

## HOME SCHOOLING AWAY FROM HOME: IMPROVING MILITARY POLICY TOWARD HOME EDUCATION

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*That some parents “may at times be acting against the interests of their children” . . . creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child’s best interests . . . The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition.<sup>1</sup>*

### I. Introduction

With the explosive growth of home schooling in the United States in the past four decades,<sup>2</sup> home school parents have frequently been at odds with state and local authorities over government regulation and control of home education.<sup>3</sup> In every state, parents who home educate have

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<sup>1</sup> Parham v. J.R., 442 U.S. 584, 602-03 (1979).

<sup>2</sup> See Patricia M. Lines, *Homeschooling*, ERIC DIG. 151 (Sept. 2001), available at <http://eric.uoregon.edu/publications/digests/digest151.html> (last visited Nov. 10, 2004) (noting that home schooling in the United States grew from 10,000 to 15,000 children in the late 1960s to perhaps one million children by 2001).

<sup>3</sup> See Michelle Malkin, *Home-Schooling Under Siege* (May 18, 2001), available at <http://www.townhall.com/columnists/michellemalkin/printmm20010518.shtml> (last visited Nov. 10, 2004) (describing how, in most states, government educators seek to

wrestled with governmental authorities over a myriad of issues, such as mandatory notification requirements, teacher certification requirements, state testing of home schoolers, religious exemptions, equal access policies, and in-home visits by state authorities.<sup>4</sup> Although the trend in recent years has been for states to “limit state controls over private education in favor of expanding parental liberty,”<sup>5</sup> the existence of differing home school legislation and case law throughout the fifty states fosters a climate of unease and uncertainty within the home school community.<sup>6</sup> Of particular concern is the burgeoning issue of educational neglect and the fact that, in some jurisdictions, home school parents are wrongly facing exposure to child neglect investigations and prosecutions.<sup>7</sup>

Military home school parents face similar concerns, as well as additional challenges unique to military service. Frequent moves force military parents to grapple with conflicting, and sometimes confusing, home school laws from state to state, and to navigate the idiosyncrasies

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enforce “meddlesome regulations” that require home school parents to submit curriculum portfolios, file notices of intent to home school, and the like. In one example, a Maryland home school mother was charged with seventy-two counts of criminal truancy for resisting government review of her lesson plan, which happened to be a nationally-respected Catholic curriculum).

<sup>4</sup> See generally CHRISTOPHER J. KLICKA, *THE RIGHT TO HOME SCHOOL* 21, 27, 49 (1998) (discussing the legislative and judicial histories of home schooling, and providing numerous examples of the obstacles often placed in the way of home school families. For example, in a case in Alabama, home school parents were presented with a court order authorizing social workers to enter the home and interrogate the children based solely on an anonymous tip of educational neglect).

<sup>5</sup> *Id.* at 158.

<sup>6</sup> See generally CHRISTOPHER J. KLICKA, *HOME SCHOOLING IN THE UNITED STATES: A LEGAL ANALYSIS* iv-viii (2003) (summarizing in detail the home school laws in the fifty states and demonstrating the lack of uniformity of home school laws throughout the country). For example, forty-one states do not require home school parents to meet specific teacher qualifications; twenty-four states require standardized testing or evaluation of home schoolers; eight states allow home schoolers to obtain some type of religious exemption from compulsory attendance laws; three states require home schools to be subject to the discretionary approval of the local school district, school board or state commissioner; six states require instruction or amount of time to be “equivalent” to public schools; fourteen states allow individual home schools to operate as private or church schools. See *id.* Given the variations in state laws, it is accurate to conclude that no two states are alike in their approach to home schooling.

<sup>7</sup> See Malkin, *supra* note 3 (citing the example of the Maryland home school mother charged with criminal truancy); see also *infra* notes 70-73 and accompanying text (providing other examples of child neglect investigations and prosecutions against home school parents).

of state and local education authorities at new duty locations.<sup>8</sup> Of equal concern are issues relating to the military's oversight of home schooling, especially in an overseas environment, and the ramifications for both the military parent and the installation/community commander. At present, although there are no separate Department of Defense (DOD) or service regulations specifically devoted to home schooling within the military, other DOD guidance and service regulations, such as DOD Education Activity policies and the Army's family advocacy regulation, raise difficult questions regarding the military's role in home schooling.<sup>9</sup> Most notable are DOD and Army regulations incorporating definitions of educational neglect within the broader definition of child abuse.<sup>10</sup> Through vague references to home schooling, these regulations open the door for misinterpretation and abuse by commanders, child development personnel, and others within the military's family advocacy bureaucracy.<sup>11</sup> These regulations create more questions than they answer. For example, what is the authority of the DOD, the military services, and the local commander to regulate home schooling? Should the military investigate allegations of educational neglect against military home schoolers? What level of coordination and cooperation with state and local authorities is required of installation commanders? Given the ever-changing landscape of home schooling throughout the country, the need for more definitive DOD policy on these issues is evident.

This article argues that the military's policy regarding home schooling is in need of major revision and is inadequate to protect the right of military parents to home school their children. This article reviews issues relevant to home schooling everywhere, such as the right

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<sup>8</sup> See generally KLIČKA, *supra* note 6, at iv-viii (summarizing in detail the home school laws in the fifty states and demonstrating the lack of uniformity of home school laws throughout the country).

<sup>9</sup> See generally U.S. DEP'T OF ARMY, REG. 608-18, THE ARMY FAMILY ADVOCACY PROGRAM (20 Oct. 2003) [hereinafter AR 608-18]; U.S. DEP'T OF DEFENSE, DIR. 6400.1, FAMILY ADVOCACY PROGRAM (FAP) (23 June 1992) [hereinafter DOD DIR. 6400.1]; U.S. DEP'T OF AIR FORCE, INSTR. 40-301, FAMILY ADVOCACY (1 May 2002) [hereinafter AFI 40-301]; OFFICE OF THE CHIEF OF NAVAL OPERATIONS, INSTR. 1752.2A, FAMILY ADVOCACY PROGRAM (17 July 1996) [hereinafter OPNAV INSTR. 1752.2A]; Memorandum, Department of Defense Education Activity, subject: Home Schooling (6 Nov. 2002) [hereinafter 2002 DODEA Memo].

<sup>10</sup> See AR 608-18, *supra* note 9, at 102; U.S. DEP'T OF DEFENSE, INSTR. 6400.2, CHILD AND SPOUSE ABUSE REPORT (10 July 1987) at enclosure 2, attachment 2, para. 13.d.(7) [hereinafter DOD INSTR. 6400.2].

<sup>11</sup> See *infra* notes 126, 128, and 131 and accompanying text (discussing how the DOD and the individual armed services define child neglect and educational neglect).

of parents to direct the education of their children, the role of the state and federal governments in regulating education and home schooling, and the uneasy connection between home schooling and child neglect laws. Next, this article looks at the military's dependent education system and the military's approach to home schooling, highlighting how DOD home schooling policies have created conflict and confusion among commanders, DOD schools, and military parents over the past decade. This article then examines military child abuse/neglect programs and state jurisdictional issues, discussing how military home schoolers are exposed to additional government oversight through educational neglect laws and regulations. Finally, this article proposes changes to DOD policy and regulations that will define specifically the role of DOD, the military services, and commanders in regulating home schooling, clarify family advocacy policy conflicts between home schooling and child neglect issues, and fine tune the cooperative relationships between military installations and state and local child protection agencies. The proposed changes aim to protect the right of parents to direct the education of their children.

## II. Parental Rights, State and Federal Roles in Regulating Home Schooling, and the Uneasy Connection with Child Neglect Laws

### A. Parents vs. the State: The Battle of Competing Interests

#### 1. *The Right of Parents to Direct the Education of their Children*

The U.S. Supreme Court consistently has held that parents have the fundamental right to direct the care, custody, and control of their children.<sup>12</sup> This fundamental right is based on the liberty clause of the Fourteenth Amendment.<sup>13</sup> A byproduct of this right is a parent's right to

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<sup>12</sup> See *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (citing a long line of cases affirming the right of parents to direct the care, custody, and control of their children, and emphasizing that this right "is perhaps the oldest of the fundamental liberty interests recognized by this Court").

<sup>13</sup> U.S. CONST. amend XIV, § 1. Section 1 states, in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* This "liberty" right in the Fourteenth Amendment has been interpreted by the Supreme Court to include "parental liberty." See, e.g., *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 536 (1925) (finding unconstitutional an Oregon compulsory attendance law that did not recognize the right to

direct his or her child's education and upbringing.<sup>14</sup> In addition to parental rights under the Fourteenth Amendment, the Court has recognized a parental interest in education under the free exercise clause of the First Amendment when a parent's basis for educating a child is "one of deep religious conviction."<sup>15</sup> Thus, the general posture of the Court today is that, although subject to some state regulation, parents have the right to educate their children through means other than the public schools, such as private schools, parochial schools, or home schools.<sup>16</sup>

## 2. State Interest in Educating Children

The right of parents to direct the education of their children is not exclusive. The Supreme Court also has recognized a state interest in ensuring that children receive an education.<sup>17</sup> The Court's reasoning

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attend private schools); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (striking down a Nebraska law making it illegal to teach a foreign language to children).

<sup>14</sup> See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("[I]n addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right . . . to direct the education and upbringing of one's children.").

<sup>15</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972) (requiring the government to show a "compelling interest" to regulate in cases where the parent's interest in educating their children is based on deeply held religious convictions). One commentator argues, however, that in cases since *Yoder*, the trend has been for the courts to reduce the state's "compelling interest" burden to a test of "reasonableness" in religion cases. This would mean, in effect, that the liberty clause of the Fourteenth Amendment is the only solid basis for parents to attempt to limit state regulation of education. See Ralph D. Mawdsley, *The Changing Face of Parent's Rights*, 2003 BYU EDUC. & L.J. 165, 174. Another commentator disagrees, arguing that the four-part "compelling interest" test still applies in cases where parental rights are combined with a free exercise of religion claim. The four parts of the "compelling interest" test in a free exercise analysis are: Are the home school family's beliefs sincere and religious?; Are home schoolers' religious beliefs burdened or violated by the state's requirements?; Is the state's regulation "essential" for children to be educated?; and Can the states establish that no alternative form of regulation exists which would be less restrictive to First Amendment rights? See KLICKA, *supra* note 4, at 49-71.

<sup>16</sup> See J. Bart McMahon, *An Examination of the Non-Custodial Parent's Right to Influence and Direct the Child's Education: What Happens When the Custodial Parent Wants to Home Educate The Child?*, 33 U. OF LOUISVILLE J. OF FAM. L. 723, 732 (1995); see also David W. Fuller, *Public School Access: The Constitutional Right of Home-Schoolers to "Opt In" to Public Education on a Part-Time Basis*, 82 MINN. L. REV. 1599, 1615 (1998); Mawdsley, *supra* note 15, at 165; Judith G. McMullen, *Behind Closed Doors: Should States Regulate Homeschooling?*, 54 S.C. L. REV. 75, 77 (2002).

<sup>17</sup> *Yoder*, 406 U.S. at 221; *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

rests on the argument that education serves both the economic and cultural interests of society.<sup>18</sup> First, education transforms a child into a productive citizen by providing “the basic tools by which individuals might lead economically productive lives.”<sup>19</sup> Second, education prepares children to become mature citizens capable of political participation: “Some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.”<sup>20</sup> It is on these grounds that the Court recognizes a constitutional basis by which a state gains the authority to regulate education.

A state is not unlimited, however, in its power to regulate the education of children. Because a parent’s right to direct the education of children is “fundamental,” the state must demonstrate that it has a “compelling interest” whenever it takes action to regulate education.<sup>21</sup> As a result, in the ongoing dispute between home school parents and state authorities, the state’s efforts to regulate home schooling must be so “compelling” that they overcome the parent’s fundamental right to direct a child’s education. Unfortunately, as parents and states alike have learned in court cases throughout the country, the application of this analysis has not been uniform. In some states, the courts have ruled in favor of the parents, such as when parents objected to vague compulsory attendance laws,<sup>22</sup> laws requiring instruction from public school teachers,<sup>23</sup> and laws requiring state certification of home school teachers.<sup>24</sup> In other states, the courts have ruled in favor of the states, such as state laws mandating teacher certification<sup>25</sup> and requiring prior

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<sup>18</sup> *Plyler*, 457 U.S. at 221.

<sup>19</sup> *Id.*

<sup>20</sup> *Yoder*, 406 U.S. at 221.

<sup>21</sup> *See id.* at 233.

<sup>22</sup> *See, e.g.*, *Ellis v. O’Hara*, 612 F. Supp. 379, 381 (E.D. Mo. 1985) (ruling that the state failed to provide the parents an adequate definition of a “substantially equivalent” education under Missouri’s home school statute).

<sup>23</sup> *See, e.g.*, *Windsor Park Baptist Church, v. Arkansas Activities Ass’n*, 658 F.2d 618, 621 (8th Cir. 1981) (stating that the Fourteenth Amendment forbids the States to prohibit attendance at nonpublic schools, either secular or religious).

<sup>24</sup> *See, e.g.*, *Michigan v. De Jonge*, 501 N.W.2d 127, 140 (Mich. 1993) (concluding that there are less intrusive means than teacher certification to fulfill the State’s interest in ensuring the education of home school children under the compulsory education law).

<sup>25</sup> *See Johnson v. Charles City*, 368 N.W.2d 74, 81 (Iowa 1985) (holding that a teacher licensing requirement for a church school was neither arbitrary nor unreasonable); *Nebraska v. Faith Baptist Church*, 301 N.W.2d 571, 579 (Neb. 1981) (holding that the state’s teacher certification requirement was neither arbitrary nor unreasonable).

approval from the local school district to home school.<sup>26</sup> The various state approaches to home school regulation reflect this lack of consensus in the courts.

