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Re Delaine Eastin's August 27, 2002
Letter to the California Legislature

Dear Senator and Assembly Member:

Superintendent of Public Instruction, Delaine Eastin, claimed this week in a letter to state legislators that home schooling is illegal in California. She is wrong. California's Education Code expressly recognizes parent-operated private schools as a legal alternative to the public schools.

By way of introduction, Home School Legal Defense Association, a national organization that has as its primary purpose the protection of the rights of parents to choose home education for their children. Many states have adopted "home school" statutes. California is one of twelve states where home schoolers legally operate as private schools. We currently represent over 14,000 member families in California.

Since the beginning of the modern home-school era over twenty years ago, parent-operated private schools have been successfully instructing children in California. These schools have thrived and have grown in numbers as their success has become thoroughly documented. Studies reveal that parent-taught children around the nation score 20 to 30 points higher on standardized achievement tests than their publicly schooled contemporaries. And elite universities like Stanford and Brown actively recruit home-school graduates.

A growing sense of dissatisfaction with the public-school system due to lowered standards, less safety, and lack of support for traditional moral values has also contributed to the decision of many parents to operate their own private schools.

Until 1993, the Department of Education did not take the position that parent-operated private schools were illegal. Nothing in the California statutes had changed, but the Department began quietly expressing the view that is similar to Eastin's position today. But the Department has no authority to regulate private schools nor does it enforce truancy laws—

that is left to local school districts—so the Department's opinion about the law has never been binding. It has also been conspicuously ignored—until now.

This is not a new controversy prompted by "aggressive home school advocates" as Superintendent Eastin's letter suggests. In July of this year, the Department of Education corresponded with school districts across the state telling them that parents who are not certified teachers may not legally teach their own children.

Several districts passed the Department's opinion along to parents, who understandably became concerned. The laws of every other state in the union provide a way for parents to teach their own children and not one requires them to have a teaching certificate. That controversial letter has attracted considerable media attention in California and across the nation. Superintendent Eastin's letter to legislators has added fuel to the growing controversy.

Attached to the Eastin letter is a legal analysis prepared by the Department of Education's Office of Legal Counsel. This analysis is a warmed-over version of a memo first drafted in 1993. Perhaps that explains why it completely ignores a 1998 amendment that expressly recognizes that parent-operated private schools are legal. Also, rather than evaluate California's private-school statutes according to what they say today, the Department's textual analysis is frozen in 1931.

The simple solution to the request by Eastin is for the California Department of Education to correct its legal opinion and bring an end to the needless strife it has caused thousands of decent, law-abiding families around the Golden State.

Legal Analysis

I. The Department's Interpretation of California's Private-School Statutes is Contrary to Legislative Intent.

A thorough analysis of the text of the private-school statutes leads inexorably to the conclusion that the Legislature is not only aware that many parent-operated private schools exist, but that it has made special provision for those very schools. Conclusive statutory proof that the Legislature intended that parents may legally operate private schools for the education of their own children is found in Education Code §44237(b)(4), which was added in 1998.

To understand the Legislature's intent in the context of parent-operated private schools, it is necessary to examine the text of three related statutes; §48222 (private-school exemption); §33190 (private-school affidavit); and §44237 (private-school criminal-record summaries).

Section 48222 exempts children who are being instructed in a private school from attendance at public schools. Nothing in the text of §48222 expressly or by implication

prohibits parents from establishing a private school exclusively for the instruction of their own children. "Private school" is not defined anywhere in the statutes, nor are private schools limited or described in terms of number of students, location, size of facilities, or relationship of students to teachers. The only requirements imposed on a private school are that:

- instruction be by persons capable of teaching;
- instruction be in the English language;
- instruction be provided in subjects taught in the public schools; and,
- the school must keep an attendance record.

Section 48222 further states that the exemption is valid only if "the owner or *other head*" of the private school files an affidavit with the Superintendent of Public Instruction in accordance with §33190. Section 33190 requires "*every person*, firm, association, partnership, or corporation offering *or conducting* private school instruction" annually to file an affidavit attesting, "*under penalty of perjury*," that certain facts about the private school are true.

Indeed, the Legislature has taken great pains to make it clear that not only *owners* of private schools but also *other heads* of private schools must file the affidavit. This distinction is important because it recognizes that private schools need not be businesses open to the public. By including "other heads" the Legislature has worded the statute broadly enough to include parent-operated private schools.

In addition to *firms, associations, partnerships, or corporations* that are *offering* private school instruction to the public, the affidavit statute textually includes in the exemption a *person*—like a parent—that *conducts* private school instruction. This would certainly include a parent who operates a school exclusively for his or her own children even though instruction is not offered to the public. The Department's legal analysis fails entirely to address the actual text of sections 48222 and 33190. This failure only serves to mislead the public.

