

STATE OF NEW HAMPSHIRE

BELKNAP, SS.

JUDICIAL BRANCH-FAMILY DIVISION
LACONIA LOCATION

IN THE MATTER OF

MARTIN F. KUROWSKI

And

BRENDA A. KUROWSKI

2006-M-0669

MEMORANDUM
IN SUPPORT OF
MOTION FOR RECONSIDERATION

NOW COMES, Respondent, BRENDA VOYDATCH, by and through her Legal Counsel, in support of her Motion for Reconsideration, and submits this Memorandum in support thereof and respectfully presents the following:

STATEMENT OF THE CASE

On July 14, 2009, this Honorable Court approved and ordered the recommendations of the Marital Master regarding pending motions between the parties. The Order determined, in part, that: 1) beginning with the 2009-2010 academic year, Amanda must cease home schooling and attend public school; 2) the Parenting Plan between the parties must be modified; and 3) For the reasons explained herein, Respondent, Ms. Voydatch, is clearly entitled to reconsideration of these provisions of the Order.

ARGUMENT

I. THE ORDER TO ATTEND PUBLIC SCHOOL VIOLATES THE CONSTITUTIONAL GUARANTEES TO PARENTAL RIGHTS AND THE FREE EXERCISE OF RELIGION.

While the Court noted it is “extremely reluctant to impose on parents a decision about a child’s education,” it nevertheless concluded in this case “that it would be in Amanda’s best interests to attend public school.” Order, p. 7. This provision of the Order should be reconsidered because it is based on a faulty premise and violates clearly established principles of federal and state law. Left unaltered, the decision to will trip several hot wires in a field full of constitutional landmines.

The Court’s fateful decision was “guided by the premise” that a proper education includes “examination of new things” and requires “social, cultural, and physical interaction with a variety of experiences, people, concepts, and surroundings. . .” *Id.*, p. 7. The Court further reasoned that “Amanda’s vigorous defense of her religious beliefs to [her] counselor suggests strongly that she has not had the opportunity to seriously consider any other point of view”—*even though* it also acknowledged that “the evidence support[s] a finding that Amanda is generally likable and well liked, social and interactive with her peers, academically promising, and intellectually at or superior to grade level.” *Id.*, p. 6. In dictating the type of schooling that must be provided for this child, the Court suggested it did not consider the “relative academic merits of home schooling and public school,” nor “the merits of Amanda’s religious beliefs,” but *did* acknowledge consideration of “the impact of those [religious] beliefs on her interaction with others.” *Id.*, pp. 7-8. In other words, the evidence shows that *socially* and *academically*, Amanda is doing great, but her *religious beliefs* are a bit too sincerely held and must be sifted, tested by, and mixed among other worldviews. *This is a step too far any court to take.*

A. The Order Treads upon Fundamental Parental Rights.

The U.S. Supreme Court has repeatedly affirmed that the “rights of parents to make decisions concerning the care, custody, and control of their children” are “*fundamental.*” *Troxel v. Glanville*, 530 U.S. 57, 66 (2000) (citing, e.g., *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Parham v. J. R.*, 442 U.S. 584, 602 (1979); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)). The New Hampshire Supreme Court has also repeatedly affirmed that these fundamental parental rights are sacrosanct and constitutionally protected by the Due Process Clause of the federal Fourteenth Amendment. See, e.g., *Appeal of Peirce*, 451 A.2d 363, 367 (N.H. 1982); *State v. Robert H.*, 118 N.H. 713, 715 (1978). As reiterated by these courts:

The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition...

Appeal of Peirce, 451 A.2d at 768 (Douglas, J., and Brock, J., concurring opinion) (quoting *Yoder*, 406 U.S. at 232).

