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Constitutional Law: *Roemhild v. State and State v. Popanz:* Their Effect on the Constitutionality of Oklahoma's Compulsory Education Statute

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NOTE

Constitutional Law: *Roemhild v. State* and *State v. Popanz*: Their Effect on the Constitutionality of Oklahoma's Compulsory Education Statute

Compulsory education statutes can be divided into three categories, each according to the type of schools children are required to attend.[1] The first category may be referred to as "no exception" statutes.[2] These statutes require a child's attendance at either a public or a private school, with no other exceptions. The second category may be referred to as the "explicit exception" statutes.[3] These statutes allow attendance at either a public, a private, or "other" school. In addition, these statutes allow an explicit exception for an approved home education program.

Oklahoma's statute is representative of the third category, which may be referred to as an "equivalency" statute.[4] In Oklahoma, it is mandatory that

1. For a more thorough discussion on the different categories of compulsory education statutes, see Tobak & Zirkel, *Home Instruction: An Analysis of the Statutes and Case Law*, 8 U. DAYTON L. REV. 1 (1982); Lines, *Private Education Alternatives and State Regulation*, 12 J.L. & EDUC. (Apr. 1983).

2. GA. CODE ANN. § 32-2104 (1976) is an example of such a "no exception" statute.

3. MO. ANN. STAT. § 167.031 (Vernon Supp. 1985) is an example of an "explicit exception" statute. "Explicit exception" statutes will not be dealt with in this paper. They represent a much smaller proportion of education statutes and have provided little difficulty in interpretation. This may be explained by the relative absence of ambiguity in the statutes. *See* Tobak & Zirkel, *supra* note 1, at 50.

4. 70 OKLA. STAT. § 10-105 (1981) provides:

> A. It shall be unlawful for a parent, guardian, custodian or other person having control of a child who is over the age of seven (7) years and under the age of eighteen (18) years, and who has not finished four years of high school work, to neglect or refuse to cause or compel such child to attend and comply with the rules of some public, private or other school, unless other means of education are provided for the full term the schools of the district are in session; and it shall be unlawful for any child who is over the age of sixteen (16) years and under the age of eighteen (18) years, and who has not finished four (4) years of high school work, to neglect or refuse to attend and comply with the rules of some public, private or other school, or receive an education by other means for the full term of the schools of the district are in session.

The statute also provides for several exceptions to the mandatory attendance requirement and a possible maximum penalty of fifty dollars and ten days imprisonment. *See also* 70 OKLA. STAT. § 10-106 (1981) (provides guidelines for the recording of pupil attendance); OKLA. CONST. art. XIII, § 4 (imposes a duty upon the Oklahoma legislature to "provide for the compulsory attendance at some public or other school, unless other means of education are provided, of all the children in the state who are sound in mind and body, between the ages of eight and sixteen years, for at least three months in each year.").

a parent, guardian, or custodian cause the child or children between the ages of seven and eighteen in his or her care to attend either a public school, a private school, an "other" school, or to receive other means of education. Should the responsible person fail to comply with the statute, criminal sanctions may be imposed by the state.[5]

Category three statutes may further be broken into two subcategories. The first is the "explicit equivalence" type in which the equivalency requirement is specifically provided for in the statute.[6] The second is the "implied equivalence" type, which fails to mention the equivalency requirements.[7] The requirements, therefore, are usually imposed by case law or Attorney General Opinions interpreting the statute.[8] Oklahoma's statute is representative of this more vague second subcategory.

