

2023

"COVID-19 Was the Publicist for Homeschooling" and States Need to Finally Take Homeschooling Regulations Seriously Post-Pandemic

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Online ISSN: 2643-7759

Recommended Citation

Kristia Hoffman, *"COVID-19 Was the Publicist for Homeschooling" and States Need to Finally Take Homeschooling Regulations Seriously Post-Pandemic*, 17 FIU L. Rev. 235 (2023).
DOI: <https://dx.doi.org/10.25148/lawrev.17.1.10>

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“COVID-19 WAS THE PUBLICIST FOR HOMESCHOOLING”¹ AND STATES NEED TO FINALLY TAKE HOMESCHOOLING REGULATIONS SERIOUSLY POST-PANDEMIC

Kristia Hoffman*

ABSTRACT

Homeschooling was rapidly growing in the U.S. even before COVID-19. The pandemic accelerated this growth by quickly exposing nearly every American family to homeschooling in some form. The pandemic has ushered in a new age of homeschooling characterized by flexibility, technology, collaboration, and alternative forms of schooling beyond the traditional parent-teaching-child framework. Although the Supreme Court has never recognized a fundamental right of parents to homeschool their children, it has repeatedly recognized that parents have the right to direct their children’s education and to choose to educate them in the way they deem fit. There is debate as to what level of scrutiny homeschooling statutes and regulations should be subjected to, but it is clear that the states must balance their own interest in ensuring children have access to education with the presumption that parents may direct their children’s education, and the strong historical basis for doing so in the home. States currently impose varying degrees of regulation with no uniformity and little enforcement. As homeschooling grows, the law must develop to support parents who choose to homeschool while imposing enough regulations to which the state can keep records of every student, track students’ progress, and increase the visibility of these students to protect them from abuse. This can be accomplished through annual notice requirements, certification of work by certified educators, minimum education requirements for homeschool educators, and wider homeschooler access to public extracurricular programs.

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¹ Pia Ceres, *They Rage-Quit the School System—and They’re Not Going Back*, WIRED (June 3, 2021, 7:00 AM), <https://www.wired.com/story/pandemic-homeschoolers-who-are-not-going-back/>.

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I. INTRODUCTION

The year 2020 marked a cultural turning point. The outbreak of the COVID-19 pandemic affected every area of our lives and every corner of the world. Things that had once been unusual and even unheard of became commonplace, from Zoom calls to face masks to homeschooling. Homeschooling was already on the rise in the United States in the decades before the pandemic, starting in the 1960s.² However, a majority of the public perceived homeschooling as a niche, unusual alternative reserved for extreme conservative religious families wanting to shelter their children.³ Most parents could never imagine themselves homeschooling their children, thinking it to be impossible, ineffective, weird, or even dangerous. COVID-19 accelerated the steady rise that has been occurring since the 1970s and 1980s and caused a major shift in public opinions on homeschooling. For the

² Katie Gilbert, *How Homeschooling Evolved from Subversive to Mainstream*, JSTOR DAILY (Sept. 8, 2021), <https://daily.jstor.org/how-homeschooling-evolved-from-subversive-to-mainstream/>.

³ See *id.*; Ceres, *supra* note 1.

first time since compulsory education was established in the United States, nearly every family in America has experienced some form of homeschooling.⁴ What was once “alternative” is now almost “mainstream.”⁵

From 1999 to 2016, the percentage of homeschooled students in the United States rose from 1.7% to 3.3%, reflecting that while the homeschooling community remained small, it nearly doubled in size in less than twenty years.⁶ In Fall 2020, 11% of school-aged children were homeschooled.⁷ In March 2021, that percentage was roughly 7.25%.⁸ As opposed to the 1.69 million children homeschooled in 2016, 3.721 million children were homeschooled in the 2020–21 school year.⁹ Even more importantly, the over two million children who switched from traditional schooling to homeschooling after the pandemic began were not necessarily from the groups traditionally associated with homeschooling, but rather were quite diverse. While 9.7% of white families with kids switched from traditional schooling to homeschooling, 12.1% of Hispanic families, 8.8% of Asian families, and 16.1% of black families did the same.¹⁰ Admittedly, this growth is not likely to be permanent. When the pandemic is over and public and private schools regain a more consistent environment and schedule unaffected by COVID-19, many of these families may choose to send their

⁴ States began to pass compulsory education laws in the mid-1800s, but it was not until 1918 that every state had such requirement. After 1850, most children were educated in schools rather than in the home. Gilbert, *supra* note 2; Sonia M. Muscatine, *Homeschooling and the Right to Education: Are States Fulfilling Their Constitutional Obligations to Homeschooled Students?*, 49 J.L. & EDUC. 67, 75, 79 (2020). For a history of the development of compulsory education laws in the United States, see S. Ernie Walton, *The Fundamental Right to Homeschool: A Historical Response to Professor Bartholet*, 25 TEX. REV. L. & POL. 377, 408–32 (2021).

⁵ Brian D. Ray, *Homeschooling: The Research*, NAT’L HOME EDUC. RSCH. INST. (Mar. 26, 2022), <https://www.nheri.org/research-facts-on-homeschooling/>; see Gilbert, *supra* note 2.

⁶ KE WANG, AMY RATHBUN & LAUREN MUSU, U.S. DEP’T OF EDUC.: NAT’L. CTR. FOR EDUC. STAT., SCHOOL CHOICE IN THE UNITED STATES: 2019 32–36 (2019), <https://nces.ed.gov/pubs2019/2019106.pdf>.

⁷ Casey Eggleston & Jason Fields, *Homeschooling on the Rise During COVID-19 Pandemic: Census Bureau’s Household Pulse Survey Shows Significant Increase in Homeschooling Rates in Fall 2020*, U.S. CENSUS BUREAU (Mar. 22, 2021), <https://www.census.gov/library/stories/2021/03/homeschooling-on-the-rise-during-covid-19-pandemic.html>.

⁸ Brian D. Ray, *How Many Homeschool Students Are There in the United States? Pre-Covid-19 and Post-Covid-19: New Data*, NAT’L HOME EDUC. RSCH. INST. (Sept. 9, 2021), <https://www.nheri.org/how-many-homeschool-students-are-there-in-the-united-states-pre-covid-19-and-post-covid-19/>.

⁹ *Id.* Those children counted as homeschooling were the ones pulled out of public and private school and did not include those who underwent virtual instruction from a public or private school. WANG ET AL., *supra* note 6 at 32–36.

¹⁰ Erica Pandey, *Homeschooling Reaches Critical Mass*, AXIOS (Aug. 31, 2021), <https://www.axios.com/homeschooling-pandemic-critical-mass-013e4f01-c962-4e38-8cb7-8079bb597540.html>.

kids back to school. Still, the fact that so many families have experienced schooling at home on a scale unmatched in the last hundred years will likely contribute to the continued acceleration of the steady growth that already began thirty to forty years ago.¹¹

Perhaps more notable than the increased number of homeschoolers is the rise of public opinion for homeschooling. Between 1850 and 1970, homeschooling was considered a strange, subversive practice “conducted by people on the fringes of society” or “carried out by idealists, often surreptitiously or underground.”¹² Now, sixty-three percent of parents say they are more favorable to homeschooling since the pandemic, and such favorability continues to trend upwards.¹³ Although on social media homeschooling has become the butt of endless internet jokes suggesting that it has all been a “complete disaster,” the statistics simply do not agree.¹⁴ Rather, as Pia Ceres suggested, “COVID-19 was the publicist for homeschooling,” and the stereotype of homeschoolers as “white, reclusive and conservative-to-cultish” has become far more diverse and modern.¹⁵ The pandemic spurred a massive nationwide education experiment, and drove “families who would have never otherwise considered taking their kids out of school feel desperate enough to try it.”¹⁶

This unprecedented growth brings forward important legal questions that have existed for many years but have gone relatively unnoticed due to the small amount of children and families that homeschooling regulations impacted. The more students educated in this form, the more pressing the need for updated, modern regulations will become. The chaos brought on education during the pandemic, though detrimental in many ways, was understandable in light of the uncertainty by which we were all living our day

¹¹ See Ray, *supra* note 8.

¹² Gilbert, *supra* note 2; see Mary Rice Hasson, *The Changing Conversation Around Homeschooling: An Argument for More Data and Less Ideology*, 7 U. ST. THOMAS J. L. & PUB. POL’Y 1, 4 (2012).

¹³ Mike McShane, *Opinions on Homeschooling Have Changed During the Pandemic*, FORBES (Mar. 9, 2021, 7:45 AM), <https://www.forbes.com/sites/mikemcshane/2021/03/09/opinions-on-homeschooling-have-changed-during-the-pandemic/?sh=1408fb0d4672>.

¹⁴ *Id.*; see Terri Peters, *The Funniest Posts from Parents About Homeschooling*, TODAY (Mar. 25, 2020, 4:18 PM), <https://www.today.com/parents/funniest-posts-parents-about-homeschooling-t176811>; Caroline Bologna, *40 Tweets from Parents About Homeschooling Amid COVID-19*, HUFFPOST (Apr. 7, 2020, 5:45 AM), https://www.huffpost.com/entry/tweets-parents-homeschool-kids-coronavirus_15e836732c5b6d38d98a5976e; Sheri Reed, *21 Hilarious Cries for Help from Parents Trying to Homeschool During COVID-19*, CARE.COM (Apr. 27, 2020), <https://www.care.com/c/parenting-tweets-coronavirus-homeschooling/>.

