

# THE YALE LAW JOURNAL POCKET PART

MICHAEL E. HERSHER

## “Home Schooling” in California

The recent decision of the California Court of Appeal in the *Rachel L.* case set off a storm of protest from the California “home school” community and drew nationwide media attention.<sup>1</sup> It was understood by many as holding that it is illegal for parents without teaching credentials to teach their own children at home, thus exposing the children and parents to truancy and child dependency proceedings.<sup>2</sup> In the wake of the public response, the Court of Appeal granted rehearing and solicited an amicus brief from the California Department of Education (CDE) and State Superintendent of Public Instruction Jack O’Connell, which we recently filed with the court. In the brief, we argued that home-schooled children should not be declared truant if, in the opinion of local public school officials, the parents are providing an adequate education in compliance with the laws governing private schools.

*Rachel L.* arose from a petition to the Family Court for an order compelling Rachel’s parents to enroll her and her two siblings in school. The parents asserted that they complied with California’s compulsory education laws by teaching their children at home under the general supervision of a private religious school that claimed to operate through independent study.<sup>3</sup> The parents also asserted that they “home school” because of religious belief. In an unpublished decision, the trial court held that the parents had a constitutional right to keep their children at home and denied the order. The Court of Appeal

- 
1. *Jonathan L. v. Superior Court (In re Rachel L.)*, No. B192878, slip op. (Cal. Ct. App. Feb. 28, 2008, revised Mar. 7, 2008), *reh’g granted and depublished* by 2008 Cal. App. LEXIS 548 (Ct. App. filed Mar. 25, 2008).
  2. The term “home school” does not actually appear anywhere in California statutes or regulations. However, for purposes of this discussion, “home schooling” means children being taught privately in their own homes by their parents who do not have California teaching credentials. The court held that “the education of the children at their home, whatever the quality of that education, does not qualify for the private full-time day school or credentialed tutor exemptions from compulsory education in a public full-time day school.” *Id.* at 12-13. However, the court also noted that the trial court “made no explicit factual findings concerning the parents’ compliance with California’s compulsory public education law” and therefore remanded the matter for such findings. *Id.* at 17. In our view, the February 28, 2008 opinion did not squarely reach the issue of whether parents can qualify as a private school in their own homes.
  3. *Id.* at 12.

reversed, holding that the parents did not have a constitutional right to keep their children out of school based on personal or religious beliefs. The court sent the case back to the trial court to look at the parents' compliance with California's compulsory public education law.<sup>4</sup> The Court of Appeal then granted rehearing of the appeal on March 25, 2008.<sup>5</sup>

We believe the court of appeals was correct on the constitutional issue and in sending the case back to the trial court, because only the constitutional issue was squarely before the court.<sup>6</sup> Due to the limited nature of the arguments on the original appeal, we also believe it was appropriate for the court to reconsider the portion of its February 28, 2008 holding that addresses parents establishing private schools in their own homes.

## I. COMPULSORY PUBLIC SCHOOL ATTENDANCE AND THE RELIGIOUS EXEMPTION

California Education Code section 48200 requires "compulsory full-time education" in the California public school system for all children between the ages of 6 and 18, subject to a number of statutory exceptions.<sup>7</sup> An additional narrow constitutional exception was created by the U.S. Supreme Court for families who hold "deep religious conviction" that home instruction of children of a certain age is vital to the core beliefs and existence of their religious community.<sup>8</sup>

The plenary power of a state legislature to provide for the education and welfare of children through compulsory attendance has been affirmed repeatedly since the decision in *Pierce v. Society of Sisters*.<sup>9</sup> *Pierce* held that a state could condition exemption from public school attendance on meeting requirements as to attendance, teacher capability, and subjects of instruction.<sup>10</sup> More recent California cases have held that the right to an education belongs to the student.<sup>11</sup> Since the child's right to an education is fundamental under these cases, the State has a compelling interest in safeguarding the right through reasonable compulsory attendance statutes. On appeal, the *Rachel L.* decision held that the personal or religious beliefs of the parents in that case did not meet the narrow attendance exemption allowed for in *Wisconsin v. Yoder* because they did not

---

4. *Id.* at 17.