#### B. State Regulation of Home Schooling

The traditional means by which states have exercised their authority to regulate education has been through compulsory education laws. Every state in the union has a compulsory education law or compulsory attendance law mandating that children attend school between certain ages, such as ages six to sixteen.<sup>27</sup> Until the 1980s, most state laws rejected home schooling as an acceptable way to comply with compulsory attendance laws.<sup>28</sup> In fact, as recently as 1980, home schooling was illegal in thirty states,<sup>29</sup> meaning that parents who chose to home educate their children in those states were in violation of compulsory attendance laws. As home schooling became more prevalent in the 1980s, state laws began to change. By 1993, home schooling was

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<sup>26</sup> See *Ohio v. Schmidt*, 505 N.E.2d 627, 629-30 (Ohio 1987) (stating that the requirement to seek approval from the school superintendent for a home education program did not infringe upon the free exercise of religion); *Care of Protection of Charles*, 504 N.E.2d 592, 600 (Mass. 1987) (holding that a school committee could impose reasonable educational requirements on home schoolers similar to those required of public and private schools); *North Dakota v. Patzer*, 382 N.W.2d 631, 639 (N.D. 1986) (concluding that teacher certification requirements are the least intrusive personally intrusive means to satisfy the state's interest in seeing that children are taught by capable persons).

<sup>27</sup> See National Center for Education Statistics, *Digest of Education Statistics, 2002*, tbl. 150, at <http://nces.ed.gov/programs/digest/d02/tables/dt150.asp> (last visited Nov. 10, 2004). Compulsory attendance laws provide that a child must attend school between certain ages. Although most states currently mandate school attendance only until age sixteen, there is a trend to expand compulsory attendance ages, either by requiring children to start school at earlier ages, such as four or five years old, or by requiring them to stay in school longer, such as seventeen or eighteen. See Scott Woodruff, *Compulsory Threats to Education, Freedom*, WASH. TIMES, Apr. 17, 2001, at E5.

<sup>28</sup> See KLICKA, *supra* note 4, at 157-58 (noting that in 1980, only three states—Utah, Ohio, and Nevada—recognized the right to home school in their state statutes; however, since 1982, thirty-five states have changed their compulsory attendance laws to specifically allow for home schooling with certain minimum requirements).

<sup>29</sup> See Patrick Basham, *Home Schooling: From the Extreme to the Mainstream*, PUB. POL'Y SOURCES 4 (2001), available at <http://www.fraserinstitute.ca/admin/books/files/homeschool.pdf> (last visited Nov. 10, 2004).

legal in every state<sup>30</sup> but usually subject to some degree of state regulation.<sup>31</sup>

The degree of state regulation and oversight of home schooling varies from state to state, resulting in a hodgepodge of home schooling laws throughout the country.

In practice, there are high regulation, moderate regulation, and low regulation states. High regulation states may require parents to inform the respective educational authority that they wish to begin to home school, maintain compulsory attendance laws, require that the home school curriculum be approved by the state, conduct periodic visits to the home, administer standardized tests, and require that home schooling parents be certified teachers . . . . Moderate regulation states may require parents to send notification and provide test scores and/or professional evaluation of the student's progress. Low regulation states do not require parents to initiate any contact with the state.<sup>32</sup>

Given this variety of approaches from state to state, the impact on military home school families is significant. For example, an Army home school family moving from Fort Hood, Texas, to Fort Lewis, Washington, goes from a state with no notice requirement, no teacher certification requirement, and no standardized testing (Texas), to a state that requires notification to the local school district, teacher certification, and annual standardized testing (Washington).<sup>33</sup> An Air Force home school family moving from Elmendorf Air Force Base, Alaska, to Minot

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<sup>30</sup> *See id.*

<sup>31</sup> *See generally* KLIČKA, *supra* note 6, at iv-viii (categorizing state home school regulation by type of regulation, such as standardized testing, amount of instruction required, and teacher qualifications).

<sup>32</sup> Basham, *supra* note 29, at 4-5; *see also* Major Michael D. Carsten, *An Education in Home Schooling*, 177 MIL. L. REV. 162, 165-70 (2003) (providing a comparison of various state home school laws).

<sup>33</sup> *See* TEX. EDUC. CODE ANN. § 25,086(A)(1) (requiring only that the curriculum include a course of study in good citizenship); WASH. REV. CODE ANN. 28A.200.010(1) (Matthew Bender & Co., Inc., LEXISNEXIS through 2004 legislation) (requiring the parent to submit annually a signed declaration of intent to home school to the local school superintendent. The notice must include the name and age of the child, specify whether a certified person will be supervising the instruction, and be written in a format prescribed by the superintendent of public instruction).



Air Force Base, North Dakota, goes from a state with no notice requirement, no teacher certification requirement, and no testing requirement (Alaska), to a state that has an annual notice requirement, significant teacher qualification requirements, and periodic testing requirements (North Dakota).<sup>34</sup> Further, the level of involvement by the local installation or community commander with home schooling issues, to include the commander's level of cooperation and assistance with state and local education authorities, is different from one installation to another and depends on variables such as the type of federal jurisdictional status of the military installation<sup>35</sup> and the type of agreement the installation has with local education and child welfare authorities.<sup>36</sup> All of the above factors combine to create an unsteady state of affairs for military home school parents, especially in light of the continuing conflict between state authorities and home school parents with regard to child neglect and educational neglect laws. This tension highlights the need for a uniform military policy on home schooling across all the armed services.

### C. The Federal Government's Role in Home Schooling

In the United States, the states, and not the federal government, have historically exercised the authority to regulate education.

Public education is primarily a province of the states because article I, section 8 of the U.S. Constitution does not designate education as one of the functions delegated to the national government. Although the federal government has enacted legislation involving various mandates for education, the primary responsibility for

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<sup>34</sup> See N.D. CENT. CODE § 15.1-23-03 (Matthew Bender & Co., Inc., LEXISNEXIS through 2003 General and Special Sess.). North Dakota's teacher qualification requirements are quite stringent in that a parent must be certified to teach in North Dakota or have a baccalaureate degree; or have a high school diploma or a GED certificate and be monitored by a certified teacher during the first two years of home instruction; or meet or exceed the cut-off score of the national teacher exam given in North Dakota. See *id.*

<sup>35</sup> A state's authority to enforce its laws on a military installation depends primarily on the federal jurisdictional status of the installation. Absent an agreement between the installation and the local community, an installation holding exclusive federal jurisdiction is less susceptible to intervention by state authorities in matters involving child abuse and neglect, to include educational neglect. See *infra* notes 142-61 and accompanying text.

<sup>36</sup> See DOD DIR. 6400.1, *supra* note 9, para. E3.1.1.3.1 (encouraging the military services to maintain agreements with local communities on child welfare issues).

determining the content and implementation of education resides with states.<sup>37</sup>

Despite having no direct constitutional role or responsibility in education, the federal government can significantly impact education issues, to include home schooling within the military, through federal legislation and policies. Of note are federal laws and policies recognizing home schooling as a positive educational alternative, and federal laws providing money to the states to strengthen child services and child welfare agencies.<sup>38</sup>

### 1. Federal Recognition of the Right to Home School

In recent years, Congress has indirectly recognized the positive results of home schooling by easing the restrictions on home schoolers attempting to enlist in the United States Armed Forces. Prior to 1998, home school graduates were not considered high school graduates for purposes of enlistment and held a lower enlistment priority.<sup>39</sup> In 1998, Congress established a five-year pilot program designating home schoolers as Tier I recruits,<sup>40</sup> which is the same enlistment priority as traditional high school graduates. In 2003, the DOD extended the program for another year.<sup>41</sup>

A more direct acknowledgement by Congress of the legitimacy of home schooling, and, specifically, the right to home school in the military, is a recent amendment to the Overseas Defense Dependents'

<sup>37</sup> Mawdsley, *supra* note 15, at 191 n.1. Additionally, the U.S. Supreme Court has held that public education is not a right granted to individuals by the federal constitution. *See Plyler v. Doe*, 457 U.S. 202, 221 (1982).

<sup>38</sup> In the view of some state courts, this flow of federal money demonstrates a desire by Congress for states to provide child welfare services on federal enclaves such as military installations. *See infra* notes 59, 152-160 and accompanying text.

<sup>39</sup> *See* U.S. DEP'T OF DEFENSE, DIR. 1304.26, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, AND INDUCTION para. E1.2.3.1 (21 Dec. 1993) (stating that alternative credential holders and nongraduates may be assigned lower enlistment priority based on their first-term attrition rates).

<sup>40</sup> National Defense Authorization Act, Pub. L. No. 105-261, div. A, tit. V, subtit. G, § 571, 112 Stat. 2033 (1998).

<sup>41</sup> Memorandum, Office of the Under Secretary of Defense, Personnel and Readiness, to: Deputy Chief of Staff, G-1, USA, Chief of Naval Personnel, Deputy Chief of Staff for Personnel, USAF, Deputy Chief of Staff for Manpower and Reserve Affairs, USMC, subject: Extension of Home School and National Youth Challenge Tier I Pilot Program (Aug. 15, 2003) (on file with author).

Education Act (ODDEA).<sup>42</sup> The ODDEA directs the Secretary of Defense to provide a free public education to dependent children in overseas areas.<sup>43</sup> In 2002, Congress amended the ODDEA by directing DOD schools to make auxiliary services available to home schooled military children, such as extracurricular and interscholastic activities.<sup>44</sup> The passage of the amendment is an unambiguous statement by Congress in support of home schooling in general, and home schooling by military parents in particular.

Finally, although still pending in Congress, the proposed Federal Home School Nondiscrimination Act (HONDA),<sup>45</sup> if passed, would be the most definitive statement yet by Congress regarding home schooling. The purpose of the bill is to “amend selected statutes to clarify existing Federal law as to the treatment of students privately educated at home under State law.”<sup>46</sup> Among other things, the bill states the following:

The right of parents to direct the education of their children is an established principle and precedent under the United States Constitution . . . . The Congress, the President, and the Supreme Court, in exercising their legislative, executive, and judicial functions, respectively, have repeatedly affirmed the rights of parents . . . . The rise of private home education has contributed positively to the education of young people in the United States . . . . The United States Constitution does not allow Federal control of home schooling.<sup>47</sup>

Passage of the bill will significantly influence future debate over the extent of control and oversight that federal agencies, to include the DOD, may have over home schooling. If it is the sense of Congress that the Constitution “does not allow Federal control of home schooling,”<sup>48</sup> then the authority of the DOD and/or commanders to regulate home schooling to any significant extent is minimal at best.

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<sup>42</sup> Overseas Defense Dependents Education Act, 20 U.S.C. §§ 921-932 (2000).

<sup>43</sup> *See id.*

<sup>44</sup> *Id.* § 926(d); *see infra* notes 107-10 and accompanying text (discussing the amendment in more detail).

<sup>45</sup> Home School Non-Discrimination Act of 2003, S.1562, 108th Cong. (2003) (pending).

<sup>46</sup> *Id.* at pmbl.

<sup>47</sup> *Id.* sec. 2.

<sup>48</sup> *Id.* sec. 3.

## 2. Federal Assistance to State Agencies

Although there are numerous other federal laws pertaining to education issues, three laws are of particular relevance to home schooling: The Individuals with Disabilities Education Act (IDEA),<sup>49</sup> the Child Abuse Prevention and Treatment Act (CAPTA),<sup>50</sup> and Title IV-B of the Social Security Act.<sup>51</sup> These laws demonstrate how federal funding has the potential to impact state action and, ultimately, home schooling.

The IDEA is a federal program that provides grants to the states for the provision of services to children with disabilities. Under the IDEA, a public school must provide special needs services to all public school children, and to fund services for privately educated children.<sup>52</sup> Some school districts have insisted that the IDEA *requires* a special needs assessment of home school children, even if the home school parents decline the school's assistance and do not consent to the evaluation.<sup>53</sup> In a recent Missouri case, the school district claimed it had an "obligation" under the IDEA to evaluate an eleven year-old home schooled boy, despite his parent's objections.<sup>54</sup> The school district asserted it would violate the IDEA if it did not pursue evaluation of the child.<sup>55</sup> Is such an interpretation an encroachment on the parents' fundamental right to direct the education of their children? The pending Home School Nondiscrimination Act contains language clarifying that local school officials do not have to evaluate home school children if the parents object.<sup>56</sup>

<sup>49</sup> Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-87 (2000).

<sup>50</sup> Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-19 (2000).

<sup>51</sup> Social Security Act, 42 U.S.C. §§ 620-26 (2000).

<sup>52</sup> See 20 U.S.C. §§ 1400-87.

<sup>53</sup> See *infra* notes 54-56 and accompanying text.

<sup>54</sup> See Home School Legal Defense Association, *Hearing Officer Rules Homeschooler Must Submit to Special Needs Evaluation*, at <http://hsllda.org/docs/news/hsllda/200303/200303271.asp> (last visited Dec. 15, 2004) [hereinafter *Hearing Officer*] (referring to a Missouri hearing officer's decision about the local school district). The Home School Legal Defense Association provides continuing information on rulings that may affect or influence the home school community even prior to those cases reaching litigation at a state or federal court level. See Home School Legal Defense Association home page, at <http://hsllda.org/docs/news/hsllda/> (last visited Dec. 15, 2004).

<sup>55</sup> See *Hearing Officer*, *supra* note 54.

<sup>56</sup> See Home School Non-Discrimination Act of 2003, S.1562, 108th Cong. § 5 (2003) (stating that in any case in which there is an absence of parental consent for an IDEA evaluation, the local educational agency shall not be required to conduct an evaluation and will not be considered to be in violation of the IDEA).

Similarly, CAPTA and Title IV-B of the Social Security Act each provide funding to states to strengthen child welfare services. To receive CAPTA funding, states must operate state-wide programs that facilitate the reporting, screening, and investigating of child abuse and neglect allegations, to include the establishment of “relatively comprehensive reporting and record keeping systems.”<sup>57</sup> In much the same way, Title IV-B funds are provided to the states for establishing, extending, and strengthening child welfare services. In order to qualify for Title IV-B funds, a state must show that child welfare services are available “in all political subdivisions of the State, for all children in need thereof.”<sup>58</sup> According to some state courts, federal funding through CAPTA and Title IV-B exemplify a strong federal policy favoring the protection of children, and, therefore, demonstrate Congress’s desire for the states to provide child welfare services to children residing on federal enclaves.<sup>59</sup> This interpretation, in turn, places military families under the purview of the state’s child neglect laws and opens the door for state child welfare agencies to investigate allegations of child neglect on military installations.

#### D. The Long Arm of Child Neglect Statutes

Over half the states include educational neglect in their statutory definition of child neglect.<sup>60</sup> Although definitions vary from state to state,<sup>61</sup> educational neglect generally encompasses a failure of parents “to

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<sup>57</sup> Kate Hollenbeck, *Between a Rock and a Hard Place: Child Abuse Registries at the Intersection of Child Protection, Due Process, and Equal Protection*, 11 TEX. J. WOMEN & L. 1, 9 (2001); Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-19 (2000).