¹⁵ Ceres, *supra* note 1.

¹⁶ Emma Green, *The Pandemic Has Parents Fleeing From Schools—Maybe Forever*, THE ATLANTIC (Sept. 13, 2020), <https://www.theatlantic.com/politics/archive/2020/09/homeschooling-boom-pandemic/616303/>.

to day lives. As time moves on, however, there is no excuse for continuing to overlook the need to ensure every child’s right to education and opportunity is fully realized.

Homeschooling regulations must take into consideration the reasons families choose this educational option, the outcomes for homeschooled students, and what the future holds for homeschooling.

A. *Why Parents Homeschool*

Parents choose to homeschool their children for many reasons, the variety of which is expanding in pandemic times. To hold onto the old-fashioned, stereotypical idea of homeschoolers as white, Christian conservatives simply does not accurately reflect the current community of homeschoolers in the United States. In 2016, the National Center for Education Statistics conducted a survey asking homeschooling parents for the reasons behind their educational choice.¹⁷ Thirty-four percent of parents cited concerns about school environments (safety, drugs, negative peer pressure); seventeen percent cited dissatisfaction with the academic instruction in schools; sixteen percent cited their desire to provide religious instruction; and five percent cited each of the following—child’s special needs, desire for a nontraditional approach, child’s mental or physical health, and a desire to provide moral instruction.¹⁸ In Spring 2021, Forbes reported that the top three reasons why families chose homeschooling were: (1) the COVID-19 pandemic, (2) wanting more flexibility to shape their child’s learning experience, and (3) wanting their child to have more one-on-one attention.¹⁹

Modern homeschooling is additionally driven by racial considerations, disability accommodations, decreasing faith in traditional schools, and children’s mental health.²⁰ Homeschooling in black families is on the rise.²¹

¹⁷ WANG ET AL., *supra* note 6 at 32–36.

¹⁸ *Id.*

¹⁹ Mike McShane, *The Push and Pull of Homeschooling*, FORBES (Aug. 5, 2021, 5:57 AM), <https://www.forbes.com/sites/mikemcshane/2021/08/05/the-push-and-pull-of-homeschooling/?sh=5b78c5263609>.

²⁰ See, e.g., Casey Parks, *The Rise of Black Homeschooling*, NEW YORKER (June 14, 2021), <https://www.newyorker.com/magazine/2021/06/21/the-rise-of-black-homeschooling>; MARTHA KENNEDY HARTNETT, CHOOSING HOME: DECIDING TO HOMESCHOOL WITH ASPERGER’S SYNDROME (2004); WANG ET AL., *supra* note 6; Pandey, *supra* note 10; Jill Ebstein, *COVID’s Impact on Education in 2021: The Good, the Bad, and the Future*, INSIDESOURCES (Dec. 29, 2021), <https://insidesources.com/covids-impact-on-education-in-2021-the-good-the-bad-and-the-future/>; William Heuer & William Donovan, *Homeschooling in Uncertain Times: COVID Prompts a Surge*, 237 PIONEER INST. PUB. POL’Y RSCH. (Sept. 2021), <https://files.eric.ed.gov/fulltext/ED615024.pdf>.

²¹ Parks, *supra* note 20.

In fact, “a higher percentage of Black households homeschool than any other racial group in America.”²² Scholars have explained that Black middle-class families are driven to homeschool by “an attempt to individualize academic programs, racial hierarchy and their children’s experiences of racial discrimination,”²³ and that some Black families choose homeschooling as a “vehicle of resistance to institutionalized racism.”²⁴ On a separate note, fifty-two percent of parents homeschooling children with disabilities state that the lack of accommodations for their child was very or extremely important in their decision to homeschool.²⁵

The pandemic caused many parents of publicly and privately educated children to become disenchanted with the traditional school environment.²⁶ Many parents became more involved than ever in their children’s education to the point of observing instruction and assignments.²⁷ This observation spurred on dissatisfaction and frustration, and caused many parents to want their child to have a more personalized education.²⁸ Psychologist Dr. Peter Gray argues that parents’ long-term decisions to homeschool after the events of the pandemic are not so much about the dangers of COVID-19 but the dangers “that they now see that regular, ‘normal’ schooling was inflicting on their children.”²⁹ He discusses how “the pandemic led [parents] to realize how stressed their children were before the pandemic, because of the demands of school,” and that “their children are happier, healthier, and learning more without school than with it.”³⁰ Gray argued that children were overall less stressed and anxious during the pandemic school closures than before: “The pandemic introduced new sources of anxiety, but for most kids these were more than compensated for by release from much of their previous school-induced anxiety.”³¹ He observed that during lockdowns, children were able to engage in self-directed activities, discover new hobbies, gain the regular sleep that they had been missing out on, and he even suggests that

22 McShane, *supra* note 19.

23 Osamudia James, *Risky Education*, 89 GEO. WASH. L. REV. 667, 694 (2021).

24 Amy Crawford, *Do-it-yourself Education is on the Rise*, BOSTON GLOBE (Dec. 23, 2021, 3:00 AM), <https://www.bostonglobe.com/2021/12/23/opinion/do-it-yourself-education-is-rise/> (quoting Cheryl Fields-Smith & Monica Wells Kisura, *Resisting the Status Quo: The Narratives of Black Homeschoolers in Metro-Atlanta and Metro-DC*, 88 PEABODY J. EDUC. 265 (2013)).

25 McShane, *supra* note 19.

26 Pandey, *supra* note 10.

27 *Id.*

28 *Id.*

29 Peter Gray, *Registrations for Homeschooling are Soaring*, PSYCH. TODAY (Sept. 7, 2020), <https://www.psychologytoday.com/us/blog/freedom-learn/202009/registrations-homeschooling-are-soaring>.

30 *Id.*

31 *Id.*

conflicts between children and parents actually went down.³² Whether the findings truly reflect a substantial group of children, this observation of even some parents will be enough for them to decide never to return to traditional schooling.

B. *Homeschooling Outcomes*

There are two major schools of thought on homeschooling outcomes. The first perspective reflects the view that statistics and studies demonstrate that homeschoolers do better overall than their public school counterparts. While a second perspective recognizes these results, its supporters argue that the research ignores other reasons for homeschoolers’ success such as the fact that they generally come from already advantaged households. Desiree Walder of the latter perspective argued that there is no reliable data on homeschooling because the research conducted is biased or flawed.³³ Similarly, Christopher Libiensi stated that the successes of homeschooling reflected in the data are not the result of homeschooling itself, but rather reflective of the “advantages that would make it likely that these students would succeed academically and in life even if they were educated in schools.”³⁴

Still, those following the first perspective refute this claim, and argue that homeschool students perform well “regardless of race and socio-economic status.”³⁵ They consistently perform better on standardized academic achievement tests, perform well in college, and even performed better than their traditionally schooled peers in tests on social skills, leadership, and community involvement.³⁶ One study suggests that homeschooled students had lower depression, higher satisfaction in their autonomy and competence, and tended to rate their educational experience more positively than traditionally school students.³⁷

³² *Id.*

³³ Desiree Walden, *The Homeschooled Child’s Right to Attend Public School: Is Judicial Bypass a Solution?*, 49 URB. LAW. 175, 189 (2017).

³⁴ Christopher Libiensi et al., *Does Homeschooling “Work”? A Critique of the Empirical Claims and Agenda of Advocacy Organizations*, 88 PEABODY J. EDUC. 378, 383 (2013).

³⁵ Tanya K. Dumas et al., *Evidence for Homeschooling: Constitutional Analysis in Light of Social Science Research*, 16 WIDENER L. REV. 63, 74 (2010).

³⁶ *Id.* at 73, 77, 79–80.

³⁷ Gilbert, *supra* note 2.

C. *Projections: The Future of Homeschooling*

In the wake of the COVID-19 pandemic, there likely will be no “returning to normal” as “normal” was before. All parents and children, homeschooled or not, have experienced some form of alternative education since the beginning of the pandemic, from virtual learning to socially distanced classrooms to so-called learning pods and more. In January 2021, forty-four percent of parents said that they prefer some mix of in-person and at-home schooling post-pandemic.³⁸ After having experienced what at-home schooling is like, some families surely will be turned off from the idea forever, but many families, who never would have considered the option before, suddenly hold it as a possibility even if their children do return to the classroom when this is all over. For many parents, the pandemic has led them to the realization that “normal” was not best, and that education needs to become more personalized.³⁹ With the rapid development of technology, more opportunities for parents to work from home, and access to so many educational resources, homeschooling is inevitably going to continue to grow and develop in the United States, and states need to be prepared to respond to this growth.