Compliance with Oklahoma's compulsory education statute is not easy for those who wish to provide their children with an alternative to public education. Because of the generality and vagueness of the Oklahoma statute, a parent might violate the law while he is attempting to comply with its provisions, or a government official might act improperly while enforcing it. The reasons for this are twofold. First, Oklahoma law does not provide a parent or an enforcement official with any definitions as to what constitutes a private school, "other" school, or other means of education. Second, Oklahoma law does not provide a parent or an enforcement official with any criteria or guidelines to determine whether the education provided to a child is equivalent in fact to that provided by the state. For these reasons, a parent cannot adequately determine what is required to comply with the statute nor can the responsible authorities properly enforce it.[9]

These contentions are supported by two recent state supreme court cases: *Roemhild v. State*[10] and *State v. Popanz.*[11] In *Roemhild,* Georgia's compulsory education statute was held void for vagueness because it did not adequately define the phrase "private school."[12] Georgia's statute was a category one

5. 70 OKLA. STAT. § 10-105(B) (1981).

6. *See* WIS. STAT. § 118.15 (1981) for an example of a statute in this subcategory.

7. 70 OKLA. STAT. § 10-105(A) (1981).

8. Sheppard v. State, 306 P.2d 346 (Okla. 1957); Wright v. State, 21 Okla. Crim. 430, 209 P. 179 (1922); Op. Att'y Gen. No. 129 (Okla. Feb. 13, 1974); Op. Att'y Gen. No. 155 (Okla. May 1, 1972).

9. It is beyond the scope of this note to discuss the propriety of home education or to address the possibility of an educational malfeasance cause of action in tort. For discussions on home education, see Lines, *supra* note 1; Stocklin-Enright, *Constitutionalism and the Rule of Law: New Hampshire's Home Schooling Quandary,* 8 VT. L. REV. 265 (1983); Tobak & Zirkel, *supra* note 1; Beshoner, *Home Education in America: Parental Rights Reasserted,* 49 UMKC L. REV. 191 (1981); Richmond, *Home Instruction,* 18 J. FAM. L. 353 (1979-80); Note, *Constitutional Law: Parent's Right to Educate the Child,* 13 OKLA. L. REV. 432 (1960). For a discussion on an educational malfeasance claim, see Note, *Educational Malfeasance: A New Cause of Action for Failure to Educate?,* 14 TULSA L.J. 383 (1978).

10. 251 Ga. 569, 308 S.E.2d 154 (1983).

11. 112 Wis. 2d 166, 332 N.W.2d 750 (1983).

12. GA. CODE ANN. § 32-2104 (1976) provided:

> Every parent, guardian, or other person residing within this state having control

"no exception" statute. In *Popanz,* Wisconsin's statute was held unconstitutional for the same reason,[13] but in addition because it did not define "substantially equivalent." Wisconsin's statute was a category three "explicit equivalence" statute. Both statutes were struck down because they did not provide persons of ordinary intelligence fair notice as to what behavior is required or prohibited under the statutes, nor did they provide definite standards or criteria under which the statutes could be enforced by responsible authorities.[14] Because of the similarities between the Oklahoma, Georgia, and Wisconsin compulsory education statutes, there are strong arguments that the Oklahoma statute is likewise unconstitutionally void for vagueness. Moreover, differences between the three statutes arguably render the Oklahoma statute more vague.

In assessing these possibilities, this note will deal with five subtopics. First, the *Roemhild* and *Popanz* opinions will be discussed. Second, the Oklahoma case law and Attorney General Opinions relating to compulsory education will be introduced. Third, Oklahoma, Wisconsin, and Georgia law will be compared. Fourth, the constitutionality of the Oklahoma statute will be

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> or charge of any child or children between their seventh and sixteenth birthdays shall enroll and send such child or children to a public or private school; and such child shall be responsible for enrolling and attending a public or private school under such penalty for noncompliance with this subsection as is provided in subsection (b) of the Code section unless his failure to enroll and attend is caused by his parent, guardian, or other person, in which case the parent, guardian, or other person alone shall be responsible; provided, however, that tests and physical exams for military service and the National Guard and such other absences as may be approved by the State Board of Education or the local board shall be excused absences....
> (b) Any parent, guardian or other person residing in this state who has control or charge of a child or children and who shall violate this part shall be guilty of a misdemeanor and upon conviction thereof, shall be subject to a fine not to exceed $100.00 or imprisonment not to exceed 30 days, or both, at the discretion of the court having jurisdiction. Each day's absence from school is violation of this part shall constitute a separate offense.