<sup>58</sup> 42 U.S.C. § 622(a)(2) (2000).

<sup>59</sup> See *In re Charles F.*, 120 N.M. 665, 668 (1995) (stating that “where the federal government has provided money to the states to establish, extend, and strengthen child welfare services and has mandated that those services be made available to all political subdivisions of the state, it has indicated a strong policy in favor of protection of children”); *In re Terry Y.*, 101 Cal. App. 3d 178, 183 (Ct. App. 1980) (stating that the juvenile court’s exercise of jurisdiction to protect Terry Y. promoted the federal policy toward abused children as reflected in applicable Army regulations and the Social Security Act).

<sup>60</sup> See Eric W. Johnson, *Educational Neglect as a Proper Harm to Warrant a Child Neglect Finding: In re B.B.*, 76 IOWA L. REV. 167 n.6 (1990).

<sup>61</sup> See National Clearinghouse on Child Abuse and Neglect Information, *Statutes-at-a-Glance Definitions of Child Abuse and Neglect*, available at <http://nccanch.acf.hhs.gov/>

ensure that their children are provided an education consistent with standards adopted by the state.”<sup>62</sup> The U.S. Department of Health and Human Services lists educational neglect as a category within its overall definition of child neglect.<sup>63</sup> Educational neglect is further divided into three subcategories: permitted chronic truancy, failure to enroll/other truancy, and inattention to special education need.<sup>64</sup> The ramifications of a finding of educational neglect can be severe, to include prosecution of the parent for criminal offenses associated with a finding of child neglect.<sup>65</sup> In addition, the parent may be listed in the state’s central registry as a child neglecter or abuser,<sup>66</sup> which could threaten important liberty interests, such as employment opportunities, the opportunity to adopt children, and the opportunity to be a foster parent.<sup>67</sup>

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general/legal/statutes/define.pdf (last visited Dec. 13, 2004). A typical state statute is Missouri’s, which states that neglect includes a failure to provide a proper education “as required by law.” MO. ANN. STAT. § 210.110(9) (LEXISNEXIS through 2003 legislation).

<sup>62</sup> Larry Kaseman & Susan Kaseman, *Taking Charge: Responding to Current Legislative Challenges Promoted by National Organizations*, HOME EDUC. MAG., July/Aug. 1998, available at [http://www.home-ed-magazine.com/HEM/HEM154.98/154.98\\_clmn\\_tkch.html](http://www.home-ed-magazine.com/HEM/HEM154.98/154.98_clmn_tkch.html) (last visited Nov. 10, 2004).

<sup>63</sup> See U.S. Department of Health and Human Services Administration for Children and Families, Administration on Children, Youth and Families, National Center on Child Abuse and Neglect, *Child Neglect: A Guide for Intervention* (Apr. 1993), available at <http://www.calib.com/nccanch/pubs/usermanuals/neglect/neglect.pdf>. Of particular relevance in this publication is the category “failure to enroll/other truancy,” which is defined as “[f]ailure to register or enroll a child of mandatory school age, causing the school-aged child to remain at home for nonlegitimate reasons (e.g., to work, to care for siblings, etc.) an average of at least 3 days a month.” *Id.* at 7. Failure to enroll and truancy violations are common areas cited by government authorities when charging home school parents with child/educational neglect. See *infra* note 70.

<sup>64</sup> See *id.*

<sup>65</sup> See *infra* note 70 and accompanying text.

<sup>66</sup> See Jill D. Moore, *Charting a Course Between Scylla and Charybdis: Child Abuse Registries and Procedural Due Process*, 73 N.C. L. REV. 2063, 2079 n.87 (1995) (noting that most states maintain some kind of central listing, or registry, for the findings of child maltreatment); see also *infra* notes 71-73 and accompanying text.

<sup>67</sup> See National Clearinghouse on Child Abuse and Neglect Information, *Due Process and Central Registries: An Overview of Issues and Perspectives*, available at <http://nccanch.acf.hhs.gov/general/legal/statutes/process.cfm> (last visited Nov. 10, 2004).

[C]entral registries are increasingly used to screen adults for various employment or license eligibility. About half the States, for example, allow or require central registry checks for individuals applying to be child or youth care providers, foster parents, or adoptive parents. Accessible central registry information may thus be available to employers in the child care business, schools, health care providers, or agencies that certify foster parents or arrange adoptions.

Despite the declining academic performance of American public school children in the past forty years<sup>68</sup> and the growing acceptance of home schooling,<sup>69</sup> it is not unusual to hear of an investigation or prosecution against home school parents for failure to comply with the state's compulsory attendance laws, criminal truancy, violation of daytime curfew ordinances, failure to allow social workers to inspect the home, and more.<sup>70</sup> A 2002 Colorado case illustrates how state and local

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*Id.* at 3.

<sup>68</sup> See CHRISTOPHER J. KLIKA, HOME SCHOOLING: THE RIGHT CHOICE 21-44 (2002). The author points out that, even after significant federal and state reforms in the 1980s, and the doubling of funds for public education, student performance continued to decline in the 1990s. *See id.* The author cites the results of the 1999 National Assessment of Educational Progress, which concluded that only one out of five high school seniors was proficient in writing. *See id.*

<sup>69</sup> See KLIKA, *supra* note 4, at 19 (asserting that the academic success of home schoolers caused home schooling to become widely accepted and a "trend of the 1990s that will take our nation into the 21st Century").

<sup>70</sup> Examples abound of aggressive government action against home schoolers. In Virginia in 2000, home school parents were arrested and charged with truancy offenses despite properly notifying the school superintendent of their intention to home school. *See* Home School Legal Defense Association, *Home Schoolers Falsely Arrested in Richmond County*, at <http://www.hslda.org/docs/news/hslda/200003310.asp> (last visited Dec. 15, 2004). In Texas in 2001, a husband and wife were summoned to court for "parents contributing to truancy" and their daughter for "failure to attend school," despite the fact that they were using an accredited home school program. *See* Home School Legal Defense Association, *Texas: Homeschoolers in Court*, at <http://www.hslda.org/courtreport/v18n5/v18n5tx.asp> (last visited Dec. 15, 2004). In 2002, another Texas family was charged with truancy after, as a courtesy, notifying the school district that they would be home schooling their twelve-year old daughter (Under Texas law, home school parents do not have to initiate contact with the school district). *See* Home School Legal Defense Association, *Texas: More Case Updates*, at <http://www.hslda.org/courtreport/v19n4/v19n4tx.asp> (last visited Dec. 15, 2004). In Missouri in 2001, a mother was arrested, charged with educational neglect, and incarcerated for three days after withdrawing her second-grade son from school, and despite the fact that she had informed the school of her intention to home school and had filed a Declaration of Enrollment in Home Education with the recorder of deeds. *See* Home School Legal Defense Association, *Wrongly Jailed Mom Cleared by Missouri Court*, at <http://www.hslda.org/docs/news/hslda/200104050.asp> (last visited Dec. 15, 2004). In Kentucky in 2001, local authorities summoned a mother to court for "not cooperating with" a Child Protective Service investigation of educational neglect allegations after refusing to allow social workers into her home to interview her daughter outside of her presence. *See* Home School Legal Defense Association, *In re M Sisters; Parents Charged with Educational Neglect*, at [http://www.hslda.org/legal/state/ky/20010213m\\_sisters/default.asp](http://www.hslda.org/legal/state/ky/20010213m_sisters/default.asp) (last visited Dec. 15, 2004). In California in 2003, officials cited a thirteen-year-old home schooled boy for violating a daytime curfew ordinance after being seen by a policeman riding his bike at 12:30 p.m. *See* Home School Legal Defense Association, *Victory for Homeschool Family in San Diego*, at <http://www/hslda.org/hs/state/ca/200401140.asp> (last visited Dec. 15, 2004).

authorities are quick to categorize allegations against home schoolers as child neglect. In that case, the Colorado Department of Human Services (DHS) investigated a home school couple for child neglect based on an anonymous allegation that their daughter was not in school.<sup>71</sup> Although the parents admittedly were late in filing their notice of intent to home school,<sup>72</sup> numerous witnesses testified that the parents provided an excellent education at home. Regardless, DHS submitted the parents' names to the Colorado state central registry for classification as child neglectors.<sup>73</sup> The parents' names were removed from the central registry only after their attorneys convinced the state Attorney General's office to intervene.

The Colorado case underscores the concerns of home school parents: a mistake in complying with a state's home school law could result in a complaint from an "anonymous" tipster, followed by an investigation by state child service workers, an official listing as a child neglecter, possible prosecution for child/educational neglect, and, ultimately, a loss of employment opportunities and other liberty rights. These concerns are not lost on *military* home school parents, who must deal not only with similar rules and regulations issued by the DOD and the military services,<sup>74</sup> but also the multitude of state and local home schooling and child neglect laws.

### III. Military Dependent Education: The All-Volunteer Force

#### A. Department of Defense Public Education: Free But Not Compulsory

The DOD operates public schools on military installations in the United States and throughout the world.<sup>75</sup> These schools are under the authority and control of the Department of Defense Education Activity

<sup>71</sup> See Home School Legal Defense Association, *Home Schooling by State*, at <http://www.hslda.org/Legal/state/co/20020730MrandMrsY/default.asp> (last visited Nov. 10, 2004) [hereinafter Home School Legal Defense Association].

<sup>72</sup> Colorado law requires parents to give notice fourteen days before starting a home school program, and annually thereafter. COLO. REV. STAT. § 22-33-104.5(3)(e) (2004).

<sup>73</sup> See Home School Legal Defense Association, *supra* note 71.

<sup>74</sup> See generally AR 608-18, *supra* note 9; DOD DIR. 6400.1, *supra* note 9; AFI 40-301, *supra* note 9; OPNAV INSTR. 1752.2A, *supra* note 9.

<sup>75</sup> The DOD operates 224 public schools in twenty-one districts located in fourteen foreign countries, seven states, Guam, and Puerto Rico. See Department of Defense Education Activity, DODEA Facts 2002, at <http://www.odedodea.edu/communications/dodeafacts2002.htm> (last visited Nov. 22, 2004).



(DODEA), whose mission in part is to “plan, direct, coordinate, and manage the education programs for eligible dependents of U.S. military personnel” stationed overseas and in specific locations within the United States and specified territories.<sup>76</sup> While DOD schools are free (at least for dependent children of military personnel), no statute or regulation states that they are compulsory.<sup>77</sup> Moreover, no statute or regulation authorizes DOD public schools to exercise authority or oversight over the education of military dependents who do not attend DOD schools. This obviously has implications with regard to command authority to regulate the home school programs of military parents.

### *1. Military Dependent Education in the United States*

The DODEA is divided into two school systems: the Department of Defense Domestic Dependent Elementary and Secondary Schools (DDESS) serving the United States, Puerto Rico and Cuba,<sup>78</sup> and the Department of Defense Dependents Schools (DODDS) serving overseas locations. The mission of DDESS is “to provide a free public education of high quality from pre-kindergarten through grade twelve for eligible dependent children of U.S. military personnel” in the United States and specified possessions.<sup>79</sup> The statutory authority for DDESS schools is 20 U.S.C. § 2164.<sup>80</sup> Neither the statute nor the two DOD directives pertaining to DDESS schools address home schooling or compulsory attendance. The statute merely states that the Secretary of Defense “may enter into arrangements to provide for the elementary or secondary education of the dependents of such members of the armed forces . . . .”<sup>81</sup>

<sup>76</sup> See U.S. DEP’T OF DEFENSE, DIR. 1342.20, DEPARTMENT OF DEFENSE EDUCATION ACTIVITY (DODEA) para. 3.3 (13 Oct. 1992) [hereinafter DOD DIR. 1342.20].

<sup>77</sup> See *id.* paras. 4.2, 4.3 (stating numerous times that the DODEA provides free education, but never stating that attendance of military dependent children is compulsory).

<sup>78</sup> See *id.* para. 4.

<sup>79</sup> U.S. DEP’T OF DEFENSE, DIR. 1342.21, DEPARTMENT OF DEFENSE SECTION 6 SCHOOLS para. 3 (13 Oct. 1992) [hereinafter DOD DIR. 1342.21]; see also U.S. DEP’T OF DEFENSE, DIR. 1342.16, PROVISION OF FREE PUBLIC EDUCATION FOR ELIGIBLE DEPENDENT CHILDREN PURSUANT TO SECTION 6, PUBLIC LAW 81-874, AS AMENDED para. 3.2 (16 Oct. 1987) [hereinafter DOD DIR. 1342.16] (incorporating changes through 5 Aug. 1994).

<sup>80</sup> The statute authorizes the Secretary of Defense to provide for the elementary and secondary education of military dependents residing on military installations in the U.S. and territories, commonwealths and possessions of the U.S. See 20 U.S.C. § 2164(a)(1) (2000).

<sup>81</sup> *Id.*

The statutory language clearly does not require the Secretary of Defense to establish DOD domestic schools, and does not grant the Secretary, nor the military services, the authority to mandate attendance or to oversee the education of military dependents not attending DOD schools. Similarly, although DOD Directive 1342.16 delegates significant responsibility to installation commanders, such as providing resource and logistics support, ensuring the establishment of elected school boards, and ensuring the safety of students traveling to and from the on-base school,<sup>82</sup> the directive does not grant the commander authority and oversight over the education of military dependents who do not attend DDESS schools. By implication this means that a commander has no authority to regulate the home school programs.

## 2. *Military Dependent Education Overseas*

In 1978, Congress overhauled the overseas dependent education program by passing the Overseas Defense Dependents' Education Act (ODDEA).<sup>83</sup> The act directed the Secretary of Defense to "provide a free public education through secondary school for dependents in overseas areas."<sup>84</sup> As with the statutes and directives pertaining to DOD domestic schools, neither the original ODDEA nor implementing directives mention home schooling.<sup>85</sup> Similarly, no provision of the ODDEA or DOD directives requires attendance at overseas DODDS schools, nor do they grant the Secretary of Defense, the military services or the overseas installation/community commander the authority to compel attendance in DODDS schools, or to oversee the education of school-age dependents who do not attend DODDS schools. As with DOD domestic schools, the logical conclusion is that a commander has no authority to regulate the home school programs of military parents overseas.

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<sup>82</sup> See DOD DIR. 1342.16, *supra* note 79, para. 5.4.

<sup>83</sup> Overseas Defense Dependents Education Act, 20 U.S.C. §§ 921-932.

<sup>84</sup> *Id.* § 921(a).

