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March 14, 2008

Representative John Stahl
S1186 House Office Building
P.O. Box 30014
Lansing, MI 48909-7514

Re: Joint Resolution NN and Parental Rights

Dear Representative Stahl:

I heard you speak at the CTV legislative briefing earlier this week and promote Joint Resolution NN. I reviewed that Resolution and ask you to consider revising the language, and/or sponsoring the attached Model Statute, or at least Section 6 thereof.

As an attorney active in the defense of home schooling parents, I have been able to rely on MCL 380.10 and its reference to the "natural" right of a parent in arguing that a parent who elects to direct the education of their own child at home is free from State requirements regarding minimum days in attendance, mandatory curriculum and teacher certification. Attached is a brief I wrote in this respect. (See pp. 11-12).

As you can see from pages 11 and 12, I have drawn a legal distinction between a natural right and a fundamental right. A natural right is not subject to be overridden by the State. The State has no jurisdiction over who educates the child in terms of their qualifications, what curriculum or ideas to which the child is exposed, where the education physically takes place, when or how long a child shall be educated in terms of attendance or years matriculated.

A fundamental parental right on the other hand, yields each of these decisions to the State, that is to say, it yields these decisions to your legislative discretion and that of your colleagues. Where the state's interest is compelling and narrowly drawn, a parent's right to direct the who, what, when and where of his or her own child's education must yield.

I am sure you can see the adverse consequences of Joint Resolution NN if made a part of the Michigan Constitution. As proposed, it states:

Sec. 27. Parents and legal guardians have a natural and fundamental right to direct the care, education, and upbringing of their children. No government action shall burden, abridge, or hinder this natural, fundamental right unless it is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

The problem here is two-fold. First, parents and legal guardians have a natural right to direct the care, education, and upbringing of their children. To add that they also have a fundamental right opens the door to the superior natural right being dragged down to the diminished level of a fundamental right. Second, to add that even a natural right may be burdened, abridged, or hindered under any compelling circumstance is to destroy the natural right itself. You must surely see that the proposed language equates a natural right with a fundamental right destroying their differences—a difference which at least MCL 380.10 preserves. The Amendment would be a step backwards—a retreat from the legislation. To then specifically grant the government the power to abridge a natural right is folly.

Thomas Jefferson and James Madison ran into this problem in the context of another natural right which they called an unalienable right because that language was closer to the language of our Declaration of Independence. Defining religion as an unalienable right was not the only approach available to Congress during the formation of the Bill of Rights. The idea of defining religion in terms of toleration was also very popular. Prior to independence in 1776, George Mason sought to write the guarantees of the English Acts of Toleration into the Virginia Declaration of Rights. As the English were entitled to the “advantages” of religious toleration under these Acts, it seemed appropriate that their American counterparts should also enjoy the same degree of *toleration*. Thus, in 1776, Mason argued “that all Men should enjoy the fullest Toleration in the Exercise of Religion, according to the Dictates of Conscience, unpunished and unrestrained by the Magistrate, unless, under Color of Religion, any Man disturb the Peace, the Happiness, or Safety of Society, or of Individuals.”¹

You should recognize the illegitimate brother of Resolution NN’s compelling state interest language in Mason’s proposal. The State would have power to punish religious conduct if it interfered with the “happiness or safety of society.” You could drive a bus load of regulation through that exemption. You could justify a State established church, mandatory attendance, forced tithing, imprisonment of uncertified clergy (primarily Baptist preachers at the time) and mandatory teaching of approved religious doctrine. All this was in fact justified in Virginia and left little of the natural and unalienable right of religious liberty.

¹ 1 THE PAPERS OF GEORGE MASON 278 (R. Rutland, ed. 1970).

Yet, rather than seeking religious toleration, James Madison sought religion's free exercise. Madison realized that English privileges did not descend from the idea of unalienable rights and therefore could only result in degrees of toleration. Privileges were, by definition, dependent upon executive, legislative or judicial grace. They could be subject to a balancing or compelling state interest test. It was Madison's view, and not that of Mason, that eventually prevailed in the Virginia constitutional and federal First Amendment context.

Yet, here we are 225 years later with Resolution NN proposing educational toleration. The Resolution does not propose to allow the regulation or punishment of parents if the education of their children interferes with the "happiness or safety of society." It rather proposes its modern equivalent. It proposes to allow you and your legislative colleagues the power to burden, abridge, and hinder parents if the education of their own children furthers a "compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest." What burdening, abridgement, and hindrance can be legislatively driven through that exemption? You could justify a State established Department of Home Schooling, mandatory attendance, fee schedules, safety regulations, inspections, fines and imprisonment of uncertified parents (primarily Christian at this time) and mandatory testing and teaching of approved State curriculum.

