

# HB 301

---

*An analysis of the New Hampshire Homeschool Freedom Act*

**Michael P. Donnelly, Esq.**  
**Staff Attorney for Member Affairs in:**  
**CO, MA, MN, NE, NH, OH, UT, VT, WY, WV, D.C.**  
**Director of International Relations**  
**HSLDA**  
**1 Patrick Henry Circle**  
**Purcellville, VA 20132**

## Contents

1. Summary .....	3
2. Protects Fundamental Rights .....	4
3. Protects Flexibility .....	5
4. Protects Choice .....	5
5. Simple One-time Notice .....	5
6. Removes Required assessments .....	6
7. Recognizes that Children are Unique .....	6
8. No Mandated (or “Encouraged”) Instructional Subjects .....	7
9. Provides Explicit Privacy Protection .....	7
10. Highest Due Process Protection .....	7
Why is this so important? .....	7
11. Removes Department of Education .....	10
12. Abolishes State’s Authority to Terminate a Home Education Program .....	11
13. Exempts Homeschoolers from Truancy Law .....	13
14. Informed by Success in Other States.....	13
15. Developed in Consultation.....	13
16. Conclusion.....	14

## 1. Summary

New Hampshire homeschoolers have defended themselves valiantly from attempts in recent years to impose onerous restrictions on homeschooling families; battles which prompted HSLDA to turn New Hampshire “red” on its national map of homeschool laws to show its “hostile legislative climate.” The most recent election has, however, improved this “climate” resulting in a number of proposals to improve New Hampshire’s twenty year old homeschool law, New Hampshire Revised Statutes Annotated 193-A (“RSA 193-A”).

HSLDA supports HB 301 sponsored by Representative Jim Parison, and we encourage our members to do the same. This document sets forth in detail the key points of the bill and explains why HSLDA is supportive of this legislation.

HB 301 dramatically improves New Hampshire's homeschool law. It creates a simpler homeschool law that recognizes parents' fundamental rights, provides for straightforward one-time notification and explicitly protects homeschoolers' privacy. The bill removes required assessments and all Department of Education (DOE) involvement in home education (HB 595 retains rule making authority for the DOE). In light of removing DOE's oversight, HB 301 creates a careful legislative framework to protect parents from unwanted encounters with DCYF, family courts, truancy officers and school officials. Unlike HB 595 the bill also removes the state's authority to terminate a home education program or force children to attend a school.

HB 301 affords homeschooling parents the highest levels of due process protections. With a sponsor's amendment, Representative Parison has taken

necessary action to remove certain language mistakenly retained during the bill drafting process and to improve the bill. The current amendment would create a system of warnings and then violation for state enforcement of the bill. A violation by definition of NH RSA 625:9 is not a crime although a person charged with a violation does receive the benefit of heightened criminal due process protection in the District Court e.g. innocent until proven guilty, strong rules of evidence etc...

The Bill is carefully drafted to create greater flexibility and freedom and reduce bureaucracy; HSLDA is convinced that New Hampshire homeschoolers will be well served by supporting HB 301.

HSLDA also knows that Representative Parison is a strong and experienced champion of homeschooling freedom. He has been a New Hampshire homeschooling parent for over 20 years, is a member of the CheNH board and has served for six years as CheNH's president. He has been at the "tip of the spear" fighting for New Hampshire homeschoolers these past four years. Representative Parison has consulted with state homeschool organizations and leaders, members of the Home Education Advisory Council, homeschooling parents and supportive state representatives, including his co-sponsors who are Representatives Paul Mirski, and Charles Sova, and Senators Raymond White and Sharon Carson.

## **2. Protects Fundamental Rights**

- a. In both the statement of purpose and operative text of the law, HB 301 recognizes the fundamental right of parents to direct their children's education.

### **3. Protects Flexibility**

- a. HB 301's definition of homeschooling explicitly contemplates that education will often take place outside the home and involve other persons besides the parent. This guarantees flexibility to parents to determine the best approach for their children's education

### **4. Protects Choice**

- a. As under current law, parents may choose a participating agent (either the public school district superintendent or a private school principal).

