factor in shaping the subsequent development of home school politics.

The ACLU's absence was not for lack of trying. John Holt wrote the national director of the ACLU, Aryeh Neier, to persuade him to support home schoolers. Holt published that letter in an early issue of *Growing Without Schooling*:

Dear Mr. Neier

Thanks very much for your kind invitation to take part in your National Convocation on Free Speech on

June 13.

I think that compulsory attendance laws, in and of themselves, constitute a very serious infringement of the civil liberties of children and their parents. This would be true, I feel, no matter what schools were like, how they were organized, or how they treated children, in short, even if they were far more humane and effective than they actually are.

Beyond that, there are a number of practices, by now very common in schools all over the country, which in and of themselves seriously violate the civil liberties of children, including ... [Holt goes on to list ten common practices in the public schools. Some of these have since been prohibited by case law or statute, others remain common to this day].

As long as such outrages go on, I can't get very excited about such issues as the controlling of violence and sex on TV, the rating of motion pictures, the censorship of student publications, or the banning of textbooks and library books on various grounds. People who argue strongly about such things, while accepting without protest the practices I here complain about, seem to me to be straining at gnats while swallowing camels.

To return once more to the matter of compulsory school attendance in its barest form, I think you will agree that if the government told you that on 180 days of the year, for six or more hours a day, you had to be at a particular place, and there do whatever people told you to do, you would feel that this was a gross violation of your civil liberties. The State justifies doing this to children as a matter of public policy, saying that this is the only way to get them educated. Even if it were true that children were learning important things in schools, and even if it were true that they could not learn them anywhere else (neither of which I believe), I would still insist that since in other (and often more difficult) cases the ACLU does not allow the needs of public policy as an excuse for violating the basic liberties of citizens, it ought not to in this case. (Holt, 1978, p. 44)

It is not easy to explain why the ACLU chose to stay out of home school cases. After all, the strongest precedent for a right to teach a child at home is *Roe v. Wade*. Roe's right to abortion is explicitly grounded in a fundamental right to "bear and raise children," and this right was first recognized by the Supreme Court in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), a 1925 case which upheld a parent's right to keep a child out of public schools.

If the ACLU had accepted home school cases, it is safe to assume that they would have tried to extend the privacy rights of *Roe* to include home education. After all, if the constitutional right to "bear or raise children" is important enough to allow a woman to terminate a pregnancy even though many Americans view that act as murder, it ought to be important enough to allow a parent to give a child an alternative form of education. (6)

The ACLU's absence is hard to explain. There is no evidence that the national organization made any top down policy decision to avoid home school cases. There was one successful New Hampshire Civil Liberties Union case, *Appeal of Peirce*, 122 N.H. 762 (1982), but a computer database search reveals no other reported case in which the ACLU or any of its state affiliates supported the right to home school. For some reason, however, the organization as a whole seemed uninterested in winning this kind of case.

#### E. **Void for Vagueness**

The early home school cases were generally won using the kind of arguments the ACLU has perfected. The single most successful argument in the early years was the "void for vagueness" defense that the ACLU has used so successfully as a defense to obscenity or loitering laws.

In states where the compulsory attendance law required attendance at a public school or "equivalent instruction elsewhere," home schoolers argued that their homes were equivalent. The earliest case on this point took place in New Jersey. In 1965, the New Jersey Supreme Court ruled that a home school might be able to provide equivalent instruction. (*State v. Vaughn*, 44 N.J. 142 (1965).) Public school officials insisted that "equivalent instruction" would have to include more than just equivalent academics. The school establishment insisted upon equivalent social interaction, too. When a home school family was prosecuted for lack of socialization, however, the court sided with the home schoolers. (*Massa, supra.*)

In states where the compulsory attendance law required attendance at a "private school," home schoolers argued that their home was a private school. In some states, the courts promptly rejected this claim. In others, the judges gave home schoolers the benefit of the doubt.

In *Roemhild v. Georgia* (251 Ga. 569, 308 S.E.2d 154 (Ga. 1983)), the Georgia Supreme Court declared Georgia's compulsory attendance law "unconstitutionally vague." (*Roemhild*, 308 S.E. 2d at 159.) The court reasoned: "...we conclude that the statute is not sufficiently definite to provide a person of ordinary intelligence, who desires to avoid its penalties, fair notice of what constitutes a 'private school....' (*Roemhild* at 158.) "Furthermore, the statute violated a second due process value in that it impermissibly delegates to local law enforcement officials, judges, and juries the policy decision of what constitutes a private school." (Id.)

In *Wisconsin v. Popanz* (112 Wis. 2d 166, 332 N.W.2d 750 (Wis. 1983)), the Wisconsin Supreme Court held that the compulsory attendance law was "void for vagueness insofar as it fails to define private school." (Popanz, 332 N.W. 2d at 756.) The Court explained: "The persons who must obey the law should not have to guess at what the phrase 'private school' means. They should have some objective standards to guide them in their attempts to 'steer between lawful and

unlawful conduct.' (*Grayned v. City of Rockford*, 408 U.S. 104 (1972).) Furthermore, standards cannot lie only in the minds of persons whose duty it is to enforce the laws. We must conclude that statute fails to provide fair notice to those who would seek to obey it and also lacks sufficient standards for proper enforcement." (*Popanz*, at 756.)

