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OF COUNSEL	Mary E. Schofield, Esq. CA Tom Sanders, Esq. TX

October 19, 2020

Pender Makin, Commissioner
Maine Department of Education
23 State House Station
Augusta, Maine 04333-0023

Sent via FedEx and email

Re: Homeschool Notice of Intent

Dear Commissioner Makin:

The Home School Legal Defense Association is a national advocacy organization. Our mission is to ensure that the rights of homeschooling parents are respected and that government officials follow the homeschooling laws they administer. We have over 101,000 member families nationally and 900 in Maine.

We have engaged attorney Joshua Dunlap of Pierce Atwood LLP in Portland to consider legal action against the Department of Education. Your department has been communicating to school districts that homeschooling families who submit the age of their child in the notice of intent, as the statute requires, are truant unless they submit the child's date of birth, which is not in the statute. We have written to you about this before and have met with your representatives to avoid the need for litigation, to no avail.

It is our sincere hope that you will take this last opportunity to correct your department's guidance to avoid the need for litigation. To assist you in making this decision, below is a brief preview of the legal arguments we expect will be made.

Background

Parents wishing to provide home instruction for their children in Maine must provide a notice of their intent to do so. They do not ask for permission. According to 20-A M.R.S. § 5001-A(3)(A)(4)(a)(ii), the notice of intent must contain the "the name and age of the student."



For nearly 30 years, homeschooling parents who provided the “age” of a student, defined in years, created no controversy. It appears that your representative, Ms. Pamela Ford-Taylor, recently began telling school superintendents that “age” means “date of birth.” In an FAQ section of a Power Point presentation dated September 10, 2019, she wrote:

Q. Can a home instruction parent provide age, defined in years, instead of date of birth?

A. No¹

On another page of the same presentation, under the banner “Home Instruction Required Items List” she lists the “Child’s Date of Birth.” On the same page, she asks the question, “What if all the information is not supplied?” Her answer says, “Please use the required item list to check submissions. If the parent does not supply the information, they are truant.”²

Your department’s communications with school superintendents about the purported need for date of birth instead of age has resulted in superintendents telling parents who provide home instruction that their children “will be considered truant” if a notice of intent includes age, which is what the statute requires, instead of date of birth.

Becky Foley, superintendent of Regional School Unit 5 in Freeport wrote the above in a letter dated September 1, 2020.³ In a letter dated October 5, 2020, Ms. Foley clarified that the earlier letter was “a form letter from the Maine DOE that we are asked to provide to parents who do not complete the form.”⁴

In at least two letters dated September 30, 2020, Ms. Foley wrote. “I am returning your notice of intent to homeschool, unfiled, as per my previous communication dated September 1, because the required information has not been provided. The required information is the date of birth of [your children].” She continued, “[The children’s] truant status may be corrected by properly re-filing the notice of intent to homeschool with the required information.”⁵

¹ Pamela Ford-Taylor, Maine Department of Education, “Home Instruction Statutes and Information,” p. 23 (updated September 10, 2019), *available at* <https://www.maine.gov/doe/sites/maine.gov.do/files/inline-files/Home%20Instruction%20Statutes%20and%20Information4.pdf> (accessed October 16, 2020).

² *Id.* at 16.

³ Attachment 1.

⁴ Attachment 2.

⁵ Attachment 3.

Public officials are bound to administer statutes as written and are not permitted to change statutes willy-nilly by administrative fiat. In an internal correspondence to Judith Houghton of RSU 10, dated July 31, 2020, Ms. Ford-Taylor says, “this has all been vetted with the Assistant Attorney General for the Maine DOE.”⁶

We respectfully disagree with Ms. Ford-Taylor and her purported reliance on advice from the unnamed assistant attorney general.