See GA. CODE ANN. § 32-2104 (1984) (for the Georgia legislature's amendments to its unconstitutional compulsory education statute).

13. WIS. STAT. § 118.15(1)(a) (1981) provided in relevant part:

> [A]ny person having under control a child who is between the ages of 6 and 18 years shall cause the child to attend school regularly during the full period and hours, religious holidays excepted, that the public or private school in which the child should be enrolled is in session until the end of the school term, quarter or semester of the school year in which the child becomes 18 years of age.

WIS. STAT. § 118.15(4) provided: "Instruction during the required period elsewhere than at school may be substituted for school attendance. Such instruction must be approved by the state superintendent as substantially equivalent to instruction given to children of like ages in the public or private schools where such children reside." *See* WIS. STAT. § 118.15 (1984) (for the Wisconsin legislature's reaction to *Popanz).*

14. Roemhild v. State, 251 Ga. 569, 308 S.E.2d 154, 158 (1983). *See also* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 486 (1982); Rose v. Locke, 423 U.S. 48 (1975); Smith v. Goguen, 415 U.S. 813 (1974); Broaderick v. Oklahoma, 413 U.S. 602 (1973); Grayned v. City of Rockford, 408 U.S. 102 (1972); J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW (2d ed. 1983) (all cites are sources of discussions on the vagueness principle).

assessed. Finally, recommendations for legislative action to cure the Oklahoma statute of its deficiencies will be proposed.

Roemhild and Popanz

In *Roemhild*, the defendants were parents of three school-age children. They were arrested for violating the Georgia compulsory attendance statute by allegedly failing to enroll their children in a public or a private school according to the statutory requirements. They defended their actions on the basis that the children were being taught at home in a private school operated by the parents themselves.[15] Both parents cited religious reasons for their decision to educate their children at home.[16]

At trial, the parents contended that the statute was impermissibly vague and thus violated their right to due process. The trial judge ruled that the defendants had not sufficiently raised the constitutional issues and were not operating a private school within the meaning of the statute. As a result, the parents were found guilty of nineteen statutory violations, one for each day the defendants' children were absent from school.[17]

On appeal, the Supreme Court of Georgia held that the defendants had properly raised the constitutional issues, and thus the case was validly before the court. Second, the court held that the statute was unconstitutionally vague because it failed to provide fair warning to a person of ordinary intelligence as to what behavior was proscribed and failed to establish minimum criteria for local authorities to use in determining what constituted a private school.[18]

In arriving at its decision, the court cited *State v. Popanz*,[19] a recent Wisconsin Supreme Court case whose facts were similar to those in *Roemhild*. In *Popanz*, the defendant was convicted under the Wisconsin compulsory attendance statute for failing to cause his three children to attend a public or private school as the statute required.[20] As a result, the defendant was

15. Roemhild v. State, 251 Ga. 569, 308 S.E.2d 154, 155 (1983). At trial, the evidence showed that neither parent had any formal qualifications to be instructors, nor did either parent hold a teaching certificate. The extent of the mother's experience was that she had been a substitute teacher in Sunday and Bible school. The father had no teaching experience whatsoever.

16. Both parents were members of the Worldwide Church of God, and each felt that the public schools were undesirable because the schools did not transmit the church's religious beliefs as part of the curriculum. In addition, the parents maintained that public schools were unsafe, immoral, did not provide a proper education, and had already had a disruptive effect on their children. The parents reasoned that by teaching their children at home, they could avoid these undesirable effects. *Id.*, 308 S.E.2d at 155. *See also* Carper, *The Whisner Decision: A Case Study in State Regulation of Christian Day Schools*, 24 J. OF CHURCH & STATE 281 (1982); Arans, *The Separation of Church and State: Pierce Reconsidered*, 46 HARV. EDUC. REV. 76 (1976); Note, *The Right to Education: A Constitutional Analysis*, 44 U. CIN. L. REV. 796 (1975); Knudsen, *The Education of the Amish Child*, 62 CALIF. L. REV. 1506 (1974); Marcus, *The Forum of Conscious: Applying Standards Under the Free Exercise Clause*, 1973 DUKE L.J. 1217; notes 1-9 *supra* and accompanying text; notes 63, 64 *infra* and accompanying text (for discussions on how the freedom of religion relates to public and private education).

