Legal Brief by Linda Conrad-Jansen

The Legality of Homeschooling Using the Private School Option (Ed. Code § 48222)
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In California, families can legally homeschool their children by establishing a private school in their home and complying with the private school requirements of the California Education Code. Parents who have established and enrolled their children in a home-based private school cannot be prosecuted for truancy.

I. California Education Code
Education Code section 33190 requires that a private school file an affidavit, declaring under penalty of perjury that the school has complied with certain legal requirements. Education Code section 48222 exempts children who are in private school from the compulsory attendance requirement of Education Code section 48200. It further states that: "Exemptions under this section shall be valid only after verification by the attendance supervisor of the district, or other person designated by the board of education, that the private school has complied with the provisions of Section 33190 requiring the annual filing by the owner or other head of a private school of an affidavit or statement of prescribed information with the Superintendent of Public Instruction." (Emphasis added.) Once the filing of the private school affidavit has been verified, the children enrolled in that school are no longer subject to compulsory education. There is no requirement in this or any other statute that the school be accredited.

Education Code section 48321.5 (e) states: "Nothing in this section shall be construed to authorize a county or local school attendance review board to issue a subpoena or request a subpoena to be issued for the production of written materials or the attendance of any person if it is verified that the minor pupil is enrolled and in regular attendance in a private school maintaining kindergarten or any of grades 1 to 12, inclusive, that has filed an affidavit pursuant to Sections 33190 and 48222 of the Education Code." Thus, as soon as the attendance of the children in a private school that has filed an affidavit is established, a truancy officer or SARB no longer has jurisdiction to proceed. A truancy action cannot be maintained once an affidavit has been filed.

California laws do not support an opinion expressed by government agencies in the past that a student cannot be homeschooled using the private school exemption. The terms "homeschool", "homeschooling" and "home education" do not appear in the California Education Code. However, the language of the private school exemption is broad enough to encompass home-based private schools and homeschooling.

It has been argued that the filing of a private school affidavit does not establish a private

school. This statement is technically correct. The affidavit merely verifies that the private school has complied with the requirements for establishing a private school. However, although the filing of the affidavit may not establish a school, once the affidavit is filed, the exemption is valid after it is verified that it was filed. (Education Code section 48222.) The affidavit proves the establishment of a private school. There is no statutory authorization for any governmental entity to look beyond the filing of the affidavit and the verification of attendance.

Another argument that has been made is that parents cannot homeschool their children by filing a private school affidavit and establishing a private school. This argument is contrary to established California School Boards Association policy (see below) and is contrary to the plain meaning of the laws. Such an interpretation of the statutes is an unconstitutional infringement upon parents' fundamental right to educate their children.

Finally, it has been argued in the past that a private school must be accredited in order to be a legal private school exempting its pupils from compulsory education requirements. This unique interpretation of section 48222 of the California Education Code is not legally sustainable.

Not only is there no provision in any section of the California Education Code requiring accreditation of private schools, but also many of the larger private schools operating in California are not accredited.

Thousands of California parents, few of them credentialed teachers, teach their children quite successfully at home, pursuant to the private school exemption set forth in Education Code section 48222. While the Education Code does not directly address homeschooling, it does, quite clearly, take a broad, non-restrictive approach to private schooling in general. The Code sets forth very limited legal requirements for a private school: private schools must file an affidavit, keep attendance, and teach children, in English, in the several branches of study required in the public schools. (Ed. Code §§33190, 48222, 51210, 51220.) Furthermore, no statute grants the CDE, local school districts, or any other state agency the right or ability to oversee the operation of private schools, including determining teacher qualifications or accrediting.

