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20 YEARS AFTER *LEEPER* – CURRENT LEGAL ISSUES IN HOME SCHOOLING

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A. Background

For many years, the Texas compulsory school attendance law has provided for compulsory school attendance. Currently, Section 25.085(b) of the Education Code provides that unless "specifically exempted by Section 25.086, a child who is at least six years of age, or who is younger than six years of age and has previously been enrolled in first grade, and who has not yet reached the child's 18th birthday shall attend school." Section 25.086(a)(1) provides that a "child is exempt from the requirements of compulsory school attendance if the child: attends a private or parochial school that includes in its course a study of good citizenship."

The Legislature has never provided a definition of the term "private or parochial school" as used in the Education Code. During the late 1970s and early 1980s, an increasing number of parents started keeping their children at home to educate them.[1] The Texas Education Agency at the time was consistently advising school districts that a so-called "home school" did not qualify for the "private or parochial school" exemption to the compulsory school attendance law, and instructed school districts and their attendance officers that they should therefore initiate truancy prosecutions against home school parents.

B. Trial Court

In 1985, a class action case was filed in state district court in Tarrant County. The Plaintiffs consisted of two main classes: one comprised of "persons who are teaching their children at home in the state of Texas," and the other of "entities who are providing home school

[1] The trend has continued to this day. It is estimated that more than 300,000 Texas children are educated at home. Associated Press, *More Texas Parents Opt for Home Schooling*, WFAA (Aug. 23, 2010), www.wfaa.com/news/More-Texas-parents-opt-for-home-schooling-101292714.html.

curricula and instruction to families residing in the state of Texas." The Plaintiffs sued the Texas Education Agency, the Commissioner of Education, and a Defendants' class consisting of "public school districts and their school attendance officers in the state of Texas."

The plaintiffs advanced various theories of recovery, including a claim that the systematic prosecution of home school parents violated the equal protection clause of the Fourteenth Amendment. They basically sought, however, a declaratory judgment to the effect that a home school could qualify as a private school as that term is used in the Education Code.

After failed settlement efforts, the case proceeded to non-jury trial in January of 1987. The Plaintiffs introduced considerable evidence regarding the history of the compulsory attendance law and home schooling in Texas. At the turn of the century, only about 10% of the school-age children in Texas attended public schools, a small number attended private academies or parochial schools, but the majority were educated at home. In 1915, the first compulsory attendance law was passed. It exempted from public school attendance "[a]ny child in attendance upon a private or parochial school or who is being properly instructed by a private tutor." In 1923, the Legislature deleted the private tutor provision, and inserted the requirement for a course of study of good citizenship. A 1923 amendment also required that private or parochial schools "make the English language the basis of instruction in all subjects." The English language restriction was moved in 1969, and dropped in 1971. *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 434-35 (Tex. 1994).

The trial court admitted expert testimony to the effect that at the time, "a child pursuing a bona fide course of study at home designed to meet the basic educational goals of reading, spelling, grammar, mathematics and good citizenship was considered to be attending a private school," and that this was not affected by the deletion of the private tutor instruction option in

1923. The evidence failed to reflect any effort on the part of the state to restrict home schooling until 1981, when TEA started taking the position that home instruction could not qualify for the private or parochial school exemption. *Id.* at 435. In 1982, TEA took the position that a "school, whether private, public, or parochial, must include retained and qualified teachers; a collection of students from different families; a curriculum that includes the basic academics as are taught in public school; and some organizational structure that assures that instruction does, in fact, occur." *Id.* at 436. TEA further stated that "action of the Legislature will be required" if home instruction were to be considered an exemption to compulsory public school attendance. In 1985, TEA issued guidance specifically stating that "educating a child at home is not the same as private school instruction and, therefore, not an acceptable substitute;" and that if a school district is aware of a situation where a school-age child "is not being educated in compliance with compulsory attendance statutes, the district should file charges against the parent under the compulsory attendance law." *Id.* Various bills were introduced in the Legislature in 1985 regarding home schooling, but none were passed. *Id.* at 436 n. 7.