II. CURRENT STATE OF THE LAW

Homeschooling is far from new. The concept of compulsory, public education did not fully develop until the mid-1800s, before which many children were schooled at home by parents or private tutors.⁴⁰ In fact, it was not until 1918 that every state had officially enacted compulsory schooling laws.⁴¹ However, laws requiring parents to provide their children with an education did exist before this time. As early as the 1640s and 1650s, several American colonies passed their first education laws requiring parents to educate their children, establishing official schools, and ensuring that children had access to education.⁴² Ultimately, from 1850 onward, most children were educated in schools rather than at home.⁴³ In the 1960s, homeschooling began to resurge, but was still considered unusual and strange, driven by conservative, religious families on the right and hippy,

³⁸ McShane, *supra* note 13.

³⁹ Ebstein, *supra* note 20.

⁴⁰ Gilbert, *supra* note 2; Walton, *supra* note 4, at 413–14.

⁴¹ Muscatine, *supra* note 4, at 75.

⁴² See Walton, *supra* note 4, at 410–15 (describing the history of home education and public education and arguing that the right to homeschool is a fundamental right).

⁴³ Gilbert, *supra* note 2.

countercultural communes on the left.⁴⁴ By 1993, homeschooling was again a legal and available option in every state.⁴⁵

In the past few years, homeschooling critics have been vocal about increasing restrictions on homeschooling even to the point of a total ban.⁴⁶ On the other hand, homeschooling supporters staunchly defend homeschooling against such attacks even going so far as to argue that it is a fundamental right.⁴⁷ Notwithstanding these two extremes, the established string of Supreme Court cases involving a parent’s right to direct their child’s education along with the practice’s growing prevalence make it unlikely that any major threat to parents’ ability to choose home education would find success. The more important question is how and to what extent can and should the practice be regulated.

A. Constitutional Law – Parental Rights

The central constitutional issue for homeschooling is the balance between parents’ right to direct their child’s education and children’s right to an education. It is well-established that parents possess the right to make choices about their child’s education. In *Meyer v. Nebraska*, the Supreme Court stated that the power of schools to educate children is only granted because parents have delegated that power to the schools, and that the right of parents to instruct their children is a constitutional right.⁴⁸ This is not only a right however, but also a duty—the duty “to give [their] children education suitable to their station in life.”⁴⁹ Because it is a duty, the state may compel attendance at *some* school.⁵⁰ However, in *Pierce v. Soc’y of Sisters*, the Supreme Court made it clear that states may not require that students attend

⁴⁴ Muscatine, *supra* note 4, at 79–80; Kimberly A. Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 CALIF. L. REV. 123, 125–26 (2008) (explaining the progressive, leftist origins of modern homeschooling).

⁴⁵ Muscatine, *supra* note 4, at 79.

⁴⁶ See Elizabeth Barholet, *Homeschooling: Parent Rights Absolutism vs. Child Rights to Education & Protection*, 62 ARIZ. L. REV. 1 (2020) (calling for a presumptive ban on homeschooling); Vivian E. Hamilton, *Home, Schooling, and State: Education in and for, a Diverse Democracy*, 98 N.C. L. REV. 1347, 1352 (2020) (arguing for a presumptive allowance of homeschooling for primary school, but a presumptive non-allowance for high school); George Shepherd, *Homeschooling’s Harms: Lessons from Economics*, 49 AKRON L. REV. 339 (arguing for a prohibition of homeschooling and calling it “the most radical form of private education and potentially the most destructive”).

⁴⁷ See Walton, *supra* note 4, at 381; Billy Gage Raley, *Safe at Home: Establishing a Fundamental Right to Homeschooling*, 17 BYU EDUC. & L.J. 59 (2017); J. Michael Smith, *HSLDA to Harvard Prof: Homeschooling is a Fundamental Right*, HOME SCH. LEGAL DEF. ASS’N (May 12, 2020), <https://hslida.org/post/hslida-to-harvard-prof-homeschooling-is-a-fundamental-right>.

⁴⁸ *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

⁴⁹ *Id.* at 400.

⁵⁰ *Id.* at 402.

public school because to do so “interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”⁵¹ The state may not “standardize its children by forcing them to accept instruction from public teachers only.”⁵² Still, the Court again emphasized that states could require that all children attend some school.⁵³

In *Wisconsin v. Yoder*, the Supreme Court addressed home education specifically where Amish parents did not send their children to public or private schools.⁵⁴ The Court, here, relied on the free exercise of religion to support the fundamental right of parents to direct their children’s upbringing.⁵⁵ The Court came down strong for parental rights in this case stating: “This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition,” and “the values of parental direction of the religious upbringing and education of their child . . . have a high place in our society.”⁵⁶ The Court emphasized that while states have a strong interest in providing universal education, they must balance this interest with parents’ fundamental rights, and may only impose “reasonable regulations” for controlling education.⁵⁷

B. *Children’s Right to Education*

Parents’ rights are not without limits, however, as children have rights, too. There are several situations where the state may interfere with a parent’s right to raise their child, most obviously in cases of abuse, neglect, and abandonment. International law recognizes many affirmative rights of the child, and in particular, the child’s right to education. In 1959, the United Nations adopted the Declaration of the Rights of the Child, which recognized a right to free education.⁵⁸ In 1989, the UN adopted the robust Convention on the Rights of the Child (“CRC”).⁵⁹ Article 28 of the CRC establishes the right of the child to education, and the duty of nations to provide free, compulsory education and encourage regular attendance at schools.⁶⁰ Article 29 states that education shall be directed to the development of a child’s full

⁵¹ *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 530, 534–35 (1925).

⁵² *Id.* at 535.

⁵³ *Id.* at 534–35.

⁵⁴ *Wisconsin v. Yoder*, 406 U.S. 205, 234–35 (1972).

⁵⁵ *Id.* at 233.

⁵⁶ *Id.* at 213–14, 232.

⁵⁷ *Id.* at 213.

⁵⁸ G.A. Res. 1386 (XIV), Declaration of the Rights of the Child (Nov. 20, 1959).

⁵⁹ U.N. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

⁶⁰ *Id.* art. 28.

potential, respect for human rights and freedoms, respect for child’s parents and culture, and preparation of the child for life in a free society.⁶¹

Although the U.S. is not a party to the CRC, the right to education is ingrained in U.S. history and tradition. Every state constitution imposes an affirmative duty on the state to provide education to its children.⁶² The existence of this duty as well as federal funding of free public schooling imply that such a right exists.⁶³ The Supreme Court has referred to the importance of education as “perhaps the most important function of state and local governments”⁶⁴ and as the “apex” of state functions.⁶⁵ Although the Supreme Court is generally reluctant to recognize positive rights which impose affirmative obligations on the states, Kara Millonzi even argued that the right of all citizens to an education is required by the Fourteenth Amendment Due Process and Equal Protection clauses.⁶⁶

Because every state has an obligation, at least through their state constitution, to provide education to its citizens, states must ensure some basic minimum level of education for all.⁶⁷ The only way for a state to ensure that it is meeting this obligation is to require some oversight of homeschooled students.⁶⁸ Although such oversight will result in some infringements on parental autonomy and the balance of these interests may be challenging, it is necessary to ensure that the rights of both parents and children are respected, and that states are meeting their obligations.⁶⁹

C. State Statutes - Homeschooling Regulations

States currently impose varying degrees of regulation with little uniformity and little enforcement. Regulations involve notice requirements, attendance requirements, assessment and intervention, qualifications for homeschool parents, curriculum requirements.⁷⁰ However, no state imposes

⁶¹ *Id.* art. 29.

⁶² Desiree Walden, *The Homeschooled Child’s Right to Attend Public School: Is Judicial Bypass a Solution*, 49 URB. L. 175, 180 (2017); Yuracko, *supra* note 44, at 135.

⁶³ Walden, *supra* note 62, at 181.

⁶⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

⁶⁵ *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

⁶⁶ Kara A. Millonzi, *Education as a Right of National Citizenship Under the Privileges or Immunities Clause of the Fourteenth Amendment*, 81 N.C.L. REV. 1286, 1287 (2003); *see also* Yuracko, *supra* note 44, at 139.

⁶⁷ Yuracko, *supra* note 44, at 142.

⁶⁸ *See generally id.*

⁶⁹ *Id.* at 180–81.

⁷⁰ *See, e.g.*, Tayler G. Hansford, *Recent Developments: Education Law – the Traveler’s Guide to Homeschool Regulation in the United States*, 43 AM. J. TRIAL ADVOC. 513, 519 (2020); Hamilton, *supra* note 46, at 1374.

all these regulations, many impose few, and even those with stricter regulations often underenforce.⁷¹ Notice is the requirement that homeschooling parents notify the state of their intent to educate their child at home. Some states require annual notice,⁷² some require it only once at the start of home education,⁷³ and some states do not require any notice at all.⁷⁴ Several states delineate the amount of time that homeschooling parents should be spending on education; many do not.⁷⁵ Assessment requirements vary considerably. Some states require homeschool students to sit for standardized exams,⁷⁶ some require student work to be reviewed by a

⁷¹ Muscatine, *supra* note 4, at 87; Hamilton, *supra* note 46, at 1374.