The Minnesota Supreme Court ruled that Minnesota's requirement that private and home school teachers have qualifications "essentially equivalent" to public school teachers was too vague to "serve as a basis for criminal conviction," and therefore, was an unconstitutional violation of due process under the 14th Amendment. (*Newstrom v. State*, 371 N.W.2d 525, 533 (Minn. 1985).)

These early cases created a new opportunity for home schoolers to thrive in those states and in others that had vague, old-fashioned laws.

#### F. **Looking for Loopholes**

Not all states had vague laws, however. Some permitted education in the home as long as the local public school district "approved" the instruction in advance. Many early home schoolers managed to get approval from open-minded school officials, but far more were rebuffed. School officials who refused to approve a home school program tended to prosecute parents who went ahead and taught their children at home without permission.

Local home school groups began to learn which school districts were receptive to home education and which were not. A patchwork approach to home education began to develop, where local home school leaders learned how to negotiate approval out of local public school officials. In hostile districts, home schoolers learned how to hide or made plans to move.

Approval in advance by local school officials worked reasonably well for some home schoolers in some school districts, but it was completely unacceptable for a brand-new national organization that was committed to defending every home schooler in every school district, including those who had strong religious objections to asking "Caesar" for permission to teach Christian values to their own children. The Home School Legal Defense Association (HSLDA) was formed in 1983 with just that mission.

If HSLDA had started off with big budgets and high-powered lawyers, it probably would not have tackled this problem as it did. But HSLDA started off as a cardboard box full of membership applications under Mike Farris's bed. HSLDA's first full-time employee was Chris Klicka, then a law student at Oral Roberts Law School. Klicka had spent a summer at the Rutherford Institute researching the compulsory attendance laws in all 50 states. When he started work at HSLDA, he set in finding every loophole in every law.

There were plenty of loopholes to find. There was some way to get away with home schooling in the majority of states by 1983, although the vast majority of school district superintendents still assumed they had the power to prosecute home schoolers if they refused to cooperate with the school system. HSLDA tended to attract the families who were least willing to cooperate, and the legal battles began in earnest.

Klicka sat down to write the book on home school law. *Home Schooling in America: A Legal Analysis*, has since become the definitive statement on home education in America (7), not so much because Klicka's interpretation of the law was widely accepted by local school officials or state departments of education, but because HSLDA settled down to the long, slow process of systematically insisting upon their interpretation of the law in every single interaction with school districts. Home schooling was so new that local school districts rarely had any official guidance from above on how to handle it. Each school official had to invent the wheel from scratch. This placed school officials at a systematic disadvantage in dealing with home schoolers, because HSLDA lawyers knew all the statutes, regulations, policies, and precedents that justified home education. HSLDA made no secret of its willingness to go to court to defend its understanding of the law. In the face of HSLDA's extensive knowledge and single-minded purpose, most districts looked for ways to tolerate home schoolers instead of prosecuting them

#### G. **Constitutional Challenges**

There were a few states, however, where there was strong leadership from above. In Texas, for example, the Texas Education Agency instructed school officials that home education was not legal and that home schoolers should be prosecuted if they would not put their children into traditional schools. HSLDA members in Texas joined a class action suit to block this prosecution. Home schoolers argued that Texas was discriminating against parents by permitting any private school to operate except a private school operated by parents. The trial court agreed that this was enough of a possibility that criminal charges against home schoolers should be enjoined until a final determination of that question could be made. *Leeper v. Arlington Indep. School Dist.*, No. 17-88761-85 (Tarrant County 17th Judicial Ct., Apr. 13 1987) (8). Home schoolers in Texas were suddenly free from the threat of prosecution.

The *Leeper* decision was HSLDA's first big win as a plaintiff in a case. Over the next few years, HSLDA lawyers filed a series of broad constitutional challenges for HSLDA members in other states where home schoolers were under attack. Pennsylvania and New York each had an "approval" law that meant that home schoolers could not operate without individualized approval by their local school superintendent. In each state, scores of HSLDA members were in court. HSLDA filed *Jeffery v. O'Donnell* (702 F.Supp. 516 (M.D. Pa. 1988)) in Pennsylvania and *Blackwelder v. Safnauer* (689 F. Supp. 106 (N.D.N.Y. 1986)) in New York.

The two cases made essentially identical federal claims about essentially identical state laws on essentially identical facts. The two courts came to opposite conclusions. The *Jeffery* court struck down Pennsylvania's compulsory attendance law. The *Blackwelder* court upheld New York's.

#### H. **Legislative Victories**

The loss in New York did not make a big difference to home schoolers in that state. On the same day that *Blackwelder* was decided against them, the New York Board of Regents issued regulations legalizing and regulating home education. The Pennsylvania

Legislature did much the same when it passed a new compulsory attendance law that permitted home education under certain conditions.

