
MEMORANDUM

TO: COUNCIL OF THE DISTRICT OF COLUMBIA
FROM: SCOTT W. SOMERVILLE, ESQ.
SUBJECT: CONSTITUTIONAL CHALLENGES TO BILL 14-261
COMPULSORY SCHOOL ATTENDANCE AMENDMENT ACT OF 2001
DATE: 3/27/2002
CC: HSLDA MEMBERS IN D.C.

Councilmember Kevin Chavous has introduced a bill that would lower the compulsory attendance age in the District. Under the terms of Bill 14-261, all four-year-old children, all three-year-old children, and one-third of all two-year-old children would be required to attend school.¹ We believe this bill unconstitutionally infringes the fundamental rights of parents. Since we are obligated to represent the interests of our members in the District, we would have no choice but to file suit if this bill is enacted into law. We submit this memorandum in a good faith effort to avoid litigation.

BILL 14-261 IS A RADICAL CHANGE

Bill 14-261 is sure to wind up in court because it is a radical change in the law. It would change the nature of compulsory attendance at the most basic level. Before addressing the constitutional dimensions of this change, it is worth taking stock of just how significant a change it would be.

The District of Columbia already enforces the lowest compulsory attendance age in America. The following are the compulsory attendance ages for a child as of September 1 of each school year:

- Eight: PA, WA
- Seven: AL, AK, CO, ID, IL, IN, KS, LA, ME, MN, MO, MT, NE, NV, NM, NC, ND, OR, WY
- Six, or seven at parent's option: SD, TN
- Six: AZ, GA, HI, IA, KY, MA, MI, MS, NH, NJ, NY, OH, OK, TX, UT, VT, WV, WI
- Five and two-thirds: CA, RI
- Five and one-half: FL
- Five, or six at parent's option: AR, CT, MD, SC, VA
- Five, or six at school's option: DE²
- Four and two-thirds: DC

Bill 14-261 changes the very nature and purpose of compulsory attendance. Since it will compel one third of all two-year-old children to attend school, a significant number of children in the

¹ Compulsory attendance would apply to every child "who has reached the age of 3 years or will become 3 years of age on or before December 31st of the current year." This means that children who are only two years and eight months old at the end of August would have to attend school in September.

² Delaware requires local school authorities to agree with the parent's request to opt the child out.

District will start “school” in diapers. If the District school buses to transport children of this age, those buses will need infant seats: no motor vehicle operator may transport a child under three without the child restraint seats required by law. D.C. Code § 40-1203(a).

If the District *raised* the compulsory age by the same proportion that bill 14-261 lowers it, pupils would have to attend school until they were over 25.³ Those seven extra years of compulsory attendance would be enough to complete a bachelor's degree, get a master's, and start a doctorate.

Washington, DC, is at one extreme of the compulsory attendance spectrum. In a curious coincidence, Washington State marks the other extreme, with a starting age of eight. If Bill 14-261 passes, children in Washington State will be three times as old as children in the District before they must start school (eight is exactly three times two and two-thirds).

BILL 14-261 IS A CHANGE IN KIND, NOT JUST A CHANGE IN DEGREE

Bill 14-261 does not merely change the age at which school starts. It changes the nature of what school is. Throughout our history as a people, school has begun with books. The District's present compulsory attendance age is already as low as one can go and still expect school to be about books. Bill 14-261 compels attendance at preschool, not school. Compulsory school attendance has been upheld by many courts against constitutional challenges, but no court has ever upheld compelled attendance at preschool. If Bill 14-261 is enacted, it will face such a challenge.

Traditionally, the years from two to five have been dedicated to *parenting* children, not *schooling* them. During the hours when school is in session, parents feed their children, instruct them, correct them, talk to them, play with them, tell them stories, and put them down for naps. In an effort to enhance a child's readiness to read, Bill 14-261 takes away all these opportunities away from parents and hands them over to paid professionals. If preschool employees perform all these parental functions, then they are really doing the job of a parent, not a teacher. If preschool employees do *not* perform these parental functions, then the children are missing something essential.

“Preschool” is not school: the term self-evidently refers to something that comes *before* school. Traditionally, what comes before school is home. Courts have universally upheld the government's right to compel attendance at school, but to the best of our knowledge, no American court has ever allowed a state to take a preschool child away from fit parents. Bill 14-261 is an unprecedented extension of government power over homes.