After the trial, the district court entered a judgment which included the following key language:

> A school age child
>
> - residing in the State of Texas who is pursuing under the direction of a parent or parents or one standing in parental authority in or through the child's home
> - in a bona fide (good faith, not a sham or subterfuge) manner
> - a curriculum consisting of books, workbooks, or other written materials, including that which appears on an electronic screen of either a computer or videotape monitor
>
> . . .
>
> - said curriculum designed to meet basic education goals of reading, spelling,

> grammar, mathematics and a study of good citizenship,
>
> is in attendance upon a private or parochial school within the meaning of . . . the Texas Education Code and exempt from the requirements of compulsory attendance at a public school.

Id. at 439. The trial court judgment also contained language to the effect that nothing in it precluded "inquiry concerning curricula and standardized test scores, in order to ascertain if there is compliance with the declaration contained in this judgment," although nothing in the judgment required standardized testing. Moreover, the judgment provided that the "lawful powers of investigation by public school attendance officers and the constitutional rights of persons subject to such investigations are not affected by this judgment." *Id.* at 440.

The trial court judgment also permanently enjoined all school districts and attendance officers from initiating prosecutions based on TEA's 1981-86 interpretation of the private school exemption; the guidelines issued in 1986 by the State Board of Education; and any other attempt by the State Board to define or regulate private or parochial schools. The trial court also awarded the plaintiffs approximately $360,000.00 in attorney's fees and costs to be split among all of the school districts in the state and collected by TEA.

C. Court of Appeals

On appeal, the Fort Worth Court of Appeals upheld the Defendants' contention that the trial court lacked jurisdiction to grant equitable relief or enter a declaratory judgment construing or interpreting a penal statute, inasmuch as violation of the compulsory attendance laws constituted a misdemeanor penal offense. *Tex. Educ. Agency v. Leeper*, 843 S.W.2d 41, 48 (Tex. Civ. App. – Fort Worth 1981), *modified*, 893 S.W.2d 432 (Tex. 1994). The court of appeals held that the case did not come within the exception which would authorize the court to enjoin a penal statute that "is unconstitutional and void, and its enforcement will result in

irreparable injury to vested property rights." *Id.* at 48, *citing City of Forth Worth v. Craik*, 411 S.W.2d 541, 542 (Tex. 1967).

The court of appeals affirmed the trial court's judgment, however, based on the Plaintiffs' equal protection theory. The court of appeals relied on evidence to the effect that the TEA guidance and policy at the time the suit was filed distinguished home schools from other private schools "on the sole basis of location within a home or outside the home." *Id.* at 51. The court held that "such ground of difference does not have a fair and substantial relation to the object sought, namely, the education of all school-age children in either a public school or a private or parochial school." *Id.* The court of appeals rejected the appellate points to the effect that the case should not have proceeded on a class action basis, as well as the appellate points attacking the assessment of the attorney's fees against the school districts. *Id.* at 52-58.

D. Texas Supreme Court

The Texas Supreme Court granted writ of error. It noted at the outset of its opinion that the "relative merits of home schooling and public education are currently the subject of a vigorous and sometimes emotional debate." 893 S.W.2d at 433.

The Supreme Court disagreed with the court of appeals' ruling to the effect that the trial court lacked jurisdiction to construe the "private school" exemption because it was a defense to a penal provision, and held that the district court did have jurisdiction to construe it because it was a civil statute. *Id.* at 441-42. The Supreme Court affirmed the lower court's declaration of the meaning of "private school" as an exemption to the compulsory attendance laws, to include a home school under the conditions stated in the trial court's judgment. *Id.* at 443-44.

The Supreme Court noted that nothing in that judgment or in its opinion "precludes the TEA from setting such guidelines for enforcement of the compulsory attendance law as are

within its authority." *Id.* at 444. The Supreme Court also wrote that any guidelines issued by the TEA could include "requesting evidence of achievement test results in determining whether children are being taught in a bona fide manner," and that such test results could be given "heavy weight;" nonetheless, they could not "be a prerequisite to exemption from the compulsory attendance law." *Id.* The Court further provided that should the State Board of Education "choose to promulgate additional rules under the Administrative Procedure Act, its authority to do so and the propriety of such rules will be subject to judicial review." *Id.*