By 1987, home schoolers had achieved enough legitimacy that lawmakers were finally willing to consider permitting home education, subject to certain regulations. In general, legislators were willing to allow parents to teach their own children as long as they provided an annual notice of their intent to teach a child at home and submitted evidence of academic achievement at the end of the school year. The following states adopted home school statutes or regulations:

1982: Arizona, Mississippi

1983: Wisconsin, Montana

1984: Georgia, Louisiana, Rhode Island, Virginia

1985: Arkansas, Florida, New Mexico, Oregon, Tennessee, Washington, Wyoming

1986: Missouri

1987: Maryland, Minnesota, Vermont, West Virginia

1988: Colorado, New York, South Carolina, North Carolina, Pennsylvania

1989: North Dakota, Hawaii, Maine, Ohio

1990: New Hampshire, Connecticut

1991: Iowa

By 1989, there were only three states where home education was still a crime. Iowa, North Dakota, and Michigan were the last home school holdouts. The North Dakota Supreme Court ruled against home schoolers seven times before 1989, when the "Bismarck Tea Party" persuaded the legislature to change the law.

Home schooling was still illegal in Iowa, thanks in large part to Kathy Collins, the attorney who used to handle home education issues for the Iowa Department of Education. In 1987, Attorney Collins wrote:

Children are not chattel; they are not personal property. They are not "owned" by their parents, nor do they "belong" to the state. The Christian fundamentalists who want the freedom to indoctrinate their children with religious education do not understand that the law that prevents them from legally teaching their kids prevents someone else from abusing theirs.

Compulsory attendance laws are protectionist in nature. Their purpose is twofold: to protect the state by ensuring a properly educated citizenry; to protect the children by ensuring that their labor is spent attaining an education. Any law that would allow Christians to teach their children without oversight or interference from the state would also allow parents with less worthy motives to lock their children in a closet, use them to babysit for younger siblings, or have them work twelve hours a day in the family hardware store. Opening the door for the lamb allows the lion to enter as well....

It has taken nearly two centuries to enact the many legal protections existing today for children. Abrogating the state's compulsory-attendance laws, or weakening them by allowing parents to teach children at home, is no less than a giant genuflection backward. The precarious balance of parents' rights versus children's rights should never be struck in favor of the parents. While the Religious Right carries the Christian flag into battle, the state must steadfastly hold high the banner of the child. (Collins, 1987, p. 11)

Despite Collins' very best efforts, the Iowa Legislature finally passed a home school law in 1991. That left Michigan as the very last state to prohibit home education by anyone but a certified teacher. The DeJonge family had spent eight years in court, and had lost every single hearing before they reached the Michigan Supreme Court. By a 5-4 decision, that court held that the Michigan compulsory attendance law violated the rights of parents who had a sincere religious objection to using certified teachers. (*People v. DeJonge*, 442 Mich. 266 (1993).) In a companion case, the court ruled in favor of the Clonlara School, which used certified teachers as required by law, but only for a few hours each school year. The rest of the instruction was provided by parents. (*Clonlara, Inc. v. State Bd. of Educ.*, 442 Mich. 230 (1993).)

These two cases effectively eliminated Michigan's ability to prosecute home schoolers, but not their power to try. Two and a half years later, the legislature enacted a home education law that eliminated all notice and reporting requirements (9). The battle for Michigan was finally over.

## I. **Holding Ground**

By the middle of 1993, home schooling was finally legal in all 50 states. The challenge for the home schooling movement shifted from making home education possible to keeping it free. This proved to be as big a task as ever.

### A. **The National Education Association**

Home schoolers have not yet won over all their opponents. The National Education Association, in particular, has voted to abolish home education every year since 1988:

The National Education Association believes that home schooling programs cannot provide the student with a comprehensive education experience. When home schooling occurs, students enrolled must meet all state requirements. Home schooling should be limited to the children of the immediate family, with all expenses being borne by the parents/guardians. Instruction should be by persons who are licensed by the appropriate state education licensure agency, and a curriculum approved by the state department of education should be used.

The Association also believes that home-schooled students should not participate in any extracurricular activities in the public schools.

The Association further believes that local public school systems should have the authority to determine grade placement and/or credits earned toward graduation for students entering or re-entering the public school setting from a home school setting. (1988, 2000) (National Education Association, 2000)

### B. **H.R. 6**

Given the National Education Association's stated position and that union's influence within the Democratic Party, many home schoolers had reason to fear the election of Bill Clinton as President in 1992. The home school movement had abolished the last significant barrier to home education at the state level, but now they faced Democrat majorities in the House of Representatives, Senate, and White House. Would the Clinton Administration support home education? The first big test came with House Resolution 6 of 1994. <sup>(10)</sup>

H.R. 6 was a reappropriations bill for the Elementary and Secondary Education Act (ESEA). Ordinarily such bills deal with public education and would have little, if any, impact on home educators. But in 1994, a few small wording changes affected thousands upon thousands of home schooling families, and resulted in over a million phone calls to Congress.