⁷² Those states that require annual notice are: Arkansas, California, Colorado, Delaware, Georgia, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, New Mexico, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington, Wisconsin, Wyoming. *See* Hansford, *supra* note 70, at 519–21; *e.g.*, ARK. CODE ANN. § 6-15-503(a)(1) (2017) (“Parents . . . desiring to provide a home school for their children shall give written notice to the superintendent of their local school district of their intent to provide a home school for their children . . . [a]t the beginning of each school year but no later than August 15 . . .”); COLO. REV. STAT. 22-33-104.5(3)(e) (2019) (“Any parent establishing a nonpublic home-based educational program shall provide written notification of the establishment of said program to a school district within the state fourteen days prior to the establishment of said program and each year thereafter if the program is maintained.”); TENN. CODE ANN. § 49-6-3050(b)(1) (2019) (“Provide annual notice to the local director of schools prior to each school year of the parent-teacher’s intent to conduct a home school . . .”).

⁷³ Those states that require one-time notice are: Florida, Alabama, Arizona, Hawaii, Kansas, Maine, Nevada, North Carolina, Oregon, Utah, and West Virginia. *See* Hansford, *supra* note 70, at 519; *e.g.*, FLA. STAT. § 1002.41(1)(a) (2021) (“The parent . . . who establishes and maintains a home education program shall notify the district school superintendent of the county in which the parent resides of her or his intent to establish and maintain a home education program . . . must be filed in the district school superintendent’s office within 30 days of the establishment of the home education program.”); N.H. REV. STAT. ANN. § 193-A:5(I) (2016) (“Any parent commencing a home education program for a child, for a child who withdraws from a public school . . . shall notify the commissioner of the department of education, resident district superintendent, or principal of a nonpublic school of such within 5 business days of commencing the program.”).

⁷⁴ Those states with no notice requirement are: Alaska, Connecticut, Idaho, Illinois, Indiana, Iowa, Michigan, Mississippi, New Jersey, Oklahoma, and Texas. *See* Hansford, *supra* note 70, at 518–19.

⁷⁵ For example, *see* COLO. REV. STAT. § 22-33-104.5(3)(c) (2022) (requiring “no less than one hundred seventy-two days of instruction, averaging four instructional contact hours per day”); KAN. STAT. ANN. § 72-3120(g)(3) (2022) (requiring 15 hours of classroom work per week under the supervision of an instructor); MONT. CODE ANN. § 20-1-301(2) (2021) (requiring different number of hours for school work depending on student’s grade level).

⁷⁶ For example, *see* COLO. REV. STAT. § 22-33-104.5(3)(f) (2022) (requiring nationally standardized achievement tests at grades three, five, seven, nine, and eleven); GA. CODE ANN. § 20-2-690(c)(7) (2022) (requiring students to be subject to nationally standardized testing administration at least every three years beginning at the end of third grade); HAW. CODE R. § 8-12-18(c) (LexisNexis 2022) (requiring state testing in grades three, five, eight, and ten); MINN. STAT. ANN. § 120A.22(11)(a) (West 2022) (requiring students to be annually assessed using a nationally norm-referenced standardized assessment); N.Y. COMP. CODES R. & REGS. tit. 8, § 100.10(h) (2022) (requiring annual standardized assessment); N.D. CENT. CODE § 15.1-23-09(1)(a) (2021) (requiring standardized testing in grades four, six, eight, and ten).

certified teacher,⁷⁷ some offer several assessment options from which the parent may choose,⁷⁸ some have no such requirement. A small number of state statutes provide for intervention if student test scores or progress do not meet a certain standard.⁷⁹ Only thirteen states have requirements for parents who wish to be their child’s educator,⁸⁰ and among those, three only require that the parent be “competent” or “adequate” as opposed to requiring a certain degree or certification.⁸¹ In sum, regulations remain very inconsistent, often nearly non-existent, and ultimately unenforced.

III. PROBLEMS

In 2020, Professor Elizabeth Bartholet of Harvard Law School published a law review article calling for a presumptive ban on homeschooling.⁸² Her article garnered much attention and indignation from homeschool supporters.⁸³ Professor Bartholet argued that homeschooling undermines the values of our democracy by allowing parents to isolate their children from hearing ideas other than the ones their parents hold.⁸⁴ She even claimed that homeschooling promotes racial segregation, female

⁷⁷ For example, *see* MD. CODE REGS. 13A.10.01.01(D)(1)(c) (2022) (requiring that a portfolio be reviewed by the local superintendent or the superintendent’s designee at the conclusion of each semester); N.H. REV. STAT. ANN. § 193-A:6(II)(a) (2022) (requiring a certified teacher or a currently working teacher to evaluate the child’s progress upon review of student’s portfolio).

⁷⁸ *See* FLA. STAT. § 1002.41(f) (2022); ME. STAT. tit. 20-A, § 5001-A(4)(b)(iii)–(v) (2022); N.D. CENT. CODE § 15.1-23-09 (2021); VT. STAT. ANN. tit. 16, § 166b(d) (2021).

⁷⁹ *See* OR. REV. STAT. ANN. § 339.035(4)(a) (West 2022); VT. STAT. ANN. tit. 16, § 166b(e) (2021); COLO. REV. STAT. § 22-33-104.5(5)(a)(I) (2022).

⁸⁰ *See* GA. CODE ANN. § 20-2-690(c)(3) (2022); KAN. STAT. ANN. § 72-3120(a) (2022); N.M. STAT. ANN. § 22-1-2.1(C) (2022); N.Y. EDUC. LAW § 3204(2)(i) (Consol. 2022); N.C. GEN. STAT. § 115C-564 (2022); N.D. CENT. CODE § 15.1-23-03 (2021); OHIO ADMIN. CODE 3301-34-03(A)(9) (2022); 24 PA. CONS. STAT. § 13-1327.1(a) (2022); S.C. CODE ANN. § 59-65-40(A)(1) (2022); TENN. CODE ANN. § 49-6-3050(a)(2)(B) (2022); VA. CODE ANN. § 22.1-254.1(A) (2022); WASH. REV. CODE ANN. § 28A.225.010(4) (LexisNexis 2022); W. VA. CODE § 18-8-1 (c)(2)(B) (2022).

⁸¹ *See* KAN. STAT. ANN. § 72-3120(a) (2022); N.Y. EDUC. LAW § 3204(2)(i) (Consol. 2022); VA. CODE ANN. § 22.1-254.1(A) (2022).

⁸² Bartholet, *supra* note 46, at 3, 57.

⁸³ *See* Walton, *supra* note 4, at 381; Smith, *supra* note 47; Patrick J. Wolf et al., *Harvard Law Professor’s Attack on Homeschooling is a Flawed Failure. And Terribly Timed, Too.*, EDUC. NEXT (May 5, 2020), <https://www.educationnext.org/harvard-law-professors-attack-on-homeschooling-flawed-failure-terribly-timed/>; Michael Strong, *The Most Chilling Aspect of Elizabeth Bartholet’s Thought on Homeschooling*, FLOW IDEALISM (May 29, 2020), <https://flowidealism.medium.com/the-most-chilling-aspect-of-elizabeth-bertholet-thought-on-homeschooling-fl135d837c>; Andrew Reder, *Harvard Prof’s Strange Claims about Homeschoolers Debunked—By Harvard’s Own Research*, FEE STORIES (Dec. 3, 2021), <https://fee.org/articles/harvard-prof-s-strange-claims-about-homeschoolers-debunked-by-harvard-s-own-research/>; Mike McShane, *Harvard’s Lazy Attack on Homeschooling*, FORBES (Apr. 21, 2020, 9:32 AM), <https://www.forbes.com/sites/mikemcshane/2020/04/21/harvards-lazy-attack-on-homeschooling/?sh=7c294f952473>.

⁸⁴ Bartholet, *supra* note 46, at 57.

subservience, and allows for abuse.⁸⁵ Though her article was written before the COVID-19 pandemic hit the United States, she has since continued to defend her strong stance.⁸⁶ If her hope for a presumptive ban on homeschooling was unlikely to succeed before, it certainly faces even more obstacles after the pandemic for many of the reasons discussed above. While her depiction of homeschooling is quite limited, subscribing mainly to the outdated view that parents only choose to homeschool their children in order to isolate them, it would be wrong to completely disregard the concerns that she and other critics of homeschooling raise.

A. *Under-regulation*

The first and most straightforward problem is the under-regulation of homeschooling. A huge percentage of homeschoolers are completely unaccounted for. The number of currently homeschooled students reflected in studies is likely lower than the actual number because multiple states have literally no way to track children who are being homeschooled.⁸⁷ Eleven states have no requirement that parents who choose to homeschool their children must provide notice to the state, superintendent, or any authority.⁸⁸ In these states, when a parent pulls their child out of public education, that child effectively disappears. The parent has no obligation to even notify any authority that they are choosing to do so. Every state has compulsory education laws.⁸⁹ Under these circumstances, how can the state possibly know if parents are fulfilling their duty to educate their children or just choosing not to send their children to school? Twelve states only require parents to notify authorities of their intent to homeschool once and not

⁸⁵ *Id.* at 12–13.