### **5. Simple One-time Notice**

- a. HSLDA has helped other states improve their homeschool laws by replacing annual notification and assessment requirements, like those in New Hampshire, with a one-time notice, e.g. Arizona and Nevada. A single notice as contemplated under HB 301 has had the effect of reducing the risk of erroneous truancy prosecution by providing the homeschooling parent with "evidence" of "compliance" when challenged over compulsory attendance issues and, in many cases, allegations of educational neglect.
- b. While HSLDA ranks states with no notice laws as the freest of states – nearly all of these states have had court cases that have created precedent to protect the implicit right of homeschoolers to comply with or exempt from compulsory school attendance. New Hampshire does not have such case precedent, which makes having an explicit statute recognizing home education helpful. In fact court precedent in the area of education is somewhat alarming including Appeal of Peirce which was a homeschooling case as well as the Court's Claremont decisions. These

cases indicate that education is a cause the court is highly interested in and believes that it is appropriate for the State to be highly involved with.

- c. Our experience in these states with “no-notice” freedom is that such freedom, while greatly appreciated by homeschoolers, does come with a slightly higher risk and incidence of interference from government officials, such as truancy officers or social workers. We find that, in the one-time or simple notice states, the simple fact of filing a notice is often sufficient to send truancy officers and social workers off to deal with their more pressing and serious cases. It should be obvious that notification **is not** seeking approval but is more like an administrative courtesy. Mere notification does not tarnish or abrogate this right but simply reduces the risk that homeschooling parents will face unnecessary and unwanted government intrusion. In no-notice states, we have and continue to experience a somewhat higher incidence of intrusion. While this intrusion is normally resolvable, we believe that the small “price” of notification is worth it. Some might argue that all parents in the state must “notify” what their intentions are with respect to education, e.g. enrolling in a private or public school or notification of homeschooling.

## **6. Removes Required assessments**

- a. While parents will undoubtedly continue to assess their own children according to their standards, there will not be a government mandated assessment. Under HB 301, parents are free to choose the appropriate form and frequency of assessment to insure that their children are being educated towards the level of literacy and self sufficiency set by parents in accordance with each child’s age or ability.

## **7. Recognizes that Children are Unique**

- a. HB 301 recognizes that education should be according to age or ability not with some cookie cutter standards. The law explicitly recognizes that each child is unique and will progress at his or her own pace and as determined by their parents. There are no impositions of external or publicly determined standards to apply.

## **8. No Mandated (or “Encouraged”) Instructional Subjects**

- a. Under HB 301, parents will be free to determine what and how they teach their children. Numerous homeschoolers in New Hampshire have told us that listing subjects in the current law has contributed to confusion in rule drafting and created confusion regarding when they are “supposed” to teach what subject. This bill removes the list and puts parents in the driver’s seat of determining what and how they are to teach their children. There are no encouraged subjects or virtues contained in HB 301. It is up to parents to determine what their children will learn.

## **9. Provides Explicit Privacy Protection**

- a. HB 301 includes explicit language that protects the privacy of homeschool information maintained, for whatever reason, by state agencies. This was a specific request from numerous homeschooling parents.