II. California School Boards Association Policy

The California School Boards Association confirms that complying with the private school requirements is a legal option for homeschoolers satisfying the compulsory attendance requirement. Board Policy 1621 (a) addresses the issue of whether or not a home school can be a valid private school in California, and concluded that it can. The Policy states, in pertinent part, as follows: "Districts may exempt students from compulsory attendance if the students are tutored at home by a certificated teacher. If the home tutor is not certificated, two options remain: The student may participate in an independent study program administered by either the district or county office of education or parents may file an affidavit with the state department of education registering as a private school" (emphasis added). "When home-based instruction is provided by a non-credentialed tutor, the student

shall be either participating in an independent study program with a supervising credentialed instructor or enrolled in a private school" (emphasis added).

III. Fundamental Rights and Strict Liability

A. Pre- Sherbert: Turner and Shinn cases The position that is sometimes advanced by those in opposition to homeschooling in California is that two California cases, People v. Turner, 121 Cal. App. 2d. 861 (1953) and In re Shinn, 195 Cal. App. 2d 683 (1961), prohibit homeschooling as a private school. The Shinn case actually supports the legality of homeschooling using the private school law. The court said that the family had not satisfied the private school requirements because they were not actually teaching the child, since the child was being taught through an out of state correspondence course. The court applied the private school requirements to a home school setting, thus recognizing that homeschooled students could be exempt under the private school exemption. In other words, the Shinn Court recognized the private school option for homeschooling if the family meets the private school requirements.

B. Sherbert v. Verner (1963) Reliance on Turner or Shinn to deny the legality of homeschooling is misplaced because they were decided before the United States Supreme Court case of Sherbert v. Verner, 374 U.S. 398 (1963). In that case the Supreme Court established that whenever there is a violation of an individual's fundamental right (e.g., parents' right to educate their children, or First Amendment right to the free exercise of religion), the compelling state interest/least restrictive balancing test must be applied rather than the reasonable relationship test. This test was confirmed again by the United States Supreme Court in the case of Employment Division, Department of Human Resources of Oregon, et al. v. Smith et al., 494 U.S. 872 (1990), and Troxel v. Granville (2000) 530 U.S. 57. Parents have a fundamental right to make decisions regarding the education of their children. (Pierce v. Society of Sisters, 268 U.S. 510 (1925), Wisconsin v. Yoder, 406 U.S. 205 (1972).

Additionally, the rationale upon which the Turner case was decided, that it was too burdensome and costly for the state to have to supervise these small private schools, no longer applies. First, the requirement to file an affidavit pursuant to Section 33190 of the Education Code was not in existence when Turner and Shinn were decided. The acceptance of this document is not burdensome or costly. Second, in Turner the Court incorrectly assumed that the state supervised private schools in California. However, the law provides that the only involvement the state has with private schools is when public schools verify that a child is enrolled in a private school that has filed a private school affidavit with the state in order to be exempt form public school attendance. There are certain inspections that larger private schools must obtain, but small private schools are exempted.

In the 1991 Western State University Law Review article entitled, "Home Education and Fundamental Rights: Can Johnny's Parents Teach Johnny? (Vol. 18, pp. 732 - 770, No. 2, Spring 1991) the author commented regarding the Turner decision (p. 756): "However, the case is now disfavored since that court's decision was not based on a strict scrutiny standard and was decided before Yoder's assertion that parental rights in child rearing was a

fundamental interest. Also, the current California Education Code now exempts private schools from compulsory public school attendance requirements.

C. Parents Have a Fundamental Right to Control the Education of Their Children: Troxel Granville (2000) In Troxel v. Granville, the Supreme Court confirmed the fundamental right of parents to the care, custody, and control of their children. The Court included a parent's fundamental right to educate his or her child in those fundamental rights, which encompasses the right to choose private or home schooling. Any regulation of that fundamental right is subject to the strict scrutiny test. The majority opinion written by Justice O'Connor and joined by the Chief Justice, Justice Ginsburg, and Justice Breyer, stated: "The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." Washington v. Glucksberg, 521 U. S. 702, 719 (1997). The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." Id., at 720; see also Reno v. Flores, 507 U. S. 292, 301-302 (1993).