You would leave little of the natural and unalienable right of a parent left untouched except at the grace of the legislature. Thomas Jefferson called this exercise of legislative grace and discretion an "impious presumption."²

I know that the conservatives think Resolution NN is a wonderful proposal. Mason's Act of Toleration was also popular. Its adoption, however, would have been a disaster. So too here. Moreover, the proposed national constitutional amendment advocated by Michael Farris and HSLDA suffers from all the same defects.

² In the Virginia Statute for Religious Freedom, as written by Thomas Jefferson and Adopted January 16, 1786, Jefferson wrote:

that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavouring to impose them on others, hath established and maintained false religions over the greatest part of the world, and through all time.

The analogy to education is clear. It is an arrogant presumption of legislators, who though not the parent of every child, yet have assumed dominion over their education and further have set up through legislation their power to define curriculum, certification and attendance, and to impose their own opinions and modes of thinking as the only true and infallible substance and means of educating a child, and as such have imposed on the people the failed education system which we have today.

See <http://www.conservativeusa.org/vareligiousfreedom.htm>

We would be better off to simply declare that:

Sec. 27. Parents and legal guardians have a natural and unalienable right to direct the care, education, and upbringing of their children. No government action shall burden, abridge, or hinder this natural and unalienable right.

You may also wish to consider companion legislation. I have attached a model state statute in this regard. If introduced by degrees or in sections, it may be more readily accomplished. I would suggest introduction of Section 6 first as a stand alone bill. Homeschool parents need financial relief now and should no longer be forced to pay for the education of their neighbor's child while also paying for their own. Generally speaking, this proposal is designed to facilitate the disestablishment of the State's control of education based on the same principles that James Madison and Thomas Jefferson relied upon in disestablishing the state church in Virginia in 1786.

Specifically, the bill, 1) treats public and home schools equally in terms of exemption from *ad valorem* real property taxes, 2) prevents the State from enforcing its truancy laws against parents who do not send their children to government approved schools, 3) eliminates the teacher monopoly through repeal of mandatory certification requirements, and 4) defines and protects intellectual freedom.

This is serious legislation and it is important to get a bill in the system that homeschoolers and others can look to and encourage their representatives to support. Republicans in particular are the natural beneficiaries of such support and they need something at the State level to motivate their constituents to get out and eventually vote in 2008.³

If you have any questions, please feel free to contact the undersigned.

Sincerely yours,



Kerry L. Morgan, Esq.

cc: James Muffett

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³ See also http://www.revivetherepublic.com/book_review.htm

HOUSE BILL No. _____

January __, 2008, by REPRESENTATIVE _____, and referred to the _____.

A bill to establish and protect certain unalienable rights of parents and legal guardians with regard to the education and upbringing of their children

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. [Short Title]

This act shall be known and may be cited as the “the unalienable rights of parents act”

Sec. 2. [Authority and Construction]

This Act shall be liberally construed to secure intellectual freedom and the unalienable right of parents to direct the education and upbringing of their own children free from state interference, regulation and control.

This Act is a valid exercise of the power reserved to the States under the tenth amendment of the United States Constitution. Its object is to define and secure the unalienable rights of parents retained by the people as guaranteed in the ninth amendment of the United States Constitution.

This Act is an appropriate legislative expression of the laws of nature and of nature's God as embodied in the Declaration of Independence, the principles of which and classification of unalienable rights referred to therein are hereby expressly acknowledged as binding on this state as a member of the Union on equal footing with all other states.

This Act implements and furthers the meaning of this state's constitution, Article 1, sections 2 and 23 referring to civil, political, and unenumerated rights including unalienable rights; Article VII, sec. 1 regarding encouraging the means of education; and MCL 380.10 referring to fundamental and natural rights.

Section 3. [Definitions and Exclusions]

For the purposes of this Act:

- a) the term “parent” includes a natural parent, legal guardian or any person acting *in loco parentis* or pursuant to a contract for educational services between a parent and teacher, but shall not include any governmental entity or public school official or employee.
- b) The term “education” includes any instruction, propagation or discipline that is intended to enlighten or expose one to any idea, set of ideas or curriculum, whether formal or informal.

c) The terms "children," "child," or "minor" shall include any person under the age of 17.

d) Nothing herein shall be construed to prohibit the state legislature from establishing, funding and maintaining institutions to: 1) instruct any member of this state's Militia in military science; 2) provide instruction or education to persons lawfully incarcerated, provided participation is on a voluntary basis or in the case of minors where the state acts in *parens patriae* pursuant to a lawful court order; or 3) preclude making available information or publications pertaining to the operation of any governmental entity or service.

e) Specific performance shall not be judicially ordered in cases or controversies arising *ex contractu* between parents and their educational agents, though other relief or damages, legal and equitable may be ordered.