<sup>85</sup> See U.S. DEP'T OF DEFENSE, DIR. 1342.6, DEPARTMENT OF DEFENSE DEPENDENTS SCHOOLS (DoDDS) (13 Oct. 1992) (incorporating changes through 5 Aug. 1994); U.S. DEP'T OF DEFENSE, DIR. 1342.13, ELIGIBILITY REQUIREMENTS FOR EDUCATION OF MINOR DEPENDENTS IN OVERSEAS AREAS (8 July 1982) (incorporating changes through 29 July 1992).

## B. The Military's Approach to Home Schooling: A Ship Without a Rudder

As home schooling grew in popularity in the 1980s and 1990s, the military services, and particularly the DODEA, were slow to adapt. The lack of a clear, comprehensive DOD home school policy, especially for overseas schools, influenced some commands to issue local command policies that either restricted home schooling altogether or regulated home schooling to some extent.<sup>86</sup> For example, on 6 November 1989, the U.S. Army community commander at Augsburg, Germany, issued a policy memorandum prohibiting home schooling and requiring parents to enroll their school-age children in either a DODDS school, an accredited local school, or a school accredited by a U.S. civil or religious organization.<sup>87</sup> The command rescinded the policy shortly thereafter, but only after intense lobbying by home school families to the DOD.<sup>88</sup>

The Augsburg policy controversy had minimal affect on DODEA. Through the 1990s, the DODEA did little to develop a uniform home

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<sup>86</sup> See Valerie Moon, *Military Homeschooling Overseas*, HOME EDUC. MAG. (Sept./Oct. 2001), at <http://www.home-ed-magazine.com/HEM/185/somilitary.html>. The author notes that:

Over the years, actions taken by military officials overseas concerning homeschoolers have been uneven, sporadic, decentralized, and yet perennial. In some overseas communities military homeschooling organizations seem to have effectively kept any control at a minimum through visibility in the community, while in other cases community commanders have felt it their business to control homeschooling through restrictive policy letters.

*Id.*

<sup>87</sup> See Memorandum, Brigadier General Louis J. Del Rosso, to See Distribution, subject: USMCA Augsburg High/Elementary School Attendance, Military Community, Policy Memorandum #31,11 (6 Nov. 1989) (on file with author). The policy stated in pertinent part:

They can elect to enroll children in:

- a. A Department of Defense Dependent School (DoDDS).
- b. A locally accredited public, private, or parochial school.
- c. A school accredited by an acknowledged U.S. civil or religious education association . . . Attendance at schools not meeting the above criteria is . . . strictly prohibited . . . . Similarly, so called "home teaching" (*i.e.*, parent keeps child at home and personally conducts education) is strictly prohibited.

<sup>88</sup> See KLICKA, *supra* note 68, at 368.

schooling policy. In 1999, Congress took notice and instructed DODEA to develop a “clear policy” on support for home schooling overseas.<sup>89</sup> The DODEA complied by issuing a home schooling policy memorandum that acknowledged the right to home school.<sup>90</sup> “It is the policy of the Department of Defense Education Activity (DoDEA) to neither encourage nor discourage sponsors from home schooling . . . . DoDEA recognizes that home schooling is a sponsor’s right and can be a legitimate alternative form of education . . . .”<sup>91</sup> The memorandum also stated that DODEA would, “consistent with existing regulations,” provide home schoolers with auxiliary services, such as library services, and allow participation in extra-curricular and interscholastic activities.<sup>92</sup> It also stated that “[h]ome schoolers who choose to use DODEA services must complete a registration form.”<sup>93</sup>

Although the policy memorandum was a step forward for DODEA, in that it acknowledged the right to home school, home school advocates viewed it as inadequate because of the “consistent with existing regulations” language in relation to the use of auxiliary services.<sup>94</sup> At the

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<sup>89</sup> See H.R. REP. NO. 106-162 (1999). In the House Armed Services Committee Report accompanying the National Defense Authorization Act for Fiscal Year 2000, Congress urged a more proactive approach on the part of DODEA in establishing a clear home school policy:

The committee believes that military families who decide to home school their children should be supported by Department of Defense Overseas Schools (DODDS) to the extent possible. . . . The committee is aware that the Department of Defense Education Activity (DODEA) claims that it fully supports home schooling. DODEA’s published material and the actual experience of some parents belie that claim, however. The committee believes that DODEA should take a more proactive approach in establishing a clear policy and providing parents information about available DODEA support for home schooling overseas, rather than merely directing parents to the overseas commander. To that end, the committee directs the Secretary of Defense to develop clear policy on support for home schooling overseas.

*Id.*

<sup>90</sup> Policy Memorandum 99-C-001, Department of Defense Education Activity, subject: Home Schooling (no date) (on file with author) [hereinafter DODEA Memo 99-C-001].

<sup>91</sup> *Id.* para. 1.

<sup>92</sup> *Id.* para. 3.

<sup>93</sup> *Id.*

<sup>94</sup> See Moon, *supra* note 86, para. 14 (arguing that one of the problems with the policy was that it failed to address the policy in DOD schools that students must have a certain

time, to be eligible for extracurricular activities at DODDS schools, home school children were required to enroll in at least four classes at a DODDS school.<sup>95</sup> Most military home school families were unwilling to do this as it obviously would defeat the purpose of home schooling altogether.<sup>96</sup>

Another weakness of the DODEA policy was that it did not address the authority of commanders to regulate home schooling. As a result, some commanders continued to issue local home school policies. For example, in a 23 October 2000 memorandum, U.S. Army Europe (USAREUR) issued a policy requiring sponsors to either enroll their children in a DODDS school, enroll them in a public or private host-nation school, or conduct home schooling.<sup>97</sup> The memorandum also required home school sponsors to submit registration forms indicating their intent to home school.<sup>98</sup> By requiring parents to submit a notice of intent, USAREUR apparently believed it had at least *some* authority to regulate home schooling.

Just a few months later, in January 2001, a subordinate unit of USAREUR, the 104th Area Support Group, Hanau, Germany, issued a similar but more detailed policy.<sup>99</sup> It not only required a written declaration of intent to home school, but also “encouraged” sponsors to maintain a “record of curriculum” containing the start date and end date of the program, hours spent in instruction, subject areas to be covered, methods used to determine mastery of materials, a list of textbooks used, progress on standardized tests, samples of student’s work, and representative tests and assignments.<sup>100</sup> The policy further stated that “Military Police have the responsibility to challenge all school age

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GPA to participate in extracurricular/auxiliary activities. The author argued that this created a “Hobson’s Choice” for DOD schools because they would either anger enrolled students and their parents by allowing non-enrolled home school students to participate without the GPA qualification, or anger home school students and parents by requiring them to participate with strings attached (GPA)). *Id.*

<sup>95</sup> *See id.* para. 24.

<sup>96</sup> *See id.*

<sup>97</sup> *See* Memorandum, Headquarters, United States Army, Europe, and Seventh Army, to See Distribution, subject: Home-Schooling in USAREUR (23 Oct. 2000) (on file with author).

<sup>98</sup> *See id.* para. 3.

<sup>99</sup> *See* Policy Memorandum, HQ, 104th Area Support Group, No: 16-4, subject: Recording Parents’/Guardians’ Choice to Educate Their School Age Family Members (22 Jan. 2001) (on file with author).

<sup>100</sup> *See id.* paras. 6a, 6b.

family members for possible truancy during DODDS school class hours (0800-1500),” but made no exception for home schoolers.<sup>101</sup> By laying out criteria by which a home school program could be evaluated (subject areas covered, textbooks used, samples of student’s work and assignments), and authorizing the military police to “challenge” children for possible truancy, the policy went far beyond the DODEA and USAREUR policies. Interestingly, neither the 104th Area Support Group policy nor the DODEA and USAREUR policies cited any authority by which the commander could regulate home schooling. As a result, despite the passing of over ten years since the controversial Augsburg prohibition against home schooling, the issue of command authority over home schooling remained unresolved throughout the DOD.

Approximately one month after the 104th Area Support Group’s January 2001 policy memorandum, the USAREUR Director of Education announced the formation of a DODEA home school working group (later referred to as a task force) to research and review host nation and “individual state laws and rules governing home schooling.”<sup>102</sup> Apparently, Army commanders in Europe had raised the issue with the USAREUR Deputy Commanding General, who took it to DODEA in Arlington, Virginia.<sup>103</sup>

The group discovered a set of issues that most states address. Those issues are hours of teaching, record keeping, curriculum requirements, teacher qualifications,

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<sup>101</sup> See *id.* para. 7. Police authority to “challenge” children for possible truancy can sometimes conflict with the rights of home schoolers. For example, on 16 December 2003, a thirteen-year old home schooled boy in San Diego was cited by a policeman for violating San Diego’s daytime curfew ordinance. See Home School Legal Defense Association, *Victory for Homeschool Family in San Diego* (Jan. 14, 2004), at <http://www.hslda.org/hs/state/ca/200401140.asp> (last visited Nov. 10, 2004). The police officer had been conducting a “truancy sweep” and incorrectly believed that home school children were required to abide by the public school’s schedule. See *id.*

<sup>102</sup> Laurie Almodovar, *USAREUR Considers Home-Schooling Rules*, CITIZEN VOL. 30, NO. 12 (June 19, 2001) (on file with author). The article summarized the events of a meeting between the USAREUR Director of Education, Mike Perez, and home school parents on 23 May 2001, wherein Perez stated that it was the “area support group commander’s responsibility to ensure children within the command are being educated,” and “since federal statutes allow only the counting and identification of home-schooled children, some commanders felt it was difficult to fulfill their responsibility.” *Id.* The article does not state whether Perez cited any authority for the conclusion that it was the commander’s responsibility to ensure that children are being educated. See *id.*

<sup>103</sup> See *id.*

notification of authorities, testing, eligibility for traditional program supplementation and medical checks . . . . The workgroup decided an assembly should decide how these issues should be addressed . . . . The assembly . . . will be tasked to make recommendations about each issue. These recommendations will go to the assistant secretary of defense for education, who will review them and send them to Congress. This could result in laws allowing regulation of home schooling in military communities outside the United States . . . .<sup>104</sup>

During the same time period, USAREUR began holding “focus group” meetings with home school parents and DODDS school personnel, passing out questionnaires that focused on methods to regulate home schooling conducted by military parents.<sup>105</sup> After pressure from home schoolers and even Congress, DODEA ultimately decided to terminate the task force, as well as its goal of revising the home school policy.<sup>106</sup> Regardless, the entire episode, from USAREUR’s lobbying of DODEA, to the focus group meetings, to the formation of the task force, was informative in that it revealed DODEA’s discontent with home schooling within the military, and, more importantly, its desire to impose additional DOD control and oversight over home schoolers. The episode also, perhaps, explained why DODEA had not previously issued a clear, unambiguous policy stating that neither DODEA, the military services,

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<sup>104</sup> *Id.*

<sup>105</sup> See E-mail from kavmom in Germany, to Military Homeschool message board (May 16, 2001 at 10:41 pm PST), at <http://www.vegsources.com/homeschool/military/messages/1077.html> (last visited Nov. 10, 2004). Typical questions on the questionnaire were: Should there be teacher certification requirements for home school parents? Should there be core subject requirements for home school children? Should parents be required to notify the command they are home schooling? Should home schoolers be required to take standardized tests? Should there be a truancy policy in DODDS schools? See *id.*

<sup>106</sup> See Home School Legal Defense Association, *Military’s Attempt to Regulate Home Schoolers is Slowed*, at <http://www.hslda.org/docs/nche/000010/20010724135801.asp> (last visited Nov. 10, 2004). The notice quoted DODEA Director Joseph Tafoya:

At this time there are no plans for the Department of Defense Education Activity . . . to hold a Home School Task Force meeting. On June 7, 2001, the Dependents’ Education Council . . . tabled proposed plans to look into the possible revision of our home school policy. It is unfortunate that remarks were made prematurely in Heidelberg about a possible task force.

*Id.*

nor commanders have any authority to regulate home schooling within the military.

### C. Recent Statutory and Policy Changes Regarding Home Schooling Within the Military

#### 1. 2002 Amendment to the Overseas Defense Dependents' Education Act

In 2002, Congress amended the ODDEA by directing that auxiliary services of DOD overseas schools be made available to eligible home schooled dependents:

(d) Auxiliary services available to home school students.

(1) A dependent who is educated in a home school setting, but who is eligible to enroll in a school of the defense dependent's education system, shall be permitted to use or receive auxiliary services of that school without being required to either enroll in that school or register for a minimum number of courses offered by that school. The dependents may be required to satisfy other eligibility requirements and comply with standards of conduct applicable to students actually enrolled in that school who use or receive the same auxiliary services. (2) . . . the term "auxiliary services" includes use of academic resources, access to the library of the school, after hours use of school facilities, and participation in extracurricular and interscholastic activities.<sup>107</sup>

The amendment clearly reflects Congress's dissatisfaction with DODEA's 1999 policy memorandum,<sup>108</sup> and mirrors the directive given by the House Armed Services Committee to the Secretary of Defense and DODEA in its report accompanying the National Defense

<sup>107</sup> 20 U.S.C. § 926(d) (2000).

<sup>108</sup> See 99-C-001 DODEA Memo, *supra* note 90. As previously discussed, the policy memo was considered flawed in that, while it authorized the provision of auxiliary services to home school children, other DOD policies required them to enroll in at least four classes at a DODDS school to be eligible for the services. See Moon, *supra* note 86.



Authorization Act for Fiscal Year 2000.<sup>109</sup> The amendment is important to military home schoolers in that it is an unequivocal acknowledgment by Congress of the right of military parents to home school their children. In addition, by authorizing the use of auxiliary services without requiring enrollment or registration, the legislation suggests an intent by Congress that the DODEA's role in regulating home schooling should be minimal.

2. 2002 DODEA Home Schooling Policy: Does it Resolve the Problem?