“Indeed, at common law *the parents' authority over the education of their children* was unquestionably a natural right which arose out of those parental responsibilities. Thus, while *the State* may adopt a policy requiring that children be educated, it *does not have the unlimited power to require they be educated in a certain way at a certain place.*” *Appeal of Peirce*, 451 A.2d at 768 (Douglas, J., and Brock, J., concurring opinion) (emphasis added; internal citations omitted). The *Peirce* Court also declared that “ ‘the child is not the mere creature of the State’ ” and thus the state cannot interfere “with the ‘liberty of parents and guardians to direct the upbringing *and education* of children under their control....’ ” *Id.* (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925)). To be certain, this fundamental parental right concerning

education “is perhaps the oldest of the fundamental liberty interests recognized by [the U.S. Supreme Court].” *Troxel*, 530 U.S. 57, 65-66. *See also*, *Santosky v. Kramer*, 455 U.S. 745 (1982); *Stanley v. Illinois*, 405 U.S. 645 (1972).

1. A “strict scrutiny” standard applies to any infringement of this fundamental parental right.

For the above reasons, any state action that impinges on a parent’s rights in training and educating her child is subject to strict scrutiny. *San Antonio Sch. Dist. V. Rodriguez*, 411 U.S. 1, 17 (1973) (stating that government “impinge[ment] upon a fundamental right explicitly or implicitly protected by the Constitution . . . require[es] strict judicial scrutiny”); *Troxel*, 530 U.S. at 80 (Thomas, J., concurring) (finding that “strict scrutiny” applies to “infringements of fundamental rights” of parents). “In order to withstand strict scrutiny, the [state] must advance a compelling state interest by the least restrictive means available.” *Bernal v. Fainter*, 467 U.S. 216, 219 (1984). Thus, in this context, before a state court can trump a custodial parent’s direction and choices concerning her child’s education, the court’s usurpation must be justified on the grounds of a compelling state interest that cannot be furthered in some more narrowly tailored, less intrusive means. Perhaps inadvertently, these safeguards have been ignored by the Order at issue here.

As explained above, the only implied justification for the new Order forcing this child to cease home schooling is that there is ostensibly some “debate center[ing] on whether enrollment in public school will provide Amanda with an increased opportunity for group learning, group interaction, social problem solving, and exposure to a variety of points of view.” Order, p. 7. *However*, there are two important problems with this rationale. First, this is *not* a legitimate “compelling interest” according to New Hampshire law, the widely accepted social science data on point, or the record evidence in this case. Second, even if this *were* a legitimate compelling

interest in the case at bar—which it is not—the Court has failed to consider more narrowly tailored, less intrusive means that would easily meet the Court’s desired ends.

a) “Group learning and interaction” is no respect a compelling interest.

New Hampshire law has long recognized the legitimacy and merit of home schooling, without regard to whether or how much participating students may mingle and mix with other children. In fact, the New Hampshire Supreme Court has specifically declared: “Home education is *an enduring American tradition and right* having produced such notables as Abraham Lincoln, Woodrow Wilson, and Thomas Edison . . .” *Appeal of Peirce*, 451 A.2d at 768 (Douglas, J., and Brock, J., concurring opinion) (emphasis added; internal citations omitted). The tradition certainly remains a *popular* one in this state. According to the New Hampshire Department of Education, the number of New Hampshire students who are homeschooled has grown steadily each year since 1993 (the earliest year for which state home school statistics are readily available).¹ This follows the national trend, as studies show home schooling to be “the fastest growing form of education.”²

New Hampshire statutes respect the rights to, and affirm the inherent value of, the home schooling option. The legislative intent of the state’s home school law is stated in N.H. Rev. Stat. Ann. § 193-A as follows:

The general court recognizes, in the enactment of RSA 193-A . . . that it is the primary right and obligation of a parent to choose the appropriate educational alternative for a child under his care and supervision, as provided by law. One

¹ See Exhibit “A,” attached hereto (New Hampshire Department of Education, State Totals - Home Schooled Enrollments by Participating Agent, for years 1993 through 2009).