Children begin learning and developing intellectually from the date of their birth—probably much sooner. This early development and learning helps set the stage for learning at traditional school age. If the government is allowed to control the process of getting ready for learning at traditional school age, then government control will begin with birth.

BILL 14-261 BURDENS FUNDAMENTAL PARENTAL RIGHTS

Bill 14-261 places a substantial burden on a parent's fundamental right to direct the education and upbringing of a child. It directly affects “the oldest of the fundamental liberty interests” recognized by the United States Supreme Court:

³ Bill 14-261 lowers compulsory attendance from 56 months to 32 months, a drop of 42%. Raising the current upper age of 18 by a similar amount would produce a compulsory attendance age of 25.5.

The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 67 L. Ed. 1042, 43 S. Ct. 625 (1923), we held that the “liberty” protected by the Due Process Clause includes the right of parents to “establish a home and bring up children” and “to control the education of their own.” Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535, 69 L. Ed. 1070, 45 S. Ct. 571 (1925), we again held that the “liberty of parents and guardians” includes the right “to direct the upbringing and education of children under their control.”

Troxel v. Granville, 530 U.S. 57, 65-66 (2000).

The *Troxel* Court recited a long series of Supreme Court cases that have protected parental rights against state action, especially in the area of education. When Oregon tried to force every child to attend public school, the Supreme Court struck that down in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). When Nebraska banned the teaching of foreign languages, the Court struck that down in *Meyer v. Nebraska*, 262 U.S. 390 (1923). When Amish parents wanted to teach their children at home, the Court struck down Wisconsin's compulsory attendance law in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). A law that compels children to go to school in diapers cannot be enforced without first surviving strict judicial scrutiny.

THE D.C. CIRCUIT COURT OF APPEALS RECOGNIZES PARENTAL RIGHTS

The Court of Appeals for the District of Columbia recognizes parental rights. Parents challenged the District's juvenile curfew, arguing that it infringed their right to direct and control their children's upbringing. The court rejected this claim, “not because we think that no such fundamental right exists in any dimension, but rather because we think it not implicated by the curfew.” *Hutchins v. District of Columbia*, 188 F.3d 531, 540, 338 U.S. App. D.C. 11, 21 (D.C. Cir. 1999). The *Hutchins* Court upheld the curfew because it concluded that the curfew was “carefully fashioned much more to enhance parental authority than to challenge it.” *Hutchins*, 188 F.3d at 545, 540338 U.S. App. D.C. at 38. “If the parents' interests were in conflict with the state's interests, we would be faced with a more difficult balancing of sharply competing claims.” *Ibid*.

Although all the judges in *Hutchins* agreed that parental rights are important, the majority limited those rights to the “parents' control of the home and the parents' interest in controlling, if he or she wishes, the formal education of children.” *Ibid* at 24. Four judges believed that parental rights reached further than that, and included the parents' right to direct the children's activities outside the home. Judge Edwards wrote, “In my view, parental rights are implicated in this case and they are truly significant—indeed, these rights are at the core of our society's moral and constitutional fiber.” *Hutchins*, 188 F.3d at 549, 338 U.S. App. D.C. at 52 (Edwards, J., *concurring*). Judges Wald and Garland upheld the law, but only because they found that the rights of parents had been adequately accommodated by the curfew. *Ibid*, at 64. Judge Tatel dissented because he believed that the curfew unduly infringed upon parental rights. *Ibid* at 124. All eleven judges on the *Hutchins* panel would hold that Bill 14-261 places a burden on the fundamental rights of parents.

BILL 14-261 CANNOT SURVIVE INTERMEDIATE SCRUTINY

The *Hutchins* court recognized that any burden on a fundamental right must be subjected to some form of heightened scrutiny. The juvenile curfew in *Hutchins* was subjected to “intermediate scrutiny.” The curfew survived that level of scrutiny because the District “presented reams of evidence depicting the devastating impact of juvenile crime and victimization in the District—the

juvenile violent crime arrest rate for juveniles ages 10 to 17 was higher than that in any state and was more than three times the national average.” *Hutchins*, 188 F.3d at 542, 338 U.S. App. D.C. at 27.