"The liberty interest at issue in this case--the interest of parents in the care, custody, and control of their children--is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in Meyer v. Nebraska, 262 U. S. 390, 399, 401 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in Pierce v. Society of Sisters, 268 U. S. 510, 534-535 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in Pierce that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Id., at 535. We returned to the subject in Prince v. Massachusetts, 321 U. S. 158 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children.

"It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Id., at 166.

"In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. See, e.g., Stanley v. Illinois, 405 U. S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' " (citation omitted)); Wisconsin v. Yoder, 406 U. S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring

American tradition"); Quilloin v. Walcott, 434 U. S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); Parham v. J. R., 442 U. S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); Santosky v. Kramer, 455 U. S. 745, 753 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); Glucksberg, supra, at 720 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the righ[t] ... to direct the education and upbringing of one's children" (citing Meyer and Pierce)). In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." In his concurring opinion, Justice Souter reiterated: "We have long recognized that a parent's interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment. See, e.g., Meyer v. Nebraska, 262 U. S. 390, 399, 401 (1923); Pierce v. Society of Sisters, 268 U. S. 510, 535 (1925); Stanley v. Illinois, 405 U. S. 645, 651 (1972); Wisconsin v. Yoder, 406 U. S. 205, 232 (1972); Quilloin v. Walcott, 434 U. S. 246, 255 (1978); Parham v. J. R., 442 U. S. 584, 602 (1979); Santosky v. Kramer, 455 U. S. 745, 753 (1982); Washington v. Glucksberg, 521 U. S. 702, 720 (1997). As we first acknowledged in Meyer, the right of parents to "bring up children," 262 U. S., at 399 , and "to control the education of their own" is protected by the Constitution, id., at 401. See also Glucksberg, supra, at 761 (Souter, J., concurring in judgment)." "Even a State's considered judgment about the preferable political and religious character of schoolteachers is not entitled to prevail over a parent's choice of private school. Pierce, supra, at 535 ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations")."(At pp. 14- 15.) Justice Thomas writes in his concurring opinion: "I agree with the plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case. Our decision in Pierce v. Society of Sisters, 268 U. S. 510 (1925), holds that parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them. The opinions of the plurality, Justice Kennedy, and Justice Souter recognize such a right, but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights." Thus, if sections 33190 and 48200 et seq. are interpreted to prohibit homeschooling using the private school exemption, or to limit homeschooling to parents holding a California teaching credential, or limit exempt private schools to those that are accredited, then those statutes are subject to strict scrutiny and must be related to a compelling state interest. As discussed herein, evidence is overwhelming that homeschooling provides superior results. The state interest in educating our children is clearly met by homeschooling families.

IV. Credentialed Teachers

Occasionally, school districts have argued that in order to homeschool, parents must use the exemption set forth in Education Code section 48224 and have a teaching credential for the grades taught. Parents can homeschool their children under this section. However, if the school district asserts that homeschooling must be taught by a credentialed teacher, then the school district must show that credential requirement is the least restrictive means available to achieve the state's legitimate interest in education. This showing is impossible in light of the fact that no other state requires certification as a qualification for home instruction. Forty-nine states have determined that something less is sufficient. In People v. DeJonge, 501 N.W.2d 127 (Mich. 1993), the Michigan Supreme Court found that the certification requirement was unconstitutional as not being the least restrictive alternative to achieve education.

Furthermore, in light of recent studies of homeschoolers and homeschooling, and the recent spate of articles regarding the scholastic achievement of homeschoolers, it would be difficult to argue and even more difficult to prove that certificating homeschool parents would achieve any legitimate interest in education. In fact, as a group, homeschooled students reach the highest levels of accomplishment in all areas. The successes of the Colfax family and their Harvard educated sons are well publicized. In addition, there are thousands of homeschooled students, taught by parents without credentials, who have successfully entered the universities, colleges and businesses of their choice. As an educational choice, homeschooling is clearly superior to the public schools.