² Brian D. Ray, Ph.D., *Facts on Homeschooling*, National Home Education Research Institute’s *Worldwide Guide to Homeschooling*. Available at: <http://www.hslida.org/research/faq.asp#1> (last visited August 21, 2009). For example, “[t]here were an estimated 1,700,000 to 2,100,000 children (grades K-12) home educated during 2002-2003 in the United States. . . Home education has constantly grown over the last two decades. The growth rate is 7% to 15% per year.” *Id.*

such alternative allows a parent to elect to educate a child at home as an alternative to attendance at a public or private school. . . The general court further recognizes that home education is more individualized than instruction normally provided in the classroom setting.

This “individualized instruction” is viewed, and has always been viewed, as a *positive feature* of home schooling—rather than a deficiency that must somehow be remedied by a court. Nowhere in the law of New Hampshire is the contrary either stated or implied. This Court’s unprecedented Order thus marks a bold departure from the state’s longstanding policy on this point, and there is accordingly no precedent for the contention that the state has a compelling interest—or *any* interest—in imposing a “group learning” requirement on a student who is otherwise performing well academically.³

The social science data on point further indicates there is no legitimate “compelling state interest” in sentencing a student like Amanda to public school for forced “group learning, group interaction, social problem solving, and exposure to a variety of points of view.” Order, p. 7. Indeed, “[m]any homeschoolers have specifically chosen homeschooling because their view is that school and the typical peer groups found there are not forces of positive socialization.”⁴ As explained above, it is the home schooler’s fundamental right to hold and abide by this view.

³ While in this case, Amanda is an academic high-achiever, it is worthy of note that even if she were *not*, state law would allow for at least one year of remedial education at home, and then an appeal process if necessary, before the drastic measure of ordering her to public school. Due process is safeguarded by these statutes: if a home schooled child does not demonstrate educational progress for her age and ability, the state is required by statute to notify the parent and then allow one year to provide remedial instruction to the child. Continuation of home education is thereafter contingent upon the child demonstrating progress “commensurate with his age and ability.” “The family has a right to request a hearing if, after a year of remedial instruction, the commissioner determines the child has not made adequate progress.” N.H. Rev. Stat. Ann. § 193-A:6.

⁴ J. Michael Smith, “The Best Kind of Socialization,” *The Home School Court Report*, Vol. XXIII, No. 4 (July/August 2007).

One journal recently editorialized about the great benefit that is often experienced by children who are protected from negative cultural influences because they spend more of their time in a safer home schooling environment. This is viewed by many parents and scholars as one of the very positive and most cherished features of home schooling. The state has no right or interest in ordering this home schooling advantage “corrected” in any way.

. . .The 2004 study *Homeschooling Grows Up* by Dr. Brian D. Ray, offers data showing that homeschooled teens are successfully integrating into society. There is very little evidence of teenage rebellion, and significant numbers of students demonstrate their maturity by being involved in their communities and generally report a good relationship with their parents.

Homeschoolers now are not alone in their view of the negative impact peer pressure has on proper socialization. Dr. Robert Epstein, a prominent psychologist, is challenging the conventional idea that teenagers have to go through a period of rebellion or turmoil. In his recent book and in the cover story in this issue, Dr. Epstein claims that the way teenagers are treated in society by parents, institutional schools, entertainment media, and peers, is more likely to cause observable differences in the way a teen operates as compared to an adult. He points out that if teen rebellion were simply a function of the brain, we would see the phenomenon across all cultures in all time periods. This isn’t the case. In pre-industrial cultures, where teens spent most of their time with adults, the majority of these societies didn’t even develop a word for adolescence, and most young males in these cultures did not display anti-social behavior. Studies show that, beginning in the 1980s, delinquency increased in non-western countries when western-style schooling, television, and movies were introduced.

Dr. Epstein concludes that the strong and largely negative influences of peers, schools, and the media are the main forces driving teen behavior in developed nations, offering a plausible explanation for why American teens are often immature and rebellious. . .

. . .Another positive result of the socialization homeschooled children receive is that they mature more quickly and are able to handle responsibilities at a younger age.