17. *Roemhild*, 251 Ga. 569, 308 S.E.2d at 156.

18. *Id.*, 308 S.E.2d at 158.

19. 112 Wis. 2d 166, 332 N.W.2d 750 (1983).

20. WIS. STAT. § 118.15 (1981).

subjected to criminal sanctions as provided for by Wisconsin law.[21] On appeal, the defendant argued that section 118.15(1)(a) of the statute was defective in that neither it nor any other statutes, administrative regulations, or rules defined the phrase "private school."[22] The Wisconsin Supreme Court agreed and held the statute to be vague and unconstitutional.[23]

Following the reasoning in *Popanz*, the Georgia Supreme Court held that the Georgia compulsory education statute failed to define private school. Further, none of Georgia's administrative rules or regulations defined the term or provided any criteria to evaluate whether a school could be considered private in compliance with the statute. These facts had two effects. First, persons seeking to comply with the statute had to guess at its meaning. Second, officials had too much discretion in interpreting and enforcing the statute.[24]

In applying these principles of due process to *Roemhild*, the court held that the facts of that case more than supported the notion that the state failed to provide adequate notice to the Roemhilds of what was required of them to be in compliance with the statute. Specifically, the court noted that the Roemhilds sought guidance from the statute itself but found no useful information. Additionally, the Roemhilds sought help from local and state officials. From these inquiries, the defendants received a conclusory statement by the authorities that home education was probably not in compliance with the law, but nothing of any certainty was conveyed to the defendants.[25]

Second, the court concluded that the impermissible delegation of discretion was perhaps the statute's most notable inadequacy.[26] This was particularly demonstrated by the State Department of Education's statement to the defendants that the decisions of whether the statute was being violated was solely up to local law enforcement officials. Without any enforcement criteria, the court said the statute necessitated that local officials apply their own standards and predilections concerning education when assessing whether a violation had occurred. Such ad hoc and subjective standards were held to pose the danger of arbitrary and discriminatory enforcement, which is contrary to due process.[27]

21. WIS. STAT. § 118.15(5) provided: "Whoever violates this section may be fined not less than $5 nor more than $50 or imprisoned not more than 3 months or both, [after evidence has been provided by the school attendance officer that the activities under § 118.16(5) have been completed."].

22. *Popanz*, 112 Wis. 2d 166, 332 N.W.2d at 754.

23. *Id.* The court stated:

> Like this defendant, we have searched the statutes, administrative rules and regulations and official Department of Public Instruction writings for a definition of "private school" or criteria which an entity must meet to be classified as a "private school" for the purposes of § 118.15(1)(a). We have found neither a definition nor prescribed criteria. Nor does the phrase "private school" have a well settled meaning in common parlance or in decisions of this court which could be used for purposes of applying § 118.15(1)(a).

24. *Roemhild*, 251 Ga. 569, 308 S.E.2d at 158.

25. *Id.*

26. *Id.*

27. *Id.*, 308 S.E.2d at 159.