⁸⁶ HLS News Staff, *A Q&A with Homeschooling Reform Advocates Elizabeth Barholet and James Dwyer*, HARV. L. TODAY (June 28, 2021), <https://today.law.harvard.edu/a-qa-with-homeschooling-reform-advocates-elizabeth-barholet-and-james-dwyer/>; Elizabeth Barholet, *Homeschooling*, in EXPLORING NORMS AND FAMILY LAWS ACROSS THE GLOBE (Melissa L. Breger, ed. forthcoming Fall 2021), <http://barholet.wpengine.com/wp-content/uploads/2021/05/HS-Breger-Book-Chapter-Final.pdf>; EducationNext, *Post-Pandemic Future of Homeschooling: Is It Time for a Change to Homeschool Law? (Panel 1)*, YOUTUBE (May 10, 2021), https://www.youtube.com/watch?v=_CGCQNh_KFY (participating in a panel on homeschooling hosted by Harvard Kennedy School’s Taubman Center for State and Local Government); The Cato Institute, *Homeschooling: Protecting Freedom, Protecting Children*, YOUTUBE (June 15, 2020), <https://www.youtube.com/watch?v=IkIL7fpBfxE> (participating in a panel discussion on homeschooling hosted by the CATO Institute).

⁸⁷ Ray, *supra* note 8 (“Not all students who are homeschooled are accounted for by state department of education. . . the number of homeschool students is disproportionately underrepresented”).

⁸⁸ Those states with no notice requirement are: Alaska, Connecticut, Idaho, Illinois, Indiana, Iowa, Michigan, Mississippi, New Jersey, Oklahoma, and Texas. See Hansford, *supra* note 70, at 518–19.

⁸⁹ Muscatine, *supra* note 4, at 75.

annually as the remaining twenty-seven states require.⁹⁰ At least these twelve states have some means of tracking and recording homeschooled children, but parents have no obligation to renew their intent.

B. *Deprivation of Educational Opportunities*

Second, the Supreme Court has recognized that it is a parent’s duty “to give his children education suitable to their station in life.”⁹¹ There is certainly plenty of room for interpretation of this short phrase, but it no doubt imposes on parents the burden to provide some basic level of education to their children. Compulsory education laws initially developed to ensure that children had access to educational opportunities so that they could contribute to and thrive in a free society.⁹² This goal does not require universal education standards imposed on all students and schools throughout the United States, but access to education demands that children be well-equipped for life after their education has concluded. All of this considered, only twenty-six states have any sort of assessment requirement for homeschooling families,⁹³ and only thirteen require any kind of qualification for the parents who choose to instruct their own children.⁹⁴ Among the states with assessment requirements, the demand varies considerably—some require standardized testing at certain ages or grade levels or that parents follow certain approved home study programs; others require a portfolio of the students’ work to be approved by a certified teacher or allow parents to administer and report results of certain tests.⁹⁵ Some states require that certain scores or percentiles be met in order for the student to pass the assessment,⁹⁶ but only three states provide for intervention when students underperform.⁹⁷

⁹⁰ Those states that require one-time notice are: Florida, Alabama, Arizona, Hawaii, Kansas, Maine, Nevada, North Carolina, Oregon, Utah, and West Virginia. See Hansford, *supra* note 70, at 519 (2020).

⁹¹ Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

⁹² See Bartholet, *supra* note 46, at 8.

⁹³ See Hansford, *supra* note 70, at 521–22.

⁹⁴ See GA. CODE ANN. § 20-2-690(c)(3) (2022); KAN. STAT. ANN. § 72-3120(a) (2022); N.M. STAT. ANN. § 22-1-2.1(C) (2022); N.Y. EDUC. LAW § 3204(2)(i) (Consol. 2022); N.C. GEN. STAT. § 115C-564 (2022); N.D. CENT. CODE § 15.1-23-03 (2021); OHIO ADMIN. CODE 3301-34-03(A)(9) (2022); 24 PA. CONS. STAT. § 13-1327.1(a) (2022); S.C. CODE ANN. § 59-65-40(A)(1) (2022); TENN. CODE ANN. § 49-6-3050(a)(2)(B) (2022); VA. CODE ANN. § 22.1-254.1(A) (2022); WASH. REV. CODE ANN. § 28A.225.010(4) (LexisNexis 2022); W. VA. CODE § 18-8-1(c)(2)(B) (2022).

⁹⁵ See generally Hansford, *supra* note 70, at 513.

⁹⁶ See N.H. REV. STAT. ANN. § 193-A:6(II) (2022); N.Y. COMP. CODES R. & REGS. tit. 8, § 100.10(h)(1)(v) (2022); OHIO ADMIN. CODE 3301-34-04(B)(1)(b) (2022); VA. CODE ANN. § 22.1-254.1(C) (2022).

⁹⁷ See OR. REV. STAT. ANN. § 339.035(4)(a) (West 2022); VT. STAT. ANN. tit. 16, § 166b(e) (2021); COLO. REV. STAT. § 22-33-104.5(5)(a)(I) (2022).

C. Risk of Neglect and Abuse

Finally and most alarming is a claim that Professor Bartholet emphasizes in her article—the risk of neglect and abuse faced by homeschooled children.⁹⁸ Professor Bartholet asserts that “ongoing abuse and neglect...constitute[s] a significant part of the homeschooling world.”⁹⁹ Under the guise of homeschooling, parents can abuse their children away from the eye of mandated reporters and isolate their children from access to aid from school officials.¹⁰⁰ A study by the Coalition for Responsible Home Education reported that forty-seven percent of school-aged torture cases involved children who were removed from school to be homeschooled after a previous file had been opened with Child Protective Services.¹⁰¹ The study stated that an additional twenty-nine percent of the children were simply never enrolled in school.¹⁰²

Reports of this kind emerged during the pandemic. During lockdowns, children had less exposure to adults outside of their home, and both parents and children experienced major stressors, less support, and more burnout.¹⁰³ Parents experiencing parental burnout are more likely to engage in abuse and neglect,¹⁰⁴ and some research suggests that the number of child abuse victims tripled during the height of the pandemic.¹⁰⁵ However, several states actually “reported double-digit percentage decreases in reports to child maltreatment hotlines.”¹⁰⁶ Considering that twenty percent of reports of child abuse and neglect are made by educators, the decrease in reports alongside an increase in abuse are likely a direct result of the decreased contact of children with educational personnel.¹⁰⁷ The stress of the pandemic played a role in

⁹⁸ Bartholet, *supra* note 46 at, 14–20, 37–42.

⁹⁹ *Id.* at 3–4.

¹⁰⁰ *Id.* at 14, 24–25, 57.

¹⁰¹ COAL. FOR RESPONSIBLE HOME EDUC., AN ISSUE BRIEF: AT-RISK HOMESCHOOLED CHILDREN 2 (2017), <https://www.responsiblehomeschooling.org/wp-content/uploads/2017/05/CRHE-At-Risk-Children-Brief.pdf>.

¹⁰² *Id.*

¹⁰³ See Elizabeth York Thomas et al., *Spotlight on Child Abuse and Neglect Response in the Time of COVID-19*, 5 LANCET PUB. HEALTH 361, 371 (2020), [https://www.thelancet.com/pdfs/journals/lanpub/PIIS2468-2667\(20\)30143-2/fulltext](https://www.thelancet.com/pdfs/journals/lanpub/PIIS2468-2667(20)30143-2/fulltext); see also Denise Mann, *Study: Child Abuse Rose During COVID Pandemic*, U.S. NEWS (Oct. 8, 2021, 11:41 AM), <https://www.usnews.com/news/health-news/articles/2021-10-08/study-confirms-rise-in-child-abuse-during-covid-pandemic>.

¹⁰⁴ Annette K. Griffith, *Parental Burnout and Child Maltreatment During the COVID-19 Pandemic*, 37 J. FAM. VIOLENCE 725, 727 (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7311181/pdf/10896_2020_Article_172.pdf.

¹⁰⁵ Mann, *supra* note 103; Thomas et al., *supra* note 103, at 371.

¹⁰⁶ Thomas et al., *supra* note 103, at 371.

¹⁰⁷ *Id.*

escalating such parental behavior, and for some children the isolation from adults outside their home was deadly.¹⁰⁸

Still, we cannot necessarily assume that homeschooling itself poses a danger to children or that parents who choose to homeschool are more likely to abuse. Some argue that critics of homeschooling use the potential of abuse to garner disfavor for homeschooling, relying on dramatic stories that understandably agitate the public. S. Ernie Walton, in a response to Bartholet’s law review article, argued that Professor Bartholet was proposing “a presumption that parents abuse their children and that the abuse of some requires the stripping of the rights of all.”¹⁰⁹ Walton stated that the law cannot infringe on our rights simply because some people abuse those rights: “Homeschooling, therefore, cannot be outlawed on the premise that some parents abuse their children. The law presumes the exact opposite, and until a parent does abuse their right, the state cannot intervene.”¹¹⁰ He cited research conducted by Dr. Brian Ray of the National Home Education Research Institute stating that: “a comparison of homeschool abuse versus public school abuse or private school abuse suggests less abuse, if anything, of homeschool students. There is no research-based evidence that homeschool children are at a greater risk than others to be abused or neglected.”¹¹¹ In his work, Dr. Ray further asserted:

Legally homeschooled students are 40% less likely to die by child abuse or neglect than the average student nationally. Truants, by contrast, are seven times as likely to die as the average student nationally. That is, in families where people are legally homeschooling, there is a significantly lower incidence of child fatalities due to child abuse or child neglect.¹¹²

¹⁰⁸ See Jeff Calaway, *Spike in Severe Child Abuse Cases Likely Result of COVID-19*, COOK CHILDREN’S CHECKUP NEWSROOM (May 6, 2020), <https://www.checkupnewsroom.com/spike-in-severe-child-abuse-cases-likely-result-of-covid-19>.

