IN THE COURT OF COMMON PLEAS
OF LACKAWANNA COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYVANIA	)	
Plaintiff	)	
	)	NO. NT-0000832-92
VS.	)	NT-0000833-93
	)	NT-0000834-92
MR. AND MRS. JOHN JEFFERY	)	
Defendants	)	

DEFENDANTS' AMENDED TRIAL BRIEF

Introduction

This case challenges the constitutionality of 24 P.S. ' 13-1327.1, Pennsylvania's law regulating home schooling, on its face and as applied to a father qualified to teach in a private religious school under 24 P.S. ' 13-1327(b). The defendant asks this Court to dismiss the prosecution because ' 13-1327.1 is unconstitutional on its face and as applied to the defendants.

Defendants raise three constitutional arguments:

1. Pennsylvania's home school statute is void for vagueness;
2. Pennsylvania's home school statute unconstitutionally delegates decision making to a person with a financial stake in the outcome.

3. Pennsylvania's home school statute unconstitutionally burdens the Jeffery's right to direct the education of their children in a manner consistent with their religious beliefs.

Facts

Defendants do not anticipate that the facts of this case will be in substantial dispute. There are certain significant areas of facts which do need to be developed to sustain the constitutional challenges raised.

We believe that the evidence introduced at trial will clearly show:

1. That Mr. and Mrs. Jeffery sincerely believe that God requires them to teach their children at home, since that is the only way they can fulfill the commandment of Scripture:

> "These words, which I command thee this day, shall be in thine heart:
> "And thou shalt teach them diligently unto thy children, and shalt talk of them when thou sittest in thine house, and when thou walkest by the way, and when thou liest down, and when thou risest up."

Deuteronomy 6:6-7.

2. That Mr. and Mrs. Jeffery sincerely believe that they must

> "render . . . unto Caesar the things that are Caesar's, and unto God the things that are God's,"

Matthew 22:21. This belief prohibits them from submitting their home instruction program to standardless review by a state agent;

3. That Mr. Jeffery's income level makes it impractical to afford tuition for all his children at private religious schools;

4. That the Jeffery's sincerely believe that the public school system is a "godless" system; and

5. That the National Education Association and other professional advocates of public schooling are on record as opposing home schooling on non-academic grounds.

I.
Pennsylvania Law Is Unconstitutionally Void For Vagueness

The Jefferys ask this Court to consider whether a vague law may be cured by simply replacing the offending words "properly qualified" and "satisfactory" by the equally vague phrases "appropriate education" and "sustained progress". A law which sets no standards for education is unconstitutionally vague, because it chills First Amendment activity.

Pennsylvania's new home school statute, 24 P.S. ' 13-1327.1, is unconstitutional for the same reason that Pennsylvania's old law was held void for vagueness in *Jeffery* v. *O'Donnell*, 702 F.Supp. 516 (M.D. Pa. 1988) [hereinafter "*Jeffery I*"]. The U.S. District Court for the Middle District of Pennsylvania held that 24 P.S. ' 13-1327 was unconstitutional because it used the terms "properly qualified tutor" and "satisfactory" without any guidelines to protect the plaintiffs' First Amendment rights. This Court must now consider whether Pennsylvania's new home school statute is consistent with the *Jeffery I* decision.

The *Jeffery I* court held that the Jefferys' home school program

implicated the First Amendment. *Jeffery I*, 702 F.Supp at 519. First Amendment freedoms are "fundamental" rights. The U.S. Supreme Court has held that there is a presumption that a law which implicates fundamental rights is unconstitutional. *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872, 888 (1990). If this Court follows the Supreme Court's rule, Pennsylvania's new home school statute should thus be presumed unconstitutional, until the Commonwealth is able to prove the reverse. To be specific, the prosecution bears the burden of proving that ' 13-1327.1 is consistent with the *Jeffery I* decision. See *Jeffery I*, 702 F.Supp. at 522.