The ODDEA amendment forced DODEA to revamp its home schooling policy. On 6 November 2002, DODEA issued a new policy memorandum applying to both domestic and overseas DOD school systems.<sup>110</sup> As before, the policy recognizes the sponsor's right to home school, and that home schooling can be a legitimate alternative form of education. Consistent with the ODDEA amendment, the policy authorizes home schoolers to use specified auxiliary services without a requirement to enroll in or to register for a minimum number of courses offered by the school.<sup>111</sup> The policy also directs DODEA schools to offer individual classes and special education services to home schoolers.<sup>112</sup> In addition, the policy includes an attachment of thirty "Frequently Asked Questions and Answers" covering specific questions pertaining to auxiliary services, eligibility, classes and special services, and miscellaneous issues.<sup>113</sup>

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<sup>109</sup> H.R. REP. NO. 106-162 (1999). The ODDEA amendment is consistent with a trend in the states to allow home school students equal access to public school services to some extent. At least thirteen states have enacted statutes guaranteeing home school children some type of public school access to auxiliary services. See David W. Fuller, *Public School Access: The Constitutional Right of Home-Schoolers to "Opt In" to Public Education on a Part-Time Basis*, 82 MINN. L. REV. 1599, 1615 (1998).

<sup>110</sup> See 2002 DODEA Memo, *supra* note 9.

<sup>111</sup> *Id.* para. 4-7.

<sup>112</sup> *Id.* para. 4. The policy requires home schoolers who take classes or use special education services in DOD schools to "complete a registration form and comply with other registry procedures and requirements." This requirement does not violate the ODDEA amendment, however, because the amendment's prohibition on requiring home schoolers to enroll in or to register for a minimum number of courses applies only in relation to the use of specified auxiliary services, and not to classes or special education services. See 20 U.S.C. § 926(d).

<sup>113</sup> See 2002 DODEA Memo, *supra* note 9, at 3.

Despite the extensive rewrite, the policy failed again to specifically address whether an installation or community commander has any authority to regulate home schooling. Instead, the policy language is ambiguous, containing such language as:

Are there legal requirements on home schooling practices for DoD dependents?

A host nation, state, commonwealth, territory, or possession where a DoD sponsor is stationed may impose legal requirements on home schooling practices. Sponsors are responsible for complying with applicable local requirements and should consult with installation Staff Judge Advocates concerning these requirements.<sup>114</sup>

Although the paragraph does not include commanders in the list of authorities who “may impose legal requirements on home schooling practices,” neither does it explicitly restrict commanders from regulating home schooling. The third paragraph of the policy memorandum uses similar language, stating:

A host nation, state, commonwealth, or territory where a DoD sponsor is stationed may impose legal requirements on home schooling practices. DoDEA encourages DoD sponsors who wish to home school their dependents to communicate their desire to their commanders to determine if there are any *command policies* or other rules ensuring that home schooling practices meet host nation, state, commonwealth, or territory requirements. Sponsors are responsible for complying with applicable local requirements.<sup>115</sup>

The reference in the second sentence to *command policies* arguably opens the door for commanders to regulate home schooling by military personnel under their command. In fact, the language appears to create a *command responsibility* to ensure that home schooling practices meet local government requirements. But how does the commander go about fulfilling that responsibility? By imposing notification requirements on home schoolers? Teacher certification requirements? Curriculum

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<sup>114</sup> *Id.* at question #27.

<sup>115</sup> *Id.* para. 3 (emphasis added).

oversight? Mandatory medical exams? The DODEA policy memorandum provides no explanation.

A better approach would have been to state clearly:

A commander has no legal authority to regulate the content or structure of home schooling practices. A commander's authority over home schooling practices is limited to those issues relating to the commander's inherent authority to maintain law, order and discipline on the installation and to promote the health and safety of persons on the installation.

With that wording, the issue of command authority to regulate home schooling content and structure would not be in question. Instead, by failing to make a definitive statement regarding the limitations of commanders over home schooling, DODEA has kept the door open for unwitting commanders to continue to issue "command policies" that may go far beyond their authority. This possibility is especially true in commands that have had, and may still have, local guidance on home schooling issued prior to the 2002 DODEA policy memorandum. A prime example is the *USAREUR Student Eligibility Enrollment and Data Handbook* for school year 2003-2004, which states, in part:

When a family declines to enroll an overseas dependent in DoDDS, the installation commander may call the family to account for this decision. The commander controls access to the military installation, and whether the overseas dependents are "command sponsored" or not, the commander may predicate continued logistical support (e.g. commissary and exchange privileges) for the sponsor's school age dependents on enrollment in some school program that serves the interests of the child. Hence, the installation commander may require attendance in DoDDS, an alternative school approved by DoDDS, or some alternative program acceptable to the commander as a condition of continued command sponsorship.<sup>116</sup>

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<sup>116</sup> USAREUR STUDENT ELIGIBILITY ENROLLMENT DATA HANDBOOK, SCHOOL YEAR 2003-2004 40 (C2, May 2003) [hereinafter HANDBOOK] (on file with author).

The paragraph wrongly states that the commander has authority to mandate attendance, as there is no compulsory attendance law for DOD students attending DODDS schools.<sup>117</sup> Further, although the paragraph is obviously outdated, its presence in the current version of the *USAREUR Student Handbook* is subject to misuse by commanders and DODDS personnel unaware of current law.<sup>118</sup> This underscores the need for an unambiguous DODEA home schooling policy that fully explains the role of DODEA and commanders with regard to home schooling within the military.

#### IV. Military and State Child Advocacy Programs: A Means to Regulate Home Schooling?

##### A. Department of Defense Family Advocacy Program

The military addresses problems of child abuse, child neglect, and spouse abuse through the DOD Family Advocacy Program and the family advocacy programs implemented by the individual military services. The starting point is *DOD Directive 6400.1*, which lays out the DOD's overall policy to prevent child and spouse abuse through early identification, intervention, rehabilitation, and coordination with civilian authorities for assistance.<sup>119</sup> The directive instructs each military service to establish family advocacy programs on each installation.<sup>120</sup> In addition, the directive requires the military services to submit child and spouse abuse reports at least semiannually.<sup>121</sup>

The directive emphasizes the importance of the relationship between military installations and local child protective agencies by ordering the services to “[e]ncourage local commands to develop memoranda of understanding (MOUs) providing for cooperation and reciprocal reporting of information with the appropriate civilian officials . . . .”<sup>122</sup>

<sup>117</sup> See *supra* notes 79-85 and accompanying text.

<sup>118</sup> The *Handbook*'s “Home Schooling” chapter apparently was not updated for the 2003-2004 school year, as evidenced by the fact that the “references” section still lists the 1999 DODEA policy memorandum on home schooling, and not the 2002 DODEA policy. See HANDBOOK, *supra* note 116.

<sup>119</sup> See DOD DIR. 6400.1, *supra* note 9, para. 4.

<sup>120</sup> See *id.* paras. 5.2.1, 5.2.11.

<sup>121</sup> See *id.* para. 7.

<sup>122</sup> See *id.* para. 5.2.8. Reiterated in para. E3.1.1.3.1 is that family advocacy programs shall include, “[t]he development of local MOUs with civilian authorities for the

Further, in all alleged child abuse cases, the directive orders military family advocacy programs to notify the local child protective services agency in the United States and “where covered by agreement overseas.”<sup>123</sup> In short, the DOD directive envisions that local commands will *actively seek* a close, cooperative relationship with local civilian authorities.<sup>124</sup>

Given the above, it is apparent that the DOD gives the military services broad authority to work with local agencies on family abuse issues. But is that authority broad enough to encompass issues of educational neglect? If so, are DOD and individual service definitions broad enough to include allegations of educational neglect against military home schoolers? The DOD directive defines child abuse or neglect as follows:

Child Abuse and/or Neglect. Includes physical injury, sexual maltreatment, emotional maltreatment, deprivation of necessities, or combinations for a child by an individual responsible for the child’s welfare under circumstances indicating that the child’s welfare is harmed or threatened. The term encompasses both acts and omissions on the part of a responsible person.<sup>125</sup>

Although the definition does not mention educational neglect, other DOD guidance is more specific. *Department of Defense Instruction 6400.2*,<sup>126</sup> which prescribes DOD reporting requirements for child and spouse abuse incidents, includes a definition of child neglect similar to the DOD Directive, but also includes a definition of educational neglect: “Educational Neglect. Allowing for extended or frequent absence from school, neglecting to enroll the child in school, or preventing the child from attending school for other than justified reasons (e.g., illness, inclement weather).”<sup>127</sup> The definition is nearly identical to the one listed in a 1997 policy memorandum issued by the Office of Assistant

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reporting of cases, provision of services, and the delineation of responsibilities in responding to child and spouse abuse.”

<sup>123</sup> *Id.* para. 6.1.4.

<sup>124</sup> The Army family advocacy regulation contains a sample format for a memorandum of agreement with Child Protective Services. See AR 608-18, *supra* note 9, fig. E-1.

<sup>125</sup> DOD DIR. 6400.1, *supra* note 9, para. E2.1.3.

<sup>126</sup> DOD INSTR. 6400.2, *supra* note 10.

<sup>127</sup> *Id.* at enclosure 2, attachment 2, para. 13.d.(7).

Secretary of Defense, Force Management Policy,<sup>128</sup> which revised parts of the DOD instruction and is the most recent DOD effort to define child neglect and educational neglect:

Neglect of a child. A type of child abuse/maltreatment . . . Child neglect includes “Abandonment,” “Deprivation of Necessities,” “Educational Neglect,” “Lack of Supervision,” “Medical Neglect,” and/or “Non-organic Failure to Thrive” . . . (3) Educational Neglect. A type of child neglect that includes knowingly allowing the child to have extended or frequent absences from school, neglecting to enroll a child in school, or preventing the child from attending school for other than justified reasons.<sup>129</sup>

Thus, DOD takes the position that educational neglect is a type of child neglect, which is a type of child abuse. Therefore, a substantiated case of educational neglect is considered child abuse. At issue for military home schoolers, however, is whether the definition of educational neglect is broad enough to include allegations of *home schooling* educational neglect. On this point the DOD guidance is unclear, leaving numerous questions unanswered. For example, if a military home school parent is accused of “neglecting to enroll a child in school,” what must the parent do to prove that the child is in school? Is home schooling an acceptable form of “school?” One would presume so given that both the U.S. Congress and the DODEA acknowledge the legitimacy of home schooling.<sup>130</sup> However, must the parent meet other standards to prove that the home school is legitimate? Is it sufficient to merely say, “We are home schooling,” or must the parent comply with some other requirement, such as teacher certification requirements or DOD approved curriculum plans? If the installation is in the United States, does the commander defer to state standards for home schooling? If the state’s home school law is lenient, may the commander require more proof than the state? On overseas installations, may commanders draft their own standards, given the lack of state standards? A review of

<sup>128</sup> Memorandum, Assistant Secretary of Defense, Force Management Policy, to Chief, Customer Service Division, Patient Administration Systems and Biostatistics Activity, CEIS, ATTN: MCHI, 1216 Stanley Road, Fort Sam Houston, TX 78234, subject: Policy Changes for the Submitting of Child and Spouse Abuse Information (22 Aug. 1997) [hereinafter ASD (FMP) Memo] (on file with author).

<sup>129</sup> *Id.* paras. 4-2-2, 4-2-3.

<sup>130</sup> See 20 U.S.C. § 926(d); 2002 DODEA Memo, *supra* note 9.

family advocacy regulations from the Army, Navy and Air Force does not resolve these issues, and, in the case of the Army, may even complicate the issues further.

#### B. Individual Service Family Advocacy Programs

As required by *DOD Directive 6400.1*, the Army, Navy and Air Force each implement family advocacy programs through individual service regulations.<sup>131</sup> The regulations are similar in that they establish family advocacy committees on each installation,<sup>132</sup> and encourage agreements between the installation and the local civilian community on the handling of child and spouse abuse cases.<sup>133</sup> The regulations are less uniform, however, in defining child abuse, child neglect, and educational neglect. For example, the Air Force instruction uses the word “maltreatment” as a term encompassing child abuse/neglect and spouse abuse/neglect,<sup>134</sup> but fails to define abuse or neglect, and does not mention educational neglect at all. The Navy includes educational neglect within its definition of neglect but defers to the DOD Family Advocacy directive for a more specific definition of educational neglect.<sup>135</sup> By default, then, the working definition for educational neglect in the Air Force and the Navy is the one found in *DOD Directive 6400.1*.<sup>136</sup>

With the revision of the Army family advocacy regulation in October 2003, the Army’s definition of educational neglect broke new ground by referencing home schooling:

*Educational Neglect.* A type of child neglect that includes knowingly allowing the child to have extended or frequent absences from school, neglecting to enroll the child *in some type of home schooling* or public or

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<sup>131</sup> See DOD DIR. 6400.1, *supra* note 9, para. 5.2.1; see also AR 608-18, *supra* note 9; AFI 40-301, *supra* note 9; OPNAV INSTR. 1752.2A, *supra* note 9.

<sup>132</sup> See AR 608-18, *supra* note 9, para. 1-8a(1); AFI 40-301, *supra* note 9, para. 1.4.3; OPNAV INSTR. 1752.2A, *supra* note 9, para. 5a.

<sup>133</sup> See AR 608-18, *supra* note 9, para. 2-12a; AFI 40-301, *supra* note 9, para. 1.4.8; OPNAV INSTR. 1752.A, *supra* note 9, at encl. 1, para. 12, encl. 4, para. 2.

<sup>134</sup> See AFI 40-301, *supra* note 9, at 31.

<sup>135</sup> See OPNAV INSTR. 1752.2A, *supra* note 9, at encl. 1, para. 7d.

<sup>136</sup> See DOD DIR. 6400.1, *supra* note 9, para. E2.1.3.

private education, or preventing the child from attending school for other than justified reasons.<sup>137</sup>

The Army's definition changes the phrase "neglecting to enroll a child in school" to "neglecting to enroll the child in some type of home schooling or public or private school."<sup>138</sup> and mirrors the DOD definition almost word for word, it changes the phrase "neglecting to enroll a child in school" to "neglecting to enroll the child in some type of home schooling or public or private school." The reference to home schooling resolves at least one question raised by the DOD's definition in that there is little doubt that the Army considers a home school to be an acceptable type of "school." However, as with the DOD definition, the Army definition leaves other questions unresolved, such as, is *any* type of home schooling acceptable to the Army? Further, must the parent meet some other standard, such as requirements under the state's home school law, or even a standard imposed by the installation commander? Additionally, what standards should apply on overseas installations where state law does not apply? The proponent of the regulation, the Office of the Assistant Chief of Staff for Installation Management,<sup>139</sup> states that the phrase "some type of home schooling" was added with state home schooling laws in mind.<sup>140</sup> The regulation is silent regarding what standards apply for home schoolers residing on overseas installations.<sup>141</sup>

Questions remain regarding home schooling overseas. For purposes of educational neglect investigations of military home schoolers, what is an acceptable "type of home schooling" on an overseas installation? Who develops the standards, and what should the standards be? Until resolution of these questions, military home school families will continue to face inconsistent rules and regulations from one installation to another, and, at times, may find themselves in conflict with commanders, DOD

<sup>137</sup> AR 608-18, *supra* note 9, at 102 (emphasis added).