“Age” and “DOB” are not synonymous

According to the Supreme Court of Maine, “In questions of statutory interpretation, ‘we first look to the plain language of the provisions to determine their meaning. If the language is unambiguous, we interpret the provisions according to their unambiguous meaning unless the result is illogical or absurd.’”⁷

The word “age” in the statutory phrase “age of the student” is not defined in the statute. It is nevertheless unambiguous. According to Black’s Law Dictionary the plain meaning of “age” is:

A period of time; esp., a period of individual existence or duration of a person’s life. In American usage, age is stated in full years completed (so that someone 15 *years of age* might actually be 15 years and several months old). (emphasis in original).⁸

Consider the following examples to demonstrate that “age” and “date of birth” are not synonymous:

Q. What is the age of your child?

A. April 1, 2010.

Q. What is your child’s date of birth?

A. 10 years old.

The statute has not changed. And the example Q&A above demonstrates the absurdity of your department’s position.

⁶ Attachment 4.

⁷ *SAD 3 Educ. Ass’n v. RSU 3 Bd. of Dirs.*, 180 A.3d 125 (Me. 2018), quoting *Town of Eagle Lake v. Comm’r, Dep’t of Educ.*, 818 A.2d 1034 (Me. 2002).

⁸ BLACK’S LAW DICTIONARY 70 (11th ed., 2019). See also *State v. Olson*, 884 N.W.2d 906, 910 (Minn. App. 2016) (citing favorably the Black’s definition of “age” as unambiguous when used in a Minnesota statute).

Moreover, the notification statute and its use of the word “age” does not require agency technical expertise to properly understand its meaning. Courts would not be required to give your department’s novel interpretation deference. “The plain meaning of a statute *always* controls over an inconsistent administrative interpretation.”⁹

It is disappointing that high government officials would ignore the plain meaning of the statutes they administer. It magnifies the problem when those same government officials accuse law-abiding citizens with violating the law when the citizen fully complies with the words the Maine State Legislature included in the statute. We will take great pains to see that any homeschooling parent who is charged with truancy based on your department’s incorrect interpretation will receive a vigorous defense.

To further demonstrate that the department’s position is untenable, in criminal or quasi-criminal proceedings, Maine courts follow the rules of lenity and strict construction. This means “any ambiguity left unresolved by a strict construction of the statute must be resolved in the defendant's favor.”¹⁰ It is unlikely that the Supreme Court of Maine would endorse an interpretation that parents who do exactly what the statute says could be guilty of truancy.

Earlier this year we had a similar case before the Supreme Court of Virginia. There, a school district adopted a local policy that added to the homeschool notification statute and threatened a family with truancy if they did not comply. We sued, and the Supreme Court unanimously held, “There is no statutory requirement that a parent provide a child's birth certificate or proof of residency. Therefore, we hold the Board's Policy requiring such documentation is inconsistent with [the homeschool notification statute].”¹¹

Conclusion

It is our sincere hope that you will renounce the erroneous interpretation your department has been communicating about the meaning of the statutory word “age” in 20-A M.R.S. § 5001-A(3)(A)(4)(a)(ii). And we trust you will instruct superintendents to cease and desist from telling homeschooling parents who provide the age of their students that they are truant.

Continuing to pursue this interpretation is causing needless distress to law-abiding parents and an unnecessary expenditure of your staff’s time. Admitting error and

⁹ *National Indus. Constructors v. Superintendent of Ins.*, 645 A.2d 342, 345 (Me. 1996) (emphasis added).

¹⁰ *State v. Lowden*, 87 A.3d 694, 697 (Me. 2014).

¹¹ *Sosebee v. Franklin County Sch. Bd.* 843 S.E. 2d 367, 370 (Va. 2020). The Supreme Court of Virginia also held that the school district exceeded its authority in adopting a policy that was inconsistent with state law.

HSLDA to Commissioner of Education Pender Makin

10/19/2020

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correcting your department's guidance could also enhance your department's credibility and generate good will.

Please respond to this letter before October 30, 2020.