5. Jonathan L. v. Superior Court (*In re Rachel L.*), 2008 Cal. App. LEXIS 548 (Ct. App. filed Mar. 25, 2008).

6. There was no evidence offered in the trial court that the parents ever attempted to establish a private school in their own home.

7. All statutory references are to the California Education Code, CAL. EDUC. CODE (West 2008), unless otherwise noted. The statutory exceptions are found in sections 48220-48232.

8. *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972) (allowing home instruction based on Amish showing that exposure to modern, material culture was undermining their religious belief in simplicity and driving children away from their community).

9. 268 U.S. 510 (1925).

10. 268 U.S. 510, 534 (1925).

11. See *Butt v. State*, 842 P.2d 1240, 1252 (Cal. 1992); *Serrano v. Priest*, 557 P.2d 929, 951 (Cal. 1976).

show membership in a well-established religious community to which home instruction was vital to its existence and most central beliefs.<sup>12</sup> We believe that the holding was proper and that the exception of *Yoder* should be narrowly applied.

## II. THE STATUTORY EXEMPTIONS

The *Rachel L.* decision describes two types of students who are exempt from public school attendance based on California statutes: those taught by credentialed tutors and those enrolled in full-time private day schools.<sup>13</sup> Since there was no evidence that the parents in *Rachel L.* held California teaching credentials, the court properly held that they could not qualify as “tutors.”<sup>14</sup>

The more controversial question is whether the private school exemption in section 48222<sup>15</sup> is available to parents without teaching credentials who declare their home to be a private school and otherwise comply with the state laws governing private schools. This is a difficult question because California statutes are silent on the issue. There is no California law that expressly uses the term “home schooling,” mentions parents without credentials, or excludes parents from the coverage of section 48222. Moreover, as discussed below, no California court has ever construed section 48222 in the factual context of a parent who complied with the private school requirements. Given the lack of statutory or decisional authority, we believe that “home schooling” should be permitted where the local school district determines that the children are not truants, because there is no basis for treating parents differently than other private individuals who operate full-time private day schools or for unnecessarily limiting parental choice.

All full-time private day schools must file a statement or affidavit that is available to the public.<sup>16</sup> CDE is required to accept any private school affidavit by the “owner or other head” of the school that contains the prescribed information. The statute does not say a parent cannot be the “owner or head” of a school. The statutory provision that requires private school employees to be fingerprinted for safety purposes also indicates that a “person” may operate a

---

12. *In re Rachel L.*, No. B192878, slip op. at 17.

13. *Id.* at 6 (citing CAL. EDUC. CODE §§ 48222, 48224 (West 2008)).

14. A tutor must hold valid teaching credential for the grade taught. CAL. EDUC. CODE § 48224.

15. Children are exempt from public school attendance if they attend a “private full-time day school” that employs “persons capable of teaching” and offers “instruction in the several branches of study required to be taught in the public schools of the state.” Such instruction must be in English; the school must maintain attendance records; and the private school must annually file a statement with CDE that contains the information specified in section 33190. *Id.* § 48222. Section 48222 further requires “the attendance supervisor of the district” to verify compliance with the statutory filing requirements as a condition of the attendance exemption. Such district verification of filing a private school statement does not constitute approval or endorsement of the private school by the district, nor is the private school licensed or approved by CDE or any other public entity. *Id.* Section 48222 notably does not require private school staff to hold teaching credentials.

16. *Id.* § 33190.

private school. That section does not exclude parents from the definition of “person.”<sup>17</sup> We believe that parents are capable of teaching their own children the full range of academic subjects and see no reason why parents should be treated differently than other private “persons” who are allowed to form private schools, provided they are subject to the same system of local monitoring.