Under intermediate scrutiny, a governmental action must be “substantially related” to the government’s “important interest.” Both the “means” and the “ends” must survive judicial review. The *Hutchins* court identified three interrelated concepts to help determine the closeness of the relationship between the means and the ends: (1) the factual premises upon which the legislature bases its decision, (2) the logical connection the remedy has to those premises, and (3) the scope of the remedy employed. *Hutchins*, 188 F.3d at 542, 338 U.S. App. D.C. at 29. The juvenile curfew survived intermediate scrutiny because the District (1) presented “reams” of data documenting the seriousness of the problem, (2) demonstrated that juvenile curfews had helped address that problem in other cities, and (3) drafted a curfew with many specific exemptions to reduce the burden on parental rights. Bill 14-261 cannot survive intermediate scrutiny on any of these three points.

To survive intermediate scrutiny, the District cannot rely on *some* studies that show that *some* preschools benefit *some* children. That kind of data would help justify making preschools available at no cost to disadvantaged parents, but that is not the issue here: the District already has free preschools. Instead the District must prove that *all* children must be compelled to attend preschool. There is no evidence to date that this is true.

BILL 14-261 IS NOT NECESSARY TO HELP THE CHILDREN OF “UNFIT PARENTS”

Our informal surveys show that the public believes compulsory attendance at preschool is plainly ridiculous unless the parents are “unfit.” If Bill 14-261 is intended to help the children of unfit parents by taking away the liberties of fit parents, it is both unconstitutional and unnecessary. The law already provides ways to assist the children of parents who have been determined to be unfit.

Mandatory preschool might help children of substance abusers, but DC law already provides a way to ensure that such children receive appropriate services. D.C. Code § 6.2104.1 allows the government to step in on the basis of “reasonable evidence that any member of the child’s home uses drugs illegally.” This low threshold of evidence allows the Department of Health and Human Services to offer any service authorized or required by any applicable laws or rules of the District. If a child is determined to be neglected, the Department must then determine whether the child should be removed from the home or can be protected by the provision of services or resources, including preschool. D.C. Code § 6.2105. Bill 14-261 is therefore not necessary to help children living in homes where there is evidence of illegal drug activity.

Parents who neglect or refuse to provide for the basic needs of their children have traditionally been considered “unfit.”⁴ The District already requires able-bodied parents to work (or actively seek

⁴ We do not suggest that parents are “unfit” simply because they receive temporary financial assistance from the government. The common law required parents to provide for their own family. *See, e.g., Cooper v. Ham*, 49 Ind. 393 (1875) (“there is a duty which he owes alike to the public and to his family which is sacred, and that duty is, to provide for the nurture, education and support of his children. He is said to be worse than an infidel, who neglects it”); *Foster v. Brown*, 65 Ind. 234 (1879) (“High authority has said, that he who neglects to provide for his household (by fair means, of course,) is worse than an infidel”); *Kelley v. Davis*, 49 N.H. 187 (1870) (“the duty of parents to provide reasonably for the maintenance and education of their children, until they shall be of sufficient age and capacity to provide for themselves is so clearly obvious to the mind and conscience, and so clearly prescribed by the positive precepts of religion, (for St. Paul says that “if any provide not for his own, and especially for those of his own house, he hath denied the faith and is worse than an

work) at least 30 hours each week to qualify for Temporary Assistance for Needy Families (TANF). 42 U.S.C. 607(c); *see* D.C. Code 3-205.21. In practice, this means that most able-bodied parents must put their children into preschool to get public aid. The only Welfare recipients who are not required to do so are the ones who are genuinely incapable of seeking employment, and there is no reason to treat these parents as “unfit.”

CONCLUSION

Bill 14-261 is a radical change that burdens the fundamental rights of “fit parents” while doing nothing new for the children of “unfit parents.” It will immediately be challenged in court, where it will undoubtedly be subjected to heightened scrutiny. The court will examine the factual premises for this legislation, the logical connection of means to ends, and the scope of the remedy employed. The court will find that the research is far from conclusive, the means are but distantly related to the ends, and the scope of the remedy is out of all proportion to the problem. Since parents have a fundamental right to direct the education and upbringing of their children, the courts must conclude that Bill 14-261 is unconstitutional. We therefore urge this Council to avoid unnecessary litigation by rejecting Bill 14-261.

infidel,”) that a violation of this duty, should, it would seem, be visited with severe punishment by human laws”).