Best regards,

A handwritten signature in black ink, appearing to read "James R. Mason III". The signature is fluid and cursive, with a large initial "J" and "M".

James R. Mason III
Vice President

Cc: Josh Dunlap, Pierce Atwood LLP
Becky Foley, Superintendent of Schools, RSU 5
The Hon. Heidi Sampson
Kathy Green, Homeschoolers of Maine

Attachment 1



Regional School Unit 5
Durham • Freeport • Pownal

"To inspire and support every learner by challenging minds, building character, sparking creativity, and nurturing passions."

Becky Foley, Ph.D., Superintendent of Schools
Riek Kusturin, Director of Finance & Human Resources

Cynthia Alexander, Assistant Superintendent of Schools
Bonnie Violette, Ph.D., Director of Instructional Support

September 1, 2020



Dear [REDACTED]

Thank you for submitting a Notice of Subsequent Year to Homeschool for the 2020-2021 school year. You are receiving this letter because your Notice was missing the birth date for [REDACTED]. Please contact Ginny McManus, Assistant to the Superintendent at 865-0928x221 or via email at mcmanusg@rsu5.org to provide this information. If you would prefer to submit this information directly to the Maine Department of Education, here is the link to their online parent homeschool portal:
<https://neo.maine.gov/doe/neo/HomeInstruction/HomeSchools/Schools/Index>

Families may be aware that in 2019-2020, the law changed compulsory school attendance in Maine to begin one year earlier, on a child's sixth birthday. Also, in 2019-2020, the Maine Department of Education launched an electronic portal to make it easier for parents providing home instruction to submit the Notice in one place, one time. Because home instruction falls within the compulsory attendance law (20-A M.R.S. 5001-A), which outlines specific student eligibility (birth date), attendance (birth date), and reporting criteria (annual, by September 1), home instruction was also included in the Department's review of public, private, and home instruction policy alignment to ensure equitable and accurate administration of the law across all instructional models. Last fall, after consulting with legal counsel in the Attorney General's Office, the Maine Department of Education clarified that parents must indicate an applicable reporting year, supply a student's date of birth in order to determine age eligibility, and provide a physical home address in order to determine school administrative unit assignment and Notice delivery location.

Because these items are now officially part of home instruction requirements, this letter is to officially notify you that, beginning with the 2020-2021 reporting school year, they must be included in your annual Notice materials. Please see the reverse side of this letter for a complete list of required information. Notices with missing information will be placed in **pending status** until you provide the missing information. Pending status means that your child's attendance status is not recognized by the State of Maine or by the school administrative unit of residence. It means the Maine Department of Education cannot provide confirmation or verification of home instruction to you or any social service agencies, school administrative units, or post-secondary career or educational entities that may be needed, now or in the future. A Notice that remains in pending status for more than 30 days will be returned to the sender, unfiled, and the student will be considered truant.

Sincerely,
Becky Foley
Superintendent of Schools

Attachment 2



Regional School Unit 5
Durham • Freeport • Pownal

"To inspire and support every learner by challenging minds, building character, sparking creativity, and nurturing passions."

Becky Foley, Ph.D., Superintendent of Schools
Rick Kusturin, Director of Finance & Human Resources

Cynthia Alexander, Assistant Superintendent of Schools
Bonnie Violette, Ph.D., Director of Instructional Support

October 5, 2020

Scott A. Woodruff
Home School Legal Defense Association
P.O. Box 3000
Purcellville, VA 20134

Re: RSU5 Home Instruction Policy

Dear Attorney Woodruff:

I am writing to respond to your letter dated September 29, 2020, and entitled "Regional School Unit 5 Home Instruction Policy, Truancy Threat[.]" My assessment of this matter is set forth below.