The Supreme Court held, for the first time, that notwithstanding their governmental immunity, the Declaratory Judgment Act authorized an award of attorney's fees against school districts. Tex. Civ. Prac. & Rem. Code § 37.009. Justice Raul Gonzalez argued that "an award of attorneys' fees would be permissible only if a statute expressly waived sovereign immunity" using "clear and unambiguous language," and "authorized the recovery of attorneys' fees from the defendant governmental agencies." *Id.* at 447. Justice Gonzalez argued that the majority opinion "stands the law of sovereign immunity on its head." *Id.* at 450.[2]

Because the Supreme Court affirmed the declaratory relief in the trial court judgment based on the Declaratory Judgments Act, it did not reach the constitutional argument asserted by the plaintiffs, which was the basis of affirmance used by the court of appeals. The Court noted that TEA itself had "acknowledged that home schooling may involve constitutional claims of religious freedom," but did not reach any of the constitutional issues in the case. *Id.* at 446. Finally, the Supreme Court reversed the permanent injunction, as it was "confident that

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[2] Section 311.034 of the Texas Government Code provides that "a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language," and further that the use of the term "person," which generally includes a governmental entity, "does not indicate legislative intent to waive sovereign immunity unless the context of the statute indicates no other reasonable construction." Section 311.034 was not enacted until 2001 – seven years after the Supreme Court's decision in *Leeper*.

defendants will abide by our decision in carrying out their duties." *Id.*

In the twenty years since the Supreme Court's opinion, the Legislature has not enacted any legislation defining the circumstances under which a "home school" is a "private school" for compulsory attendance purposes. The State Board of Education has not adopted any rules on the subject either. The Commissioner of Education, however, has from time to time issued guidance in the form of "To the administrator addressed" letters. The most recent letter regarding home schools, dated April 8, 2013, and from current Commissioner of Education Michael L. Williams, is included in the Appendix of this paper. Note that it provides that "districts which become aware of a student who is potentially being home schooled may request in writing a letter of assurance from the parents of the student regarding their intention to home-school the student," and the "letter may require assurances that the home-school curriculum is designed to meet basic education goals including reading, spelling, grammar, mathematics and a study of good citizenship." The Texas Home School Coalition, at its website, states that it was involved in working with TEA in developing the letter of assurance guidance.[3]

II. The *McIntyre* Case

A. Background

What happens, however, when parents refuse to provide a letter of assurance, and the school attendance officer is provided information to the effect that a bona fide education as contemplated by *Leeper* is not occurring in the home? That situation was faced by the

[3] The Texas Home School Coalition agrees with this approach, and recommends it to its members. Lambert, *Texas Stands Strong Against Harassment of Home Schoolers; THSC Knows your Rights*, www.thsc.org/2014/09/texas-stands-strong-against-harassment-of-home-schoolers-thsc-knows-your-rights/ (Sept. 16, 2014) (last visited Dec. 30, 2014).

attendance officer in the case of *El Paso Indep. Sch. Dist. v. McIntyre*, ___ S.W.3d ___, 2014 WL 3851313 (Tex. App. – El Paso 2014, pet. filed, No. 14-0732). A copy of the opinion of the Court of Appeals is reproduced in the Appendix to this paper. Pertinent facts of the case are summarized at pp. 2-5 of the opinion. Key factual elements included:

- McIntyre children had been enrolled in a private Christian school, but were withdrawn by their parents after the Fall 2004 semester.

- Over the next year and a half, the McIntyre parents claimed to be educating their children, first at a family-owned motorcycle dealership, and later at home.

- The eldest McIntyre daughter, at age 17, was unhappy because she was "not allowed to attend school." She ran away from home, went to live with relatives, and was enrolled in an EPISD school. She was unable to explain the education that she had received during the one and one-half years since she had been withdrawn from the private Christian school, and declined the opportunity to take placement exams. Her parents refused to provide any information to the district regarding her education. At age 17, she was placed as a second semester freshman.

- The children's paternal uncle and paternal grandparents, based on their observations, were concerned that the children were not being properly educated.

- The McIntyre grandparents voiced their concerns to the school attendance officer, essentially stated that they believed that the McIntyre home school was a "sham," and asked him to investigate.