Sec. 4. [Unalienable Right of Parents]

a) Every parent has the unalienable right to direct the education and upbringing of his or her child, free from any governmental interference, regulation or control.

b) No law shall control, regulate or alienate this right, including any law relative to when, where, by whom or in what manner children are to be educated.

c) No parent shall be compelled to expose his or her own child to any education, curriculum or instruction, nor shall any parent be punished or fined for failure to instruct or expose their own children to same.

Sec. 5. [Limited Parental Liability]

a) No minor child shall be considered or declared abused or neglected or otherwise in need of social services pursuant to MCL 722.622 or other statute, solely on the basis that his or her parent has not attended to his or her education.

b) No child has any right to compel his or her parent to provide him or her with an education, the natural relationship between parent and child not being subject to regulation by any civil power. No governmental entity shall interfere with the parent-child relationship, absent demonstrable evidence indicating imminent endangerment of the physical health or physical safety of the child. No governmental entity shall interfere with the parent-child relationship on the basis of a psychological or mental condition arising from the child's education or lack thereof.

Sec. 6. [Financial Support]

a) No person shall be compelled by law to provide financial support by taxation of any type, fees, assessments or by any other means, to any school, educational program, curriculum or instruction. The state fund established in Article IX, Section 11 of the

Michigan Constitution, shall not include revenue based upon or derived from a primary residence or other facility or structure in which a child is being educated.

b) Notwithstanding any section of MCL 211.21a *et. seq.*, the entire parcel upon which is located a primary residence or other facility or structure in or upon which a child is being educated, is exempt from all ad valorem real and personal property taxes imposed by this state or by any political subdivision, public body, or taxing district in which the residence, facility or structure is located.

c) The record owner of said parcel shall be entitled to the above exemption by annually filing an affidavit with the local unit of government averring that a child is being educated upon or within the parcel. No other averment shall be required or permitted.

Sec. 7. [Compulsion in Attendance]

Notwithstanding MCL 380.1561, MCL 380.1577 and MCL 388.554 or other law pertaining to compulsory attendance, no minor child shall be compelled to attend any school or educational institution whatsoever. Nothing herein shall be construed to prohibit any parent from compelling his or her own minor child from attending any school, home school, or educational institution; or to prohibit the state from providing education to minors committed to its custody by Court order.

Sec. 8. [Regulation of Parents and Teachers Prohibited]

a) Notwithstanding MCL 380.1233, no person shall be subject to any registration, licensure, certification or review by any state, municipal or other governmental authority as a condition or qualification to teach or instruct any child.

b) Nothing in this section shall be construed to prohibit any private authority from establishing standards or regulating its membership.

Sec. 9. [Intellectual Freedom]

a) All persons shall be free to profess, and by argument to maintain, their opinions, and that the same shall in no wise diminish, enlarge, or affect their unalienable, civil or any constitutional rights. No person shall be restrained, harassed, or interfered with in his or her person or property by any state, municipal or other governmental authority, nor shall otherwise suffer on account of his or her own opinions or beliefs or on account of transmitting those beliefs to his or her child.

b) Nothing in this section shall be construed to affect the laws of this state pertaining to protection of minors from exposure to lewd or pornographic materials.

Sec. 10. [Freedom of Contract]

Every parent shall be free to select or not select his or her own agent as instructor or teacher and no state agency, county or local unit of government shall approve, license, register, certify or otherwise regulate or interfere with that freedom.

Sec. 11. [Judicial Relief]

a) Any parent, natural guardian or any of their lawful agents who are interfered with by any person acting under state law, color of state law or in a private capacity in any way prohibited by this Act, may seek legal and equitable relief including damages in a court of competent jurisdiction.

b) If a public body, school official or political subdivision is not complying with this act, the attorney general, prosecuting attorney of the county in which the public body or political subdivision serves, or a person may commence a civil action to compel compliance or to enjoin further noncompliance with this act.

c) An action for injunctive relief against a local public body, school official or political subdivision shall be commenced in the circuit court, and venue is proper in any county in which the public body or political subdivision serves. An action for an injunction against a state public body, school official or political subdivision shall be commenced in the circuit court and venue is proper in any county in which the public body or political subdivision has its principal office, or in Ingham county. If a person commences an action for injunctive relief, that person shall not be required to post security as a condition for obtaining a preliminary injunction or a temporary restraining order.

d) An action for mandamus against a public body, school official or political subdivision under this act shall be commenced in the court of appeals.

e) If a public body or political subdivision is not complying with this act, and a person commences a civil action against the public body or political subdivision for injunctive relief to compel compliance or to enjoin further noncompliance with the act and succeeds in obtaining relief in the action, the person shall recover court costs, actual attorney fees for the action and actual damages, or liquidated damages of not more than \$500.00.