#### The Miller Amendment

Just before sending H.R. 6 back to the House floor, the Education and Labor Committee approved Congressman George Miller's amendment (Section 2124(e)). His amendment stated:

ASSURANCE.—Each State applying for funds under this title shall provide the Secretary with the assurance that after July 1, 1998, it will require each local educational agency within the State to certify that each full time teacher in schools under the jurisdiction of the agency is certified to teach in the subject area to which he or she is assigned.

Many local school authorities believe that home and private schools are under their jurisdiction, so home schoolers were concerned. The new definition of schools in H.R. 6 made the Miller amendment unacceptably threatening. The word "nonprofit" had been added to the definition of schools in H.R. 6, changing the definition for the first time since ESEA was enacted in 1965. Where the word had previously been understood to refer to public schools, it now clearly meant more.

#### Rep. Arme y Offers an Amendment

Concerned by the implications of the Miller amendment and new definitions of "school" in H.R. 6, Representative Dick Arme y (R-TX) offered his own amendment to protect home and private schools from the certification requirement:

"Nothing in this title shall be construed to authorize or encourage Federal control over the curriculum or practices of any private, religious, or home school."

Arme y's amendment was rejected in the committee on February 14, 1994 on a straight party-line vote in the Democratic-controlled House Education Committee. Arme y's office called then HSLDA President Mike Farris and asked him to analyze the Miller amendment. Based upon review of Miller's amendment, the definitional language, and HSLDA's 11 years of defending home schools against legal challenges from local education agencies, Farris felt it was imperative to add protective language to the bill.

#### Rep. Miller Refuses to Negotiate

HSLDA immediately contacted Representative Miller's office to express concern and ask for clarifying language, which is the normal way of handling such situations. Unfortunately, Miller's staff refused to consider any amendments to § 2124(e).

A quick review of Rep. Miller's voting record showed that he was a staunch supporter of the National Education Association, which had never been favorable to home schoolers. With the rejection of Rep. Arme y's amendment, the refusal to negotiate with home schoolers, and a vote only nine days away, HSLDA began contacting its members.

On Tuesday, February 15, 1994, HSLDA staff began preparing for the battle. President Mike Farris drafted a letter to all 435 members of Congress, explaining the threat to home schooling and asking them to support the Arme y amendment.

Next, arrangements were made for printing, collating, and labeling an "urgent alert" letter from Farris to HSLDA's then 38,000 members. <sup>(11)</sup> The letter summarized the situation and outlined a six-step plan of action for contacting Congress and spreading the alert to friends and neighbors. Also contained in the mailing was a list of the representatives whose offices did not need to be contacted because they had already assured HSLDA of their support for protective language.

That evening, the National Center for Home Education launched a nationwide fax alert containing the same information to home school leaders around the country.

Twelve hours later, on Wednesday morning, telephone trees across America were abuzz thanks to the efforts of state and support group leaders. Tens of thousands of copies of the fax alert were photocopied and distributed. Christian television and radio shows picked up the alert. CBN's television program *The 700 Club* and Marlin Maddoux's nationally-syndicated radio show *Point of View* featured Mike Farris telling the story of H.R. 6.

#### Congressional Phone Lines Overloaded

On Thursday, February 17, more than 60 local home schoolers volunteered to participate in an emergency lobbying effort. Congressional switchboards became so overloaded due to the amount of incoming calls that they literally shut down.

Besieged by over 20,000 telephone calls to his office alone, Congressman Miller's staff finally put an answering machine on with a message claiming that he had no intent to regulate home schoolers.

By 9:00 a.m. the following morning, the Capitol Hill switchboards were again jammed as tens of thousands of calls flooded congressional offices. Across America, home schoolers called radio stations, faxed letters, and distributed literature on the Rep. Arme y's "Home School/Private School Freedom Amendment." When the receptionists for certain congressmen began giving false information about H.R. 6 to callers, the National Center sent another fax broadcast to help home schoolers respond to confusing and misleading statements about the bill.

Over the weekend, dozens of congressmen visiting their districts for the President's Day recess were confronted at town hall meetings, in their home offices, and elsewhere by concerned parents. Congressmen were shocked by the populist response to what many of them believed to be an insignificant provision in a non-controversial bill. Even the Associated Press ran a favorable nationally-syndicated story about the home school telephone blitz of Congress.

Little did Congress know that the battle had just begun. On Monday, February 21 (President's Day), Dr. James Dobson's *Focus on the Family* radio show featured Michael Farris and former Congressman Bob McEwen discussing the implications of H.R. 6. HSLDA's membership began receiving their urgent alert letters in the mail. Several Christian

school organizations actively jumped on the H.R. 6 bandwagon, sending out their own mailings and fax alerts. Rush Limbaugh discussed H.R. 6 on his radio show. Capitol Hill switchboards again closed down as record-breaking numbers of telephone calls poured into Congress.