As you know, RSU 5 works with the Maine Department of Education to register students for homeschool instruction. Occasionally, intentionally or unintentionally parents and guardians do not provide full information to complete the application, such as the birth dates for their children. When that happens, the form is, in essence, "rejected" by the Department of Education, which RSU 5 has no control over. My understanding from speaking to the DOE is that the electronic form is relatively unsophisticated, and literally will not submit properly if any information is missing on the electronic form, including birth dates. This is not an issue RSU 5 is able to correct, but I believe the Maine Department of Education may be able to work with you to sort out this issue.

With respect to the information regarding truancy, we are sorry that you perceived this to be a "threat," as it was not intended as such. This was a form letter from the Maine DOE that we are asked to provide to parents who do not complete the homeschool form. I believe the language was less a "charade" or "insult," and instead was simply intended to put the family on notice that the School may, in certain circumstances, have a legal obligation pursuant to 20-A M.R.S.A. § 5051-A to report a student truant to local law enforcement.

I trust that you will be able to resolve this through the Maine Department of Education, but if you have additional questions please do not hesitate to reach back out to me.

Sincerely,

A handwritten signature in black ink that reads "Becky Foley".

Becky Foley
Superintendent of Schools

Attachment 3



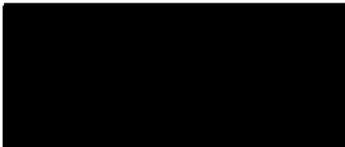
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"To inspire and support every learner by challenging minds, building character, sparking creativity, and nurturing passions."

Becky Foley, Ph.D., Superintendent of Schools
Rick Kusturin, Director of Finance & Human Resources

Cynthia Alexander, Assistant Superintendent of Schools
Bonnie Violette, Ph.D., Director of Instructional Support

September 30, 2020



Dear Ms. [REDACTED]

I am returning your notice of intent to homeschool, unfiled, as per my previous communication dated August 31, 2020 (copy enclosed) because the required information has not been provided. The required information is [REDACTED] date of birth.

[REDACTED] truant status may be corrected by properly re-filing the notice of intent to homeschool with the required information. You may also provide the information directly to the Maine Department of Education through their online parent portal at the link below:
<https://neo.maine.gov/doe/neo/HomeInstruction/HomeSchools/Schools/Index>

Sincerely,

A handwritten signature in cursive script that reads "Becky Foley".

Becky Foley
Superintendent

Enc: Notice of Subsequent Year to Homeschool
8/31/20 Letter

Attachment 4

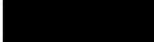


RE: Equivalent Instruction paperwork

1 message

Ford-Taylor, Pamela <Pamela.Ford-Taylor@maine.gov>

Fri, Jul 31, 2020 at 9:44 AM

Dear 

Here is how we connect the dots

There is no written legal definition of "age" in M R S 20-A. Home instruction falls under the attendance statute. The law (§5003) requires School Boards to administer the attendance law with the Commissioner's guidance, and the Commissioner interprets the reference to "age" as meaning date of birth, since eligibility and compulsory school attendance are determined by a student's birth date. Just as a parent previously included all of the items on the old Notice, so should they include all of the items on the updated and corrected Notice as published on the Department's webpage/portal. If it does not contain the birth date, it is not in compliance with the Department's interpretation of the legal requirement as described above and will be considered incomplete and returned if not corrected. Noncompliance means among other things that should parent or child request confidential confirmation of having properly filed home instruction Notices for a specified number of years (for social security benefits, law enforcement purposes, or entry to college, etc.) the Department/Superintendent will be unable to provide that confirmation.

This has all been vetted with the Assistant Attorney General for the Maine DOE. The alternative legal advice is coming from the national organization Home School Legal Defense Association.

Pamela Ford-Taylor, M.S., School Enrollment Specialist

Maine Department of Education

23 State House Station, Augusta, ME 04333-0023

207-624-6617 Pamela.Ford-Taylor@maine.gov

Home Instruction, Parents, and Public/Private Schools, subscribe to receive Maine DOE News