## **10. Highest Due Process Protection**

**Why is this so important?**

- a. Over the last 20 years in New Hampshire, only a handful of cases have ever been brought under the current due process procedure which allows for a one year probation and then if progress is not made, termination of a home education program – not one home education has ever been terminated by the state. It is reasonable to expect that this should continue under the new law. Homeschoolers are doing a good job in NH.
- b. However, it is important to understand that one of the reasons DCYF has not been involved with home educators for so long is precisely because the Department of Education (DOE) was recognized to have jurisdiction over homeschoolers through the current homeschool law's due process and hearing procedures.
- c. Prior to enactment of RSA 193-A in 1990, homeschoolers were brought into family court under educational neglect charges. This is precisely why it is so important to carefully articulate standards and procedures that explicitly protect parents from family court run neglect proceedings. Because the DOE will no longer have jurisdiction over home educators under HB 301, it is critical to ensure that justice in other courts is available instead of family courts.
- d. Under statutory rules established explicitly for the family courts under RSA 169-C the rules of evidence are relaxed to admit hearsay and opinion evidence. A family court is also allowed to make rulings on the basis of a "preponderance of evidence," rather than "beyond a reasonable doubt." The rules in family court impose a "gag-order" of confidentiality to proceedings and on all parties so that any abuses or injustices are hidden from the light of day. While these rules were created to protect the confidentiality of families and children, and often do, the down side is that abuses and over reaching by state agencies and courts is hidden and difficult to challenge.
- e. To address this, HB 301 removes educational neglect from the Child Protection Act and requires that a parent receive 2 warnings prior to being prosecuted from a violation.

- f. A violation is not a crime. NH RSA 625:9 states in part "(b) A violation does not constitute a crime and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense."
- g. However a "violation" is an offense and thus subjects a person to criminal due process which is stronger than civil due process. According to RSA 625:10 which says "No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is assumed."
  - a. HB 301 extends the highest levels of due process protection to parents in these unlikely circumstances. These statutory and constitutional protections require probable cause, a burden of proof that is innocent until proven guilty, *real* rules of evidence, and open courts.
  - b. Because HB 301 does not require subjects or assessments, unschooling families need not fear notification or prosecution because of their educational approach.
  - c. By establishing defenses and affirmative defenses, HB 301 creates specific means by which a homeschooling parent can demonstrate their innocence in the unlikely event that they are ever called upon to do so. The bill establishes reasonable criteria to end prosecution swiftly without a long inquiry. The bill provides parents with reasonable and minimal standards to demonstrate a prosecution should not go forward. Such evidence may include results of a national standardized achievement test showing above the 15<sup>th</sup> percentile, a letter from a credentialed teacher, or other evidence, such as educational materials or anything else that demonstrates a child was being educated towards literacy and self sufficiency commensurate with the child's age or ability.
  - d. No agency would be able to simply require homeschoolers to produce such evidence. Prosecutors would have to have probable cause to move forward with a case first and parents would be presumed innocent until proven guilty.

- e. The bill establishes a reasonable standard recognizing that, in our society, we, as parents, have a duty that goes along with our right to educate our children. The bill recognizes that not all children progress at the same rate and protects parents from being treated by courts or agencies according to arbitrary standards set by the public education system. Thus, in the unlikely event that parents who are educating their children, face prosecution and must defend themselves these reasonable safeguards create a straightforward and reasonable defenses. These defenses protect parents from judges who might be quick to look to the public school system and apply arbitrary or subjective age and grade level standards to children.

## **11. Removes Department of Education**

- a. Under HB 301, the DOE would no longer have rule making or oversight responsibility for home education. This is not the case under HB 595 which the bill's author and proponents point to as a key reason that their bill is better than 301.
- b. Under HB 301, the current rules would cease to be enforceable since the DOE would be without authority to make rules. HB 301 repeals the specific grant of rule making authority which is necessary for any administrative agency to have the ability to engage in rule making.
- c. This is critical. In it 27 years of experience HSLDA has discovered that the rule making process can be quite dangerous for homeschoolers. Administrative agencies can and have exercised great "liberty" in writing rules – and the law grants them a great amount of discretion to write rules that "reasonable". Because rule making occurs outside of the statutory process the initial draft created by the administrative
- d. Under current law, the HEAC provides an important governing mechanism on the DOE to prevent it from writing rules however it sees fit. Today the

HEAC includes 6 homeschoolers and 6 educators appointed by the DOE as well as some legislators. This group serves as an advisory body with respect to rulemaking. This kind of formalized input has been an important reason why in New Hampshire homeschoolers have not had unreasonable rules in the past – despite attempts on the part of the DOE to create new requirements that homeschoolers opposed.