Because of the infirmities of the statute, the Georgia Supreme Court reversed the Roemhilds' convictions. In concluding the opinion, the court proposed two further clarifications. First, the court stated that in no way was it passing upon the propriety of home education.[28] Second, the court said that although the word "school" put one on notice that some type of structured education was mandated, there were many unanswered questions as to the scope, nature, and place of education. The court indicated that the legislature needed to clarify these areas in order to cure the statute of its constitutional deficiencies.[29]

In *Roemhild*, three justices dissented on various grounds, two of which are important to the discussion in this note.[30] First, the dissenters stated that the Georgia compulsory attendance law had been indirectly upheld in *Anderson v. State*.[31] In *Anderson*, the Georgia Court of Appeals affirmed the conviction of a defendant who, while allowing his child to attend school, refused to allow the child to receive immunization against some contagious diseases. Such injections, the parent alleged, were in violation of his religious beliefs. The court analogized that the failure to immunize the child was equivalent to a failure to enroll the child in school (because immunization was a prerequisite to the right of attendance). The defendant was thus violating the compulsory attendance statute in a roundabout way. The dissenters said that *Anderson* was ample precedent for upholding the compulsory education statute and that the facts in *Roemhild* did not warrant the court's invalidation of the statute.

Moreover, the dissenters did not find the statute unconstitutionally vague because the word "school" was easily capable of being defined. In support of this proposition the dissenters cited *Risser v. City of Thomasville*.[32] In *Risser*, the Supreme Court of Georgia relied on a dictionary definition of school. Under this definition, school was "an organized source of education or training: as (1) an institution for the teaching of children."[33] Because the word

28. *Id.*, 308 S.E.2d at 157.

29. *Id.*, 308 S.E.2d at 158, where the court stated:

> A sampling of these questions follows: Must the place of education be an "institution" which many children attend and which has an influx of new students and outflux of graduating students every year, or may parents teach or have their children taught at home? Must the "school" provide for the yearly sequential advancement of students or may students proceed at their own pace? What facilities, such as libraries, classrooms, or playing fields must the "school" provide? What must be the educational background of the teachers—must they be state certified or may "qualified" persons teach? What kind of curriculum and educational materials must be provided—must they rigidly compare to public schools or can a "private school" vary their nature? And, finally, must the time schedule of a "private school" be consistent with that of a public school?

30. *Id.*, 308 S.E.2d at 159-60.

31. 84 Ga. App. 259, 65 S.E.2d 848 (1951).

32. 248 Ga. 866, 286 S.E.2d 727 (1982). *See also* Bangor Baptist Church v. State, 549 F. Supp. 1208 (D. Me. 1982); Attorney Gen'l v. Bailey, 386 Mass. 367, 436 N.W.2d 139 (1982); State v. Bowman, 60 Or. App. 184, 653 P.2d 254 (1982); State v. Labarge, 134 Vt. 276, 357 A.2d 121 (1976) (all cases upholding vagueness challenges against compulsory education statutes).

33. *Risser*, 248 Ga. 866, 286 S.E.2d at 728. This definition was used to hold that a kindergarten

"school" had been defined in *Risser*, the dissenters said there was no need to invalidate the statute in *Roemhild*.

The Oklahoma Statute

Because the Oklahoma statute falls under the more vague of the two subcategories of "equivalency" statutes, Oklahoma case law and Attorney General Opinions must be consulted in order to obtain any understanding of the statute's requirements. However, aside from providing a few rough guidelines, these sources of information do not cure the statute of its vagueness. If anything, they raise more questions in the mind of a citizen seeking to comply with the law.

In *Wright v. State*,[34] a defendant was convicted under the Oklahoma compulsory education attendance law for failure to compel his minor child to attend the public school of his district, or any private school, for two-thirds of the time the private school was in session.[35] The child's parents testified that they were members of the Seventh Day Adventist Church and were training their children at home to become ministers or missionaries. Both contended that the public schools were not a proper atmosphere to achieve this end. The evidence at trial showed that the mother was a graduate of a normal training school and the father was an experienced teacher, having taught in Kansas, Oklahoma, and the Philippines. The evidence also showed that the child was unusually proficient in all subjects for a child of her age.