The prosecution cannot satisfy their burden of proof, because the new home school statute *is* vague, and vague on the precise point that really matters. The new home school statute permits superintendents to shut down a home school program based on a finding that "*appropriate education* is not taking place for the child in the home education program." ' 13-1327.1(i) [emphasis supplied]. Appropriate education consists of three elements:

(1) instruction in the subjects required by law,

(2) for the statutorily prescribed time, and with

(3) "sustained progress" in the overall program.

' 13-1327.1(a). The statute makes no attempt to define sustained progress.

Jeffery I held that "absent definition in the statute itself, and failing supplementary support from regulations promulgated by the Department of Education, the law providing for . . . ["satisfactory"] education is unconstitutionally vague." *Jeffery I*, 702 F.Supp. at 521. The court there cited

four constitutional values which had been offended.

1. A person of ordinary intelligence could not reasonably steer between the lawful and unlawful to avoid criminal prosecution.

2. There were no standards for determining who was "qualified" and what was "satisfactory."

3. Superintendents made decisions on an ad hoc basis which could result in the dangers of arbitrary and discriminatory application.

4. The law implicated First Amendment freedoms.

Each of the elements listed in *Jeffery I* are offended here. The Jefferys are now prosecuted under a new statute which does not define "sustained progress" for the person of reasonable intelligence, which offers no standards for that component of "appropriate" education, which puts ad hoc decision-making power in the hands of local superintendents, and which continues to burden the Jefferys' First Amendment freedoms.

The Pennsylvania Legislature cannot escape its duty to define "sustained progress" by delegating the job to local public school superintendents, just as it could not escape its duty to define "satisfactory" instruction by delegating it to the superintendents. *Jeffery I*, 702 F.Supp. at 521. The burden of proof is upon the prosecution to show that "appropriate" is not vague. Until they do so, the Jefferys may not be convicted.

The Commonwealth may argue that a clear definition of "sustained progress" would allow parents to teach down to the minimum standards, and that the State therefore has a compelling interest in keeping the standards undefined. Such an argument is unconstitutional on its face. No State has the

right to be intentionally vague where the First Amendment is at stake.

II.

Pennsylvania Law Unconstitutionally Delegates Decision-Making To A Person With A Financial Stake In The Outcome

Superintendents have a vested interest in the public school they administer, and this interest prevents a superintendent from being the neutral decision-maker required by the Due Process Clause of the Fourteenth Amendment.

In Pennsylvania, a family may only home school from year to year if the local superintendent finds that "appropriate education" is taking place. 24 P.S. ' 13-1327.1(i). Each student whose home school program is terminated and then enrolls in the public school would increase the school district's state aid by a complex formula which amounts, on average, to between 30 and 40 percent of the annual per pupil cost. 24 P.S. ' 25-2502. If a family continues to educate the child at home after the superintendent finds the home instruction is not "appropriate", the superintendent may prosecute the family. Any fines imposed as a result of such prosecution are collected "for the benefit of the school district in which such offending person resides." 24 P.S. ' 13-1333. Thus, either way, the superintendent's district gets more money.

The Supreme Court of the United States has definitively ruled that a decision-maker with a financial stake in the outcome is not a neutral magistrate. Entrusting standardless review of a home school program to such a party is a violation of the Fourteenth Amendment Due Process Clause.

In *Tumey* v. *Ohio*, 273 U.S. 510 (1927), a mayor was the decision-maker in a process concerning a liquor law. If the mayor decided in favor of the individual, the city would receive no money. But if the mayor decided against the individual appearing before him, the mayor received a nominal sum of money while the city received a substantial sum of money. The Supreme Court held that both types of financial incentives violate the Due Process Clause. It does not matter if the situation is as here, where the financial incentive flows exclusively to the governmental entity and not to the individual. *Tumey* also stands for the proposition that a local government official who has a financial stake in the outcome on behalf of his local governmental unit is not a neutral decision-maker for the purpose of the Due Process Clause.

