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PARENTAL RIGHTS MOVEMENT ON UTAH'S CAPITOL HILL SHOULD NOT MAKE GAINS AT THE EXPENSE OF THE STATE'S CHILDREN

*David B. Dibble**

I. INTRODUCTION

On September 4, 2003, approximately 300 people rallied on the steps of the Utah State Capitol for what had been called a “D-Day long in the making for the parental rights movement.”¹ They were gathered to protest the State’s involvement in the medical treatment of twelve-year-old Parker Jensen.² Doctors diagnosed Parker with a potentially lethal form of cancer and recommended that he undergo intensive chemotherapy treatment.³ When his parents refused to submit him to chemotherapy the State intervened and ordered the treatment anyway.⁴ “In Utah, Daren and Barbara Jensen and their son Parker became the poster family for the parental rights movement.”⁵

In the words of one journalist, “the newest *cause celebre* in Utah and nationwide is the belief that an overzealous child welfare system is destroying families.”⁶ The parental rights movement extends beyond parents’ rights to decide on children’s medical treatment. It has led to some of the “most far-reaching legislative proposals to revamp Utah’s child welfare system”⁷ and has implications for the State’s role in education, particularly with regard to home schooling.

Home schooling proponents have been among the first groups to “feed into the parents’ rights movement,”⁸ hoping to capitalize on the

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1. James Thalman, *Parents Decry State “Tyranny,”* Deseret News (Salt Lake City, Utah) A1, A1 (Sep. 7, 2003).

2. *See id.*

3. *See Jensen Timeline,* Deseret News (Salt Lake City, Utah) A5, A5 (Sept. 3, 2003).

4. *See id.*

5. Brooke Adams, *Parent Power,* Salt Lake Trib. A1, A8 (Oct. 18, 2003).

6. *Id.*

7. Amy Joi Bryson, *Concerns Over Protecting Kids Stalls Legislation,* Deseret News (Salt Lake City, Utah) (Feb. 18, 2004).

8. Adams, *supra* n. 5, at A1.

“efforts to limit state involvement in family affairs.”⁹ Lawmakers should proceed with caution in order to “provide balance to the parents’ rights groups that so easily capture media attention with their crowds and catchy phrases.”¹⁰

Utah’s compulsory education laws have long been in tension with those who feel that parents should have the ultimate say when it comes to their children’s education. Richard Anderson, director of Utah’s Division of Child and Family Services (“DCFS”), calls this a “healthy tension” that “needs to exist in child welfare.”¹¹ “We need to make sure there is a group protecting parents’ rights and a group protecting children’s welfare.”¹² Before Utah decides to revamp its child welfare laws in response to an “extraordinary case,”¹³ lawmakers should bear two important facts in mind. First, lawmakers should consider the liberality of Utah’s existing home school laws in comparison to other states. Second, lawmakers should consider Utah’s reluctance to enforce existing compulsory education laws partially in response to a previous high-profile parental rights battle—Utah’s attempts in the 1970’s to force John Singer’s children to attend public school.¹⁴

Utah lawmakers should not overreact in response to the current uproar over parental rights by passing laws that could lead to the increased neglect of certain home schooled children in the State. If anything, they should consider tightening several restrictions on parents’ rights to educate their children at home. Part II of this paper gives a brief overview and history of compulsory education laws in the United States. Part III provides a look at Utah’s compulsory education laws and their exception for home schooled children. Part IV describes the effects of John Singer’s battle with Utah over the State’s compulsory education laws. Part V examines the Parker Jensen case and its impact on the parental rights movement in Utah and analyzes the impact that an expansion of parental rights could have on the children home schooled in the State. Part VI concludes that Utah legislators must be cautious when considering the sweeping changes now being proposed to Utah’s child welfare laws.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *No Winners in Jensen Saga*, Deseret News (Salt Lake City, Utah) A11 (Oct. 1, 2003).

14. *See Test Home Schoolers*, Salt Lake Trib. A14 (Nov. 20, 1997).

II. HOME SCHOOLS AND COMPULSORY EDUCATION IN THE UNITED STATES

Children in every state are required by law “to attend school or to receive some minimum level of instruction in the home.”¹⁵ The traditional justification for compulsory school attendance laws has been the State’s interest in “maintaining minimum educational standards.”¹⁶ The common school began more than a century ago, based in part on the “belief that parentally directed education was too haphazard an enterprise to guarantee educational quality and to ensure that children became productive and literate citizens.”¹⁷

A. *The Right of Parents to Control Their Children’s Education*

The U.S. Constitution does not contain an explicit parental right to control the education of one’s child.¹⁸ “State courts have been left to decide to what extent the state can regulate education,”¹⁹ and in almost all states parents who fail to comply with compulsory education laws are subject to fines and jail sentences.²⁰ States have traditionally “exercised exclusive control over the education of children, . . . [b]y determining the subjects in which educators instruct children as well as the process by which educators teach.”²¹ Nevertheless, the Supreme Court has held that parents have a fundamental right to manage their children’s education.²²

1. *Meyer v. Nebraska*

The Supreme Court first recognized the right of parents to manage their children’s education in 1923 in *Meyer v. Nebraska*.²³ The plaintiff, a parochial teacher in a Nebraska school district, was convicted for unlawfully teaching children to read in German.²⁴ Nebraska law prohibited any person “in any private, denominational, parochial or

15. Mark G. Yudof et al., *Educational Policy and the Law* 1 (4th Ed., West/Thompson Learning 2002).

16. Wendy Wheeler, Student Author, *Is Home Schooling Constitutional?*, 1995 B.Y.U. Educ. & L.J. 78 (1995).

17. Yudof et al., *supra* n. 15, at 56.

18. See Wheeler, *supra* n. 16, at 78.

19. *Id.*

20. See *id.*

21. Alma C. Henderson, *The Home Schooling Movement: Parents Take Control of Educating Their Children*, 1991 Annual Survey of Am. L. 985 (March, 1993).

22. See Wheeler, *supra* n. 16, at 78. (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

23. 262 U.S. 390; see also Wheeler, *supra* n. 16 at 80.

24. *Meyer*, 262 U.S. at 396.

public school” from teaching “any subject to any person in any language [other] than the English language.”²⁵ The purpose of the statute was to ensure that English was the “mother tongue of all children reared in [the] state.”²⁶ The question for the Court was “whether the statute as construed and applied unreasonably infringe[d] the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment.”²⁷

The *Meyer* Court determined that the enactment of the statute fell reasonably within the police power of the State, but it was prohibited by affirmative limitations in the Constitution. It also recognized a corresponding duty of parents to give their children “education suitable to their station in life”—an obligation enforced by compulsory education laws.²⁸ The Court clearly stated that it did not question “[t]he power of the state to compel attendance at some school and to make reasonable regulations for all schools.”²⁹ However, the statute in question exceeded the limitations upon the power of the State because it conflicted with rights assured to the parents and the teacher.³⁰ The teacher’s right to teach and the parents’ right to engage him to do so were protected as liberty interests under the Due Process Clause of the Fourteenth Amendment.³¹

2. *Pierce v. Society of Sisters*

The Supreme Court further clarified parents’ rights to determine the nature of their children’s education in *Pierce v. Society of Sisters*.³² The Court struck down as unconstitutional an Oregon law requiring parents and guardians to send their children to public school.³³ Parents who failed to send their children were guilty of a misdemeanor.³⁴ The plaintiffs, a Roman Catholic school and a military academy, claimed that in addition to ruining their businesses and diminishing the value of their property, enforcement of the statute conflicted with the rights of parents to choose the schools where their children would receive appropriate training.³⁵

25. *Id.* at 397.

26. *Id.* at 398.

27. *Id.* at 399.

28. *Id.* at 400.

29. *Id.* at 402.

30. *See id.*

31. *Id.* at 400.

32. 268 U.S. 510 (1925).

33. *See id.* at 534.

34. *Id.* at 530.

35. *See id.* at 531–32, 534.