<sup>138</sup> The Army's definition references the 1997 memorandum issued by the Assistant Secretary of Defense, Force Management Policy, and, but for the additional reference to home schooling, mirrors the DOD definition almost word for word. See ASD (FMP) Memo, *supra* note 128.

<sup>139</sup> See AR 608-18, *supra* note 9, at i.

<sup>140</sup> See Telephone Interview with Colonel Yvonne Tucker-Harris, Deputy, Family Programs, Family Advocacy Program Manager, U.S. Army Community and Family Support Center, Office of the Assistant Chief of Staff for Installation Management (Jan. 27, 2004).

<sup>141</sup> AR 608-18, *supra* note 9.



school authorities, and even family advocacy personnel over their right to home school.

### C. State Involvement In Military Child Advocacy Issues

The ability of a state to exercise legislative jurisdiction on a military installation is significantly affected by the federal jurisdictional status of the installation.<sup>142</sup> Depending on the type of federal jurisdiction, a state's authority to enforce its laws on the installation may range from no authority to full authority.<sup>143</sup> Obviously, this issue has relevance to allegations of home schooling educational neglect and their relation to child protection issues on military installations. If a state has jurisdiction over these issues, then the relationship between the state, installation authorities, and military home schooling parents changes dramatically. In particular, parents would not only have to deal with the military's rules and regulations regarding home schooling and child abuse issues, but also with the *state's* home schooling and child abuse laws.

There are three main categories of jurisdiction on military installations in the United States—proprietary, concurrent, and exclusive.<sup>144</sup> On proprietary and concurrent jurisdiction installations, state criminal and civil laws apply to all persons.<sup>145</sup> On exclusive federal jurisdiction installations the federal government possesses all legislative authority, with no authority reserved to the state, except the right to serve judicial process.<sup>146</sup> Theoretically, this means that state home schooling and child abuse laws apply on proprietary and concurrent jurisdiction installations, but not on exclusive federal jurisdiction installations. As with most issues involving federal-state relations, the analysis regarding exclusive federal legislative jurisdiction is not that simple, especially with regard to areas of the law normally handled exclusively by the

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<sup>142</sup> See generally Major Stephen E. Castlen & Lieutenant Colonel Gregory O. Block, *Exclusive Federal Legislative Jurisdiction: Get Rid of It!*, 154 MIL. L. REV. 113, 114 (1997) (citing numerous examples of the unclear intersection of state and federal jurisdiction, such as cases involving juvenile crime, domestic violence, personal injury, wrongful death, and service of process).

<sup>143</sup> See *id.* at 116.

<sup>144</sup> AR 608-18, *supra* note 9, at app. D. A majority of Army installations in the United States are under exclusive Federal legislative jurisdiction. See *id.* at app. D, para. D-1a.

<sup>145</sup> *Id.* at app. D, para. D-1c.

<sup>146</sup> See Castlen & Block, *supra* note 142, at 142.

states.<sup>147</sup> Under the traditional view, the federal installation (called a federal “enclave”) was considered a “state within a state,” and all state authority ceased at the federal enclave’s border.<sup>148</sup> The modern trend, however, is for the courts to examine the state law in question to see if it interferes with federal sovereignty.<sup>149</sup> The landmark case in this area is *Howard v. Commissioners*,<sup>150</sup> where the U.S. Supreme Court held that when state law does not interfere with a federal interest, the fiction of a “state within a state” will be ignored.<sup>151</sup> As a result, even on a federal enclave, the state law may apply.

The impact of *Howard* to states dealing with child welfare issues on military installations was significant, and obviously influences an analysis of the applicability of state home schooling laws on military installations under exclusive federal jurisdiction. Two state court cases involving child abuse on military installations are especially instructive. In a 1980 California case, *In re Terry Y.*,<sup>152</sup> state welfare authorities removed an infant child residing on Fort Ord, California, from the custody of his parents’ home due to allegations of parental abuse and neglect.<sup>153</sup> The parents argued that the state lacked jurisdiction over the

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<sup>147</sup> See *id.* at 124. Areas of the law normally handled exclusively by the states include: contracts, sales, guardianship, and family relations. See *id.*

<sup>148</sup> See *id.* at 122.

<sup>149</sup> See *Howard v. Comm’s*, 344 U.S. 624, 627 (1953) (holding that at times the fiction of a state within a state can have no validity); *In re Charles F.*, 120 N.M. 665, 667 (1995 N.M. Ct. App.) (stating that the more recent trend is to examine the state law to be applied to determine whether it interferes with federal sovereignty); *In re Terry Y.*, 101 Cal. App. 3d 178, 181 (Ct. App. 1980) (stating there has been a trend in state courts to hold that the exclusive jurisdiction of Congress does not deprive enclave residents of benefits which would otherwise be theirs).

<sup>150</sup> 344 U.S. 624 (1953).

<sup>151</sup> *Id.* at 627. The Court summarized its landmark holding—“where there is no friction, avoid the fiction” as follows:

The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is not interference with the jurisdiction asserted by the Federal Government. The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim. It is friction, not fiction, to which we must give heed.

*Id.*

<sup>152</sup> 101 Cal. App. 3d 178 (Ct. App. 1980).

<sup>153</sup> *Id.* at 179 (describing how the child suffered four fractures over a period of two years).

matter.<sup>154</sup> The California appeals court invoked the *Howard* rationale, stating that child protective laws were a benefit to children living on the installation, and that the laws were consistent with federal policy towards abused children and Army regulations that encouraged state involvement.<sup>155</sup> The court specifically noted that not only did Fort Ord authorities not oppose the jurisdiction of the state courts in the area of child abuse, but they actively sought state jurisdiction.<sup>156</sup>

Similarly, in a 1995 New Mexico case, *In re Charles F.*,<sup>157</sup> a state district court barred the local child protective agency from becoming involved in a child abuse case on Holloman Air Force Base, New Mexico, noting that the base held exclusive federal jurisdiction.<sup>158</sup> The New Mexico Court of Appeals reversed, holding that “in those areas such as public schooling, voting, and welfare benefits, where the federal government has failed to exercise jurisdiction, the states may act even though the area or person over which they assert jurisdiction are located on a federal enclave.”<sup>159</sup> Consistent with the analysis in *In re Terry Y.*, the court noted that the Air Force base had an agreement with state officials regarding child abuse cases and that the Air Force actively sought state involvement in those cases.<sup>160</sup> The court stated that under those circumstances, the state’s involvement did not interfere with the exercise of federal government sovereignty.<sup>161</sup>

With these cases as a backdrop, it is important to recall that the DOD encourages the military services to work closely with state and local child protective agencies.<sup>162</sup> A prime example is the Army’s approach. In *Army Regulation 608-18*, the Army provides a sample “memorandum of agreement for child protective services” between the local installation and local authorities.<sup>163</sup> The sample agreement states that the installation relies upon the local juvenile court to exercise its authority, that the court’s jurisdiction over child abuse cases on the installation is supported by congressional deference to state child abuse statutes, and that

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<sup>154</sup> *Id.*

<sup>155</sup> *See id.* at 183.

<sup>156</sup> *See id.* at 182.

<sup>157</sup> 120 N.M. 665 (1995 N.M. Ct. App.).

<sup>158</sup> *See id.* at 667.

<sup>159</sup> *Id.*

<sup>160</sup> *See id.* at 668.

<sup>161</sup> *See id.*

<sup>162</sup> DOD DIR. 6400.1, *supra* note 9, para. 5.2.8.

<sup>163</sup> *See* AR 608-18, *supra* note 9, fig. E-1.

“developing case law” upholds the exercise of state civil jurisdiction on federal enclaves where the exercise of state authority does not compromise federal sovereignty.<sup>164</sup> This is an aggressive solicitation of state and local civil jurisdiction. If the Army retains this approach, it is likely that in future cases where parents challenge state authority over child protective issues on the installation, the courts will agree with the rationale in *In re Terry Y.* and *In re Charles F.* and conclude that state jurisdiction applies.

Given the above analysis, the question remains whether state and local civil jurisdiction is broad enough to encompass educational neglect cases involving home schoolers residing on military installations under exclusive federal jurisdiction. Do *Howard*, *In re Terry Y.*, and *In re Charles F.* settle the issue of state authority over *all* child welfare issues on exclusive federal enclaves, to include educational neglect? Can a distinction be made between a state’s authority over allegations of *home schooling* child neglect and *traditional* types of child abuse/neglect on the installation? Additionally, if the conclusion is that the state *does* have authority over military home school cases, should the military be more aggressive in protecting the rights of military home schoolers from state intervention?

The argument in favor of making the distinction between the state’s authority over *traditional* child abuse or neglect cases and *home schooling* educational neglect cases is that the military has *not* invited the state to assume jurisdiction over *minor* neglect issues occurring on the installation. As the argument goes, the main purpose of a family advocacy regulation is to protect children from the most severe forms of child abuse, such as physical and sexual abuse.<sup>165</sup> Additionally, although the installation has the ability to resolve relatively minor neglect cases through administrative measures, such as removing the offender from the installation,<sup>166</sup> installations are not equipped to handle the more severe

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<sup>164</sup> *See id.*

<sup>165</sup> *See* OPNAV INSTR. 1752.2A, *supra* note 9, para. 5d (emphasizing, in particular, physical and sexual abuse over other types of abuse).

<sup>166</sup> *See* AR 608-18, *supra* note 9, para. 3-22 (listing various administrative actions the commander may take against offenders in abuse/neglect situations, such as removal from government quarters, bar from the installation, letter of warning, advanced return of civilian family members from overseas locations, termination of post exchange and other privileges, and curtailment of a soldier’s military tour of duty in a foreign country).

forms of abuse that require the intervention of state agencies and state civil courts.<sup>167</sup>

This argument is vulnerable because it conflicts with a plain reading of current DOD and service regulations and definitions regarding child neglect and child abuse. As previously discussed, the DOD and service regulations are clear that the military services, and especially the Army, *do* include educational neglect in their definitions of child neglect and child abuse.<sup>168</sup> With the Army's sample memorandum of agreement with local agencies for child protective services specifically stating that child abuse includes child neglect,<sup>169</sup> and absent an affirmative statement in the agreement that educational neglect is excluded from state jurisdiction, there is little room to argue that the state's authority over child abuse and neglect issues does not include educational neglect.

A stronger argument in favor of excluding educational neglect issues from the jurisdiction of state and local agencies is that the federal government, through the operation of DOD schools on military installations, has retained its sovereignty over the education of military dependents. The argument is that the installations that operate DOD schools have, in effect, exercised federal sovereignty in this area.<sup>170</sup> As established in *In re Terry Y.*, and *In re Charles F.*, in determining whether state law applies on a federal enclave, the courts place great significance on whether the federal government has retained jurisdiction

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<sup>167</sup> See Major Lisa M. Schenck, *Child Neglect in the Military Community: Are We Neglecting the Child?*, 148 MIL. L. REV. 1, 4 (1995) (noting that although the goal of the DOD Family Advocacy Program is to protect the child, it is "limited in large part to education, rehabilitation, treatment, and monitoring of parents who commit offenses against the child.") Others measures to protect an abused child, such as removing the child from the home, placing the child in foster care, the issuance of restraining orders, and the authorization of home inspections normally require the involvement of civilian child protection agencies, local law enforcement, and civil courts. See AR 608-18, *supra* note 9, para. 3-22e.

<sup>168</sup> See *supra* notes 125-41 and accompanying text.

<sup>169</sup> See AR 608-18, *supra* note 9, fig. E-1.

<sup>170</sup> A counter argument would be that the federal government does not have, and *never* had, sovereignty over education issues on federal enclaves because, historically, education has been primarily a province of the states. See *supra* note 37 and accompanying text. This argument is weakened by the fact that the U.S. Congress, with regard to military dependent education, has specifically authorized the Secretary of Defense to operate primary and secondary schools on domestic military installations. See 20 U.S.C. § 2164 (2000); see also *supra* text accompanying notes 80-81.

over the issue in question.<sup>171</sup> When the federal government invites the state to exercise jurisdiction on the installation, the courts are inclined to conclude that state action does not interfere with federal sovereignty.<sup>172</sup> Thus, it is reasonable to conclude that when an installation operates DOD schools, the federal government retains jurisdiction over dependent education on that installation. As a result, the exercise of state jurisdiction on the installation would create the “friction” that concerned the Court in *Howard*.<sup>173</sup> This argument may be limited, in that arguably it would only apply on those installations operating DOD schools. For installations not operating DOD schools, the door would remain open for the states to exercise authority over allegations of educational neglect involving home schoolers.

#### V. Military Home Schoolers Residing Off the Installation

Thus far, the focus of the analysis has centered on home schoolers residing on military installations, whether in the United States or overseas. While a majority of the issues pertaining to military home schooling originate *on* installations, any discussion of home schooling within the military is incomplete without consideration of issues facing military home schoolers living *off* the military installation. For example, what is the applicability of state and host nation home schooling laws to military home schoolers residing off the installation? What is the applicability of the *military’s* home schooling policy and regulations in these situations?

#### A. Domestic Home Schooling Off the Installation

The school-age children of military personnel residing in a state, whether on or off the military installation, are subject to the state’s compulsory attendance law.<sup>174</sup> With home schooling now legal in every

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<sup>171</sup> *In re Terry Y.*, 101 Cal. App. 3d at 182; *In re Charles F.*, 120 N.M. at 667; *see also supra* text accompanying notes 154-61 (discussing how the courts developed their findings by examining the state law in question to see if it interferes with federal sovereignty).

<sup>172</sup> *In re Terry Y.*, 101 Cal. App. 3d at 182; *In re Charles F.*, 120 N.M. at 667.

<sup>173</sup> *See Howard v. Comm’rs of Louisville*, 344 U.S. 624, 627 (1953); *see also supra* text accompanying notes 146-57.