V. Accredited Schools

An argument that has been made is that in order for the school to be a legal private school thus exempting its students from compulsory education, the school must be accredited. This argument lacks any merit because there are no statutes requiring accreditation and accreditation has never been a requirement for any private schools. Furthermore, this interpretation of the statutes is not constitutionally sound. Such an interpretation of the statutes would subject them to the strict scrutiny test and there must be a compelling state interest for such a regulation. This argument would be difficult to sustain because of the number of private schools in this state, including several of the larger established schools, which are not accredited. In addition, the use of the term "accreditation" is vague and unenforceable because there is no guidance in the Code regarding what type of accreditation is required.

VI. Legislative Support for Homeschooling

In addition to the persuasive legal precedent in favor of the small private schools in the state of California, there is clear legislative support for homeschoolers. I attended and testified in opposition to AB 804, which attempted to add "educational neglect" to the Welfare and Institutions Code section 300) at the Assembly Education Committee hearing on April 6, 1999. Several of the committee members expressed their support for homeschooling under the current system, even after it was explained that there was little state oversight of private school homeschoolers.

In the legislative analysis of the bill, support for homeschooling was exhibited in the

following statements (See Exhibit B): "[T]his bill: …3) Exempts from the definition of educational neglect a child who is excused from compulsory attendance requirements because he or she attends a private school or is being homeschooled." "Exception for Homeschoolers. The bill specifically provides that if a child has been granted the necessary waivers for compulsory attendance, because, for example, the parents are homeschooling the child, lack of enrollment or regular attendance at school will not bring the child within the purview of this provision or the juvenile dependency court. However, the Private School Advocacy Center, writing in opposition to the bill, argues, "there are already sufficient laws available to adequately address this issue [of truancy] . . .. AB 804 would bypass all of this and place a child directly into the judicial system based on an allegation of 'educational neglect' stemming from the assumption that a minor was not enrolled in or regularly attending a bona fide school." The exception crafted into the bill for homeschoolers would appear adequate to satisfy these concerns. The California Homeschool Network also opposes this bill, arguing that it "could lead to harassment of, and false allegations of truancy against, families whose children are enrolled in schools with flexible schedules including private schools and public schools on year-round calendars." Furthermore, while negotiating regarding this bill, the support for homeschooling by the author and sponsor as an educational alternative was overwhelming. AB 804 was eventually dropped.

The legislature considered parents teaching their children at home when it recently amended Education Code section 44237 (regarding fingerprint requirements) to state: "This section does not apply to a secondary school pupil working at the school he or she attends or a parent or legal guardian working exclusively with his or her children." (Education Code section 44237 (b) (4), emphases added.) The California State Legislature also recognized the private school exemption in 1990 regarding AB 43. Exhibit C is a letter from Assemblyman Dave Elder, 57th District regarding AB 43, which he sponsored. The bill increased the fine for truancy pursuant to Education Code section 48293. Writing to the legislative consultant of California Home Educators (who was concerned that the bill would address homeschoolers) Mr. Elder affirmed: "…it is our opinion that it would be highly unlikely that any child welfare or school attendance official could make a case that a private home educator, who is in compliance with all other state laws pertaining to elementary and secondary private schools or tutors, could be subject to enforcement action because of the language in my bill. "In short, I can tell you that the intent of my bill is not to inhibit, in any way, home educators who are offering instruction consistent with current provisions of the California Education Code." The legislature clearly supports homeschooling using the private school exemption.

Conclusion Homeschooling families who establish home-based private schools in compliance with California law and enroll their children in those schools cannot be successfully prosecuted for truancy. Homeschooling is legal in California pursuant to the private school exemption. If California law is interpreted to prohibit homeschooling, the law is unconstitutionally vague and violates the strict scrutiny test for fundamental rights. Thousands of children are being successfully homeschooled pursuant to the private school exemption in the state of California.

The United States Department of Education, the California School Boards Association, the

State Legislature and a respected law review article, all have recognized that homeschooling is legal in California pursuant to the private school exemption.