The *Pierce* Court relied on the doctrine established in *Meyer*, holding that the Oregon statute “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control.”³⁶ “The child is not the mere creature of the state,”³⁷ so the State’s high interest in universal education must be balanced against parents’ fundamental rights and interests, such as their traditional interest in their children’s religious upbringing, so long as the parents “prepare them for additional obligations.”³⁸ However, the Court again indicated that “[n]o question [was] 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 . . . and that nothing be taught which is manifestly inimical to the public welfare.”³⁹

3. *Wisconsin v. Yoder*

In addition to creating a Fourteenth Amendment right for parents to direct their children’s education, the Court has also used the Free Exercise Clause of the First Amendment to expand parents’ rights over their children’s education. When dealing with a First Amendment interest, courts generally weigh “the interest of the state against an individual family’s freedom to determine a child’s education.”⁴⁰ The respondents in *Yoder* were convicted for violating Wisconsin’s compulsory school attendance law, which required all parents in the State “to cause their children to attend public or private school until reaching age 16.”⁴¹

In *Yoder*, Amish parents refused to send their children, ages fourteen and fifteen, to public or private school because they “believed that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but . . . also endanger their own salvation and that of their children.”⁴² The parents believed that “[f]ormal high school education beyond the eighth grade [was] contrary to their beliefs,” in part because “it places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to

36. *Id.* at 534–35.

37. *Id.* at 535.

38. *Id.*

39. *Id.* at 534.

40. Wheeler, *supra* n. 16, at 81.

41. *Wisconsin v. Yoder*, 406 U.S. at 207.

42. *Id.* at 207, 209.

conform to the styles, manners, and ways of the peer group.”⁴³ Amish society, in contrast, emphasizes “informal learning-through-doing; a life of ‘goodness,’ rather than a life of intellect; wisdom, rather than technical knowledge, community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.”⁴⁴ High school would take their children “away from their community, physically and emotionally, during the crucial and formative adolescent period of life.”⁴⁵

The Court began by reiterating its position taken in other compulsory education cases: “There is no doubt as to the power of a State, having a high responsibility for [the] education of its citizens, to impose reasonable regulations for the control and duration of basic education.”⁴⁶ In fact, the Court stated, “[p]roviding public schools ranks at the very apex of the function of a State.”⁴⁷ Nonetheless, relying on *Pierce*, the Court declared that this “paramount responsibility” has been “made to yield to the right of parents to provide an equivalent education in a privately operated system,” specifically when the state standards impair the free exercise of religion.⁴⁸

Rather than give weight to the parents’ secular justifications, the Court stated “that the record abundantly support[ed] the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living.”⁴⁹ The Court declared: “It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some ‘progressive’ or more enlightened process for rearing children for modern life.”⁵⁰ Wisconsin’s compulsory attendance law had an inescapable and severe impact on the respondents’ practice of religion because it required them to perform acts undeniably at odds with fundamental tenets of their Amish faith. Accordingly, the Court held that “the First and Fourteenth Amendments prevent[ed] the State from compelling respondents to send their children to attend formal high school [until] age 16.”⁵¹

43. *Id.* at 211.

44. *Id.*

45. *Id.*

46. *Id.* at 213.

47. *Id.*

48. *Id.* at 213, 236.

49. *Id.* at 216.

50. *Id.* at 235.

51. *See id.* at 234.

4. State Interpretations of *Wisconsin v. Yoder*

Courts have construed the *Yoder* decision narrowly.⁵² For example, in *State v. Riddle*,⁵³ “the Supreme Court of West Virginia found that *Yoder* did not apply when parents taught their children at home because they believed the public schools had a destructive influence on them.”⁵⁴ The court held that *Yoder* “supported the parents’ right to educate a child at home only when public or private schooling did not sufficiently support the family’s religious principles.”⁵⁵

While the Supreme Court has never reviewed the right to home schooling,⁵⁶ it has established that the Free Exercise Clause of the First Amendment “protects a parent’s religiously motivated decision to teach his child at home,”⁵⁷ and the “Due Process Clause of the Fourteenth Amendment protects a parent’s right to control his child’s education and teach him at home.”⁵⁸ Those protections, however, “do not give a parent absolute freedom to teach his child at home without any government interference, for each state has a compelling interest in ensuring the adequate education of its citizens.”⁵⁹ As long as the State’s home school requirements “ensure that parents have reasonable opportunities to exercise their constitutional rights,” they survive constitutional challenge.⁶⁰ It is the States, therefore, that “traditionally have exercised exclusive control over the education of children.”⁶¹

B. History of Home School in the United States

With the establishment of public schools and compulsory attendance laws, which were enacted primarily in the 1900’s, “home schooling nearly died out.”⁶² Prior to the 1980’s, home schooling was not permitted in a number of states.⁶³ By 1980, the right to home school was officially

52. See Henderson, *supra* n. 21, at 1004 (noting that in *State v. Patzer*, 382, N.W.2d 631 (N.D. 1986), the court distinguished the “‘exceptional circumstances’ of *Yoder*” from a parent’s claim that a legislative requirement that parents who teach their children at home hold teaching certificates violated their free exercise rights).

53. *State v. Riddle*, 285 S.E.2d 359 (W. Va. 1981).

54. Wheeler, *supra* n. 16, at 83.

55. *Id.*

56. *Id.* at 81.

57. Henderson, *supra* n. 21, at 993.

58. *Id.*

59. *Id.*

60. *Id.*

61. See *id.* at 985.

62. See Christopher J. Klicka, *The Right to Home School: A Guide to the Law on Parents’ Rights in Education* 159 (3d ed., Carolina Academic Press 2002).

63. See Yudof et al., *supra* n. 15, at 57.

recognized by state statute in three states—Utah, Ohio, and Nevada.⁶⁴ “Between 1982 and 1992, thirty-four states adopted home schooling statutes or regulations.”⁶⁵ Today, home school is allowed in all fifty states.⁶⁶

Since the early 1980’s, the home schooling movement has begun “to grow at a tremendous pace”⁶⁷ and “[experience] a rebirth in popularity.”⁶⁸ In the 1970’s, the number of students who were schooled at home was approximately 15,000. By 1995, that number had grown to somewhere between 500,000 and 750,000.⁶⁹ The U.S. Department of Education estimated that in the 1997–98 school year the number of home schooled children was one million (about 1 to 2 percent of the school-aged population).⁷⁰ By the year 2002, the Home School Legal Defense Association (HSLDA) estimated that the number of home schooled children was between 1.7 million and 2.1 million.⁷¹ The home school growth rate over the last two decades is somewhere between 7 and 15 percent per year.⁷²

It is difficult to know with any precision the exact number of children that are schooled at home in the United States because “[n]ot all home schooling parents comply with requirements to notify state or local officials” of their decision to home school.⁷³ Moreover, many parents simply refuse to respond to surveys or “to call their home school a school.”⁷⁴ Finally, not all states collect data regarding home schools.⁷⁵

There are various reasons that parents choose home school as an alternative to public or private school. Many have chosen to school their children at home based on “a child-directed philosophy of education, where education is less structured and more experiential.”⁷⁶ This philosophy is what drove many early home schoolers to remove their children from public or private schools.⁷⁷ Many of them were “distrustful

64. See Klicka, *supra* n. 62, at 159.

65. Yudof et al., *supra* n. 15, at 58.

66. Klicka, *supra* n. 62, at 159.

67. *Id.*

68. *Id.*

69. Yudof et al., *supra* n. 15, at 57.

70. *Id.*

71. HSLDA, *Homeschooling Research*, <http://www.hslda.org/research/faq.asp> (accessed Mar. 6, 2004).

72. *Id.*

73. Yudof et al., *supra* n. 15, at 57. Part V, *infra*, elaborates on the non-reporting problem.

74. *Id.*

75. See *id.*

76. *Id.*

77. *Id.*

of bureaucratic educational institutions (whether public or private) as being too rigid and autocratic and inhibiting learning.”⁷⁸ Conversely, for many of the home schoolers of the 1980’s, public and private schools did not “provide a sufficiently structured and formal learning environment for children” and they failed “to teach the values and beliefs these parents considered important.”⁷⁹ Indeed, according to Christopher J. Klicka, Senior Counsel of HLSDA, the primary reason that most home school parents choose to home school is religious.⁸⁰ These parents are concerned with the “academic and moral decline in the public schools” and are “dissatisfied and disappointed with the removal of God and religion from public schools.”⁸¹ Some are also concerned with “the lack of safety and discipline in the public schools.”⁸² Finally, some commentators have claimed that it is dissatisfaction with the quality of instruction in public schools that is driving the fastest growing segment of home schoolers today.⁸³

C. State Regulation of Home Schools

Today, before states will allow a home school to operate as an alternative means of complying with compulsory education laws, home schooling parents must comply with specific state restrictions and conditions.⁸⁴

1. Typical State Home School Requirements

As of 1997, thirty-seven states specifically allow home school, provided certain requirements are met.⁸⁵ Six of those states’ compulsory attendance statutes simply require parents schooling their children at home “to submit an annual notice of intent verifying that instruction will be given in certain core subjects for the same amount of days as the public schools.”⁸⁶ “Parents are presumed to be educating their children

78. *Id.* at 57–58.