In a more recent case, *Ward* v. *Monroeville*, 409 U.S. 57 (1972), the Supreme Court reaffirmed *Tumey* and made even more clear that the financial incentive need not be personal to the decision-maker. A financial incentive on behalf of his governmental unit is sufficient to violate the Due Process Clause. It does not cure the Due Process defect to allow for a review by an independent hearing officer. First of all, the Supreme Court rejected the argument that ultimate review by a neutral decision-maker would be sufficient in *Ward*, saying:

> Respondent also argues that any unfairness at the trial level can be corrected on appeal and trial de novo in the County Court of Common Pleas. We disagree. This 'procedural safeguard' does not guarantee a fair trial in the mayor's court; there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal. Nor, in any event, may the State's trial court procedure be deemed constitutionally

> acceptable simply because the State eventually offers a defendant an impartial adjudication. *Petitioner is entitled to a neutral and detached judge in the first instance.*"

409 U.S., at 61-62. [Emphasis added.]

It is informative to note that in the heavily litigated area of special education, independent hearing officers are chosen and compensated directly by the Secretary of Education, and may not be an employee or agent of a school entity or agency responsible for the child. 22 P.S. ' 14.64(n). By contrast, home school hearing officers are chosen and compensated directly by the local school district. It is hard to see how letting the decision-maker pick and pay the person who will review his or her decision comports with due process.

The only federal court to comment, thus far, on the application of this financial incentive/Due Process argument in an education case came down clearly in support of the defendant's position in this case. In *Fellowship Baptist Church* v. *Benton*, 620 F.Supp. 308 (S.D. Iowa 1985); 815 F.2d 486 (8th Cir. 1986), the federal district court stated the following in a case challenging Iowa's private education law:

> "The Court cannot leave this issue without pointing out other troubling matters. There may be problems when the responsibility of determining equivalent education is placed on local school boards even when more closely defined for two reasons. First each local school board may still have a different interpretation. Second, local school boards have an *inherent conflict of interest* since each student in a private school is potentially a *source of additional state aid.*"

620 F.Supp., at 318. [Emphasis added.] It is clear that the Due Process Clause is contravened when a government decision-maker can effectively put money

into his official coffers by denying a parent the right of home education, especially where that decision-maker is given no standard by which to measure "sustained progress."

Actually, the Due Process Clause's requirement of neutrality runs deeper than mere monetary neutrality. The principle of due process is violated when the decision-maker occupies two positions -- "one partisan, the other judicial." *Ward*, *supra*. Superintendents should be strong advocates of public education, and characteristically are so. Can it be consistent with Due Process to give such a partisan the power of standardless, discretionary review of a competing form of education? The superintendent's job is to make the public school system the best it can be. He or she is placed in an awkward position to rule when a child is getting an acceptable level of education by non-professional parents. This would be the equivalent of allowing the local bar president the right to decide when a litigant may appear pro se. Natural professional pride makes such a decision difficult to administer in a neutral and detached manner.

In addition, parents who decide to pull a child out of the public school system typically do so because of a conviction that the public school has failed in some essential respect. Of all the possible decision-makers, the superintendent bears the most direct responsibility for the school system which the parents have rejected. These parents believe their programs work, but they have reason to wonder if the superintendent can give them a fair hearing.