- e. Under 595 the DOE would retain rulemaking authority but homeschoolers would lose an important counter balancing “check” in the process.
- f. Administrative agencies should not be permitted an unfettered ability to write rules as they see fit. Unfortunately the SBOE and JLCAR while providing some oversight are not as strong a counterweight as HEAC. Under HB 595, homeschoolers would be at the whim of an administrative agency given essentially unfettered rule making authority. Such a situation would not be an improvement over the current rule making approach and would likely require significant effort on the part of homeschooling advocates and families to monitor the rules

## **12. Abolishes State’s Authority to Terminate a Home Education Program**

- a. Under current law (and some other current legislative proposals) the state can eventually terminate a parent’s right to homeschool. This should not be. Under our federal constitution, a fit parent is presumed to make decisions in the best interests of their children. And until a determination of unfitness is made, the state should never be permitted to over-ride that parents’ decision.
- b. Under HB 301, the remedy available to the state when an allegation is made against a homeschooling family would be to warn the parents and could only proceed if two warnings were given. A violation is defined under NH RSA 625:9 and is not a crime - see NH RSA 625:9 which says

in part "(b) A violation does not constitute a crime and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense." Nevertheless, an offense grants a defendant accused of a violation criminal due process (which is stronger than civil due process although Jones bill has imported some of the language of criminal due process into her bill but called it a civil offense - which is in and of itself confusing) AND according to RSA 625:10 which says "No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is assumed."

- c. Because, as previously pointed out, this is a high standard of culpability, and because probable cause would be required to prosecute, it is likely that only the most meritorious cases would be brought to court. Based on the fact that only very few homeschoolers have ever been challenged under the current due process standard, it is likely that there will be no prosecutions under the new approach.
- d. Those who follow "non-traditional" educational approaches have nothing to fear from HB 301. Under HB 301, parents are completely free to direct their children's education as they see fit.
- e. The duty under HB 301 is simple – education towards literacy and self-sufficiency, commensurate with age or ability. This means something different for each child. HB 301 treats children as individuals and protects parents' rights to individualize each child's education according that child's unique talents and abilities.
- f. HSLDA's experience has been that in cases where parents are as derelict as to "purposely fail" to provide their children with an education, there are other more serious issues. Failure to educate a child does not rise to the level of harm that should empower the state to dramatically interfere with a family by taking custody of a child or terminating a parent's right to educate their child at home. The likelihood of any cases being initiated under this standard is low. And those cases that are initiated have a

higher probability of being meritorious in large part because county prosecutors, who have real crimes to go after, are extremely unlikely to waste their resources and time quibbling over minor educational differences, such as whether a particular curriculum, or the any curriculum, is evidence of a purposeful failure to educate.

### **13. Exempts Homeschoolers from Truancy Law**

- a. The law exempts parents who are homeschooling from the truancy law. And because of notification, provides an easy way for parents to avoid harassment from truancy officers and overzealous school officials.

### **14. Informed by Success in Other States**

- a. Arizona and Nevada are two states that have moved from home school regimes very similar to New Hampshire's current law with annual notification and assessment. Working together, state homeschool organizations and HSLDA were successful in creating laws with one time notice and no required assessments. In the years since these laws were passed, homeschoolers report that they are working very well.

### **15. Developed in Consultation**

- a. HB 301 was developed based on input from national homeschool associations, state level associations, past and present members of the HEAC, homeschooling parents and homeschool supportive legislators.
- b. HB 301 was developed after coordination among a number of interested and supportive groups and individuals. Along the way, there have been

refinements and changes made. HB 301 takes into account many important considerations and, with the sponsor's amendment, stands as a very strong proposal to improve New Hampshire's home school law.

## **16. Conclusion**

This Bill is carefully drafted to create greater flexibility and freedom, reduce bureaucracy, and protect family freedoms. HSLDA is convinced that New Hampshire homeschoolers will be well served by supporting HB 301.