- During the investigation initiated by the school attendance officer, he confirmed the situation regarding the eldest daughter. The McIntyre parents repeatedly refused to provide any information to the district regarding any curriculum that they were using, refused to sign any letter of assurance, and simply referred the district to an out-of-state attorney with the Home School Legal Defense Association ("HSLDA").

- The HSLDA attorney wrote two letters claiming that the McIntyres were in compliance with *Leeper*, and threatened suit, but did not profess to have any personal knowledge of what was occurring in the McIntyre home.

- Relying on information provided by the children's grandparents, his confirmation of information regarding "the eldest child's inability to describe her home school education, and the refusal of the McIntyres to provide the District with any written assurance regarding the curriculum they were using 'from somebody who had firsthand knowledge of the homeschooling education that was happening in the home,'" the attendance officer

filed truancy complaints, pursuant to Sections 25.091, 25.093, and 25.094 of the Education Code, as they were then in effect. Slip Op. at 3-4.

B. Trial Court

In response, the McIntyres filed suit against the district, the district's attendance officer, three campus assistant principals; the children's grandparents; and the children's uncle. As against the school district defendants, the plaintiffs alleged various theories, including violations of the Texas Religious Freedom Restoration Act (Chapter 110, Texas Civil Practice & Remedies Code); Texas common law malicious prosecution; the Texas Education Code; and the state and federal constitutions. Ultimately, the plaintiffs voluntarily dismissed their claims against the three assistant principals and settled their claims with the children's grandparents and uncle.

The trial court denied the school district defendants' motions for summary judgment and pleas to the jurisdiction. They appealed all of the trial court's interlocutory orders that were subject to appeal. Tex. Civ. Prac. & Rem. Code § 51.014(a)(5) and (8).

C. Court of Appeals

The El Paso Court of Appeals reversed the trial court's orders. The Court of Appeals reviewed the *Leeper* decision, and concluded that "nothing in *Leeper* suggests that an attendance officer does not have the right to investigate truancy claims, or that home school parents need not prove they are teaching their children in a *bona fide* manner from an appropriate curriculum." Slip Op. at 9.

The Court of Appeals reversed and rendered judgment for the district on the Texas Religious Freedom Restoration Act claim, based on the Plaintiffs' failure to meet the notice requirement stated in Tex. Civ. Prac. & Rem. Code § 110.006. TRFRA prohibits a governmental agency from substantially burdening a person's free exercise of religion, unless the

burden is in furtherance of a compelling governmental interest, and is the least restrictive means of furthering that interest. Tex. Civ. Prac. & Rem. Code § 110.003. The Court did not address the merits of the Plaintiffs' TRFRA claim, only the notice issue; on appeal, the Plaintiffs conceded that their notice did not meet the statutory requirements.

Because the Plaintiffs claimed that the Defendants had wrongfully instituted truancy prosecutions despite the Plaintiffs' contention that their home school met the "private school" exemption to compulsory school attendance, the heart of their claim involved alleged violation of the school laws of the state. Accordingly, based on a line of cases stretching from *Palmer Publ'g Co. v. Smith*, 130 Tex. 346, 109 S.W.2d 158 (Tex. Comm'n App. 1937) to *Nairn v. Killeen Indep. Sch. Dist.*, 366 S.W.3d 229 (Tex. App. – El Paso 2012, no pet.), the Court ruled that with respect to their other state law claims, the plaintiffs were required to have exhausted their administrative remedies. Slip Op. at 10-19. Plaintiffs undisputedly had not availed themselves of either the District's parent complaint or public complains policies, Board Policies FNG and GF, respectively. The Court held that the exhaustion requirement applied to a complaint "arising under school laws whether as against a professional employee of a school district or a school district itself." Slip Op. at 10.

The Court of Appeals rejected the Plaintiffs' argument that because the McIntyre children had never been enrolled in public school, the requirement to exhaust remedies prior to filing suit did not apply to them. Of course, to hold that the Education Code requirements do not apply to students who have never enrolled in public schools would have the effect of creating a new exemption to the compulsory school attendance laws: never enrolling in public school. Although not cited by the Court of Appeals, note that Section 4.001 of the Education Code provides as follows:

> The mission of the public education system of this state is to ensure that *all* Texas children have access to a quality education that enables them to achieve their potential and fully participate now and in the future in the social, economic, and educational opportunities of our state and nation. That mission is grounded in the conviction that a general diffusion of knowledge is essential for the welfare of this state and for the preservation of the liberties and rights of citizens (emphasis added).