On Tuesday, February 22, the second wave of telephone calls hit Congress in full force. For the rest of the day, no one on Capitol Hill would get anything done. Several congressmen could not even reach their own staff by telephone. Congressman Arney and Mike Farris continued to fight misinformation about the amendment on the Hill. HSLDA's own office received a record 10,000 incoming telephone calls.

Braving an ice storm early the next morning, Mike Farris and home schoolers from as far away as Missouri made it into D.C. to lobby Congress. Local home school volunteers delivered another letter from Mike Farris to each congressional office. Attached to this letter was a list of thousands of state and local home school organizations from around the country who officially supported the effort to advance the "Home School/Private School Freedom Amendment." Later that day, Farris was interviewed on H.R. 6 by more national media including CNN, Pat Buchanan, and Beverly LaHaye. And, amazingly, the Democrat-controlled House Rules Committee, willing to do almost anything to stop the mounting tide of phone calls, agreed to "open rule" on the floor.

On Thursday, February 24, Arney's staff discovered that the Rules Committee inadvertently reprinted an outdated version of the "Home School/Private School Amendment." HSLDA asked Massachusetts home school leaders Bev Somogie and Marcie Arnett to alert home schoolers in the district of Rules Committee Chairman Joseph Moakley (D). Within the hour, Rep. Moakley's office was flooded with calls and he agreed to allow Arney to revise the amendment on the floor. Senators Ford and Kildee sponsored an ineffective competing amendment and circulated letters undermining the "Home School/Private School Amendment." Arney responded with his own letter, refuting Ford and Kildee's charges.

Finally, on Thursday afternoon, debate began on the two amendments. The Ford/Kildee amendment came to a vote and passed 424-1. Representative Miller was the only member to vote for it. Then Arney submitted his revised amendment. Home schoolers around the country watched C-Span with bated breath as congressmen from both parties lined up four and five deep to publicly state their support for the cause of home educators. After an hour-and-a-half of debate, the House voted on the Arney amendment, and home schoolers won a stunning 374-53 victory! HSLDA sent out fax number five announcing the victory to the home school community.

One week later, DC-area home school families delivered a special 10-pound bag of apples and a note of thanks to each congressional office. Home schoolers all over the country expressed their appreciation by sending flowers to their congressman.

HSLDA's all-out assault on H.R. 6 had an undeniable political impact, but it did not make every home schooler happy. Some were willing to give Rep. Miller the benefit of the doubt, others felt that the Arney Amendment had the potential to federalize home education instead of keeping the federal government out of it. Such home schoolers eventually founded the National Home Education Network (12) to counter the growing impression that HSLDA was the only group speaking for home schoolers.

### C. **National Testing**

Home schoolers recognize how fragile their liberty is, and are committed to defending that liberty at all costs. Chris Klicka of HSLDA provides the following first-hand account of one of the more recent political battles for liberty:

During the 105th Congress, I obtained a transcript of a meeting the U.S. Department of Education convened with educators from around the country to discuss the creation and implementation of a national test for all students. A university professor from Kansas, John Poggio, made a startling but obvious statement. He warned, "What gets tested, must be taught." A member of the Delaware Board of Education echoed a similar sentiment. She explained that Delaware would have to adjust its curriculum to fit the national test. The danger was clear. If Clinton was able to create and implement a national test, it would, by default, create a national curriculum. The federal education bureaucracy in Washington, D.C., would control the education of our nation's youth in a more profound degree than ever before. We had to fight this test. But how?

After meeting with the president of HSLDA, Mike Farris, who agreed battling this national test would be a major priority for us, I contacted Congressman Goodling's counsel [Bill Goodling was the Chairman of the House Education Committee] and told him that Mike Farris agreed we would "pull out all stops" if Goodling introduced a bill to cut off funding to Clinton's national test. The counsel said he would talk to Goodling. A week later, he explained Goodling was willing to introduce a resolution expressing the sense of the House opposing national testing. I told him there was no way we could get home schoolers to flood the Congress with calls over a resolution which had no power to stop testing. I asked him to go back to Goodling and explain we could not help him unless he introduced a bill to permanently ban testing. I emphasized, then and only then, could we deliver calls. A week later Goodling agreed!

Over the next year and a half, the home schoolers had the opportunity to prove themselves again and again as HSLDA sent out nearly 35 nationwide fax alerts. And the home schoolers responded! Repeatedly the home schoolers flooded the House with calls and we organized our Congressional Action program volunteers to visit every office with packets exposing the dangers of the Clinton national test. In September of 1997, we won the first round in the House: 296 to 125 to stop funding of all national testing. The home schoolers had made the ban on testing viable. A key congressional staff admitted, "Without HSLDA and the home schoolers this could not have happened!"

In October 1997, the Senate sold us out by compromising the bill and allowing a national test. This was unacceptable. We told the leadership we would unleash another nationwide alert. In high stakes negotiating in

conference committee, we achieved a temporary victory. We won a **one-year ban** on national testing. This meant the fight would continue in 1998. We hoped the grassroots would not become worn out.

