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HSLDA Memo in Opposition to New Hampshire House Bills 367 and 368

11 Reasons to oppose HB 367 & 368

INTRODUCTION

This memorandum is intended to assist New Hampshire homeschoolers in preparing to testify in opposition to H.B. 367. This is HSLDA's interpretation of the proposed language of H.B. 367 without amendment and is not legal advice.

New Hampshire homeschoolers will have to pull together to defeat Representative Judith Day's ill-conceived homeschool bills (H.B. 367 and 368). H.B. 367 is the most significant threat to New Hampshire homeschoolers since New Hampshire's homeschool law was passed in 1990. H.B. 367 is a dramatic and misguided effort to rewrite the entire Records and Evaluation portion of N.H. RSA 193-A:6.

While H.B. 368 proposes no substantive changes, it does require that participating agencies provide certain listed materials to homeschoolers and that homeschoolers sign a statement assuring the participating agency that they will comply with the law. Both provisions are superfluous. Therefore, New Hampshire homeschoolers should remain unified in their opposition to any form of either of these bills. For 20 years the current legal framework, with minimal changes, has served New Hampshire well.

If enacted, H.B. 367 would make New Hampshire's homeschool law one of the most restrictive in the country. Because of its scope, the bill would create new burdens on homeschoolers and participating agencies.

In the United States of America only a minority of states require *any* assessment of home educated students. Of those that do not, a single state, Pennsylvania, one of the most restrictive in the country, requires both a standardized test *and* a portfolio – and that only during grades 3, 5 and 8 a total of just 3 years of the student's entire educational career.

These bills impose a needless burden on homeschoolers and shift authority to determine whether a child should be homeschooled from parents to others. Parents have a fundamental right under the United States Constitution to direct the upbringing and education of their children, and legislation like Representative Day's undermines this right by going against the presumption that parents act in the best interest of their children.

Both H.B. 367 and 368 are unnecessary. This analysis focuses on H.B. 367 which is by far the more offensive of the two.

KEY POINTS

This memo seeks to analyze the various provisions of the proposed legislation to demonstrate that it ought to be found inexpedient to legislate for the following reasons:

1. It is unnecessary, and unreasonably burdens natural and constitutional rights of parents, is sweeping in its changes without justification, and will result in greater confusion among all stakeholders;
2. This legislation proposes substantive and sweeping changes that will significantly increase the burden and cost for both homeschoolers and participating agencies;
3. The bill reduces the choices available to parents to assess and evaluate their students while placing unfettered discretion in the hands of a participating agency to determine whether or not a homeschool program should be terminated;
4. The language of the legislation is also problematic in that it creates potentially unconstitutional vagueness which could result in needless litigation;
5. There is no evidence supporting such radical changes in a law that has functioned well for nearly 20 years, with minimal changes;
6. Current law regarding recordkeeping is already burdensome enough. H.B. 367 creates new and unnecessary recordkeeping requirements for both homeschoolers and participating agencies;
7. Current Law contains objective standards or clear guidelines for review of “educational progress” whereas H.B. 367 imposes subjective and unfettered discretion in contravention of clearly established jurisprudential and legislative norms;
8. Current law respects differences in children’s learning styles and abilities whereas H.B. 367 applies a one size fits all approach with “exceptions.” Current law provides clear guidance to participating agencies for assessment norms, H.B. 367 will create confusion;
9. Current law is balanced, specific, detailed and objective whereas H.B. 367 creates vague and unbalanced general subjectivity which will likely lead to arbitrary and capricious enforcement problems;
10. Current law was the careful product of long deliberation between N.H. legislators, homeschoolers and other stakeholders (such N.H. School Board Association and Teacher’s Association). H.B. 367 is the product of one legislator without involvement and indeed against the recommendation of a study commission set up for the purpose of studying the issue and recommending any needed legislation;
11. H.B. 367 ignores both New Hampshire’s study commission recommendations and the growing body of research demonstrating that homeschooling works and that the trend in homeschooling is deregulation not increased regulation.

DISCUSSION

A variety of issues with this legislation are discussed below, followed by suggestions for those who will testify before the committee.

H.B. 367 will create vagueness and confusion.

H.B. 367 creates the undefined term “credentialed educator”. What is a credentialed educator? Does this mean that anyone with a college degree in teaching is “credentialed”? Does this mean a “certified teacher”? Current law allows, as one of four methods for assessment, a report by a “certified teacher” or a “non public school teacher”. Is a non-public school teacher considered “credentialed”? Is a person with an associate’s degree in education or a paraprofessional “credentialed”? Is a person teaching and certified in another state “credentialed”?

The current law provides clear guidelines for parents so that they know how to comply with assessment requirements. The proposed law creates vagueness for parents making it difficult to understand who is a “credentialed educator.”