The Court of Appeals also rejected the Plaintiffs' arguments that they were not required to exhaust administrative remedies because the misdemeanor truancy complaints had been filed before their lawsuit; because their claims involved only questions of law and not of fact; because they made claims under the state constitution; and because otherwise they would suffer irreparable harm. Slip Op. 13-19.

With respect to the state constitutional issues, the Court ruled that the state constitutional claims were only "ancillary to" the Education Code claims, and did not stand alone as an attack on the actions or policies of the district, following *Dotson v. Grand Prairie Indep. Sch. Dist.*, 161 S.W.3d 289, 293 (Tex. App. – Dallas 2005, no pet.) (requiring exhaustion where state constitutional claims "ancillary to and supportive of a complaint about the . . . application of school law"). Slip Op. 16-17.[4] Although the opinion itself does not cite authority for the proposition, the Court also noted "a party who alleges a [state] constitutional claim must first exhaust available administrative remedies that may moot the constitutional claim." Slip Op. at 16.[5]

The Court of Appeals disposed of the state law claims against the District employees based on the election of remedies provision in Section 101.106 of the Civil Practice & Remedies

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[4] *See also Jennings v. Scott*, No. 04-12-00845-CV, 2014 WL 60920 (Tex. App. – San Antonio Jan. 18, 2014, no pet.) (mem. op.)

[5] Although not cited in the opinion, *see City of Beaumont v. Como*, 381 S.W.3d 538 (Tex. 2012) (*per curiam*).

Code, based on *Mission Cons. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653 (Tex. 2008) and its progeny. Slip Op. at 19-22. Although the Plaintiffs claimed that they were not suing pursuant to the Texas Tort Claims Act, the Supreme Court held in the *Mission CISD* case that the election of remedies provision applies to all common-law "theories alleged against a governmental unit, whether it is sued alone or together with its employees." *Id.* at 659. Thus, the election of remedies provision applies to all common-law claims seeking recovery of damages on a tort theory.[6]

The Court of Appeals also ordered dismissal of all of the federal constitutional claims against the attendance officer based on his qualified immunity. Slip Op. at 22-34. Under *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), the court focused on the second prong of the qualified immunity analysis – whether the attendance officer violated a constitutional right of the Plaintiffs that was "clearly established at the time of the challenged conduct." The Court of Appeals proceeded to reject all of the Plaintiffs' constitutional theories – substantive due process/"shock the conscience;" fundamental liberty interest; denial of equal protection/ discrimination against a "class of one;" and free exercise of religion.[7] The liberty and free exercise issues are discussed further below.

1. Fundamental Parental Liberty.

Three early Supreme Court cases did strike down some state law restrictions and requirements, but they all contain language supportive of compulsory school attendance.

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[6] The election of remedies provision does not apply to "claims asserted pursuant to independent statutory waivers of immunity," including Section 1983 claims. *Texas Dep't of Aging & Disability Servs v. Cannon*, _____ S.W.3d _____, 58 Tex. S. Ct. J. 197, 2015 WL 127829 at *3 (No. 12-0830, Jan. 9, 2015).

[7] The Court of Appeals did *not* reach the arguments that the attendance officer, as to the federal law claims, was entitled to absolute prosecutorial immunity; and as to the state law claims against him, that the Plaintiffs were required to exhaust administrative remedies under Section 22.0514 of the Education Code, that he was entitled to professional immunity under Section 22.0511 of the Education Code, and that he was entitled to common law

In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court overturned the conviction of Mr. Meyer, an instructor at a parochial school, for violating the Nebraska law prohibiting the teaching of foreign languages to any student, in any school, before the ninth grade. In reaching its decision, the Court noted that the "American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted;" that it "is the natural duty of the parent to give his children education . . .; and nearly all the states . . . enforce this obligation by compulsory laws;" and that "[p]ractically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto." *Id.* at 400. The Court further noted that the "power of the state to compel attendance at some school and to make reasonable regulations for all schools . . . is not questioned." *Id.* at 402.