Other states have resolved this issue without leaving the decision up to

public school personnel. New Hampshire requires every home school family to be supervised by someone, but gives the family the choice of being supervised by the local public school superintendent, the State Department of Education, or a private school principal. New Hampshire Rev. Stat. Ann. '193-A. Many states set objective minimum criteria which home schools must meet, and thus provide a bypass for discretionary review. Ark. Stat. Ann. ' 6-15-505; Col. Rev. Stat. ' 22-33-104.5(5)(a); Hawaii Rev. Stat. ' 298-9 and Hawaii Admin. Rules, ' 8-12-15; Iowa Code Ann. " 299B.4 and 299B.5; Louisiana Rev. Stat. Ann. ' 17:24.4; Minn. Stat. Ann. ' 120.101(8)(c); Nev. Rev. Stat. Ann. ' 392.065(7); New York Ed. Law ' 3205; N.D. Century Code ' 15-34.1-03; Ohio Rev. Code Ann. ' 3301-34-04; Or. Rev. Stat. ' 339-035(3)(a)-(e) as defined by Ore. Admin. Rules Ch. 581-21-026 through 028; Code of Laws of S.C. Ann. ' 59-65-40(D); Tenn. Code Ann. ' 49-6-3050(b)(6); Code of Va. Ann. ' 22.1-254.1(C); W.Va. Code ' 18-8-1(B)(b).

Nothing could be more different from public schooling than is home schooling. Home schools, by their very existence, challenge the assumptions and practices of public schooling. The public school superintendent cannot reasonably be expected to be a neutral decision-maker in evaluating this competing form of education.

III.
Pennsylvania Law Unconstitutionally Burdens The Jeffery's Right To Direct The Education Of Their Children In A Manner Consistent With Their Religious Beliefs

The Jefferys both believe that they must provide a religious education at home, and that they may not "render unto Caesar" the things that are God's. Their religious education program, they believe, belongs to God.

The choice of a religious education for one's child is a hybrid right demanding the highest level of judicial scrutiny. *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990). When coupled with the parent's right to direct the education of a child, the Free Exercise Clause demands a four part analysis. *Smith*, 494 U.S. at 881; *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

First, the religious litigant must be sincere. This is a matter of res judicata: the Jefferys have been in and out of state and federal courts since 1988 because of their sincerity.

Next, the litigant must show that the governmental requirements "burden" the exercise of his faith. In this case, there are two distinct "burdens." Mr. and Mrs. Jeffery are being criminally prosecuted because they refuse to "render unto Caesar" the things that are God's by submitting their program to standardless review. If the government seeks to prohibit or regulate the exercise of one's faith, or command actions in disobedience to one's faith, a burden has been shown. *Thomas* v. *Review Board*, 450 U.S. 707 (1981). If they were to submit their program to standardless review, they bear an additional burden, the family must also guess at what the superintendent will think constitutes "sustained progress." Will the superintendent determine that studying Martin Luther fulfills the statutory requirement for the study of history? Is Bible reading sufficient for the reading requirement? Teaching in

the shadow of standardless review by a potentially hostile government agent burdens the Jefferys' religious liberty.

We now turn to the third and fourth points of free exercise analysis. The government must be pursuing a compelling state interest. The government asserts a compelling interest in the education of children.

The fourth step in the free exercise analysis is the least restrictive means test. There are means which are quite effective, but are unconstitutionally restrictive. We recognize that standardless review might be an effective way to motivate parents to teach as much as they can. Unfortunately for the state, this very effective means of motivation is *per se* unconstitutional. A vague law is unconstitutional because it leads the cautious citizen to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked. *Grayned* v. *City of Rockford*, 408 U.S. 104, 109 (1972). The State cannot assert a right to "leave the boundaries of the forbidden areas unmarked" because it has a compelling interest in leading cautious citizens to "steer far wider of the unlawful zone." This is not the least restrictive means to effect the State's interest.

Conclusion

Pennsylvania's home school statute, vesting standardless review of First Amendment activity in a financially interested and potentially hostile party, cannot constitutionally be applied to the Jeffery family. This Court should find the Defendant not guilty of truancy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on December 16, 1992, I hand-delivered a true, correct and complete copy of the enclosed DEFENDANT'S AMENDED TRIAL BRIEF to representatives of the Scranton Public School System appearing at trial.

Counsel for Mr. and Mrs. John Jeffery, Defendants

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