Current law regarding recordkeeping is already burdensome enough; H.B. 367 creates new and unnecessary recordkeeping requirements for both homeschoolers and participating agencies.

Today, New Hampshire homeschoolers are to retain a portfolio of student work materials for two years. This material would be useful if a hearing were ever called to question a home education program. As a testimony to the responsible and diligent nature of homeschoolers in New Hampshire, who largely “self-police” themselves, there have been very few hearings called.

Under the proposed law, New Hampshire homeschoolers would now have to find a “credentialed educator” (whatever that means) and submit a portfolio for review. New Hampshire is already among a small minority of states that even require parents to maintain any post instruction educational materials. Such a requirement in itself is unnecessary and burdensome. Why should homeschoolers be singled out and burdened by having to keep used educational records around even after the child has demonstrated that he has made educational progress? To add to the existing requirement an annual portfolio review is excessive and unnecessary. When a homeschool student has demonstrated through one of the four ways that they have made educational progress, the state’s interest has been achieved. Such record keeping requirements is already superfluous.

To add the additional imposition of recordkeeping on behalf of the participating agency is also significant. Superintendents and non-public school principals would now have to review both a teacher’s portfolio review report *and* a standardized test score *and* apply their own individual judgment to determine *whether* a student made “academic growth”. Academic growth is another undefined term and is apparently left up to the arbitrary judgment of a superintendent or non public school principal.

This language lacks any objective standards and is inherently vague. Today, managing a homeschooled student as a participating agency is not time consuming. In order for superintendents or non-public school principals to comply with their new duties, some would have to invest significant time into reviewing test results and portfolio reports. New Hampshire’s public school superintendents have enough of a challenge managing their own students and should not be burdened with this requirement.

Furthermore, it is wrong to give superintendents such broad discretion. Pennsylvania is the only other state that requires superintendents to review annual portfolios. This is the cause of great confusion because of the differences in subjective opinions of superintendents. The law is being challenged in court with several school districts involved over litigation because of arbitrary application of the law.

New Hampshire's law allows for a standardized approach to measuring academic progress (40% on either a national standardized test or state assessment test) or a teacher's report on the educational progress of the student. Teachers are appropriately authorized by the legislature as those most familiar with educational development and academic standards to make this determination. And, as long as the student's work product measures up, there is no reason an additional review by the superintendent or principal should be required. Finally, under current law, a parent and superintendent may agree on any other valid measurement tool. These four approaches provide an appropriate balance between parent's constitutional rights and the state's interest in making sure that children are being educated.

A statute or regulation is unconstitutionally void when it either forbids or requires an act "in terms so vague those persons "of common intelligence must necessarily guess at its meaning and differ as to its application..." This quote comes from the Federal District Court for Maryland and Pennsylvania in the case *Jeffery v. O'Donnell* (702 F.Supp 516 (1988)) quoting the United States in *Connally v. General Construction*, 269 U.S. 385, 391. In *Jeffrey*, this case the phrase "properly qualified private tutor" was held to be unconstitutionally vague as applied to homeschooling parents in Pennsylvania.

The proposed language in H.B. 367 moves New Hampshire's current homeschool regulations into the position of being as vague and more restrictive as Pennsylvania's current law, which HSLDA is challenging in court. Pennsylvania has one of the most restrictive and problematic homeschool laws in the country because of its inherent vagueness. However, even Pennsylvania, which requires an annual portfolio review, only requires standardized testing three times over the course of a student's education. H.B. 367 would require both annual testing and portfolio review every year between ages 6-18. Pennsylvania's compulsory attendance age is only between ages 7-17. Therefore, H.B. 367 creates a statutory framework that is both more restrictive for parents and vaguer.

H.B. 367 will increase costs to homeschoolers and participating agencies.

Today, homeschoolers have a choice of selecting the best method of assessment for their children. These methods cost homeschoolers who are already subsidizing public education without any benefit. Adding a testing requirement and a portfolio review would at least double the per-student cost of complying with the new law. This is simply unfair. Participating agencies would also have to add staff and devote more time to reviewing added paperwork or dealing with the increased administrative paperwork the bill proposes. This bill has enough problems on the merits and the financial impact to new Hampshire taxpayers and homeschoolers is yet another reason this bill deserves to fail.

Current Law contains objective standards or clear guidelines for review of "educational progress" whereas H.B. 367 imposes subjective and unfettered discretion in contravention of clearly established constitutional norms.

In *Grayned v. City of Rockford*, 408 U.S. 92 the Supreme Court of the United States said:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked." [408 U.S. at 108-109, 92 S.Ct. at 2298-2299.](#)

H.B. 367 violates these norms and expectations. In light of the fact that current law respects these norms and standards, H.B. 367 is an unacceptable substitute. In light of a lack of evidence suggesting a need for change, this legislation is at best inexpedient and at worst a power grab over children.