The Supreme Court again recognized, in *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925), that the states have the power to regulate non-public schools:

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

The *Pierce* Court struck down an Oregon compulsory school attendance law that did not contain a private or parochial school exemption. The Court reached this result based both on the "substantive due process right" of private and parochial schools to engage in a business that is not harmful to the public; as well as "the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35. Again, home instruction was not an

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official immunity.

issue.

Wisconsin v. Yoder, 406 U.S. 205, 213 (1972), involved both 14th Amendment liberty and First Amendment freedom of religion claims. The Court reiterated that there "is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education." The Old Order Amish prevailed in their argument that they had the right to withhold their children from any type of institutional school beyond the eighth grade. They convinced the Court that institutional schools after the eighth grade would essentially destroy their way of life, which was infused with their religious beliefs. *Yoder* addressed the issue as one of fundamental constitutional rights, because of the unique freedom of religion and way-of-life issues in the case presented by the Old Order Amish.

But "[n]o parents have ever prevailed in any reported case on a theory that they have an absolute constitutional right to educate their children in the home, completely free of any state supervision, regulation or requirements." Slip Op. at 33. In case after case decided after *Yoder*, courts across the country have upheld reasonable state requirements against the 14th Amendment challenges of home school parents. *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 249 (3d Cir. 2008), *cert. denied*, 555 U.S. 1138 (2009) ("Parents do not have a constitutional right to avoid reasonable state regulation of their children's education"; upholding statutory provisions requiring home schools to provide instruction for minimum number of days and hours in certain subjects, and to submit teaching logs and children's work product for review); *People v. Bennett*, 442 Mich. 316, 501 N.W.2d 106 (1993) (upholding teacher certification requirement for home school instruction); *Blackwelder v. Safnauer*, 689 F. Supp. 106 (N.D.N.Y. 1988), *appeal dism'd*, 866 F.2d 548 (2d Cir. 1989) (upholding requirements that

home school instruction must be "at least substantially equivalent to the instruction given . . . at the public schools," and must be delivered by "competent" instructors, against First and Fourteenth Amendment challenges); *Jernigan v. State*, 412 So.2d 1242 (Ala. Ct. Crim. App. 1982, cert. denied) (upholding conviction of home school mother who did not have required state teacher certificate, against First and Fourteenth Amendment challenges).

The specific situation involving the Old Order Amish in *Yoder* was so exceptional that the same treatment has never been extended to any other individual or religious group. In the 43 years since *Yoder* was decided, no individual or religious group has been able to make a showing that compares to the showing made by the Old Order Amish in that case. *See Combs v. Homer-Center Sch. Dist.*, *supra*, 540 F.3d at 249-252; *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1067 (6th Cir. 1987) ("*Yoder* rested on such a singular set of facts that we do not believe it can be held to announce a general rule . . ..").

In *Jonathan L. v. Superior Court*, 165 Cal. App. 4th 1074, 81 Cal. Rptr. 3d 571 (2008), the court held that home education would implicate fundamental constitutional rights only "if *applied to parents similarly-situated* to the Old Order Amish." 81 Cal. Rptr. 3d at 592 (court's emphasis). The court wrote that "the level of scrutiny to which alleged violations of the parental liberty interest in directing the education of one's children or subject is not clearly established." The court recognized that an "asserted violation of the federal free exercise clause, standing alone, is not subject to strict scrutiny." *Id.* at 593 & n. 32. The *Jonathan L.* court concluded that parents have no "absolute constitutional right to home school." *Id.* at 592.

2. Free Exercise of Religion.

Likewise, numerous other post-*Yoder* cases have rejected First Amendment challenges to state requirements for home schooling. These include *New Life Baptist Church Acad. v. Town*