At the beginning of the next year, our champion, Congressman Goodling, introduced H.R. 2846, a **permanent ban on national testing**. Riding on a wave of calls from the home schoolers, the testing ban passed in a vote of 242 to 174. The fight, however, was just beginning. We still had to get the bill through the Senate. Our champion in the Senate was John Ashcroft from Missouri. The only problem is that we did not have a "vehicle" to which to attach our testing amendment.

Meanwhile, I attended a meeting with Senator Coverdell's chief of staff where he was recruiting support for the Senator's "A+ Education Savings Accounts" bill. I told him we could not deliver calls unless something was attached which would really motivate home schoolers to call. . . something like our prohibition on a national test amendment.

A few days later, I received a call from Coverdell's office that they would allow the testing amendment to be attached. The rules, however, required that a separate vote be taken on our amendment. We scheduled a lobby day and set appointments with a majority of senators while simultaneously sending out a nationwide alert to home schoolers to call their two U.S. Senators.

I soon received a call from Senator Lott's office, who was the majority leader, telling me there was "not a chance in -----" that our testing amendment would be successful. They had done a "whip count" earlier in the day and only found 30 senators who would support our testing ban. They urged us not to push for the amendment because we would lose big. Our lobby effort the day before, however, gave us evidence that we were very close to winning the vote. Lott's office told me it was our call. I said we wanted to go forward with the vote. I thought we could win. Besides, it might be our only chance to get a vote that year. In the meantime, the home schoolers were delivering thousands of calls and God's people were praying.

On April 22, 1998, the vote was scheduled. It was amazing to watch. Ashcroft's amendment permanently banning national testing passed in a vote of 52-47! Far more votes than the 30 votes predicted by Lott's office. The Senate leadership was amazed. The home schoolers had pulled it off.

Later in June, we were contacted by the leadership in both the House and Senate, asking us if we would agree to have our testing amendment removed so that the "A+ Education Savings Account" bill could go the president in a "clean" form. (The "A+" bill was subsequently vetoed by the president.) We made Speaker Gingrich and Majority Leader Lott promise, in writing, that our testing amendment would be attached to another bill later in the year. In October 1998, they kept their promise in spite of intense threats from President Clinton. We finally won. A permanent ban on a national test was achieved! (Klicka, personal communication.)

## I. Home School Politics

The preceding sections describe a surprisingly successful movement. In this section, we will grope for some explanation of the secrets of that success. How did this small group of ragtag radicals become the largest successful educational reform movement in America today? How did they change the laws of all 50 states and enact federal legislation over President Clinton's objections? Three factors seem to make the difference.

### A. **Right Makes Might**

According to the "social contract" theories that led to the American Revolution, governments exist to serve certain purposes, and when the government undermines those purposes instead of serving them, the people have the right (perhaps even the duty) to rebel. Most home schoolers believe that governments should protect the safety and integrity of the home and leave the task of childrearing to parents. When parents believe their government threatens their home instead of protecting it, they feel justified in resisting that threat. Laws fade into insignificance when a parent thinks the government threatens the good of his or her children.

This touches on profound issues of political philosophy that need not be resolved for the purposes of this essay. We need not determine whether parents actually have a right to break a law that threatens their home, although such questions have begun to reach the highest courts in our land. (See, e.g., *Troxel v. Granville*, 530 U.S. 57 (2000).) It is enough for us to examine what happens when large numbers of parents *believe* they have a right to go against the law. Home schoolers believe they do have a right to do what is best for their own children in their own homes, whatever the law may say.

A mother's love is an irresistible force, and the compulsory attendance laws are hardly an immovable object. When nineteenth century parents claimed a right to force their children to work in the potato fields instead of sending them to school, it was easy for society to insist that a child's right to an education outweighed the parent's right to the child's income. But when twentieth century parents claimed a right to give their children a better education than that in the public schools, society lost its will to resist.

Home schoolers have gone forth on the courage of their convictions, and the opposing forces of government have melted away at their advance. Time after time, a home school mom with a cardboard box full of books has marched into a superintendent's office to say, "I don't care what the law says. This is what my child needs!" Time after time, the schools have found a way to work around the law, or, if the case goes to court, the judge has found the way, or, if the case is lost, the legislature finds the way, or, if the legislature refuses to act, the family moves on to another state. Good parents don't give up until they have what is best for their children, and home schoolers believe home schooling is best for theirs.

### B. **Active Citizens (13)**

In the 1996 National Household Education Survey (NHES), the U.S. Department of Education's National Center for Education Statistics surveyed 9,393 parents of school age children. The survey asked numerous questions about the extent of family involvement in a variety of civic activities. Some of the questions asked whether the parent had voted recently,

telephoned or wrote a public official, signed a petition, attended public meetings, contributed to political campaigns, participated in community service activities, worked for a political cause, or participated in a boycott in the past twelve months. The survey differentiated public schoolers from home schoolers and both religious and non-religious private schoolers. Christian Smith and David Sikkink of the Department of Sociology at the University of North Carolina analyzed the data, which was published in 1999.