In reversing the conviction, the Oklahoma Court of Criminal Appeals held that as long as the child's education was not neglected, the parents had a constitutional right to manage and supervise the child's education. As long as this education was done in a fitting and proficient manner, the parents would be in compliance with the statute.[36]

The court also discussed the specific terms of the statute, noting that the Oklahoma statute neither specifies the qualifications required of private school teachers nor prescribes definite courses of study. Nonetheless, the court held that so long as the education provided by the parents (wherever it may take place) was supplied in good faith and was equivalent in fact to the education provided by the state, the parents would not be in violation of the statute. In addition, the good faith and equivalency requirements were questions of fact to be determined by a jury.[37] However, the court did not elaborate on what criteria could be used by a parent or a jury in evaluating whether the

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operated by a church on property which was within 100 yards of premises for which petitioner sought a beer and wine license from a city was an institution in which traditional subjects and learning associated with early grades of common public schools were taught. Therefore, the kindergarten was held to be "school" within proscriptions of the ordinance and statute against sale of beer and wine within 100 yards of any school.

34. 21 Okla. Crim. 430, 209 P. 179 (1922).

35. 7930 R.L. 1910, as amended by § 1, ch. 59, Okla. Sess. Laws of 1919 (which in substance is the same as 70 OKLA. STAT. § 10-105 (1981).

36. 21 Okla. Crim. at 433-34, 209 P. 179 at 180.

37. *Id.*, 209 P. at 180-81.

education provided a child was equivalent in fact to that available from the state.

In *Sheppard v. State*,[38] the defendants were also convicted of violating Oklahoma's compulsory education statute.[39] The parents defended on the grounds that the children were being taught in a building adjacent to their home by the parents themselves and that this was a private school. Therefore, the parents argued, they were in compliance with the statute. In reversing the convictions, the Oklahoma Supreme Court built on the principles enunciated in *Wright* and elaborated upon the burden of proof requirement in a compulsory education statute prosecution. The court held that it is incumbent upon the prosecution to show that the children were withdrawn from public school by their parents and not provided with other means of education, or if such alternative education was provided, it was wholly inadequate and not furnished in good faith. Absent this showing, the state will not have made a prima facie case of a statutory violation.[40] However, the court once again sidestepped the issue of criteria and guidelines in determining whether an entity would be considered a school within the meaning of the statute, or what equivalency entailed.

The constitutionality of Oklahoma's compulsory education statute was tested in *Hatch v. Goerke*.[41] In *Hatch*, the parents of a child who had attended a public school brought suit against local school officials and the District Attorney, alleging that their son was wrongfully dismissed from school for failure to comply with a regulation that would require the cutting of their son's Indian-braided hair. As a result of the expulsion, the parents were held to have been in violation of the statute. The parents' complaint alleged that the statute was unconstitutionally vague, overbroad on its face, and invalid as applied.[42] Consequently, the parents maintained that the statute failed to

38. 306 P.2d 346 (Okla. 1957).

39. 70 OKLA. STAT. § 10-10 (1951) (which in substance is the same as 70 OKLA. STAT. § 10-105 (1981)).

40. Sheppard v. State, 306 P.2d at 357. *But see* Hill v. State, 410 So. 2d 431 (Ala. Crim. App. 1982); People v. Turner, 121 Cal. App. 2d 861, 263 P.2d 685 (Super. Ct. 1953); State v. Moorhead, 308 N.W.2d 60 (Iowa 1981); *In re* Falk, 110 Misc. 2d 104, 441 N.Y.S.2d 785, 82 A.2d 974 (N.Y. Fam. Ct. 1981); *In re* Myers, 203 Misc. 549, 119 N.Y.S.2d 98 (N.Y. Fam. Ct. 1953) (cases placing the burden of proof upon the parents). *See also* Scoma v. Chicago Bd. of Educ., 391 F. Supp. 452 (N.D. Ill. 1974) (holding that when a criminal statute sets forth an exception that is not part of the crime, but operates to prevent an act otherwise included in the statute from being a crime, the burden of proof shifts to the defendant); State v. Massa, 95 N.J. Super. 382, 231 A.2d 252 (Morris County Ct. 1967); State v. Vaughn, 44 N.J. 140, 207 A.2d 537 (1965) (cases splitting the burden of proof between the prosecution and the defendants).