of East Longmeadow, 885 F.2d 940 (1st Cir. 1989) (Breyer, J.), *cert. denied*, 494 U.S. 1066 (1990) (upholding state requirements that private school must meet certain statutory criteria, and must offer a secular education comparable to that provided in the public schools and that is subject to approval of local school committee); *State v. Schmidt*, 29 Ohio St. 3d 32, 505 N.E.2d 627, *cert. denied*, 484 U.S. 942 (1987) (upholding convictions of parents for violating requirement that they obtain approval of the school board superintendent for the home education program); *Howell v. State*, 723 S.W.2d 755 (Tex. App. – Texarkana 1986, no pet.) (upholding pre-*Leeper* conviction for violation of Texas compulsory school attendance law); *State v. Patzer*, 382 N.W.2d 631 (N.D.), *cert. denied*, 479 U.S. 825 (1986) (affirming convictions of parents for violating provision requiring teachers at all non-public schools to hold state-issued teaching certificates; state's compelling interest in education of its citizenry outweighed burden on parents' religious beliefs); *Duro v. District Attorney*, 712 F.2d 96 (4th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984) (upholding state requirements for all nonpublic schools, including periodic standardized testing); *State v. Riddle*, 168 W. Va. 429, 440, 285 S.E.2d 359, 365 (1981) ("sincerely held religious convictions are never a defense to total noncompliance with the compulsory school attendance law;" upholding convictions of violating state compulsory school attendance law, which required review and approval by county board of education regarding time of instruction, qualifications of instructor, and attendance, instruction and progress of pupils).

Moreover, since *Yoder*, the Supreme Court has held that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993) (invalidating ordinance prohibiting Santeria ritual animal sacrifice because not neutral and of general applicability); *Employment*

Div., Oregon Dept. of Human Res. v. Smith, 494 U.S. 872, 879, 890 (1990) (upholding denial of unemployment benefits to employee terminated for (religious) use of peyote). In *Smith*, the Court distinguished *Yoder* on the basis that it did not involve "the Free Exercise Clause alone," but rather that clause in conjunction with "the right of parents, acknowledged in *Pierce* . . ., to direct the education of their children." 494 U.S. at 881. The Supreme Court subsequently has recognized that *Smith* "largely repudiated the method of analyzing free-exercise claims that had been used in cases like . . . *Wisconsin v. Yoder,*" which it described as "a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. 2751, 2760 (2014).[8]

The balancing test was used in *People v. DeJonge*, 442 Mich. 266, 501 N.W.2d 127 (1993). The Church of Christian Liberty and Academy provided "testing, individualized curriculum, and monitoring of the home school." 501 N.W.2d at 130. The educational program being provided in the home had been employed by "thousands of youngsters who have attended and successfully graduated from major colleges and universities throughout the United States." *Id.* The parents had administered standardized tests to the children, and did "not object to such testing." *Id.* at 143. Even though "the prosecution never questioned the adequacy" of the parents' "instruction or the education the children received," the parents were convicted of violating that portion of the Michigan compulsory school attendance law requiring students in non-public schools to be instructed by certified teachers. *Id.* at 130. A majority of the

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[8] In reaction to *Smith*, Congress passed the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, which purported to apply both to federal and state governmental entities. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court ruled that Congress had exceeded its 14th Amendment power insofar as it purported to extend RFRA to state and local governments. Thereafter, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc, which, among other things, amended RFRA to delete from

Michigan Supreme Court, over the dissent of three justices, applied a strict scrutiny analysis, because the case, as did *Yoder*, involved a free exercise claim in conjunction with a parental liberty claim, citing *Smith*'s discussion of *Yoder*. The court overturned the convictions, on the basis that the mandatory use of certified teachers was not the least restrictive means of promoting the state's compelling interest in educating its youth, where that requirement irreconcilably conflicted with the free exercise of the parents' sincerely-held religious beliefs. Note that the certification requirement was upheld against a 14th Amendment (only) challenge by this same court, on the same day, in *People v. Bennett, supra.*

CONCLUSION

A requirement that a state certified teacher must be delivering the instruction in order for a home school to qualify as an exemption to a state compulsory school attendance requirement was upheld against a 14th Amendment liberty interest-only argument in the *Bennett* case, but struck down when the fundamental parental liberty interest was combined with the free exercise of religion claim in *DeJonge*. The adequacy of the instruction received by the children was never in question. The requirement of a state certified teacher is a far cry from the minimal Texas requirements set out in *Leeper*, and reviewed in the *McIntyre* case. It would seem to be extremely unlikely that any parent would be able to claim successfully that the *Leeper* requirements, as discussed in *McIntyre*, violates any parental constitutional right(s).

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its coverage states and their political subdivisions. 42 U.S.C. § 2000bb-2.