79. *Id.* at 58.

80. See Klicka, *supra* n. 62, at 2. According to Klicka, approximately 85 percent of families that home school do so for religious reasons. *Id.*

81. *Id.* at 3.

82. *Id.*

83. Yudof et al., *supra* n. 15, at 58.

84. See *id.* at 57.

85. Klicka, *supra* n. 62, at 160. Those states are Alaska, Arkansas, Arizona, Connecticut, Colorado, Delaware, Georgia, Hawaii, Florida, Iowa, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Mississippi, Montana, New Hampshire, New Mexico, New York, Nevada, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Virginia, Vermont, Washington, Wisconsin, West Virginia, and Wyoming. *Id.*

86. *Id.* at 161.

and therefore will be left alone unless the state has evidence” otherwise.⁸⁷ Home school proponents consider these statutes “model” laws because “they are properly based on the ‘honor system’ which protects parental liberty and takes all monitoring power from the state authorities.”⁸⁸ Other states have similar laws but require some combination of additional standards, such as: that children be tested every other year, that parents administer annual standardized achievement tests, that home teachers be certified, that on-site visitation by a representative of the State be allowed, and that records be kept.⁸⁹

Courts have generally upheld state requirements such as “prior approval, home school registration, standardized testing for home schooled children, and on-site visitation requirements” because they “represent a true balancing of a state’s and a parent’s interests.”⁹⁰ In general, the courts have “rejected parents’ contentions that their state’s home education requirements unconstitutionally burden their First or Fourteenth Amendment rights.”⁹¹

2. *Care and Protection of Charles*

One of the leading state court cases dealing with the legal issues surrounding home schooling is the Massachusetts case *Care and Protection of Charles*.⁹² In *Charles*, the parents of three elementary children decided to keep their children home during the school year for religious reasons.⁹³ The parents instructed their children at home and notified the school of their intent to home school but the superintendent recommended that the parents be denied, and the school board initiated truancy proceedings.⁹⁴ The school board rejected the parents’ home school proposal for various reasons:

First, the superintendent had not been given reason to believe that the parents were competent to teach their children. Second, the parents had indicated that the children would spend less time on formal instruction than would children in public schools. Third, the parents objected to the school’s efforts to monitor or observe the instructional methods

87. *Id.*

88. *Id.*

89. *Id.* at 161, 163.

90. Henderson, *supra* n. 21, at 993. Yudof et al., *supra* n. 15, at 73 (“Today, more than half of the states mandate testing of home-schooled children, with several permitting the option of an evaluation by a certified teacher or submission of a portfolio in lieu of testing.”).

91. Henderson, *supra* n. 21, at 993.

92. *Care and Protection of Charles and Others*, 504 N.E.2d 592 (Mass. 1987).

93. *See id.* at 594.

94. *See id.*

used in the home school and periodically to test the children to determine whether they were making reasonable progress in their education.⁹⁵

In the judgment of the superintendent, “allowing the parents to educate their children ‘would be denying those children a proper education, by any reasonable standards.’”⁹⁶

The district court judge determined “that the children were in need of care and protection” within the meaning of the relevant state statute and ordered that the children “commence public or approved school attendance forthwith.”⁹⁷ On appeal, the parents argued that the State’s compulsory education law infringed their right to educate their children as protected by the Fourteenth Amendment.⁹⁸ The law in question required every child between minimum and maximum ages established by the Board of Education to attend public school in the town where the child resided, unless the child was being otherwise instructed in a manner approved by the superintendent or school committee.⁹⁹ The school committee required that parents submit to them a home school proposal “outlining, among other things, the curriculum, materials to be used, and qualifications of the instructors, for its approval.”¹⁰⁰

The Massachusetts Supreme Court recognized the liberty interest of the parents to rear and educate their children, but it declared that “such a right is not absolute but must be reconciled with the substantial state interest in the education of its citizenry.”¹⁰¹ The parents argued that “the extent of the state’s interest is not in educating the children but only in knowing that the children are being educated.”¹⁰² The court agreed with the parents that the state interest was in ensuring that the children received an education, “not that the educational process be dictated in its minutest detail;”¹⁰³ however, in order to make certain that all the children were being educated, the committee’s approval process was necessary.¹⁰⁴

The court recognized “that courts are not school boards or legislatures, and are ill-equipped to determine the ‘necessity’ of discrete

95. *Id.* at 595.

96. *Id.*

97. *Id.* at 594.

98. *See id.* at 598.

99. *See id.*

100. *Id.*

101. *Id.* at 599.

102. *Id.*

103. *Id.* at 600.

104. *See id.*

aspects of a State's program of compulsory education"¹⁰⁵ and cautioned the committee that approval of a home school proposal "must not be conditioned on requirements that are not essential to the State interest in ensuring that 'all the children shall be educated.'"¹⁰⁶ Those factors that may be considered by the superintendent or school committee in determining whether or not to approve a parent's proposal for home schooling include: the proposed curriculum and number of hours of instruction in each of the proposed subjects; the competency of the parents to teach the children; access to textbooks, workbooks and other instructional aids by superintendent or school committee; and the requirement of standardized testing.¹⁰⁷ While the parents are not required to have college or advanced degrees, the State may "properly inquire as to the academic credentials or other qualifications of the parent or parents who will be instructing the children."¹⁰⁸ The use of appropriate testing procedures would possibly, in the court's view, negate the need for periodic on-site visits or observations of the home school environment.¹⁰⁹ Finally, the State's access to the student's instructional materials may not be used "to dictate the manner in which the subjects will be taught."¹¹⁰

3. Educational Neglect

Another area of state education law that affects home schooling is educational neglect. Educational neglect refers to a custodial parent's failure to ensure that his child has made "adequate educational progress."¹¹¹ For example, under New York's Family Court Act Section 1012(f):

- (f) 'Neglected child' means a child less than eighteen years of age
 - (i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care
 - (a) in supplying the child with adequate food, clothing, shelter or

105. *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 235 (1972)).

106. *Id.*

107. *See id.* at 601-02.

108. *Id.* at 601.

109. *See id.* at 602.

110. *Id.*

111. Sara E. Bouley, Student Author, *Utah's Child Welfare Reform Act Amendments*, 1995 Utah L. Rev. 1232, 1240.

education¹¹²

New York's compulsory education law requires that parents furnish proof to the State that a child who is not attending public or private school is receiving "required instruction elsewhere."¹¹³ "Failure to furnish such proof shall be presumptive evidence that such individual is not attending."¹¹⁴ New York courts have held that "[p]roof that a minor child is not attending a public or parochial school in the district where the parents reside makes out a prima facie case of educational neglect"¹¹⁵ Once the State has proven that a child is not attending public or private school, the burden is on the parent to establish that the child is in fact attending school and receiving the required instruction in another place.¹¹⁶

III. UTAH'S HOME EDUCATION LAW

Today, some 9,500 families are members of the Utah Home Education Association (UHEA).¹¹⁷ According to the UHEA, the number of families in Utah that are choosing to home school their children is growing at a rate of 30 percent each year.¹¹⁸ Compared with the home school laws of several other states, Utah's rules are "very liberal."¹¹⁹ The UHEA claims that Utah has "one of the most favorable home education laws in the nation."¹²⁰

A. Utah's Home Education Law: One of the Most Liberal in the Nation

Utah's compulsory education law requires public or private school attendance by "a minor who has reached the age of six years but has not reached the age of eighteen years."¹²¹ Exceptions to Utah's compulsory education law are found in § 53A-11-102 of the Utah Code. It provides in relevant part:

112. N.Y. Fam. Ct. Act § 1012 (McKinney 1998) (emphasis added).

113. N.Y. Educ. § 3212(2)(c) (McKinney 1998).

114. *Id.*

115. *In re Christa H.*, 127 A.D.2d 997, 997 (N.Y. Sup. Ct. 1987).