. . .Providing the opportunity for our teens’ exposure to positive role models and other adults in our families, churches, and communities will reap positive rewards. So will helping them to make choices that limit their exposure to peer pressure and the mass media marketing of undesirable role models.⁵

⁵ *Id.*

Lastly, and perhaps *most importantly*, this Court has itself already plainly acknowledged that “the evidence support[s] a finding that *Amanda is generally likable and well liked, social and interactive with her peers, academically promising, and intellectually at or superior to grade level.*” *Id.*, p. 6 (emphasis added). Accordingly, it defies reason for the Order to then suggest just one page later that Amanda requires public school enrollment to improve her social skills. In this case, the state has no legitimate interest—much less a “compelling” one—to punish this child by forcing her to attend the local public schools.

b) The Court did not consider more narrowly-tailored, less intrusive means.

Even if the state *did* have a legitimate compelling interest to force public schooling in this case—which it clearly did not—the Court failed in its Order to consider more narrowly tailored, less intrusive means that would satisfy the Court’s purported concerns. With regard to her current “socialization,” the Order documents that Amanda attends a local, fully interactive theater class where she produces and performs plays and skips with other students on a monthly basis, and she also attends art, Spanish, and physical education classes in the Meredith public schools. Order, p. 3. The record shows her teachers have reported Amanda “is an active participant in the classes and is adapting well and making friends and keeping up with the work.” *Id.*, p. 4.

The Court seemed bothered by the report of a counselor who opined that Amanda “lack[s] some youthful characteristics” (*Id.*), and the Guardian ad Litem who suggested that Amanda somehow needs further “exposure to different points of view at [this] time in her life...” *Id.*, p. 5. Even if those *were* sufficient reasons and compelling interests to impinge upon the fundamental parental rights at issue here—which they clearly are not—there are much less restrictive means available than the draconian demand to cease Amanda’s home schooling all

together. A provision for additional peer group interaction through local community organizations, or social clubs, or athletic club opportunities, to name just a few, would be much less intrusive and pursue the same ends. By failing to consider or apply such alternative measures, the Court ensured that its Order cannot meet the rigors of strict constitutional scrutiny.

It is precisely because “ ‘the child is not the mere creature of the State’ ” that the state cannot interfere “with the ‘liberty of parents and guardians to direct the upbringing and education of children under their control...’ ” *Appeal of Peirce*, 451 A.2d at 768 (Douglas, J., and Brock, J., concurring opinion) (*quoting Society of Sisters*, 268 U.S. at 534-35). This constitutional prohibition applies with equal rigor to every branch and division of state government—even its family law courts. In this case, there is no question the July 14th Order crosses these lines and thus should be duly reconsidered.

B. The Order Undermines the Free Exercise of Religion.

Equally important here is the fact that it has also been long established that the *First* Amendment to the U.S. Constitution protects the right of parents to direct their children’s education in conjunction with the free exercise of their religion. The seminal case on this point is the landmark *Wisconsin v. Yoder*, 406 U.S. 205 (1972), in which the U.S. Supreme Court held that a state could not compel Amish children to attend high school in violation of their religious beliefs. The Court found that “accommodating the religious objections of the Amish” in this way would “not impair the physical or mental health of the child[ren], or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society.” *Id.* at 234. Importantly, the Court also acknowledged: “The duty to prepare the child for ‘additional obligations,’ referred to by the Court

[in *Society of Sisters*], must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Id.* at 233.

In the *Society of Sisters*, the U.S. Supreme Court struck down a 1922 Oregon statute that sought to ban all private education and compel children to attend public schools. The New Hampshire Supreme Court later described the Oregon law in that case as an unconstitutional violation of parents' rights because "[t]he implicit intent of this action was to *promote uniformity* by forbidding ethnic and religious groups to educate their children in the manner they desired." *Appeal of Peirce*, 451 A.2d at 768 (Douglas, J., and Brock, J., concurring opinion) (emphasis added).