A. The 1998 Amendment Recognizes Parent-Operated Private Schools.

If the text of sections 48222 and 33190 weren't enough, conclusive statutory proof is found in §44237(b)(4). All private schools must file an affidavit. According to §33190(g) the affidavit must attest to the fact that "criminal record summary information has been obtained pursuant to Section 44237."

Section 44237 generally requires private schools to submit fingerprints to the Department of Justice for the purpose of determining whether a potential employee, owner, or operator of a private school has been convicted of certain crimes. If they have been so convicted, they may not be employed by, own, or operate the private school.

Subsection 44237(b)(4), added to the statute in 1998, states that the requirements of §44237 do not apply to "a parent or legal guardian working exclusively with his or her

children." In other words, those private schools that consist of "parents or legal guardians working exclusively with his or her own children" are not required to submit fingerprints to the DOJ nor may they be banned from operating a private school.

The text of §44237(b)(4) is statutory proof that the Legislature intended for parent-operated private schools to be free from the criminal-record summary requirements that would apply to other private schools. There can be no other explanation. If parent-operated private schools were not already legal in 1998, there would have been no need for the Legislature to expressly add the provision allowing them to operate without submitting fingerprints.

B. The Legislative History Behind the 1998 Amendment Demonstrates that Parent-Operated Private Schools are Legal.

This interpretation is not just speculation. When the Legislature was in the process of amending the criminal-background provisions in 1998, the Independent Private Schools of California, a home-school advocate that worked closely with Home School Legal Defense Association, wrote a letter to the bill's principal sponsor in the assembly. The letter, dated July 6, 1998, had this to say:

> This is to follow up on our conversation this morning concerning the amendment passed by the Senate Education Committee on July 1, 1998, which is expected to require owner/operators of private schools to obtain a Department of Justice (DOJ) background check prior to operating a private school.
>
> As you are aware, there are a large number of small private schools throughout California which are owned or operated by parents where the only pupils are their own children. Any requirement that these parents obtain a background check would place an unnecessary burden on them and an unnecessary and burdensome workload on the DOJ.
>
> We are asking that language be included in AB 1392 that would exempt parents who have established a small private school solely for the purpose of educating their own children.
>
> For example, AB 1804 (Havice) contained language excluding ". . . a p arent or guardian working with his or her own child."

The bill was amended on July 27 and again on August 11, 1998, adopting the language that is in the statute today. The bill in this final version was unanimously approved by the assembly and the senate and was signed by the Governor.

California's private-school statutes have never outlawed parent-operated private schools. Superintendent Eastin's letter and attached legal analysis are simply wrong. No legislation is needed because the law already clearly recognizes the legal authority of parents to teach their own children by complying with the private-school statutes and is consistent with how eleven other states address home education.

II. The Private-School Statutes and the Private-Tutor Provision Aim at Different Targets.

Also, contrary to the Department's analysis, a correct understanding of the private-school statutes does not render the private-tutor provision meaningless. The private-tutor statute aims at a different target and properly understood is consistent with parents operating private schools exclusively for their own children.

The requirement that private tutors must possess a teaching certificate was enacted in 1931, early in the studio era in the Hollywood movie business. Due to the difficulty of child actors attending public schools or private, full-time day schools, the studios hired tutors. Unlike the private-school statutes the private-tutor provision has always required that instruction occur on a certain number of days per year, 170 in 1931. Today, the private-tutor statute also requires that at least 3 1/2 hours of instruction occur each day between the hours of 8 and 4.

The Department's speculation that the Legislature intended to outlaw parent-operated private schools in 1931 is refuted by the text of the statutes as they exist today, especially by the 1998 amendment. A more plausible explanation that does not do violence to the current text is that the Legislature in 1931 was concerned that tutors-for-hire be trained in classroom management, an especially important trait in the hurley-burley of the Hollywood studios.

The Department's reliance on an obscure lower-court decision from 1953 is also groundless. Because it is not a California Supreme Court case, the Legislature has never been bound by *State v. Turner*. Later amendments to the private-school statutes conclusively demonstrate that the Legislature never intended the result reached in *Turner*.

Significantly, if a student is taught by a certified tutor today no state or local official need be notified. All private schools, on the other hand, including those operated by non-credentialed parents, must file the informational affidavit each fall. This is not unlike the home-school laws of several states, which similarly require annual notification. Moreover, those filing the affidavit must swear under penalty of perjury that the information is accurate, and that the parent will carry out the private school requirements.

If the purpose of the affidavit were merely to create a list of private schools, as the Eastin letter claims, there would be no reason for the sworn affidavit. Instead, the Legislature recognized that creating a private school, no matter how small, is a serious undertaking.

Conclusion

Nothing in the text of any of the private-school statutes has ever prohibited parents from operating private schools to teach their own children, a practice that is legal in 11 other

states. To remove all doubt, the text and the legislative history behind the 1998 amendment demonstrate that parent-operated private schools have always been legal in California.

Very truly yours,

Michael Smith, President
Home School Legal Defense Association