<sup>174</sup> Examples of state compulsory attendance laws include WASH. REV. CODE ANN. 28A.225.010 (requiring children between ages eight and eighteen to attend public school,

state,<sup>175</sup> compliance with a state's compulsory attendance law is simply a matter of complying with the state's home schooling requirements.<sup>176</sup> No federal law or DOD policy or regulation authorizes a commander to regulate the home schooling activities of military parents residing off the installation.<sup>177</sup> Further, no federal law, state law, or DOD policy or regulation exempts military families residing off the installation from the compulsory attendance laws or home school laws of the states.<sup>178</sup> This does not mean, however, that arguments for an exemption are not available. For example, does the *temporary residency* status of the military dependent diminish a state's responsibility over the education of the child?

The temporary residency argument focuses on the contention that the state's long-term interest in educating a military dependent child who is temporarily residing in the state is significantly less than that pertaining to a non-military child.<sup>179</sup> With regard to a non-military child, the state can convincingly assert that it has primary jurisdiction and responsibility over all other states to educate the child.<sup>180</sup> The state's position,

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private school or a home school); N.D. CENT. CODE § 15.1-20-01 (requiring children between ages six and sixteen to attend public school unless an exemption applies, such as private school or home school). Although this article proposed in Part IV.C. that a state's home schooling laws should not apply on installations that have retained federal sovereignty by operating DOD schools, this argument has not been used by the DOD and has not been litigated in court. As a result, the general rule that education historically falls under the province of the states and not the federal government is followed in this analysis. See *supra* text accompanying notes 27, 37.

<sup>175</sup> See generally KLICKA, *supra* note 6, at iv-viii (summarizing the home school laws of the fifty states).

<sup>176</sup> See generally KLICKA, *supra* note 68, at 367 (stating that "military home schoolers in the United States . . . are required to follow the home school requirements of the state in which they are stationed").

<sup>177</sup> See generally discussion *supra* pt. III (frequently making the point that neither the statutes nor DOD Directives pertaining to dependent education, nor the DODEA Home School Policy, give commanders any authority to compel school attendance or to regulate home schooling in any way).

<sup>178</sup> This conclusion is based on research of federal and state law, and DOD policy and regulations, pertaining to home schooling that have been cited throughout this article. See generally *supra* pts. II.B, II.C.1, III.B., III.C.

<sup>179</sup> Arguably, a state has a greater interest in educating someone who is likely to stay in the state. Although not explicitly stated by the courts, a state's interest in transforming a child into an "economically productive" person and one "capable of political participation" is as much for the benefit of the state as the child. See generally *supra* text accompanying notes 19-20.

<sup>180</sup> See Mawdsley, *supra* note 15, at 191 n.1 and accompanying text. If public education is primarily a "province of the states," then it stands to reason that the state where the

however, is weakened with regard to a military child, because the child's state of domicile, as well as the other states where the child may live during the parent's military career, will have equal if not more responsibility for the child's education at some point during the child's upbringing. In effect, the state's interest in the education of a temporary resident is not sufficiently "compelling" to overcome the constitutional right of the parents to direct their children's education and upbringing.<sup>181</sup> With this dilution of state responsibility and interest over the education of the military child, the military parent's fundamental rights under the Constitution to direct the child's education free of state regulation and control comes to the forefront.

#### B. Overseas Home Schooling Off the Installation

Compulsory attendance laws of the fifty states do not apply to military dependents residing overseas, whether on or off the military installation, because they do not reside in any of the fifty states.<sup>182</sup> Additionally, neither the DOD nor the military services have authority under statute or regulation to compel school attendance of military dependents overseas.<sup>183</sup> By implication, neither the DOD nor the military services have the authority to regulate the home schooling activities of overseas military parents residing off the installation.

The authority of the host nation to enforce compulsory attendance and home schooling laws against military dependents living off the installation is not so clear. One scholar maintains that military home schoolers on foreign soil are not subject to host nation compulsory attendance laws when a Status of Forces Agreement (SOFA) or some other similar agreement applies to the foreign country.<sup>184</sup> This conclusion is likely based on the argument that command-sponsored dependents of military personnel covered by a SOFA are generally

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child resides on a permanent basis is the state that has jurisdiction over the child's education. *See Plyler v. Doe*, 457 U.S. 202, 221 (1982).

<sup>181</sup> *See supra* text accompanying note 21 regarding the "compelling interest" standard; *see supra* text accompanying notes 12-16 regarding the parent's right to direct the education of their children.

<sup>182</sup> *See* Letter from CPT Chris E. Ambrose, United States Air Force, Assistant Staff Judge Advocate, to Mrs. Gravelle (July 21, 1989), *quoted in* KLIČKA, *supra* note 68, at 369.

<sup>183</sup> *See supra* text accompanying notes 83-85.

<sup>184</sup> *See, e.g.*, KLIČKA, *supra* note 68, at 369.



restricted from utilizing social benefits of the host nation, such as voting privileges, universal health care and the like. Public education is clearly a social benefit. Although this argument appears sound, the SOFAs governing American relations with Germany, Japan, and Korea<sup>185</sup> are silent on issues relating to the education of military family members, to include home schooling issues. As a result, other scholars contend that the SOFAs “do not exempt military dependents from the application of host nation law,”<sup>186</sup> and, by implication, “military dependents should be bound by the education requirements of host nations.”<sup>187</sup> It would be prudent for the DOD to develop a home schooling policy that allows military home school families to use the DOD as a liaison between the family and the host nation authorities. This policy would provide additional support to the military family in the event the host nation authorities allege that the family is violating host nation law.

#### VI. Framework for Change: Improving Military Policy Toward Home Education

This article has addressed the conflict between home school parents and government authorities over the regulation and oversight of home schooling, with emphasis on the concerns faced by military home school families. The discussion has highlighted problem areas, such as excessive regulation by local commands, the discord and confusion created by the DODEA’s failure to develop clear guidance on home schooling, the intrusion of child neglect laws and regulations into the home schooling arena, and the difficult issues surrounding federal legislative jurisdiction and state laws. These problems underscore the need for the military to rewrite its policies relating to military home schooling, with a view toward protecting the rights of military home school families whenever possible.

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<sup>185</sup> Status of Forces in the Federal Republic of Germany, Aug. 3, 1959, 14 U.S.T. 531, 481 U.N.T.S. 262; Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Jan. 19, 1960, U.S.-Japan, 11 U.S.T. 1652; Mutual Defense Treaty Between the United States of America and the Republic of Korea, July 9, 1966, U.S.-Rep. of Korea, 17 U.S.T. 1677. Given the dates of the SOFAs, it is likely that the drafters of the SOFAs did not envision such a thing as home schooling of military family members.

<sup>186</sup> See Carsten, *supra* note 32, at 171 n.65.

<sup>187</sup> *Id.*

The findings and concepts establish the need for changes in the following areas:

1. Issuance of a comprehensive *DOD Home School Policy* addressing all relevant issues related to home schooling within the military. The policy should clearly define the role of the DODEA, commanders, and family advocacy personnel with regard to home schooling issues. The policy should establish a mechanism by which the local installation/community commander can maintain accountability of military home schoolers for purposes of promoting law, order, and discipline on the installation and to serve as a liaison and buffer between state/local/foreign authorities and military home schoolers. The policy should be the DOD's cornerstone guidance on home schooling, and should also include coverage of issues raised in paragraphs 2 and 3 below.

2. Revision of DOD and individual service *family advocacy regulations* to specifically exclude home schooling from definitions of educational neglect. The regulations should also restrict family advocacy jurisdiction over home schooling issues.

3. Revision of DOD and individual service regulations pertaining to *state jurisdiction* over child abuse issues on military installations. The regulations should require that agreements between military installations and state and local authorities will exclude home schooling issues from the jurisdiction of civil authorities.

#### A. A New DOD Home School Policy: General Provisions<sup>188</sup>

As a starting point, the proposed DOD home school policy should be promulgated by an entity in the DOD other than the DODEA. The DODEA's mission is to provide a free, *public* education for eligible dependents of military personnel in the United States and overseas.<sup>189</sup> The DODEA has no authority over home school education. Removing DODEA from responsibility over home school policy will eliminate the

<sup>188</sup> A proposed new home school policy is at the appendix.

<sup>189</sup> DOD DIR. 1342.20, *supra* note 76, paras. 4.2, 4.3.

inherent conflicts of interest between DOD professional educators and military home school parents.<sup>190</sup>

The philosophical cornerstone of the proposed policy centers on two key concepts addressed throughout this article: That the parents have a constitutional right to direct the education of their children, and the federal government's role in regulating education is extremely limited.<sup>191</sup> The policy would apply equally to military installations in the United States and overseas. The policy recognizes a small, but not insignificant, role for the commander with regard to home school issues. The policy limits the commander's authority to require that military home school parents submit a notice of intent to home school, and conduct a *limited* inquiry into the home school program *if* the commander has probable cause to believe that the program is not legitimate.

Of central importance is the basis for the authority granted to the commander in the policy. The commander's authority is based not on any authority to regulate the education of military dependents, but rather on the commander's *inherent* authority to maintain law, order and discipline within the command and on the installation.<sup>192</sup> Thus, the requirement for the sponsor to submit a notice of intent to home school is intended to address *accountability* and *safety* issues that are of concern to every commander (such as, who is caring for a child during the day?; how many children are on post in case of emergencies?) rather than *education* issues. Likewise, the commander's authority to inquire into a questionable home school program is narrowly tailored to address the fundamental question of whether a child is being educated *at all*, and *not* to regulate the content or structure of the home school program itself.

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<sup>190</sup> See KLIČKA, *supra* note 4, at 21-27, 113-18. In the view of home school advocates, public school officials are in conflict with home schooling in two critical areas: financial and philosophical. *See id.* at 21-22. Public school officials have a financial interest in whether or not a child attends their schools because for every child on their rolls, they may receive between \$3,000 and \$4,000 of government funding. *See id.* at 21-22, 113-15. Each home school student is potentially a source of additional government aid for the school. In addition, public school officials are generally philosophically opposed to home schooling because they believe that parents do not possess the qualifications to train and educate children. *See id.* at 22-26.

<sup>191</sup> *See supra* text accompanying note 37; discussion *supra* pt. II.A.1.

<sup>192</sup> *See* AR 608-18, *supra* note 9, fig. E-1 (stating that by virtue of his inherent authority as commander, the commander "is responsible for . . . maintaining law, order, and discipline on the installation").

Accordingly, the proposed policy limits the commander's probable cause inquiry to solicitation of a *statement of assurance* from the parents verifying that they have a written curriculum, are teaching math, reading, spelling, grammar, and are conducting the home school program in a bona fide manner. The commander *may not* require the parents to submit to home visits, teacher certification, student testing, or approval of curriculum. The policy has as its model the home school law as currently applied in Texas,<sup>193</sup> where the parents do not have to initiate any contact with the state or school district.<sup>194</sup> Given the federal government's limited authority to regulate education, applying a lenient state model as a basis for a new DOD Home School Policy only makes sense. In addition, a lenient model would reflect the military's deference to the unique challenges and issues faced by military parents in making educational choices for their children.<sup>195</sup>

In addition, the policy authorizes commanders to promulgate procedures by which off-post military parents, whether in the United States or overseas, may *voluntarily* submit to the installation a notice of intent to home school. The policy authorizes the commander to appoint a liaison from the installation to serve as a single point of contact with local authorities regarding issues pertaining to the home schooling practices of military personnel, whether on or off the installation. The purpose of this process would be to provide a military advocate for military home school families dealing with local education officials, and

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<sup>193</sup> KLICKA, *supra* note 6, at 105-07. The Texas model is based on case law and is quite simple: The parents do not have to initiate contact with the state or the school district in order to home school. *See id.* at 106. If contacted by state authorities, however, the parents may be required to submit written assurance that they are conducting home schooling in a bona fide manner and teach math, reading, spelling, grammar, and good citizenship. *See id.* The parents do not have to submit to home visits, have curriculum approved, or have any special teacher certification. *See id.* The key difference between the Texas model and the proposed DOD Home School policy in this article is that the proposed policy requires the military parents to submit a notice of intent to home school to the commander, whereas Texas law does not require parents to initiate any contact with the state. The notification requirement in the proposed policy centers on the recognition of the unique responsibilities placed on a commander in the U.S. Armed Forces and the inherent authority of the commander to maintain law, order, and discipline on a military installation.

<sup>194</sup> *See id.* at 105-07. Other states and territories that do not require home school parents to initiate any contact with state or local authorities include Alaska, Guam, Idaho, Illinois, Indiana, Michigan, Missouri, New Jersey, Oklahoma, and Puerto Rico. *See generally* KLICKA, *supra* note 6, at 1-123.

<sup>195</sup> *See generally* discussion *supra* pts. I, II.B.

to encourage a positive relationship between the military and the local community.

The proposed policy also clarifies the role of the DODEA with regard to home school issues. In short, the policy limits DODEA's role to making available those auxiliary services and special programs required by the 2002 amendment to the Overseas Defense Dependents' Education Act.<sup>196</sup> Further, the policy removes DODEA from any responsibilities over the parent's submission of the notice of intent to home school.

#### B. Clarifying the Role of Family Advocacy Programs

The next section of the policy addresses the role of family advocacy programs in relation to educational neglect and home schooling. The policy redefines the DOD definition of educational neglect as follows:

*Educational Neglect.* A type of child neglect that includes knowingly allowing the child to have extended or frequent absences from school (*excluding home school children*), failing to provide *notice of intent* to enroll the child in home school or a non-DOD public or private school, or preventing the child from attending school (*excluding home school children*) for other than justified reasons. *Home schooling is a justified reason for absence from school and is not considered educational neglect.*

The definition clarifies the Army's confusing "some type of home schooling" language<sup>197</sup> by limiting the definition of home school educational neglect to a failure to submit a notice of intent to the commander. This clarification eliminates any involvement by DOD or the military services in defining an acceptable *type* or *content* of a home school program.<sup>198</sup> The policy reiterates that the authority of the

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<sup>196</sup> 20 U.S.C. § 926(d) (2000); *see also* discussion *supra* pt. III.C.1.

<sup>197</sup> *See* AR 608-18, *supra* note 9, at 102.