41. 502 F.2d 1189 (10th Cir. 1974).

42. *Id.* at 1191. In addition to the allegations discussed in the text of this note, the parents also alleged that (1) local rules requiring the cutting of their son's Indian-braided hair violated their parental rights to raise their children according to their own religious, cultural, and moral values in violation of the first, fifth and fourteenth amendments to the Constitution; (2) the expulsion of their son without a hearing was a denial of fourteenth amendment procedural due process; and (3) permitting religious services to be conducted during school hours contravenes

provide them fair notice as required by due process and was also an unconstitutional delegation of discretion to the responsible authorities.

The Tenth Circuit Court of Appeals was not persuaded that the statute was invalid. The court stated that the statute merely provided reasonable requirements for compelling school attendance. As such, the purpose and scope of the statute was clear and the claim of vagueness was untenable.[43]

Oklahoma Attorney General Opinion 72-155[44] stated that the State Board of Education, not the Oklahoma Education Association, is the proper certifying authority, and that the State Board certifies only teachers and not tutors. In addition, the opinion stated that the requirements of the Oklahoma statute could be met by providing a means of education other than public or private schools, but if contested, the equivalency of such education is a question of fact for the jury in an action on the merits.[45]

In Oklahoma Attorney General Opinion 73-129[46] several questions were answered.[47] The Attorney General stated the Oklahoma compulsory attendance statute does not require that a private school be accredited, or that a private tutor hold a certificate, so long as the private instruction is supplied in good faith and is equivalent in fact to that offered by the state. Second, credit for private instruction may not be denied solely because the instructor was not certified.[48] Finally, the state is under a duty to supply only public schools, not private schools, with materials and supplies.

The cases and Attorney General Opinions explain the requirements of the statute in a cursory fashion. A series of vague rules are laid out, but no guidelines are provided for determining whether the rules are being complied

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the first amendment establishment and free exercise clauses. The court held all the parents' contentions were properly dismissed except for the procedural due process and establishment and free exercise clause arguments.

43. 502 F.2d at 1193.

44. Op. Att'y Gen. No. 155 (Okla. May 1, 1972). The question of whether it is possible for a private tutor who has been certified by the Oklahoma Education Association as a teacher to tutor twenty students and satisfy the compulsory school attendance statute was addressed. This question was submitted by E.C. (Sandy) Sanders, State Representative, House of Representatives, Oklahoma City, Oklahoma.

45. In rendering this opinion, the Attorney General cited 70 OKLA. STAT. § 10-105 (1981); Sheppard v. State, 306 P.2d 346 (Okla. 1957); Wright v. State, 21 Okla. Crim. 430, 209 P. 179 (1922).

46. Op. Att'y Gen. No. 129 (Okla. Feb. 13, 1974).

47. These questions were submitted by Dr. Leslie Fisher, State Superintendent of Public Instruction, State Capitol Building, Oklahoma City, Oklahoma. The questions presented were: First, if other than a public school is chosen by the parents, must it be accredited by the Oklahoma State Department of Education? Second, if the parent chooses either to instruct the child himself or provide a private tutor, must such parent or tutor be certified by the Department of Education? Third, if such private tutoring by either a parent or a tutor is pursued, is the Board of Education of a school district required to grant credits to be applied toward graduations, or are such credits available only if the parent or teacher is certified? And, finally, if the child is not attending a district-operated school, is he still entitled to be supplied with state purchased textbooks, supplies, materials and/or equipment?

48. The opinion did state that the Board of Education has discretion to classify students as it deems appropriate, and to require examinations relative thereto. Op. Att'y Gen. No. 129, at 26.

with. In a prosecution under the statute, the burden of proof is upon the prosecution to show either that the child was provided with no education at all, or that the education was not equivalent to that provided by the state. Should the prosecution pursue this second option, the adequacy of such education is a question of fact for the jury in a trial on the merits. Again, no guidelines are provided to help the prosecution and the jury to determine whether the burden of proof has been met.