116. *Id.*

117. Jacob Santini, *For Conferces, Home Is Where the School Is*, Salt Lake Tribune B1, B2 (June 8, 2003).

118. See Utah Home Education Association, *Home Education and Legal Information Packet 2* (unpublished ms. May 2002) (copy on file with author) [hereinafter UHEA].

119. Wheeler, *supra* n. 16, at 86.

120. Utah Home Education Association, *So You Want to Homeschool, How to Deal with the Legalities of Home Education*, <http://www.uhea.org/wantoschool/index.shtml> (accessed January 28, 2005).

121. Utah Code Ann. § 53A-11-101(1)(d) (2004).

(1) A school-aged minor may be excused from attendance by the local school board of education and a parent exempted from application of Subsections 53A-11-101(2) and (3) for any of the following reasons:

. . . .

(b) on an annual basis, a minor may receive a full release from attending a public, regularly established private, or part-time school or class if:

. . . .

(ii) the minor is taught at home in the subjects prescribed by the State Board of Education in accordance with the law for the same length of time as minors are required by law to be taught in the district schools

. . . .¹²²

Parents who wish to exempt their children from public or private school attendance must present sufficient evidence to the local school board demonstrating that the family home schooling complies with the statute.¹²³ If the board excuses the minor from attendance then it “shall issue a certificate stating that the minor is excused from attendance during the time specified on the certificate.”¹²⁴

Utah courts, like the U.S. Supreme Court, have not directly addressed the issue of home schooling.¹²⁵ In Utah, the State Board of Education is charged with the “general control and supervision” of public education,¹²⁶ directed by the State Superintendent of Public Instruction.¹²⁷ When the Superintendent has questions regarding legal issues he may request legal advice from the State Attorney General; unless that advice is set aside by legislation or a judicial decision, it is legally binding.¹²⁸ In 1997, the Superintendent requested legal advice concerning the “rights and duties of parents and school districts regarding home education in Utah.”¹²⁹ The Attorney General’s Office responded with a letter of informal legal advice outlining and clarifying Utah’s home school laws.¹³⁰

In summary, a child qualifies for the home school exemption if:

122. *Id.* at § 53A-11-102.

123. *Id.* at § 53A-11-102(2).

124. *Id.* at § 53A-11-102(3).

125. See Wheeler, *supra* n. 16, at 85.

126. UHEA, *supra* n. 118, at 4.

127. *Id.*

128. See *id.*

129. Ltr. from John S. McAllister, Asst. Atty. Gen., Educ. Div. Off. of the Utah Atty. Gen., to Scott Bean, Superintendent Utah St. Off. of Educ. I, <http://www.usoe.k12.ut.us/curr/homeschool/pdf/AttGenLet.pdf> (Feb. 14, 1997) [hereinafter Attorney General].

130. See *id.*

in the reasonable judgment of the local school board, there is sufficient evidence to show that: (1) The student is to be taught at home; (2) in the subjects prescribed by the State Board in accordance with law; and (3) for the same length of time as required in the public schools.¹³¹

Therefore, parents may not unilaterally withdraw their children from school for home school.¹³² It is the responsibility of the parents to inform the school district that they wish to home school their child and to “present satisfactory evidence to support that intent.”¹³³ The type of evidence that must be presented to the local school board in order to obtain a release includes: “lesson plans, academic subjects to be covered, time for study, evidence of student performance, . . . or whatever the school district may deem appropriate, within reason.”¹³⁴ Before the school district issues a certificate of exemption it should examine the evidence “to ensure that the children will receive a reasonably adequate home education.”¹³⁵ However, district parental inquiries should be “directly related to the statutory requirements.”¹³⁶ As an example, the Attorney General’s Office indicated that it would be inappropriate for the school district to inquire about religious education.¹³⁷ The School Board may revoke a parent’s permission to home school during the school year, but “the school district should base the revocation on substantial evidence rather than unsubstantiated belief.”¹³⁸

The Attorney General’s 1997 letter also reviewed several mechanisms used in other states to ensure compliance but not applied in Utah. The letter recognized that home visits and school logs have been accepted by courts in other jurisdictions, but are not required by Utah law.¹³⁹ Although the letter noted that Utah statutes do not address the issue of mandated standardized tests, it declared that “evaluating a student’s ongoing attendance and performance would be a reasonable condition imposed by the local board to satisfy the requirement of the statute that

131. *Id.* at 2. The core curriculum of Utah includes: language arts, math, science, social studies, arts, health, computer literacy, and vocational education. HSLDA, *Home Schooling in the United States, A Legal Analysis: Utah*, <http://www.hslda.org/laws/default.asp?State=UT> (accessed Mar. 8, 2004).

132. *See* Attorney General, *supra* n. 129, at 3. In contrast to home school, parents do not need permission from the school district to send their children to private school. A private school is an entity licensed as a business by the Utah Department of Business Regulations. The State Board of Education maintains a list of accredited private schools recognized for academic credit. *See id.* at 11.

133. *Id.* at 4.

134. *Id.* at 3.

135. *Id.* at 4.

136. *Id.*

137. *See id.* at 5.

138. *Id.* at 8.

139. *See id.* at 6.

the student be taught in the same subjects for the same length of time as in public schools.”¹⁴⁰ Finally, the opinion recognized that “a reasonable inquiry into the competency and qualifications of those who would be providing instruction in the home school would be permissible.”¹⁴¹ However, because Utah has no statutory requirements for teacher certification it is not an essential element for a school exemption.¹⁴²

If a parent’s plan to home school has not been approved by the school district, children who are kept home by the parent will be considered absent from school as a matter of law.¹⁴³ Additionally, if children fail to attend school because of their parents’ refusal to cooperate with the school district, the school may refer the matter to juvenile court.¹⁴⁴ Finally, if a parent willfully fails to comply with the compulsory education laws, he may be criminally prosecuted for a misdemeanor.¹⁴⁵

B. Recent Changes in Utah’s Child Welfare System

A 1993 legislative audit of Utah’s child welfare system identified “serious deficiencies” in the system.¹⁴⁶ According to the audit, the Division of Child and Family Services (DCFS) had failed in some cases to protect children from abuse and neglect.¹⁴⁷ The audit recommended “substantive changes in the philosophy of Utah’s child welfare services.”¹⁴⁸ In response to the audit and a lawsuit, which had been brought against the State in the same year “on behalf of 1,500 Utah children in foster care and the 10,000 children reported annually as suspected victims of abuse or neglect,” the state legislature enacted the Child Welfare Reform Act (Act).¹⁴⁹ The Act created “sweeping reforms in Utah’s child welfare system.”¹⁵⁰ Most important for education law, however, were the 1995 amendments (Amendments) to the Act, which, in part, “establish[ed] criteria for determining whether a child has been educationally neglected.”¹⁵¹

140. *Id.* at 7.

141. *See id.* at 8.

142. *See id.*

143. *See* UHEA, *supra* n. 118, at 1.

144. *See id.*

145. *See id.*

146. Victoria P. Coombs, *Recent Legislative Developments in Utah Law*, 1994 Utah L. Rev. 1589, 1589-90.

147. *See id.* at 1590.

148. *Id.* at 1592.

149. *Id.* at 1589 (quoting *David C. v. Michael Leavitt*, No. 93c-206W (D. Utah Mar. 15, 1995)).

150. Bouley, *supra* n. 113, at 1232.

151. *See id.* at 1232-33.