By comparing differences in family participation in these various forms of civic involvement, Smith and Sikkink found that home school families and private school families are consistently **more involved** in all of the civic activities examined than are families with children in public schools. In fact, by an average margin of 9.3%, the private and home school families are more likely than the public school families to engage in any listed forms of civic participation. Up to 13% more private and home schoolers have given money to political causes and up to 15% more have voted in recent elections and telephoned elected officials. An amazing 26% more private and home school families are members of community groups and volunteer at local organizations. (Smith & Sikkink, 1999, pp. 16-20)

The researchers conclude that home schoolers and private schoolers are "definitely not the isolated recluses that critics suggest they might be. It is rather the public schooling families that are clearly the least civically involved of all the schooling types." Smith and Sikkink state:

The empirical evidence is clear and decisive: private schoolers and home schoolers are considerably more involved in the public square than are public schoolers—even when the effects of differences in education, income, and other related factors are removed from the equation. Indeed, we have reason to believe that the organizations and practices involved in private and home schooling, in themselves, tend to foster public participation in civic affairs . . . the challenges, responsibilities, and practices that private schooling and home education normally entail for their participants may actually help reinvigorate America's civic culture and the participation of our citizens in our public square." (Smith & Sikkink, 1999, p. 18)

Smith and Sikkink ponder the surprising civic lifestyle of home schoolers. Their comments explain a great deal about the success of the home school movement:

Of all types of nonpublic education, home schooling as a practice—by so closely uniting home, family, education, and (usually) religious faith—might seem the most privatized and isolated from the concerns of the public sphere. But in fact, most home schoolers are not at all isolated. Indeed, most are embedded in dense relational networks of home schooling families; participate in local, state, regional, and national home schooling organizations; and engage in a variety of community activities and programs that serve the education of their children. Home schooling families meet together at playgrounds; frequent local libraries, museums, and zoos; organize drama productions, science projects, and art workshops; enroll their kids in YMCA soccer and swimming classes; organize home school association picnics and cookouts; and much more. Home schooling families also frequent home education conferences and seminars; pay close attention to education-related legislative issues; share political information with each other; and educate themselves about relevant legal concerns. Far from being privatized and isolated, home schooling families are typically very well networked and quite civically active. (Smith & Sikkink, 1999, p. 20)

Even one active citizen can make a difference in his or her own community. Seventy thousand families' worth of activists can make a difference nationwide. The Home School Legal Defense Association unites these unusually effective citizen-activists into a force to be reckoned with. As the United States Congress discovered during H.R. 6, a scattered but committed minority can be extraordinarily effective in this age of electronic communications.

### C. **Strength in Diversity**

Kathy Collins, the attorney who used to supervise home education in Iowa, wrote home schoolers off as Christian fundamentalists. Ms. Collins was wrong. The diversity of home schoolers is a great strength of the home school movement.

The increasing popularity and acceptability of home education has given it a foothold in some communities that might otherwise have never considered it. The first wave of home schoolers was far to the left of the American political spectrum, and the second wave of evangelical home schoolers was well to the right. The new waves of the home school movement are rapidly filling in the vital center of American politics. Each new wave makes it harder for politicians to take away the right to teach a child at home. Diversity is especially useful when home schoolers interact with legislators. There are home schoolers who are very comfortable with the most conservative politicians, and others who are equally at home with the most liberal. When home school freedoms are genuinely threatened, every faction of this diverse community will quickly join together to fend off government control of home education.

Legislators must remember the diversity of home education when they consider how (or whether) to regulate it. A legislative proposal might be perfectly acceptable to most home schoolers, yet fundamentally violate the deepest convictions of others. Dr. Mary Hood, a home schooler herself, dealt with this issue in her doctoral dissertation:

[I]t is important for policy-makers to recognize that no single individual, group or organization, either on a local or a national level, can possibly hope to represent the views of all home educators adequately. Whenever policy decisions are made, it is important to include representatives of the homeschool movement in the planning process in order to ensure that decisions are fair and plans are feasible. However, the views of minorities should be given consideration and the concerns of those individuals or groups who are most noticeable or vocal in a given area should not be allowed to dominate the discussion completely. (Hood, 1991, p. 3)

Diversity makes a huge difference in the way the media report on home schooling. If home educators were uniformly conservative Republicans, many in the press would have been quick to label them part of the "vast right wing conspiracy." But any reporter who has ever actually covered home schoolers knows this just isn't true. Home schoolers come in too many different flavors to be stuffed in one box.

## I. Conclusion

Home schooling is the movement that should not have happened, yet somehow ordinary parents have overcome the combined barriers of compulsory attendance laws, social disapproval, and a hostile teacher's union. This could never have happened if home schoolers had all been cut from the same cloth. Any movement capable of uniting Marxist teachers and fundamentalist lawyers is probably destined to be a smashing success or a startling failure. Home schooling managed to succeed.

Home schoolers value this freedom and aim to keep it. In the immortal words of the Preamble to the United States Constitution, we intend to "secure the blessings of Liberty to ourselves and our Posterity." Home schoolers would not quit unless they were put in jail. As Mohatma Gandhi and Martin Luther King, Jr. knew, Western democracies lack the will to punish honest people with good motives. A totalitarian state can stamp out home education. A free people will not.