In this case, the Court's frankly stated concern that Amanda may be too "rigid" on "questions of faith" (Order, p. 4), and too "vigorous [in] defense of her religious beliefs" (Order, p. 6), is both telling and deeply problematic from a constitutional standpoint. The Order reasons that "Amanda's vigorous defense of her religious beliefs to [her] counselor suggests strongly that she has not had the opportunity to seriously consider any other point of view." *Id.*, p. 6. The Order further admits the Court's focus was, at least in part, upon the "the impact of those [religious] beliefs on her interaction with others." *Id.*, pp. 7-8. Perhaps Amanda is too bright and articulate for her own good. What an ironic tragedy it would be for her to be punished by a court for exhibiting self-confidence and the strength of heart to stand for her beliefs.

The above language from the Order smacks of the kind of implicit intention that was at play in the illicit '20s-era Oregon statute struck down in *Society of Sisters*. Is *uniformity* of thought to be preferred over individualism? May a parent with sincerely-held religious beliefs educate and pass those values and ideals along to her child *in the manner she desires*? The

Constitution provides concrete answers to these questions, but those answers are in direction opposition to the ones suggested by the Order at issue here.

Simply put, our federal and state constitutions prohibit almost every state action—whether in the form of legislation or a well-intended court order—that would interfere with the religious rights of a parent to direct the education of her child. Many other federal and state courts have applied the fundamental rights/strict scrutiny standard analysis in this context, and *upheld the rights of parents*. See, e.g., *Peterson v. Minidoka Cty. Sch. Dist. No. 331*, 118 F.3d 1351 (9th Cir. 1997) (state’s interests were not compelling enough and did not outweigh public school principal’s interest in exercising his religious freedom to choose home schooling for his own children); *Brunelle v. Lynn Public Schools*, 702 N.E.2nd 1182 (Mass. 1998) (state’s interest in heavily regulating home schooling is outweighed by parent’s fundamental interests); *People v. DeJonge*, 501 N.W.2d 127 (Mich. 1993) (state’s interest in mandating teaching certificate for home schooling parents violated their rights to parenting and free exercise of their religion).

Indeed the principles that were announced in *Society of Sisters* more than 80 year ago and still applicable today. Courts have routinely found within the ambit of the free exercise clause a constitutional right for parents to educate their children at home in good faith, and in strict accordance with their own beliefs. See, e.g., *Minnesota v. Newstrom*, 371 N.W.2d 525 (Minn. 1985); *State v. Popanz*, 112 Wis.2d 166 (Wis. 1983); *Roemhild v. State*, 251 Ga. 569 (Ga. 1984); *Bangor Baptist Church v. State of Maine*, 576 F.Supp. 1299 (D.Maine 1983); *Delconte v. State*, 313 N.C. 384 (N.C. 1985); and *Grigg v. Georgia*, 224 Va. 356 (Va. 1982). This Honorable Court must uphold these principles in this case as well.


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II. CONCLUSION

The Order issued on July 14, 2009, treads on the constitutional rights of the Respondent to raise and educate her child. Amanda is a very bright, confident and well-adjusted ten year old precisely *because* she has been home schooled, and has enjoyed the parental arrangements that have been in place now for several years. With regard to the order to cease home schooling, the Order goes too far. For all of these reasons, Respondent respectfully prays that the Order be duly reconsidered.

Respectfully submitted,
Brenda Voydatch, Respondent
By and Through Her Legal Counsel

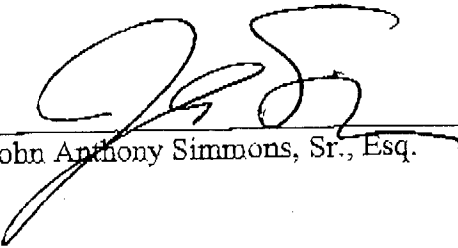
Dated: August 24, 2009



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CERTIFICATE

I hereby certify that a copy of the foregoing was mailed this 24th day of August, 2009, to Attorney Elizabeth Donovan, counsel for the Petitioner, 461 Middle Street, Portsmouth, New Hampshire 03801, and mailed to Janice McLaughlin, GAL, 501 Union Ave, Suite 2, Laconia, NH 03247.



John Anthony Simmons, Sr., Esq.