¹⁰⁹ Walton, *supra* note 4, at 394.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 393 n.85 (quoting Brian D. Ray, *The Relationship Between the Degree of State Regulation of Homeschooling and the Abuse of Homeschool Children (Students)*, NAT’L HOME EDUC. RSCH. INST. (Mar. 15, 2018), <https://www.nheri.org/degree-of-homeschool-regulation-no-relationship-to-homeschool-child-abuse/>).

¹¹² Brian D. Ray, *Child Abuse and Neglect Fatalities Not Correlated with Homeschooling*, NAT’L HOME EDUC. RSCH. INST. (Feb. 1, 2017), <https://www.nheri.org/child-abuse-and-neglect-fatalities-not-correlated-with-homeschooling/#:~:text=%E2%80%9CLegally%20homeschooled%20students%20are%2040,as%20the%20average%20student%20nationally.>

He also reported that “adults who had been home educated reported being abused at a lower rate than those in two other schooling groups.”¹¹³

D. *Strong Opposition to Increased Homeschooling Regulations*

Notably, when states have tried to increase and streamline homeschool regulations in the past, they have come up against strong opposition. Homeschooling advocates stand firmly against most, if not all, attempts to regulate homeschooling.¹¹⁴ These advocates unwaveringly promote parents’ right to oversee their children’s education, and reject the idea that the state should interfere in that endeavor.¹¹⁵ Homeschooling advocates have found a lot of success in state legislatures.¹¹⁶ One of the most prominent homeschool advocacy groups, the Home School Legal Defense Association (“HSLDA”), “tracks proposed state legislation and mobilizes its members to overwhelm legislative offices to express their opposition.”¹¹⁷ For nearly twenty years, HSLDA has been working to oppose any proposed restrictions or oversight of homeschooling.¹¹⁸ In 1994, HSLDA opposed an amendment to the Elementary and Secondary Education Act, which it interpreted as requiring homeschooling parents to be certified teachers.¹¹⁹ HSLDA members and volunteers flooded members of Congress with calls and office visits to express their opposition.¹²⁰ HSLDA’s efforts went beyond the failure of the amendment, but resulted also in added language to the act stating that it did not authorize any federal control over homeschools.¹²¹ Its efforts have resulted in the failure of state bills that would require mandatory testing, tightened recordkeeping, notice, monitoring of educational progress, annual homeschool inspections, background investigations for individuals living in homeschooled households, health and safety visits to homeschool students, and more.¹²² HSLDA stands against teacher certification requirements, subject matter requirements, testing requirements, and inspections.¹²³

¹¹³ *Id.*

¹¹⁴ See Bartholet, *supra* note 46, at 44, 48–49; Hamilton, *supra* note 46, at 1372–74; Yuracko, *supra* note 44 at 128–130.

¹¹⁵ See Bartholet, *supra* note 46, at 44, 49; Hamilton, *supra* note 46, at 1372–74; Yuracko, *supra* note 44, at 128–130.

¹¹⁶ Hamilton, *supra* note 46, at 1372.

¹¹⁷ *Id.*

¹¹⁸ Yuracko, *supra* note 44, at 128.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See *id.*

¹²² See Bartholet, *supra* note 46, at 53.

¹²³ See Yuracko, *supra* note 44, at 128–30.

The hard work of HSLDA is likely the reason for much of the leniency and inconsistency that currently exists in homeschool regulations.¹²⁴ Politicians who have worked to pass homeschooling regulations have commented on the power of the homeschooling lobby. Senator Loretta Weinberg of New Jersey, who proposed a bill that would require homeschoolers to register with their district, submit proof of schoolwork, and have an annual medical exam, stated, “We just want to know your child exists.”¹²⁵ When “besieged” with opposition,¹²⁶ she said, “[t]he homeschool community flooded me with calls, followed me around the Statehouse,”¹²⁷ and, “[y]ou would have thought I had suggested the end of the world as we know it.”¹²⁸ Under similar circumstances, Rep. Michael Switalski of Michigan stated, “[t]he homeschoolers are so organized and vocal that I’ll never get a hearing.”¹²⁹ Resistance to regulation should not stop it where it is needed, but it signals to lawmakers the special need to carefully design regulations as to not be overly intrusive and stay closely connected to state interests. Although regulations have been unsuccessful in the past, the pandemic has bred a new community of homeschoolers and states must find a way to fulfill their obligations to the millions of children being educated this way while still respecting parents’ rights and decisions.

IV. RECOMMENDATIONS: PROGRESS, OPPORTUNITY, AND SAFETY

For years, parents have been choosing to homeschool their children for a wide variety of reasons. After COVID-19, those reasons have only broadened. In reality, home education is even older and more historically entrenched than compulsory public education, a relatively recent construct in the scheme of history. Just as the pandemic ushered in major cultural shifts in the workforce, we should expect and embrace the shift towards individualization in education.¹³⁰ Education is meant to equip children with

¹²⁴ See *id.* at 128–29.

¹²⁵ Susan K. Livio, *After Irvington Suspected Neglect Case, Legislator Reconsiders Home-Schooling Laws*, NJ.COM (May 31, 2011, 1:10 PM), https://www.nj.com/news/2011/05/after_irvington_suspected_negl.html.

¹²⁶ Travis Pillow, *Home School Advocates and the Fight for Parental Autonomy*, REIMAGINED (Sept. 2, 2015), <https://www.reimaginedonline.org/2015/09/home-school-advocates-and-the-fight-for-parent-autonomy/>.

¹²⁷ John Mooney, *Putting a Face to New Jersey’s Homeschooled Students*, NJ SPOTLIGHT NEWS (Nov. 23, 2011), <https://www.njspotlightnews.org/2011/11/11-1122-2204/>.

¹²⁸ Livio, *supra* note 125.

¹²⁹ Judith G. McMullen, *Behind Closed Doors: Should States Regulate Homeschooling?*, 54 S.C. L. REV. 75, 104 (2002).

¹³⁰ See Kim Parker, Juliana Menasce Horowitz & Rachel Minkin, *How the Coronavirus Outbreak Has – and Hasn’t – Changed the Way Americans Work*, PEW RSCH. CTR. (Dec. 9, 2020), <https://www.pewresearch.org/social-trends/2020/12/09/how-the-coronavirus-outbreak-has-and-hasnt->

the skills they will need to lead fruitful adult lives. Our adult lives are changing too. The skills we need in the workforce are different than what they were at the turn of the twentieth century so it follows that the constructs of education will also shift. The COVID-19 pandemic has only accelerated that shift. So many American adults no longer need to leave their homes to go to work.¹³¹ Most of us no longer leave our homes to watch movies,¹³² exercise,¹³³ or shop.¹³⁴ More and more is occurring within our homes, so why not education?

changed-the-way-americans-work/; Christina Pazzanese, *How COVID Experiences Will Reshape the Workplace*, HARV. GAZETTE (Feb. 9, 2021), <https://news.harvard.edu/gazette/story/2021/02/how-covid-experiences-will-reshape-the-workplace/>; Susan Lund et al., *The Future of Work After COVID-19*, MCKINSEY & CO. (Feb. 18, 2021), <https://www.mckinsey.com/featured-insights/future-of-work/the-future-of-work-after-covid-19>; William A. Galston, *Politics & Ideas: How Covid Changed the American Workforce*, WALL ST. J. (Dec. 14, 2021, 12:51 PM), <https://www.wsj.com/articles/how-covid-changed-the-american-workforce-participation-remote-benefits-welfare-inflation-11639496874>; Dina Gerdeman, *COVID Killed the Traditional Workplace. What Should Companies Do Now?*, HARV. BUS. SCH. (Mar. 8, 2021), <https://hbswk.hbs.edu/item/covid-killed-the-traditional-workplace-what-should-companies-do-now>.

¹³¹ See Lydia Saad & Ben Wigert, *Remote Work Persisting and Trending Permanent*, GALLUP (Oct. 13, 2021), [Alexa Lardieri, *Poll: Americans Like Working at Home*, U.S. NEWS \(Feb. 12, 2021\), <https://www.usnews.com/news/national-news/articles/2021-02-12/majority-of-americans-work-remotely-a-year-into-coronavirus-pandemic-poll-finds>.](https://news.gallup.com/poll/355907/remote-work-persisting-trending-permanent.aspx#:~:text=Most%20recently%2C%2025%25%20worked%20exclusively,over%20half%20by%20October%202020; Parker et al., supra note 130; Zoe Strozewski, Number of Americans Working from Home Doubled in 2020, Higher Rate of Women Than Men, NEWSWEEK (July 23, 2021, 9:38 AM), https://www.newsweek.com/number-americans-working-home-doubled-2020-higher-rate-women-men-1612530;</p>
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¹³² See Nelson Granados, *How Will Theaters and Streaming Coexist After the Pandemic?*, FORBES (Feb. 22, 2021, 1:34 PM), <https://www.forbes.com/sites/nelsongranados/2021/02/22/how-will-theaters-and-streaming-services-coexist-after-the-pandemic/?sh=454f7cbe5106>; José Gabriel Navarro, *Watching Movies in the Theater vs. Via a Streaming Service U.S. 2018–2020*, STATISTA (Aug. 12, 2021), <https://www.statista.com/statistics/947757/theaters-streaming-watching-movies/>.