Western democracies lack the will to punish, but do not lack the will to regulate. The most remarkable thing about the modern home school movement is that it is still so unregulated. Almost 2% of America's school-aged population is now taught at home by uncertified parents, free of any day-to-day government control of content or method. As long as the National Education Association continues to resolve to abolish home schooling, home schoolers view *any* regulation as the first of a thousand cuts. *Any* possible restriction on home schooling, from the ambiguous language of H.R. 6 to the development of a national test, will be met with fierce resistance from well-organized home schoolers.

Home schoolers still practice the politics of survival. Many still see themselves as a micro-minority, fighting to maintain a way of life in a society that may tolerate them today but could turn on them at any moment. Politicians respect groups that successfully fight for the rights of a discrete and insular minority. No candidate seeking national office would ever intentionally irritate the Jewish Anti-Defamation League, for example. Home schoolers have not earned that kind of respect—at least, not yet.

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## FOOTNOTES

1. Adjunct Assistant Professor of Government, Patrick Henry College and Staff Attorney, Home School Legal Defense Association, One Patrick Henry Circle, Purcellville, VA 20134.  
The author would like to thank Patrick Farenga, President of Holt Associates and Editor of *Growing Without Schooling Magazine*, for his assistance and information on the work of John Holt and the early days of the modern home school movement. Christopher Klicka, Senior Counsel of the Home School Legal Defense Association, graciously gave permission to incorporate substantial amounts of materials he has written for HSLDA.
2. It would be 15 years before the courts finally ruled that Clonlara's program satisfied Michigan law, in *Clonlara, Inc. v. State Bd. of Educ.*, 442 Mich. 230 (Mich. 1993).
3. The School Prayer cases of the '60s were initially met with stunned disbelief among believers, followed by "massive resistance" to the secularization of what had traditionally been generically Protestant public schools. At first, Evangelicals just fought to get prayer back in the classrooms. As alienated Evangelicals began to critique the public schools, however, they concluded that the problems went deeper than that. Evangelicals decided that schools were actively promoting an alternative religion that they identified as "secular humanism."  
. The resulting "Christian Schools Movement" spawned thousands of church schools in the 1970s, often meeting in Sunday School rooms. These church schools routinely operated without State approval, and were the subject of much litigation. Some of the more influential leaders of the Christian Schools Movement became prominent in the Christian home school movement, including Dr. R.J. Rushdoony, a prominent Reconstructionist, and Dr. Paul Lindstrom, the founder of Christian Liberty Academy. The Christian Liberty Academy Satellite Schools program (CLASS) later became an "umbrella school" similar to Clonlara.
4. "Reported cases" set forth principles of law that can be cited in other legal proceedings, while unreported cases generally do not. When a home school family is acquitted in a criminal trial, that ruling is *not* reported and is *not* generally relevant in other cases. When a family loses in criminal court, appeals that loss, and wins at the appellate level, the appellate decision announces a principle of law that can be cited in other cases.
5. Holt was experienced enough to realize this was unlikely. He recognized that the ACLU was unlikely to oppose compulsory schooling on constitutional grounds. (Holt, 1976, p. 310)
6. It is interesting to speculate how the home school movement would have been different if the right to home school had been successfully built upon an abortion-rights foundation. It seems safe to assume that the "religious right" would view home schoolers

with suspicion, if not overt hostility. If the ACLU had defended home schooling, Christian home schoolers would probably find themselves in the same uncomfortable shoes that left-leaning home schoolers find themselves in today.

7. Significant portions of this paper have been taken directly from Klicka's work with his kind permission.

8. The trial court blocked any further prosecutions while the case worked its way through the court system. It took seven more years before the Texas Supreme Court ultimately upheld this decision in *Texas Educational Agency, et al., v. Leeper, et al.*, 893 S.W.2d 432, (Tex. 1994).

9. Michigan Compiled Laws § 380.1561(3)(f) exempts a child from attendance at a public school if the child is being educated at the child's home by his or her parent or legal guardian in an organized educational program in the subject areas of reading, spelling, mathematics, science, history, civics, literature, writing, and English grammar. There are no reporting or notification requirements.

10. The material in this section has been adapted by permission from material on the Home School Legal Defense Association web page, at [www.HSLDA.org](http://www.HSLDA.org).

11. HSLDA now has over 70,000 member families.

12. NHEN can be found on the web at [www.nhen.org](http://www.nhen.org). Its mission statement reads:

The National Home Education Network exists to encourage and facilitate the vital grassroots work of state and local homeschooling groups and individuals by providing information, fostering networking and promoting public relations on a national level. Because we believe there is strength in a diverse network of homeschoolers, we support the freedom of all individual families to choose home education and to direct such education.

13. This section is taken, in large part, from Chris Klicka's "Home-School Families: Involved or Isolated?" from *Private School Monitor*, Vol. 20, No., 3, p. 9 (1999).