<sup>198</sup> In many states, the courts have ruled as unconstitutionally vague certain statutes yielding broad discretion to school officials to define what is a "satisfactory" home school curriculum, or whether a home school curriculum is "substantially equivalent" to the public schools. Laws granting excessive discretion to school officials to define a "satisfactory" home school program infringe upon the constitutional right of parents to

commander and family advocacy personnel to investigate is limited to the notice issue, and to requesting a statement of assurance in those cases when the commander has probable cause to believe that the home school program is not legitimate. Additionally, the policy includes provisions designed to protect the rights of home school parents by prohibiting the initiation of home school investigations based on *anonymous tips*,<sup>199</sup> requiring the release of family advocacy *records* to home school parents upon request,<sup>200</sup> and prohibiting submission of home school neglect *allegations* to the *central registries* of the military services.<sup>201</sup>

### C. Fine Tuning Agreements Between Installations and Civil Authorities

The proposed policy modifies current DOD and service regulations by directing commanders to seek agreements with state and local authorities that specifically exclude *home school educational neglect* from the jurisdiction of civil authorities. The policy provides a sample definition of child abuse to be used in local agreements, as follows:

Child abuse: Child abuse includes child sexual abuse and child neglect and means the physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child under the age of 18 by a person who is responsible for the child's welfare – including any employee of a residential facility or any staff person providing out-of-home care – under circumstances that indicate that the child's health or

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direct the upbringing and education of their children. See KLICKA, *supra* note 4, at 83-97 (providing a detailed discussion of these issues).

<sup>199</sup> Home school advocates have proposed a number of reforms designed to prevent harassment of home schoolers, curtail false reporting of abuse or neglect, and protect due process rights. Among the reforms proposed are laws requiring all reporters of child abuse to give their names, addresses and phone numbers, and laws authorizing the subjects of social work investigations the right to inspect their records. See Home School Legal Defense Association, *Practical Way to Reform the Child Welfare System*, at <http://www.hslda.org/docs/nche/000000/00000058.asp> (last visited Nov. 22, 2004).

<sup>200</sup> See *id.*

<sup>201</sup> The Army Family Advocacy regulation requires the installation case review committee to submit every report of child abuse, *whether substantiated or unsubstantiated*, to the Army-wide, centralized data bank. Because the Army regulation includes child neglect (including educational neglect) in the definition of child abuse, home schoolers are faced with the very real possibility that a mere allegation of educational neglect will result in an entry in the Army-wide, centralized data bank. See AR 608-18, *supra* note 9, paras. 5-2, 5-4.

welfare is harmed or threatened thereby. *For purposes of this agreement, the terms child abuse, child neglect, mental injury, negligent treatment and maltreatment do not include actions or conduct by home school parents with regard to educating their children.*

The policy also encourages local commands to tailor agreements as much as possible toward the type of federal legislative jurisdiction held by the installation. The policy encourages installations that operate DOD schools to emphasize this fact in their agreements and to state that they are retaining federal sovereignty over education issues on the installation. The policy includes sample language for installations holding concurrent and exclusive legislative jurisdiction. While it is possible that local civil authorities will not agree to limitations on their jurisdictional authority, it is also possible that they *will* agree given their limited resources and heavy workload. By pursuing this policy, the DOD would be taking aggressive steps to protect the rights of military parents to direct the education of their children.

## VII. Conclusion

This article examined the problems and conflicts faced within the military home school community, and recommended change to benefit not only military home schoolers, but also to improve the environment confronting commanders, DODEA personnel, family advocacy personnel, and others within the DOD dependent education and child protection community. This article demonstrated that home school issues are at times complex and confusing, ranging from issues faced by the highest court in the land, to the concerns of the U.S. Congress, to the web of fifty states' laws and regulations, and on to local and very personal issues such as whether sponsors should inform commanders of their intent to exercise a fundamental right. Given the dynamic nature of home schooling throughout the country over the past twenty years, it is understandable that the military has been slow to adapt. As with most issues that highlight the natural tension between individual rights and command authority, however, military home schooling is not an insurmountable problem for the DOD, the military services, or commanders. Instead, it provides the military another avenue to aggressively promote individual rights without compromising the needs of the military, and to enhance the quality of life for military families and

military communities as a whole. The proposals and recommendations derived from this article are intended to serve that end.



## Appendix

### DEPARTMENT OF DEFENSE POLICY MEMORANDUM

#### HOME SCHOOLING

This Policy Memorandum supercedes all previous policies on home schooling issued by the Department of Defense Education Activity (DODEA). It applies to all Department of Defense (DOD) dependent students eligible to attend a DODEA school on a space-required basis in the Department of Defense Dependents Schools (DODDS) and on a tuition-free basis in the Department of Defense Domestic Dependent Elementary and Secondary Schools (DDESS) systems.

#### I. Core Concepts Regarding Home Schooling

The DOD recognizes the following:

1. The right of parents to direct the education of their children is an established right protected by the U.S. Constitution.
2. The Congress, the President, and the Supreme Court have repeatedly affirmed the rights of parents.
3. The rise of private home education has contributed positively to the education of young people in the United States.
4. The U.S. Constitution does not allow Federal control of home schooling.
5. Military parents face unique challenges in educating their children, brought on by frequent moves and interruptions in the continuity of life that threatens educational progress. Education by military parents at home has proven to be an effective means of providing a stable educational environment.
6. The DOD supports the right of parents to conduct home education.

## II. Authority of Commanders to Regulate Home Schooling

A. The federal government, the DOD, and subordinate commanders have no specific authority to regulate home schooling. However, by virtue of the inherent authority of command, commanders have a responsibility for maintaining law, order and discipline on military installations. Installation/community commanders may exercise the following authority with regard to military home school children residing on military installations:

1. Commanders may promulgate policy requiring sponsors of school-age children residing on the installation to provide notice at the beginning of each school-year of their intent to enroll the child in a non-DOD school or a home school.

2. School-age children are those children who are at least 7 years old and have not turned 17 by 30 October of the new school year. Children who have completed high school, but have not reached the age of 17, are not school-age children.

3. A sponsor's notice of intent should be submitted to the office of the commander or designee. DODEA school officials or personnel shall not play any role in the notice of intent process.

4. If, upon probable cause, a commander has reason to question the legitimacy of the home school, the commander may require the sponsor to provide a written statement of assurance verifying that they have a written curriculum, are teaching math, reading, spelling, grammar and good citizenship, and are conducting the home school program in a bona fide manner. Commanders *may not* require submission to home visits, teacher certification, student testing, or approval of curriculum.

5. Commanders are authorized to take administrative action against sponsors who fail to comply with notice of intent requirements, or who fail upon request to a written statement of assurance verifying the existence of a bona fide home school program. Administrative action may include letters of concern, revocation of installation privileges, such as exchange and commissary privileges, revocation of government housing, and a bar from the installation. In overseas locations, administrative action may also include the return of the civilian family members to the United States. Commanders must warn sponsors at least

60 days prior to *initiating* administrative action. When taking administrative action, commanders must comply with administrative due process procedures required in applicable regulations.

B. Installation or community commanders are authorized to take the following action with regard to military home school children residing *off* the military installation, whether overseas or in the United States, territories and possessions:

1. Commanders may promulgate policy authorizing the sponsors of military school-age children residing off the installation to *voluntarily* provide notice at the beginning of each school-year of their intent to enroll the child in a home school program.

2. Commanders are encouraged to appoint a liaison from the installation to serve as a single point of contact with local authorities regarding issues pertaining to the home schooling practices of military personnel, whether on or off the installation. The purpose of this process would be to provide a military advocate for military home school families dealing with local education officials, and to encourage a positive relationship between the military and the local community.

### III. Role of DODEA

Neither the DODEA nor its subordinate DOD school systems or personnel have the authority to regulate home schooling. DODEA schools will comply with the following guidance:

1. DODEA schools will provide and offer home schooled DOD dependents classes and/or special education services, consistent with existing regulations and policy. Dependents of sponsors electing to take a single class or more must complete a registration form and comply with other registry procedures and requirements.

2. By statute, (20 U.S.C. § 926(d), as amended by section 353 of Pub. L. No. 107-107) eligible dependents in overseas areas are entitled to receive specified auxiliary services from DODDS. This Policy Memorandum implements this statutory provision for DOD dependents that are eligible to enroll in DODDS on a space-required basis and administratively extends it to DOD dependents that are eligible to attend

DDESS on a tuition-free basis. A DOD dependent who is educated in a home school setting but eligible to enroll in a DODEA school, shall be permitted to use or receive auxiliary services of that school without being required either to enroll in or to register for a minimum number of courses offered by the school. A DOD dependent who is home schooled may be required to satisfy other eligibility requirements as well as to comply with standards of conduct applicable to students actually enrolled in the DODEA school who use or receive the same auxiliary services. Auxiliary services includes use of academic resources, access to the library of the school, after-hours use of school facilities, and participation in music, sports, and other extracurricular and interscholastic activities. For the purposes of use or receipt of auxiliary services without enrolling or registering in DODDS, a DOD dependent must be eligible for space-required enrollment as specified in *DOD Directive 1342.13*, "Eligibility Requirements for Education of Minor Dependents in Overseas Areas." For the purposes of use or receipt of auxiliary services without enrolling or registering in DDESS, a DOD dependent must be eligible for tuition free enrollment, as specified in *DOD Directive 1342.26*, "Eligibility Requirements for Minor Dependents to attend Department of Defense Domestic Dependent Elementary and Secondary Schools (DDESS)." In both DODDS and DDESS, eligible home schooled DOD dependents using or receiving auxiliary services or electing to take courses will not be charged tuition. Proof of eligibility must be provided and will be maintained at the school where the dependent is receiving services or participating in extracurricular or interscholastic activities. Documentation establishing eligibility will not be maintained as a permanent record and will be returned to the sponsor when services are no longer being received, the dependent is no longer participating in extracurricular or interscholastic activities, or the school year ends, whichever is earliest.

#### **IV. Role of Family Advocacy Programs**

The role of the federal government in regulating education and home schooling is extremely limited. With regard to allegations of home school educational neglect, the role of DOD family advocacy programs must also be limited:

1. Definition of educational neglect: The DOD family advocacy directive and the individual service family advocacy regulations shall use the following definition for educational neglect:

*Educational Neglect.* A type of child neglect that includes knowingly allowing the child to have extended or frequent absences from school (*excluding home school children*), failing to provide *notice of intent* to enroll the child in home school or a non-DOD public or private school, or preventing the child from attending school (*excluding home school children*) for other than justified reasons. *Home schooling is a justified reason for absence from school and is not considered educational neglect.*

2. Investigations: Investigations by the military services into allegations of educational neglect relating to home schooling are limited to the following:

a. Whether the sponsors have complied with the commander's requirements to provide notice of intent to home school. Sponsors deemed to have failed to comply will be given 60 days written notice prior to any final finding of substantiated educational neglect.

b. Whether the sponsor is conducting a bona fide home school program. These inquiries are extremely limited in scope. Sponsors may be asked to provide a written statement of assurance verifying that they have a written curriculum, are teaching math, reading, spelling, grammar and good citizenship. Commanders and government personnel *may not* require submission to home visits, teacher certification, student testing, or approval of curriculum.

3. Anonymous tips: Allegations of educational neglect against home schoolers from anonymous sources shall not be used as a basis to initiate an inquiry or investigation. All reporters of educational neglect against home schoolers shall be required to provide their name, address and phone number. This will discourage false reporting and harassment from those persons opposed to home schooling.

4. Central registries:

a. Prohibition against submission of initial allegations to central registries: The DOD and individual services are prohibited from submitting initial allegations of educational neglect involving home schoolers to the service's central registry.

b. Substantiated cases of educational neglect: Allegations of educational neglect may only be substantiated for the reasons specified in paragraph 2 above.

5. Cooperation with state authorities: DOD personnel are prohibited from participating in investigations against military home schoolers by state authorities. DOD personnel will neither encourage nor discourage involvement by state authorities in allegations against military home schoolers for violating state law.

6. Access to records: Upon request, home school sponsors who have been the subject of an investigation or inquiry into allegations of educational neglect *will* be allowed access to those records.

## **V. The Relationship Between Local Installations and Civil Authorities**

Previous DOD policy encouraged local commands to *actively seek* a close, cooperative relationship with local civilian authorities in matters involving child abuse and child neglect, and to relinquish jurisdiction to the states whenever possible.

This policy modifies previous policy by directing local commanders to seek agreements with state and local authorities that exclude *home school educational neglect* from the definition of child abuse and child neglect, and restrict the local community's authority to investigate such issues. Local commands should seek to tailor agreements as much as possible toward the type of federal legislative jurisdiction held by the installation. For installations that operate DOD schools, commands should emphasize this fact in their agreements and state that they are retaining federal sovereignty over education issues on the installation. Sample model language for local agreements is as follows:

### 1. Definition of child abuse:

Child abuse: Child abuse includes child sexual abuse and child neglect and means the physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child under the age of 18 by a person who is responsible for the child's welfare—including any employee of a residential facility

or any staff person providing out-of-home care—under circumstances that indicate that the child’s health or welfare is harmed or threatened thereby. *For purposes of this agreement, the terms child abuse, child neglect, mental injury, negligent treatment and maltreatment do not include actions or conduct by home school parents with regard to the education of their children.*

2. For installations holding *concurrent* legislative jurisdiction:

Fort X is within an area of concurrent legislative jurisdiction with the State of Y. While the State and the Federal governments concurrently exercise all of their legislative jurisdiction over the land area of Fort X, state authorities may at times agree to refrain from exercising jurisdiction in certain cases. With regard to issues relating to *home schooling educational neglect* occurring within Fort X boundaries, the Y County Child Protective Services Agency, and the Y County School District hereby agree that Fort X is responsible for the intake, investigation, management and resolution of such cases. The parties agree that Fort X investigations will be based on Department of the Defense regulations and standards and not state home schooling law.

3. For installations holding *exclusive* legislative jurisdiction:

Fort X is within an area of exclusive legislative jurisdiction with the State of Y. While State civil laws generally apply to persons on the installation, those State civil laws requiring enforcement by State officials (for example, child protection laws) only apply to the extent that the Federal laws and military regulations do not conflict with State law, and the installation commander invites the State authorities to exercise jurisdiction on the installation. With regard to issues relating to *home schooling educational neglect* occurring within installation boundaries, the Department of Defense and the United States Army have promulgated regulations addressing the intake, investigation, management and resolution of such cases. As a result, Fort X does *not* invite the Y County Child Protective Services Agency or

the Y County School District to exercise their authority on the installation with regard to home school educational neglect. As such, Fort X retains responsibility for such cases. The parties agree that Fort X investigations will be based on Department of the Defense regulations and standards and not state home schooling law.

4. Additional language for installations operating DOD schools:

It is recognized by the parties that Fort X operates DOD schools on the installation. As a result, the federal government maintains its sovereignty over dependent education issues on the installation. Under these circumstances, any unsolicited state involvement with dependent education on the installation would interfere with the exercise of federal government sovereignty.