¹³³ See Gretchen Reynolds, *How the Pandemic Is Changing Our Exercise Habits*, N.Y. TIMES (Oct. 7, 2020), <https://www.nytimes.com/2020/10/07/well/move/pandemic-exercise-habits-study.html>; Rachel King, *Most Americans Plan to Continue At-Home Workouts Even Once Gyms Fully Reopen*, FORTUNE (Aug. 17, 2020, 11:05 AM), <https://fortune.com/2020/08/17/covid-workouts-at-home-gyms-reopening-coronavirus-fitness/>; SWNS, *Most Americans Believe Gyms Will Become Thing of the Past After Coronavirus*, N.Y. POST (July 16, 2020, 12:46 PM), <https://nypost.com/2020/07/16/survey-says-the-at-home-workout-is-here-to-stay-even-if-covid-19-disappears/#>.

¹³⁴ See Chloe Sorvino, *Instacart Survived Covid Chaos – But Can It Keep Delivering After the Pandemic?*, FORBES (Jan. 27, 2021, 6:30 AM), <https://www.forbes.com/sites/chloesorvino/2021/01/27/instacart-survived-covid-chaos—but-can-it-keep-delivering-after-the-pandemic/?sh=27b4d280bfa1>; Jaewon Kang, *Instacart Expects More Growth in Grocery Delivery*, WALL ST. J. (Oct. 19, 2021, 2:05 PM), <https://www.wsj.com/articles/instacart-expects-more-growth-in-grocery-delivery-11634666233>; Magdalena Petrova, *Coronavirus Is Making Grocery Delivery Services Like Instacart Really Popular and They Might Be Here to Stay*, CNBC (May 13, 2020, 11:00 AM), <https://www.cnn.com/2020/05/13/coronavirus-making-grocery-delivery-services-like-instacart-popular.html>; Levi Sumagaysay, *The Pandemic Has More Than Doubled Food-Delivery Apps' Business. Now What?*, MARKETWATCH (Nov. 27, 2020, 7:00 AM),

Children must have access to education, and parents must be held accountable for their duty to provide that access. The state owes a duty to both—to protect children and respect parents. The challenge for the states is finding the proper balance between a proper amount of regulation and overly burdensome regulations. Many parents choose to homeschool for the sake of flexibility, individualization, and a desire to break their children out of the usual confines of school-based education. Rather than punishing parents who choose this alternative route, states should recognize and honor the many reasons parents may decide that homeschooling is best for their child without imposing too burdensome restrictions. The recommendations below come from the perspective that homeschooling regulations need not be overly restrictive, but rather, like many parents who choose it, should be motivated by a degree of flexibility. Increased regulation is necessary, but only to a small extent. These minimal changes can simultaneously advance homeschooling parents’ interests and government interests. By refraining from overly restrictive requirements that aim to effectively simulate school conditions in the home, the government will not only honor parental rights but likely find it easier to pass and enforce regulations. Sonia M. Muscatine put it well when she stated: “State oversight of homeschooling is necessary for states to fulfill their affirmative obligations to provide education. The flip side of regulation, of course, is that too much oversight can interfere in otherwise successful endeavors.”¹³⁵

To fulfill their duties to children, states must keep records of every student, track students’ progress, and increase the visibility of these students to protect them from abuse. This can be accomplished through annual notice requirements, certification of work by certified educators, minimum education requirements, and wider homeschooler access to public extracurricular programs.

A. *Annual Notice*

Each state should require that parents who choose to homeschool their children notify the school district at the beginning of each academic year or at the time that the parents choose to pull the child out of school. The notification should include basic information about the child’s age, grade, reason for homeschooling, the academic subjects that the parent intends to cover in the home education program, and the school that they left if they are leaving a traditional school. This notification can easily be renewed each year. This is a simple, easy, non-invasive requirement that allows the school

<https://www.marketwatch.com/story/the-pandemic-has-more-than-doubled-americans-use-of-food-delivery-apps-but-that-doesnt-mean-the-companies-are-making-money-11606340169>.

¹³⁵ Muscatine, *supra* note 4, at 68.

district to at the very least have some record of every child in the district and a statement by their parents that they intend to educate them. The school district should be aware of how each child in its territory is being educated. Annual notice is a non-intrusive way to keep tabs on every child in the district and to hold parents accountable as educators. This requirement places a very light burden on homeschooling parents while furthering the state's interest in ensuring that every child has some access to education. It is a very low starting point, but an important one.

B. *Certification of Work*

Each state should require that a portfolio of student work be reviewed by a certified educator annually. States need a way to assess the homeschooled child's progress to ensure that they are, in fact, being educated. In this area, I recommend an emphasis on flexibility. Many homeschooling parents choose to homeschool their children precisely to avoid certain forms of rigid testing requirements, state grade-level benchmarks, mandated curriculum requirements, etc.¹³⁶ In fact, some homeschoolers do not even use traditional grade levels to identify themselves.¹³⁷ A major attraction of homeschooling is its flexibility, particularly the ability to go at the student's pace. It makes little sense to subject homeschoolers to the same standardized testing and curricular requirements of public school students when many parents remove their children for these very reasons. While there certainly needs to be minimum requirements and oversight, these should reflect the flexibility in content and pace that most parents are looking for when they choose to homeschool. As such, assessment requirements should not focus on scores and percentiles but rather on progress. The standard for such assessment should be *reasonable progress* rather than grade-level benchmarks.

States that require standardized testing are often either too demanding on homeschool students, or not demanding enough using the test simply to check a box. States that require certain scores and percentiles fail to consider that students may be homeschooled because of learning differences. Some states that require standardized testing do not even require the parents to

¹³⁶ See T. Jameson Brewer, *Political Rationales for Homeschooling*, in HOMESCHOOLING: A GUIDEBOOK OF PRACTICES, CLAIMS, ISSUES, AND IMPLICATIONS 65–73, 69 (2021), <https://brill.com/view/book/9789004457096/BP000004.xml>; Kimberly McFall, *Why American Parents Choose Homeschooling*, 10 FILOTEKNOS 455, 463 (2020), <http://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.desklight-26fc2ba8-8385-40d5-972f-e657e52fd2a3>.

¹³⁷ See, e.g., Jeanne Faulconer, *Homeschooling and Grade Levels (Or...Relax)*, HOMESCHOOL MOM (July 6, 2021), <https://www.thehomeschoolmom.com/homeschooling-grade-levels-relax/>.

report the scores,¹³⁸ begging the question—what is the point? Some of these states say that the parent should use these scores as their own reference to see whether their child is making progress.¹³⁹ This approach imposes a rigid requirement but with little to no significance. Many students will sit for the exam out of obligation while the state remains in the dark as to whether the student is progressing. This is counterproductive, and arguably a waste of time and resources for both the state who administers the tests and the homeschooling parent and child.¹⁴⁰

All this considered, assessment requirements for homeschooling should honor homeschooling parents’ and students’ desire to pace themselves appropriately. Of course, some standard must be met. With a focus on progress, the states should require that a student’s portfolio of work be certified by a certified educator at the end of every academic year. The aim of this assessment is to ensure that the child is making *reasonable progress* in all core subjects, and that the parent-educator is steadily introducing new topics. This approach allows homeschooling families to work out the best curricular approach for their child while holding them accountable. Ideally, the families can develop a relationship with their evaluator(s) after working with them each year, giving the state another non-intrusive way to oversee the child and the family. If a parent does not submit a portfolio or the work does not show progress in the necessary subjects, the evaluator should inquire about the reasons, and ultimately, report suspicious families who give reason for concern. This regulation will both ensure children have access to education and add another layer by which the authorities may detect signs of neglect. No intrusion needs be made where work is certified, but where a portfolio is not received or is troubling, the state may further investigate.

¹³⁸ See Hansford, *supra* note 70, at 516.

¹³⁹ See *id.*

¹⁴⁰ Not to mention the fact that standardized testing has come under major criticism, and largely fallen out of public favor anyway. Tim Walker, *Poll: Americans Want Less Standardized Testing and More School Funding*, NEA (Aug. 23, 2015), <https://www.nea.org/advocating-for-change/new-from-nea/poll-americans-want-less-standardized-testing-and-more-school>; Dami Rosanwo, *Americans Want to End Standardized Tests for Good*, HARRIS POLL (Jan. 31, 2021), <https://theharrispoll.com/briefs/americans-want-to-end-standardized-tests-for-good/>. Some states are doing away with standardized testing altogether. Pat Mueller, *Florida to End Standardized Testing*, Gov. DeSantis Announces, WCTV (Sept. 14, 2021, 1:08 PM), <https://www.wctv.tv/2021/09/14/florida-end-standardized-testing-gov-desantis-announces/>. Many universities no longer even require it for admissions; most parents don’t trust it. Alina Tugend, *Questioning Their Fairness, a Record Number of Colleges Stop Requiring the SAT and ACT*, HECHINGER REP. (Oct. 9, 2019), <https://hechingerreport.org/questioning-their-fairness-a-record-number-of-colleges-stop-requiring-the-sat-and-act/>.