Educational neglect has important implications for home school law because it “falls squarely in the middle of the debate over parents’ constitutional right ‘to direct the upbringing and education or their children,’ and the State’s interest in protecting children ‘whose parents abuse them or do not adequately provide for their welfare.’”¹⁵² The new criteria for establishing educational neglect have been characterized as “an effort to combat abuses in the home-schooling system.”¹⁵³ The Amendments, however, also provide a list of defenses to an allegation of educational neglect “in order to protect legitimate home-schooling arrangements.”¹⁵⁴ For a school district to prove educational neglect under the Amendments, it must show clear and convincing evidence that:

- (i) the child has failed to make adequate educational progress, and school officials have complied with the requirements of Section 53A-11-103; and
- (ii) the child is two or more years behind the local public school’s age group expectations in one or more basic skills, and is not receiving special educational services or systematic remediation efforts designed to correct the problem[.]¹⁵⁵

Prior to the Amendments, a parent was guilty of educational neglect if he failed to provide a “reasonable and necessary” education.¹⁵⁶

A child will not be considered educationally neglected if his parent or guardian establishes by a preponderance of the evidence that:

- (i) school authorities have failed to comply with the requirements of [the State’s compulsory education laws];
- (ii) the child is being instructed at home in compliance with [Utah law];
- (iii) there is documentation that the child has demonstrated educational progress at a level commensurate with the child’s ability;
- (iv) the parent, guardian, or other person in control of the child had made a good faith effort to secure the child’s regular attendance in school;
- (v) good cause or a valid excuse exists for the child’s absence from school;

152. *Id.* at 1239 (quoting *In re J.P.*, 648 P.2d 1364, 1372 (Utah 1982)).

153. Bouley, *supra* n. 111, at 1239.

154. *Id.* at 1239–40.

155. Utah Code Ann. § 78-3a-316(2)(a) (2004).

156. UHEA, *supra* n. 118, at 12.

(vi) the child is not required to attend school pursuant to court order or is exempt under other applicable state or federal law;

(vii) the student has performed above the twenty-fifth percentile of the local public school's age group expectations in all basic skills, as measured by a standardized academic achievement test administered by the school district where the student resides; or

(viii) the parent or guardian has proffered a reasonable alternative to required school curriculum, in accordance with [Utah law], that alternative was rejected by the school district, but the parents have implemented the alternative curriculum[.]¹⁵⁷

According to the UHEA, the new definition “assumes that parents generally are acting completely in good faith regarding their children’s education, wherever it is obtained,” and reaffirms “the right and duty of parents, acting in good faith, to provide for the care and upbringing of their children.”¹⁵⁸

The State may deem that home schooled children are not receiving proper care if the parents deliberately refuse to educate their children in accordance with the law.¹⁵⁹ “This refusal is educational neglect and should be reported to the juvenile court by school authorities.”¹⁶⁰ However, as mentioned above, a parent will not be charged with educational neglect if he obtains an annual waiver from the local school board.¹⁶¹

IV. UTAH V. JOHN SINGER

Over twenty years before Parker Jensen and his family re-ignited the battle over parental rights in Utah, John Singer’s dispute with the State over his right to home school his children created an “uneasy alliance” between Utah and home schoolers.¹⁶² John Singer’s clash with Utah began in 1973 when he decided to withdraw his children from public school because he no longer wanted them to be “indoctrinated” by the

157. Utah Code Ann. § 78-3a-316(2)(b) (2004).

158. UHEA, *supra* n. 118, at 12.

159. See Attorney General, *supra* n. 129, at 13. However, “an allegation of educational neglect may be sustained solely on the basis of a child’s absence from school only if the child has been absent ‘without good cause, for more than ten consecutive school days or more than 1/16 of the applicable school term.’” Bouley, *supra* n. 111, at 1240 (quoting Utah Code Ann. § 78-3a-316(1)(d) (2000)).

160. Attorney General, *supra* n. 129, at 13.

161. See *id.* at 3.

162. See Matthew Collin, *Districts Have an Uneasy Alliance with Home Schools*, Salt Lake Trib. B2 (Dec. 12, 1983).

State.¹⁶³ “He cited his children’s exposure to drugs, sex, and homosexuality and the school’s failure to teach religion as reasons for the move.”¹⁶⁴ John and his wife, Vickie, opened a home school in their living room.¹⁶⁵

A. *The Singers’ Refusal to Send Their Children to School*

Two weeks after the Singers had withdrawn their children from public school, the superintendent of the local school district visited the Singers and invited them to meet with the school board about their decision to home school their children.¹⁶⁶ John Singer explained that their decision to home school was an issue of their right to practice religion “without interference from the government.”¹⁶⁷ The school board provided the Singers with a copy of Utah’s compulsory education law and informed them that they could apply for an exemption but, by law, the reasons for home schooling children must be acceptable to the school board.¹⁶⁸ John Singer responded to the school board by letter, telling them, “Go to hell, you and your kind, for such unrighteous demands.”¹⁶⁹

By the end of 1973, after the Superintendent had consulted with the Attorney General’s Office on the matter, the school filed a complaint in juvenile court to force the Singers to comply with the law.¹⁷⁰ The Singers were charged with “contributing to the delinquency and neglect” of their children.¹⁷¹ When the Deputy Sheriff tried to execute a warrant for John Singer’s arrest, John Singer refused to go and the officer left in peace.¹⁷² Several weeks later, on January 11, 1974, John Singer relented and accompanied the Sheriff to court. Singer grudgingly agreed to work out a home school plan that that would satisfy the school board, and in March

163. David Fleisher & David M. Freedman, *Death of an American, The Killing of John Singer 1* (Continuum Publ. Co. 1983). For example, on March 29, 1973, John Singer complained to the school principal that his child’s U.S. history textbook contained a drawing of George Washington, Betsy Ross, and Martin Luther King, Jr., with a caption describing the three as great American patriots. He found the inclusion of Martin Luther King Jr. in the photograph objectionable because in his estimation “Martin Luther King, Jr. was nothing but a Communist inspired rabble-rouser, and he paid the price of a traitor and got shot.” *Id.*

164. Walter Mattern, *John Singer Was Hub of Controversy During 30 Years in Summit*, Salt Lake Trib. B6 (Jan. 19, 1979).

165. See Fleisher & Freedman, *supra* n. 163, at 6.

166. See *id.* at 8.

167. See *id.* at 9.

168. See *id.* at 11–12.

169. *Id.* at 14.

170. *Id.* at 46.

171. *Id.*

172. See *id.* at 48.

1974 the school board decided to issue a certificate of exemption to the Singers on several conditions, including the school board's right to monitor the education program.¹⁷³

After several months of complying with the conditions of their exemption, the Singers determined that they had "bowed down to [the school board] long enough" and began ignoring the State's requirements.¹⁷⁴ By April 1975, a school psychologist, assigned by the school board to monitor and test the Singer children, determined that they were falling behind their peers in learning¹⁷⁵—some were almost two years behind their age group educationally.¹⁷⁶ A year later, the Singers decided that they would no longer allow anyone to come to their home and test their children.¹⁷⁷

After a series of failed negotiations with the Singers, the school board again reported the case to juvenile court in March 1977.¹⁷⁸ By August of that year, John Singer was back in court defending his decision to home school his children.¹⁷⁹ Relying on *Wisconsin v. Yoder*, John Singer argued that Utah's compulsory education law was unconstitutional.¹⁸⁰ The judge refused to find the Utah law unconstitutional and determined that John and Vickie Singer were in violation of Utah law for neglecting their children's education.¹⁸¹ He ordered that the Singer children be placed in the temporary care, custody, and control of the DCFS.¹⁸² The children were not removed from the Singer home, but DCFS was given the right to monitor the children.¹⁸³

In September 1977, the Singers' battle with the State began to attract the attention of both the local and national media.¹⁸⁴ The Singers were featured in local news articles and television interviews.¹⁸⁵ They began to receive "calls from people all over the state offering them suggestions on

173. See *id.* at 49–51.

174. See *id.* at 52–53. For example, the Singers began to modify their schedule, "reducing the daily hours first to five, then to four and a half hours. They started using their own choice of textbooks in social studies and science. They added formal religious instruction to the curriculum, and allowed the kids to proceed at their own pace instead of enforcing a fixed schedule of lessons." *Id.*

175. *Id.* at 53.