Current law respects differences in children's learning styles and abilities whereas H.B. 367 applies a one size fits all approach with "exceptions".

Current law requires that "a parent shall provide for an annual educational evaluation in which is documented the child's demonstration of educational progress at a level commensurate with *the child's age and ability.*"

The fact that New Hampshire's current homeschool law requires documentation based on a child's age and ability recognizes that all children are created as unique and distinct individuals with different talents and abilities. Of course one of the great benefits of homeschooling is that it allows educational programs to be customized to a child's age and ability. Current law provides a variety of options for parents to comply with assessment provisions and empowers parents, as the primary educator in a homeschool environment to determine what the best method for assessment among the four approaches (see is above) authorized in current law.

Although the proposal allows parent educators to request different tests than those explicitly identified in the law (one wonders why those three tests were singled out), or to request an exception under "unusual circumstances", this approach undercuts the notion that parent-educators are best situated and ought to be the ones to make the determination as to the best method for assessment. Parent educators should not have to request an exemption or change. Because current law allows parents to choose among four viable methods of assessment with specific standards and guidance, current law is superior to the proposed changes.

Furthermore, standardized tests are not an appropriate means of evaluating all children. Requiring parents, unless they get an exception, to use one is a bad idea. One of the benefits of home education and one of the banes of public education is this notion of standardization. In the home environment individualized attention and custom education is possible, whereas it is impossible in a public school environment. Parents should not be subjected to the constraints of a particular standardized test in educating their children. By requiring the use of standardized tests, this bill is an attempt to standardize children, something the United States Supreme Court has said the government may not do.

In *Pierce v. Society of Sisters*, the United State Supreme Court penned these important words when considering the right of parents to educate their children relative to the power of the government to interfere: “*The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.*” 268 U.S. 510, 535 (1925).

Current law provides clear guidance to participating agencies whereas H.B. 367 will create confusion for them.

Current law is explicit as to what documents “academic progress” and gives a number of alternatives for parents to choose from in order to demonstrate this progress.

These include a teacher’s report, a national student achievement test, a state student assessment test or any other valid measurement tool mutually agreed upon by the participating agency and the parent. The current approaches provide specificity, detail and objective standards by which the parent and the participating agency can operate to know that they are in compliance with the law. The ability of parents to choose an approach which best suits their needs and the needs of their individual children are also an important positive aspect of the current law. Not all children test well on standardized tests, and not all parents wish to use standardized tests in their educational program. Although the standard in the current law of 40% as demonstrative of adequate educational progress is higher than in most other states that provide a percentile norm (e.g. Minnesota is 30% and Ohio is 25%), this standard is objective which is an important attribute when applying standards to homeschool programs.

The proposed legislation contains no standard and thus opens the door for arbitrariness and confusion which, as earlier pointed out in *Grayned*, conflicts with the important principles of legislative authority.

Current Law is balanced, specific, detailed and objective whereas H.B. 367 creates vague and unbalanced general subjectivity which will likely lead to arbitrary and capricious enforcement problems.

The proposed law eliminates these carefully balanced, specific and objective assessment options for parents and applies a one size fits all approach that requires a participating agency to review both standardized test results and a portfolio report to determine in its own subjective “judgment” whether a student has “demonstrated adequate academic growth over the course of the school year.” Without arguing whether “academic growth” and “academic progress” are the same, this language is potentially vague and destroys the scheme created in 1990 to allow parents options and to provide clear standards to participating agencies. Requiring participating agencies to exercise their own “judgment” adds an additional burden on the participating agency and introduces *subjectivity* where *objectivity* is preferred. This language on its own would transform NHs homeschool law into potentially one of the most restrictive and problematic laws in the country. Today, Pennsylvania has a portfolio review requirement that routinely creates problems of administration for homeschoolers and school officials because of the lack of objective standards by which to judge submissions.

Current Law was the careful product of deliberation between New Hampshire legislators, homeschoolers and other stakeholders. H.B. 367 is the product of one legislator without involvement and indeed against the recommendation of a study commission set up for the purpose of studying the issue and recommending any needed legislation.

New Hampshire's homeschool law was passed in 1990 after much deliberation among all stakeholders including homeschoolers, public education officials, and legislators. The next year, in 1991, the New Hampshire legislature amended the homeschool law to add a statement of purpose

"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...The general court further recognizes that home education is more individualized instruction than instruction normally provided in the classroom setting."