C. Minimum Education Requirements or Alternative Instruction

Each state should require that parent-educators have at minimum a high school diploma or alternatively, provide their child with some instructional contact with another educator with that minimum degree. The widening of access to more and more educational resources is making a requirement for parents' minimum education less and less important. In contrast to the traditional view of homeschooling, it is quite rare to find a homeschooling family where a parent does all of the teaching.¹⁴¹ Many homeschoolers are not solely educated by their parents but have some contact with other educators through alternative, hybrid forms of instruction¹⁴² including online classes,¹⁴³ cooperatives (where parents come together each with a separate expertise and teach a "class" of homeschoolers),¹⁴⁴ the pandemic-born learning pod (where students and parents form a small group to learn together and share instructional responsibilities),¹⁴⁵ and "extension programs" (schools that homeschoolers go to once or twice a week to be guided through a curriculum without the confines of enrollment in a traditional school).¹⁴⁶ In some states, students can even register for a handful of classes at their local public school.¹⁴⁷ Suffice to say, a parent does not need to be an expert educator to provide adequate home education for their children especially in

¹⁴¹ See AARON HIRSH, CTR. ON REINVENTING PUB. EDUC., *THE CHANGING LANDSCAPE OF HOMESCHOOLING IN THE UNITED STATES* 1 (2019).

¹⁴² See Rebecca Tilhou, *Contemporary Homeschool Models and the Values and Beliefs of Home Educator Associations: A Systematic Review*, 14 J. SCH. CHOICE 75, 88 (2020); Eric Wearne & Daniel Kennelly, *The Growth of the Hybrid Homeschool Movement*, CITY J. (May 14, 2021), <https://www.city-journal.org/the-growth-of-the-hybrid-homeschool-movement>; Angela R. Watson, *Parent-Created "Schools" in the U.S.*, 14 J. SCH. CHOICE 595, 598 (2020); Albert Cheng & Daniel Hamlin, *Contemporary Homeschooling Arrangements: An Analysis of Three Waves of Nationally Representative Data* 7 (Educ. Reform Faculty & Grad. Students Pubs., Working Paper No. 2021-10, 2021); MICHAEL Q. MCSHANE, *HYBRID HOMESCHOOLING: A GUIDE TO THE FUTURE OF EDUCATION* 35 (2021).

¹⁴³ See, e.g., Maggie Gile, *38 States Setting Up Permanent Virtual Schools After Pandemic Sparked Interest*, NEWSWEEK (Aug. 12, 2021, 3:23 PM), <https://www.newsweek.com/38-states-setting-permanent-virtual-schools-after-pandemic-sparked-interest-1618894>.

¹⁴⁴ See Nicole Johnson, *What is a Homeschool Co-op?*, PARENTS.COM (July 1, 2020), <https://www.parents.com/kids/education/what-is-a-homeschool-co-op/>; see generally CAROL TOPP, *HOMESCHOOL CO-OPS: HOW TO START THEM, RUN THEM AND NOT BURN OUT* (2008).

¹⁴⁵ See Michael B. Horn, *The Rapid Rise of Pandemic Pods: Will the Parent Response to COVID-19 Lead to Lasting Change?*, 21 EDUC. NEXT 93, 93 (2021); Angela R. Watson, *Pandemic Pods and Alternative Modes of Education, in COVID-19 AND THE CLASSROOM: HOW SCHOOLS NAVIGATED THE GREAT DISRUPTION* (David T. Marshall ed., 2022).

¹⁴⁶ See, e.g., *Homeschool Extension Program*, HIGHLANDS SCHOOL, <https://www.highlandsschool.net/ef-smart-school/homeschool-extension/> (last visited Sept. 9, 2022); *PROVIDENCE EXTENSION PROGRAM*, <https://www.pep1.org/> (last visited Sept. 9, 2022); *Homeschool Extension Program*, NAPLES CHRISTIAN ACAD., <https://napleschristian.net/admissions/homeschool-extension-program-2/> (last visited Sept. 9, 2022).

¹⁴⁷ MCSHANE, *supra* note 142.

the age of technology. Still, states should require that homeschooling parents without a high school education report their plans for ensuring their child has access to alternative educators through one of these alternative homeschooling methods. In most cases, this will not be a restrictive requirement since many homeschoolers are already engaged in these practices. The requirement should be a small burden on parents, not requiring a lengthy explanation or a thoroughly developed plan but, rather, simply identifying where they can get access to such educators for their children and acknowledging that they will do so. This small burden will go a long way in promoting the state’s interest in ensuring that every student has access to quality education.

D. *Public Extracurricular Programs*

Finally, rather than limiting homeschoolers’ opportunities, states and school districts should encourage and support homeschool students’ involvement in public activities. Doing so not only supports the state’s interest in advancing each child’s educational opportunity but offers another way for homeschool students to be visible to the public and more frequently exposed to mandated reporters. Twenty-three states now have what are referred to as “Tim Tebow laws.”¹⁴⁸ These laws (named after the University of Florida quarterback who famously played football for his local public high school as a homeschooled student) allow homeschool students to compete in public school sports and sometimes even in other extracurricular activities such as school plays, band, and more.¹⁴⁹ In his law review article, Michael Atkinson argued in favor of such laws, stating that homeschool students should have access to those extracurricular opportunities to develop their talents and interact with other students.¹⁵⁰ In school, many student-athletes are held to certain academic standards to maintain their eligibility to participate.¹⁵¹ Like other team members, homeschooled student-athletes can be held to higher academic standards and required to provide the school with the annual notice submitted to the state as well as the results of their evaluation by a certified educator.¹⁵²

¹⁴⁸ See Hansford, *supra* note 70, at 522–24.

¹⁴⁹ *Id.* at 517.

¹⁵⁰ Michael Atkinson, *Let Them Play: Why Kentucky Should Enact a “Tebow Bill” Allowing Homeschoolers to Participate in Public School Sports*, 43 J.L. & EDUC. 433, 434 (2014); see also Cora Moy, Comment, *Equal Access: A Proposal for Homeschooled Students and Athletics*, 7 N. ILL. U. L. REV. ONLINE J. 29, 36 (2015); Benjamin Olneck-Brown, *Legislatures Consider Homeschool Laws*, NAT’L CONF. STATE LEGIS. (Apr. 14, 2021), <https://www.ncsl.org/research/education/legislatures-consider-homeschool-laws-magazine2021.aspx>.

¹⁵¹ Atkinson, *supra* note 150, at 434, 436.

¹⁵² See *id.* at 436.

This policy cannot fully benefit all homeschool students because, like any student body, many students will choose not to participate. However, the mere fact that this option is available will bring many homeschool students into contact with adults other than their parents who can watch for signs of neglect and abuse just as they would for the students enrolled in classes at their school.

In addition to Tebow laws, it would be worthwhile for states to invest in public activities made available to homeschoolers (though they do not need to be exclusively for homeschoolers). If the annual notice requirement suggested above is implemented, the state can have a better sense of the actual number of students being homeschooled in its territory and respond accordingly. Public parks, museums, and libraries should develop programs that invite homeschoolers' participation. Stefan McDaniel goes so far as to argue that states should "prescribe a mandatory amount of time" that homeschooled students must participate in accredited extracurricular group activities, and that local public schools should provide those opportunities to fulfill the required hours.¹⁵³ McDaniel argues that his recommended policy "encourages regular contact between children and mandatory reporters of child abuse" and allows for "light, informal public surveillance of children [that will make] more intrusive measures unnecessary."¹⁵⁴ While policies making extracurricular hours mandatory may be difficult to pass, the development of such public programs would be extremely beneficial for homeschoolers and the state. The more opportunities the state can provide for homeschoolers and the more recognition, acceptance, and support given to homeschooling families, the more visible they will become.

V. CONCLUSION

Many states already have some of these standards written into their homeschooling statutes; none have all. By modifying their current regulations to these basic, non-intrusive requirements, states will more easily and accurately be able to keep track of the homeschooling families in their territory, ensure they are meeting their obligation to provide children with access to education, and respect the long-standing historical tradition of home education. School districts and public authorities can no longer ignore the homeschooling population or write them off as an insignificant, extremist minority. Post-pandemic, that is simply not the case. Even public education itself is in a state of flux. The needs of our children are changing; what will

¹⁵³ Stefan McDaniel, Note, *Child's Play: A Simple Constitutional Route to Regulation of Home Schools*, 9 NYU J.L. & LIBERTY 580, 601 (2015).

¹⁵⁴ *Id.* at 603.

allow them the opportunity to be fruitful and successful in the future is not what it was a hundred years ago. The government should be willing to support parents who are adapting to these changing needs while strongly re-asserting its commitment to guaranteeing safety and opportunity to the next generation.