176. See Mattern, *supra* n. 164, at B-6.

177. See Fleisher and Freedman, *supra* n. 163, at 61.

178. See *id.* at 65.

179. See *id.* at 70.

180. See *id.* at 88.

181. See *id.* at 89.

182. See *id.*

183. See *id.*

184. See *id.* at 92–93.

185. See *id.* at 93.

how to beat the school district and juvenile court.”¹⁸⁶

The Singers failed to appear at trial since, in their view, compromise was out of the question,¹⁸⁷ and “[t]here could be no recourse from the juvenile court.”¹⁸⁸ When the Singers failed to appear, the judge issued a warrant for their arrest¹⁸⁹ and found them guilty of child neglect in January 1978.¹⁹⁰ Nevertheless, the Singers continued to refuse attempts by the school board to provide a tutor to the children or to present alternative home schooling plans.¹⁹¹

The case was eventually transferred to Utah’s Second Judicial District and reassigned to Judge John Farr Larson, a former juvenile judge and director of children’s services.¹⁹² On April 6, 1978, after the Singers failed to appear at any of the hearings on the matter, Judge Larson issued an arrest warrant for the Singers.¹⁹³ In handing down his decision, Judge Larson made a statement that garnered nationwide attention. He said:

By law, children in this state have a right to an education and a duty to attend school. Children are no longer regarded as chattels of their parents. They are persons with legal rights and obligations. The rights of parents do not transcend the right of a child to an education nor the child’s duty to attend school. Parents who fear the negative influence of public education should also examine the damaging effects of teaching a child disobedience to law and defiance to authority.¹⁹⁴

“Judge Larson’s statement from the bench was quoted in almost every newspaper in Utah, and was carried by United Press International to news bureaus all over the world.”¹⁹⁵

B. The Killing of John Singer

The issue finally came to a head on January 18, 1979, when law enforcement officers attempted to arrest John Singer at his home. When the officers attempted to arrest him, he waved a fully loaded handgun at them.¹⁹⁶ An officer, standing to the right of John Singer, fired his

186. *See id.*

187. *Id.* at 98–100.

188. *Id.* at 100.

189. *See id.* at 103.

190. *See id.* at 106.

191. *See id.* at 107.

192. *See id.* at 110.

193. *See id.* at 114.

194. *Id.*

195. *Id.* The Singer story was aired on CBS and John and Vickie Singer were interviewed by telephone by NBC on national television. *See id.* at 119, 137.

196. Jon Ure & Angela Nelson, *Judge Frees Widow From Jail; Test Shows Singer Shot in Back*, Salt Lake Trib. A1, A2 (Jan. 20, 1979).

shotgun at Singer.¹⁹⁷ Singer died several minutes later.¹⁹⁸ Vickie Singer was arrested and taken into custody, released soon after, and given custody of her children within several days.¹⁹⁹

“John Singer’s death touched off widespread public reaction the likes of which Utah had not experienced [that] century.”²⁰⁰ The major newspapers in the State were “flooded” with letters and editorials.²⁰¹ One local newspaper, in its editorial, wrote, “The controversy engulfing Mr. Singer and his family has triggered prolonged and deep emotional reaction throughout Utah, and to a lesser extent, across the nation. Sides have been chosen over whether or not . . . [anyone] has the right to educate his children at home . . .”²⁰² Even the New York Times, in response to the Utah’s action, ran an editorial entitled “That’ll Teach the Singer Children,” criticizing the State’s zeal in enforcing its truancy laws.²⁰³

“Almost everyone who had anything to do with the Singer case received threatening letters, telegrams, and telephone calls at their offices and homes.”²⁰⁴ The Utah State Capitol had to be evacuated when someone called in a bomb threat.²⁰⁵ Some sympathetic to the Singers responded with anger towards the state.²⁰⁶ Utah’s Superintendent of Public Instruction responded in defense of the State’s compulsory education laws, claiming that they were necessary and that they needed to be more uniformly enforced.²⁰⁷ Members of the State School Board expressed grief at the “Singer Tragedy” and met together to discuss ways “to enhance their image and inform the public of their leadership role.”²⁰⁸ Even Utah’s Governor responded to the incident. He called the shooting “a tragedy,” but also pointed out that society must live by a set

197. *See id.*

198. *See id.* at A1.

199. *See id.*

200. Fleisher & Freedman, *supra* n. 163, at 200.

201. One such editorial asked, “Are differing ideas so dangerous to the Utah population at large, that, to protect our children we must kill off the fathers?” Thomas Milton Tinn, *Murder by Law*, Salt Lake Trib. A14 (Feb. 7, 1979).

202. *Summit Attorney Should Probe ‘Why?’ of John Singer’s Death*, Salt Lake Trib. A14 (Jan. 20, 1979).

203. *That’ll Teach the Singer Children*, N.Y. Times E20 (Jan. 21, 1979).

204. *See Ure & Nelson, supra* n. 196, at A2.

205. *See id.*

206. *See id.*

207. Walter Mattern, *Compulsory Education Law ‘Necessary,’ State Schools Chief Claims*, Salt Lake Trib. B6 (Jan. 20, 1979).

208. Diane Cole, *State School Board Members Express Grief at Singer Tragedy*, Salt Lake Trib. B6 (Jan. 20, 1979).

of rules.²⁰⁹ “Without these rules, there would be anarchy and society couldn’t survive.” Mr. Singer, he said, “chose to live outside this process.”²¹⁰ In contrast, Representative Samuel S. Taylor of the Utah legislature declared that John Singer was a “victim of a society which declared he had no rights.”²¹¹

C. *The Impact of the Singer Case*

The lasting impact of the Singer affair has been “a kind of uneasy alliance between school districts and parents who choose to teach at home.”²¹² Even several years after Singer was killed, an Associated Press writer wrote that the entire issue of home schooling “continues to be influenced by the stark specter of John Singer.”²¹³ In 1983, the Utah Attorney General’s Office issued an informal opinion, which included guidelines for interpreting the State’s compulsory education law in relation to home schools.²¹⁴ Months later, Washington School District’s Superintendent declared, “We’ve made no attempt to enforce [the guidelines], and in light of the Singer case, I don’t know if we will.”²¹⁵

The year after John Singer was killed the UHEA held its first convention. By 1984, conditions between home educators and public schools had improved, but there were still “no major alliances and the hatchet remain[ed] unburied.”²¹⁶ At the fourth annual UHEA convention, the association’s president noted that most school districts were cooperative. He stated, “Those involved in public and home education have long viewed each other with distrust and suspicion and the current collegiality between some home schoolers and local districts is a long way from a year ago, when a legal opinion seemed to deepen the abyss between the two groups.”²¹⁷ Proponents of home school have admitted that the Singer case helped shape public attitudes toward home education.²¹⁸ For example, the UHEA’s latest legal information packet includes letters written by parents to the UHEA, where one parent, explaining that she knew little about home schooling wrote,

209. Peter Scarlet, *Matheson Terms Shooting of Singer ‘Tragic,’ Defends Plan of Arrest Organized by Lawmen*, Salt Lake Trib. A1 (Jan. 21, 1979).

210. *Id.*

211. *Singer Victim of Society, Utahn Claims*, Salt Lake Trib. A6 (Jan. 25, 1979).

212. Collin, *supra* n. 162, at B2.

213. *Id.*

214. *See id.*

215. *Id.*

216. Peter Scarlet, *Home Educators, Public Schools Enjoying More Cooperation*, Salt Lake Trib. B19 (July 15, 1984).

217. *Id.*

218. *See id.*

“Homeschooling? Isn’t that what the Singers did?”²¹⁹

As late as 1997, the John Singer controversy has been cited as a source of conflict between school boards and home schoolers. In that year, the State Board of Education created a committee to investigate ways to hold home schoolers accountable “without violating their sense of freedom.”²²⁰ In response, *The Salt Lake Tribune* called the Board’s plan “a tall order, given past resistance by home-schoolers to government intervention,” citing John Singer as an example.²²¹

Despite the furor that has arisen over the Singer case, it must be remembered that John Singer’s story is an unusual and extreme case. As will be discussed further, Utah should not allow extraordinary events, like the State’s standoff with John Singer, to continue to dictate the measures the State takes to protect the children within its boundaries.

V. PARKER JENSEN, A RENEWED PARENTAL RIGHTS MOVEMENT, AND HOME SCHOOL IN UTAH

The illness of Parker Jensen, a twelve-year old boy from Sandy, Utah turned into another “landmark standoff” between parents and the State.²²²

A. The Jensens’ Refusal to Submit Their Child to Medical Treatment

In May 2003, a Washington State lab analyzed a growth taken from Parker Jensen’s mouth and determined that the growth was a malignant tumor, possibly Ewing’s Sarcoma, a rare and potentially lethal form of cancer.²²³ Several weeks later, Primary Children’s Medical Center (PCMC), in Salt Lake City, Utah, confirmed that Parker Jensen in fact had Ewing’s Sarcoma.²²⁴ Parker’s parents, however, called for more testing.²²⁵ The hospital performed more testing and the results were inconclusive; a full body bone scan and X-rays were negative.²²⁶ Doctors, however, claimed that despite what further tests might indicate, Parker was “clearly” in need of a yearlong course of chemotherapy, which they recommended he begin immediately.²²⁷ Parker’s parents felt that

219. Sherianne Schow, *An Outsider’s View of Homeschooling*, in UHEA, *supra* n. 118, at 20.

220. *Test Home Schoolers*, *supra* n. 14.