The local monitoring of truancy is provided for by statute, which requires each school district to appoint a “supervisor of attendance” of all students to oversee compliance with “compulsory full-time education.”<sup>18</sup> These attendance officers participate in local school attendance review boards that also include law enforcement and child welfare officials.<sup>19</sup> Local officers can investigate purported private schools, including home schools, to determine whether children are in schools that have capable teachers and offer the necessary subjects. If not, the child may be declared a truant and referred to the district attorney for juvenile court proceedings.<sup>20</sup> After a hearing, a judge may order the child placed in a public or private school and may make other orders for the welfare of the child.<sup>21</sup>

### III. PRIOR JUDICIAL DECISIONS ON HOME SCHOOLING

California courts have considered these statutory exemptions in prior decisions. The *Rachel L.* court reviewed at length the holdings in *People v. Turner*.<sup>22</sup> The *Turner* case involved the criminal conviction of parents who kept their children out of public school and asserted a constitutional right to do so. The court rejected that constitutional assertion and then opined on the availability of the statutory exemptions, despite the lack of any claim in that case that the parents either qualified as tutors or had enrolled their children in any kind of private school. The *Turner* decision therefore reaches conclusions regarding “home schooling” that were not necessary given the allegations or facts proven in the case.

The reasoning of *Turner* actually supports our argument that children should not be declared truant if their parents comply with the education laws because the decision focuses on assuring that private schools meet minimum public standards in order to support an exemption from public school. The *Turner* court reasoned that the State has the power to “establish a system whereby it can be known, by reasonable means, that the required teaching is being done” by a private school “meeting certain prescribed conditions.”<sup>23</sup> As described above, California has, since 1953, enacted a comprehensive system of

---

17. *Id.* § 44237(a)(1).

18. *Id.* § 48240.

19. *Id.* § 48321. The California Legislature has left it to the discretion of each school district to decide how rigorously to monitor the private schools, given the unique circumstances of the 1,100 widely disparate districts in the State.

20. *Id.* § 48263.5.

21. *Id.* §§ 48267, 48268.

22. 263 P.2d 685 (Cal. 1953).

23. *Id.* at 689, 687 (quoting *State v. Hoyt*, 146 A. 170 (N.H. 1929)).

regulating truancy and preventing abuse of children.<sup>24</sup> “Home-schooled” children are now protected from potential neglect of their educational rights by this local system of monitoring. Moreover, the Education Code permits a school district to take any action that is not prohibited by or inconsistent with law.<sup>25</sup> Under that authority, it should be within the discretion of a district attendance supervisor to conclude that a child in a home school setting is not a truant if the home school meets the qualitative requirements of section 48222. The courts should, in such cases, defer to the presumed professional expertise of local education officials, unless they are clearly unreasonable.<sup>26</sup>

There is neither a legal nor policy reason to categorically exclude potentially high-performing students from the coverage of section 48222 when so many private schools of varying quality and performance are allowed to operate freely. Parental and student choice should be encouraged, as they are with independent study or charter schools, to allow freedom from the limitations of the regular classroom.<sup>27</sup> Current California truancy and child welfare laws create a reasonable system of private school regulation which, if properly implemented at the local level, will assure that “home schooled” children receive an education that satisfies the requirements of the compulsory education laws.

*Michael E. Hersher has served as General Counsel and Deputy General Counsel for the California Department of Education during the last 22 years and is also an Adjunct Professor of Public Education Law at the Pacific McGeorge School of Law in Sacramento, California. The views expressed above are consistent with the amicus brief filed by the Department in the Rachel L. case on behalf of State Superintendent of Public Instruction Jack O’Connell.*

Preferred citation: Michael E. Hersher, “Home Schooling” in California, 118 YALE L.J. POCKET PART 27 (2008), <http://thepocketpart.org/2008/07/18/hersher.html>.

---

24. 1974 Cal. Stat. 2624.

25. CAL. EDUC. CODE § 35160.

26. Dawson v. E. Side Union High Sch. Dist., 34 Cal. Rptr. 2d 108, 115-17 (1994) (noting that curriculum decisions by local school boards regarding the use of commercial television programming were entitled to judicial deference).

27. CAL. EDUC. CODE §§ 51745 & 47601(e).