The law has since been slightly modified. Then, in 2008, a legislative commission, formed by S.B. 337, to examine to see if changes were needed in the law voted 4-2, with one abstention by the chairman, NOT to make changes to the home school law. In the face of this vote, and a lack of substantive data indicating any problem to be solved at all (never mind that the current draft not only does not SOLVE a problem but would create a host of other problems), Representative Day has proposed radical changes to the law in the form of H.B. 367 and 368.

In the surrounding states of Vermont, Massachusetts and Maine, the last 20 years have seen great conflict between homeschoolers and the government over how much government involvement is appropriate. In Massachusetts there have been two Supreme Court cases and a number of lower level court cases -- even today there is constant friction between homeschoolers and local school officials. In Vermont there are dozens of hearings every year over usually minor issues of administration and paperwork at the State level. In 2003, Maine finally reduced the amount of regulation on homeschoolers and switched its law from approval to a "notice of intent" because of the problems. In stark contrast, New Hampshire has enjoyed a healthy relationship between homeschoolers and the government because of the parent's options, created by the law, to partner with a non-public school and to choose from among four different options to comply with the annual assessment.

H.B. 367 ignores both New Hampshire's study commission recommendations and the growing body of research demonstrating that homeschooling works and that the trend in homeschooling is de-regulation not increased regulation.

In 2008, the New Hampshire Legislature passed S.B.337 which slightly modified the existing law and created a study commission that was to meet and report any needed legislation to the legislature. While the actual contents of the study report have not been officially published, a majority of the commission voted not to change any aspects of the homeschool law.

A growing body of national research supports the contention that increasing regulation on homeschooling does not further the interests of the state or assists homeschoolers.

Since the first homeschooling laws were implemented in the 1980s homeschooling has continued to grow and become a mainstream educational alternative to public and private schools. The latest U.S.

Department of Education estimates that there are approximately 1.5 million homeschooled students in the United States.¹

A growing body of research demonstrates that homeschooling produces superior academic performance in students who are mature, civic minded and socially aware. Studies have also demonstrated that there is no correlation between increased regulation and higher academic performance. Therefore, since NH already as a more regulated environment for homeschoolers, there is no independent credible evidence suggesting a need to change the law. In the absence of evidence to the contrary, additional regulation should not be imposed. And, where the regulated population is willing to comply with current laws and regulations that have served the state's purpose, the status quo should be preserved.

For studies that show this information follow these links:

<http://www.hslda.org/docs/study/comp2001/HomeSchoolAchievement.pdf>

<http://www.hslda.org/docs/nche/000010/200410250.asp>

<http://www.hslda.org/research/ray2003/Socialization.asp>

Other research is also available at www.hslda.org/research

Other talking points may be found at: <http://groups.yahoo.com/group/legalizehomeschooling>.

¹ <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2009030>

PREPARING FOR TESTIMONY

New Hampshire homeschoolers are becoming altogether too familiar with the process of testifying before the education committee. Please keep these general guidelines in mind as you prepare to testify. Last year New Hampshire's Education Committee Chair, Emma Rous, was gracious enough to allow all citizens who wished to attend and testify an opportunity to be heard in Representative Hall. We can hope that such will be the case again this year.

If you desire to testify you will need to submit a card which is usually available at the door as you enter the committee chamber. There is also a register that you can sign to indicate whether you are attending in opposition or support of the bill. When testifying it is also a good practice to spell your last name for the record and to hand your written testimony to the committee before beginning your verbal testimony.

It is helpful to create your testimony in two forms; written and verbal. In the event that you are unable to testify verbally you may still submit your written statement to the committee. As you prepare your testimony it is the custom of the legislature to ask people to keep their testimony limited so that others can have their say. The committee usually reminds witnesses not to repeat points previously repeated. Personal experiences that illustrate points already made are not repetitive. You can state that you agree with a point made and would like to provide an example of the practical effect or consequence of the legislation or an anecdote or real life example of how homeschooling has benefitted your children and how, in contrast, the proposed regulations would affect you.

You may also choose one of the points contained in this or other memos to discuss and elaborate briefly on how this would affect you personally as a citizen.

It is likely that there will be hundreds of New Hampshire homeschoolers and others interested in testifying. Therefore it is in our interest to be as sensitive to the demands on all witnesses and the committee. By preparing your oral testimony in advance you can practice it and insure that it does not take more than 1-3 minutes to deliver. It is also appropriate to provide a more extensive written testimony as a companion to the oral testimony.

In oral testimony it is always best to be as polite as persuasively possible. It is appropriate to remember that New Hampshire legislators are essentially volunteers who, for the most part, wish to do what is best for the state and their constituents. While we may disagree vehemently in principal, it is possible to disagree without being "disagreeable". We can thank the committee for their service and ask them to vote ITL on the legislation.

Thank you for your commitment to freedom and to your family in being ready to stand with us as we attempt to defeat this unnecessary and misguided legislation.