221. *Id.*

222. *Jensen Timeline*, *supra* n. 3, at A5.

223. *See id.*

224. *Id.*

225. *See id.*

226. *See id.*

227. *Id.*

chemotherapy would be too aggressive and would have too many side effects. They determined instead to have more tests performed on Parker before they made any further decisions on his treatment.²²⁸

One month later, on June 17, the Parker Jensen matter was referred to state officials, whereupon the State filed a petition with the court to intervene on Parker's behalf.²²⁹ On July 10, the Jensens told the court that they would obtain an evaluation from Los Angeles Children's Hospital and that they would go along with whatever treatment it recommended.²³⁰ A week later, the Los Angeles hospital reviewed the results sent there from PCMC and recommended that Parker begin chemotherapy within seven to ten days.²³¹ In response, Parker's parents claimed the Los Angeles hospital had merely "rubber-stamped" PCMC's findings.²³² Nonetheless, the judge ordered the Jensens to choose a board-certified oncologist to administer chemotherapy to Parker and to begin that treatment no later than August 8.²³³

When the court-ordered deadline for Parker's treatment arrived, the Jensens still had not submitted Parker to chemotherapy.²³⁴ They claimed that Parker was going to the Burzynski Clinic in Houston, Texas on August 12 for evaluation and an unspecified treatment.²³⁵ According to the Jensens, the clinic reviewed Parker's test results and "highly question[ed]" whether he had Ewing's Sarcoma.²³⁶ Even so, the judge issued a warrant that would place Parker in state protective custody.²³⁷ Despite the Judge's orders, Parker's parents remained in Idaho, where they had been staying, with their son.²³⁸ One week later, Salt Lake County prosecutors issued criminal charges against Parker's parents for kidnapping their own child.²³⁹ DCFS eventually abandoned its efforts to force Parker to undergo cancer treatment. On September 5, 2004, the Jensens finally reached a settlement with the State.²⁴⁰ The felony charges

228. *See id.*

229. *See id.*

230. *See id.*

231. *See id.*

232. *Id.*

233. *See id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *See id.*

238. Jennifer Dobner & Joseph M. Dougherty, *More Than 300 Rally to Back Jensens and Parents' Rights*, *Deseret Morning News* (Salt Lake City, Utah) B1 (Sept. 5, 2003).

239. *See id.*; see also *Jensen Timeline*, *supra* n. 3, at A5.

240. *See* Amy Joi Bryson, *Brakes Sought on DCFS Power*, *Deseret Morning News* (Salt Lake City, Utah) A1 (Dec. 3, 2003).

that the State had filed against the Jensens were reduced in a plea agreement.²⁴¹

B. The Impact of the Jensen Case

Like the Singer conflict, the Jensen case has served as a “flashpoint” to bring the parental rights movement “back to the surface.”²⁴² While groups battling for increased parental rights have gained national interest, “Utah is the only state . . . where they are getting significant attention and leverage.”²⁴³ According to Brooke Adams, the leader of the conservative Utah Eagle Forum, “Grass-roots efforts to limit state involvement in family affairs have always been well-received [in Utah].”²⁴⁴ The rallying cry of “My Child, My Choice,” “resonates in Utah where there is widespread support for limited government.”²⁴⁵ One parental rights advocate, who marched to Capitol Hill in protest of the State’s action, declared, “[T]his is just the first wave.”²⁴⁶ “The battle has just begun,” declared another.²⁴⁷ Indeed, over fifty bills dealing with parental rights were introduced in the 2004 Legislature, an issue that, as some predicted, “promised to be the nastiest of the early fights” of the session.²⁴⁸ More than twenty-four of those bills were introduced as “Parker Jensen” bills.²⁴⁹

The most “aggressive” attempt to overhaul Utah’s child welfare system was HB266, the “Child Welfare Omnibus” bill, which passed in the House after a vote of 43–29.²⁵⁰ In addition to establishing “latitude for parents when they make medical decisions on behalf of their children or discipline their children,” the bill proposed to make the State’s role “secondary” to the parent’s role when it came to child welfare.²⁵¹ For example, the bill included language that “would decrease the welfare of a

241. *Id.*

242. Adams, *supra* n. 5, at A8.

243. *Id.* at A1.

244. *Id.* at A8.

245. *Id.*

246. James Thalman, *Parents Decry State Tyranny*, [http://64.233.183.104/search?q=cache:yWbiWpnTu7A\):deseretnews.com/dn/view/0,1249,510052455,00.html](http://64.233.183.104/search?q=cache:yWbiWpnTu7A):deseretnews.com/dn/view/0,1249,510052455,00.html) (Sept. 7, 2003). One Kaysville mother who home schooled her children brought them to the Capitol to teach them a lesson about freedom.

247. *Id.*

248. Bob Bernick Jr. & Jerry D. Spangler, *Parental Rights are Rallying Cry in Utah*, <http://deseretnews.com/dn/print/1,1442,590037597,00.html> (Jan. 21, 2004).

249. See Kirsten Stewart & Dan Harrie, *Mission Accomplished?*, Salt Lake Trib. A1 (Mar. 4, 2004).

250. See Amy Joi Bryson, *House OKs 'Parental Rights' Measures*, Deseret Morning News (Salt Lake City, Utah) B1 (Feb. 28, 2004).

251. *Id.*

child from ‘paramount’ to ‘primary’ when state agencies and the juvenile court system render decisions in cases.”²⁵² The bill proposed that Section 62A-4a-201, which deals with the rights of parents in relation to their children, be amended to include the following additional language: “[P]arents have the right, obligation, responsibility, and authority to manage, train, educate, provide for, and discipline their children; and . . . the state’s role is secondary and supportive to that primary role of the parents.”²⁵³ The statute as unamended by HB266 states that “as a counterweight to parental rights, the state, as *parens patriae*, has an interest in and responsibility to protect children whose parents abuse them or do not adequately provide for their welfare.”²⁵⁴ HB266, however, would delete “welfare” and replace it with the more narrow “health and safety.”²⁵⁵ That change is one that HB266 proposed be made throughout the statute. It is not entirely clear the impact such a change could have for DCFS’ ability to monitor home schools, but it would seem that it would be easier to fit the State’s interest in protecting a child under “welfare” than it would under “health and safety.”

C. A Dark Side to the Parents’ Rights Movement

Although Utah lawmakers wanted 2004 to be “remembered as the year of the child,”²⁵⁶ the two “most far-reaching” bills to come out of the parental rights debate ultimately did not pass.²⁵⁷ Prior to HB266’s demise, Alain Balmanno, an Assistant Attorney General for Utah, stated that the bill “present[ed] serious threats to the well-being of children.”²⁵⁸ Representative Litvack of Salt Lake City had criticized the bill as a “dangerous and a bad move.”²⁵⁹ He said, “Any time we talk about the child welfare system we should walk cautiously, because we are walking on eggshells. If we crush one of these eggshells, we’re leaving kids vulnerable.”²⁶⁰ In the words of Utah Senator Lorraine Pace, “We cannot swing the pendulum too far in one direction”²⁶¹ An article written by the *Deseret News* editorial staff provided an appropriate warning to

252. *Id.*

253. Utah H. 266, 56th Leg. Sess. (Utah 2004) (proposing to amend Utah Code Ann. § 62A-4a-201(1)(b)(i)(A)-(B)).

254. Utah Code Ann. § 62A-4a-201(2) (2004).

255. Utah H. 266, 56th Leg. Sess., *supra* n. 256.

256. Stewart & Harrie, *supra* n. 249, at A1.

257. Dan Harrie, *As the Dust Settles*, Salt Lake Trib. A10 (Mar. 5, 2004).

258. Bryson, *supra* n. 7, at B1.

259. Bryson, *supra* n. 250, at B1.

260. *Id.*

261. *Id.*

state legislators. It said, "Before legislators start drafting bills to address what could be considered an extreme case, they must consider the harm that could come to other children when the fixes are not so extreme but the risks to the child are just as great."²⁶²

Critics of HB266 and other child welfare reform bills were not directly addressing the potential for harm presented by some home schools when they urged the legislature to proceed with caution. Utah home schoolers generally have had a positive relationship with the State,²⁶³ but unfortunately, in a minority of cases, some children who are kept home for school are subject to abuse. Restrictions on home schools are especially necessary to protect this particular group of children.

To begin, many Utah home schools "have never formally been 'approved' by their local school district."²⁶⁴ Some groups, like HSLDA, argue that this makes parents more vulnerable to truancy penalties and therefore Utah's approval law should be changed to protect parents.²⁶⁵ The more important implication of unapproved home schools, however, is that children who slip below the State's "radar" are more susceptible to abuse. "[S]ome parents claim to be teaching their own children when they are simply keeping them out of the public eye."²⁶⁶ As an example, Utah has historically had a problem with some polygamist families in the State who, in an effort to keep their plural marriages secret, have "kept the[ir] children isolated."²⁶⁷

Several stories have raised national awareness of the potential for abuse in some home schools. In two infamous Texas cases, Andrea Yates drowned her five children in a bathtub and Deanna Laney beat her three sons with rocks; both mothers taught their children at home.²⁶⁸ In Iowa, a mother was sent to jail and the father was sentenced to life in prison for "killing their 10-year-old adopted son and burying him at their house. Because they were home schooling, no one noticed he was missing for more than a year."²⁶⁹ CBS News reports that these cases are not isolated. Their investigation uncovered "dozens of cases of parents convicted or

262. *No Winners in Jensen Saga*, *supra* n. 13.

263. Home Sch. Leg. Def. Assn., *Utah Senate Kills Truancy Bill*, <http://www.hsllda.org/hs/state/ut/200303120.asp?PrinterFriendly=True> (Mar. 12, 2003). According to UHEA, home schooled children score at or above the national mean for all traditional academic subject areas and in measurements of self-concept and social skill. UHEA, *supra* n. 118, at 12.

264. See Home Sch. Leg. Def. Assn., *supra* n. 265.

265. See *id.*

266. *Test Home Schoolers*, *supra* n. 14.

267. Collin, *supra* n. 162, at B2.

268. Vince Gonzales, *Home Schooling Nightmares*, <http://www.cbsnews.com/stories/2003/10/14/eveningnews/printables578007.shtml> (Oct. 14, 2003).

269. *Id.*

accused of murder or child abuse who were teaching their children at home, out of the public eye.”²⁷⁰ No one knows for sure the extent to which abuse in home schools may occur “because the government doesn’t keep track.”²⁷¹ As mentioned above, the government does not even know how many children are home schooled.²⁷²

D. Lawmakers Should Proceed with Caution

As a representative of the North Carolina Child Advocacy Institute pointed out, it is important to recognize that “[t]he genuine home schoolers are doing a great job with their children,” but on the flipside, “there is a subgroup of people that are keeping [their children] in isolation, keeping them from public view because the children often do have visible injuries.”²⁷³ A task force that investigated the neglect of a child who was home schooled in North Carolina determined that home school laws “allow persons who maltreat children to maintain social isolation in order for the abuse and neglect to remain undetected.”²⁷⁴

Despite the foregoing, it must be pointed out that the extreme cases of child abuse in home schools are, according to home school advocates, “very, very rare.”²⁷⁵ Even so, cases of the State “yank[ing] kids out of homes” for inappropriate reasons are equally rare.²⁷⁶ Utah, in fact, “has one of the lowest rates in the nation for the percentage of children removed from homes because of neglect or abuse.”²⁷⁷ However, one Utah news station reported that while there is “a growing movement to limit the power of Utah state social workers in favor of ‘parents’ rights’ . . . [There is] evidence that instead of being too AGGRESSIVE, the Division of Child and Family Services may NOT be doing enough to protect youngsters.”²⁷⁸ In the 2003 fiscal year, DCFS received 19,284 abuse referral calls,²⁷⁹ which indicates that child abuse is a serious problem. This statistic does not distinguish between children schooled by the State and children schooled at home, but if the State is no longer allowed to monitor the “welfare” of children or ensure that children left at home

270. *Id.*

271. *Id.*

272. *See id.*

273. *Id.*

274. Vince Gonzales, *A Dark Side to Home Schooling*, <http://www.cbsnews.com/stories/2003/10/13/eveningnews/printable5778717.shtml> (Oct. 13, 2003).

275. *Id.*

276. Bryson, *supra* n. 250, at B1.

277. *See id.*

278. Jill Atwood, *Special Report: Harm’s Way*, <http://tv.ksl.com/index.php?sid=76320&nid=5&template=print> (Feb. 19, 2004).

279. Thalman, *supra* n. 1, 7,209 of the 19,284 calls were actually established as abuse. *Id.*

during the day are in fact being educated, the numbers could become even worse.

The problem of abuse cited above shows, at least, that just as it would be unfair to rely on a handful of “sensational”²⁸⁰ incidents to call for heavy-handed restrictions on a parent’s right to home school, it would likewise be unwise to cite cases like Parker Jensen and John Singer as a justification for sweeping changes to Utah’s child welfare laws or as justification for the lax enforcement of compulsory education laws.

VI. CONCLUSION

Parker Jensen is “hardly the poster child for child welfare reform,”²⁸¹ nor was John Singer a symbol for home school parents oppressed by the State. The Jensens “defied court orders, spirited their son out of state for medical evaluation and entered agreements” they never honored.²⁸² Similarly, John Singer made little effort to obey the law and responded with violence when the State attempted to enforce its rules. Cases like Parker Jensen’s and John Singer’s “[distract] from bigger issues.”²⁸³ “For all the drama surrounding the Jensens, the truth is, medical neglect cases are 1 percent of DCFS referrals.”²⁸⁴ In contrast, “[t]he numbers show irrefutably that two of society’s greatest ills—domestic violence and substance abuse—are driving the DCFS caseload.”²⁸⁵

Some human services officials and advocates warned that the Utah legislature was possibly going too far in its advocacy of parental rights and “that some children could end up harmed or even dead because lawmakers too tightly tied the hands of state social workers, investigators or the courts in removing children from abusive homes.”²⁸⁶ Although 2004 did not result in sweeping changes in Utah’s child welfare law, parents’ rights advocates promise that the issues will be back next year.²⁸⁷ Since the number of home schooled students is still increasing,²⁸⁸

280. Homeschool World News, *HSLDA President Rebukes CBS Parent Company for Slanted Report*, <http://www.home-school.com/news/rebukescbs.html> (Oct. 17, 2003).

281. *Study DCFS ‘Reforms’ Carefully*, *Deseret Morning News* (Salt Lake City, Utah) A21 (Dec. 5, 2003).

282. *No Winners in Jensen Saga*, *supra* n. 13, at A11.

283. Holly Mullen, *Jensen Case Distracts From Bigger Issues*, *Salt Lake Trib.* C1 (Jan. 20, 2004).

284. *Id.*

285. *Id.*

286. Bernick & Spangler, *supra* n. 248.

287. Harrie, *supra* n. 257, at A10.

288. Dean Schabner, *Looking for an Answer: Homeschooling Offers Alternative, Challenge for Parents and Kids*, http://abcnews.go.com/sections/us/DailyNews/home_school1010810.html (Sept. 4, 2001).

pressures on the legislature to cede power to the parents may expand in turn.

Hopefully, in response to extreme cases, the legislature will continue to avoid “knee-jerk legislative fixes to problems that are far more complex than meet the eye. Abused and neglected children in Utah deserve better than that.”²⁸⁹ The legislature must carefully balance the rights of parents against the State’s interest in protecting children. Such important legislation requires much discussion and debate.²⁹⁰ The inadvertent harm to children may outweigh the benefits of decreased State supervision of home schools. “Because school attendance is mandatory, every child is entitled to receive an education and every state has the duty to see that the child gets one. Therefore, children do have rights which exist independently of their parents’ wishes for some purposes.”²⁹¹

289. *No Winners in Jensen Saga*, *supra* n. 13, at A11.

290. See Bryson, *supra* n. 250, at B1.

291. Attorney General, *supra* n. 129, at 13.