A Need for Change

Oklahoma's compulsory education statute is unconstitutional for several reasons. Because the statute fails to define the phrase "private school," it is constitutionally deficient for the same reasons as the statutes cited in *Roemhild* and *Popanz*. This is highlighted by the fact that there is still much disagreement among the various jurisdictions as to what constitutes a private school. Basically, there are two theories. One is that a private school is a learning situation fulfilling only an academic function.[49] A second theory maintains that in addition to providing academic training, a private school must also provide socialization and group interaction.[50]

The Oklahoma statute is also vague in that it does not prescribe any criteria or guidelines for determining what the phrase "other school" means. Nor does the statute provide any definition as to what "other means of education" are.

It can be argued that the category three "equivalency" statutes are more descriptive and therefore less vague than the shorter, less-descriptive "no exception" statutes. By the inclusion of additional language like "other school" and "other means of education," it is clear that the statutes encompass more than just traditional education in an institutional setting. Arguably, the additional language of this type of statute helps to modify and clarify the actual meaning of the phrase "private school." The additional requirements included in a category-three statute can, however, be viewed as just more vague and meaningless language. By making the statute appear to be more permissive, it can be considered a trap for the unwary who may be unapprised of the exact meaning and proscriptions of the statute.[51]

49. *See* State v. Massa, 94 N.J. Super. 382, 231 A.2d 252 (1967) (equivalent education requires only the showing of academic equivalence, not group education or socialization); People v. Levisen, 404 Ill. 574, 90 N.E.2d 213 (1950) (a school is a place where instruction is imparted and is not dependent on the number of persons being taught, or on the particular manner and place such education is provided).

50. *See* State v. Hoyt, 84 N.H. 38, 146 A. 170 (1929) (holding that a private school in addition to being an institutional setting, must provide the child with socialization); State v. Counart, 69 Wash. 361, 124 P. 910 (1912) (holding that a private school means the same character of school as the public school, a regular, organized and existing institution); *In re* Shinn, 195 Cal. App. 2d 683, 16 Cal. Rptr. 165 (1961). *See also* State v. Lowry, 191 Kan. 701, 383 P.2d 962 (1963).

51. This contention is supported in a recent law review article. In that article the author maintains that "equivalency" statutes are much more vague and ambiguous than "no exception" statutes. As a result, there has been much more litigation in "equivalency" jurisdictions. Toback & Zirkel, *supra* note 1, at 34, 35.

The Oklahoma statute may be more vague than the Wisconsin statute because it does not explicitly provide for an equivalency requirement in the statute. Instead, this requirement is drawn from case law and Attorney General Opinions. In contrast, the Wisconsin statute explicitly provides for the equivalency requirement in the statute, although the statute fails to adequately define equivalence.

Perhaps both the Oklahoma and the Wisconsin statutes are unconstitutionally vague for a more basic reason. Although not discussed in *Popanz*, nor in Oklahoma law, none of the statutes nor accompanying guidelines provide any criteria individuals can use in determining whether the requirement of equivalency has been met. At best, the present law presents a mere skeleton of guidelines, requiring interested parents to guess at the rest. This contention is supported by the policies of the Oklahoma State Board of Education. In administering the statute, the authorities discourage home education programs not because they are prohibited by the statute but because it is difficult to determine equivalency.[52]

Additionally, the concern in *Roemhild* and *Popanz* that a vague enforcement section in the statute would impermissibly delegate enforcement power to authorities on a subjective and ad hoc basis seems to be supported by the facts in *Sheppard*. In *Sheppard* the prosecuting authority seemed to proceed on the basis that since the children were not enrolled in a public or a private school, there must be a violation of the statute. In this regard, he simply ignored the portion of the statute that exempted children from attendance at either a public or a private school if other means of education were provided.[53] Granted, the court in *Sheppard* held that the supervisor of school attendance was primarily responsible for enforcing the statute, but such violations need not exclusively be prosecuted by him.[54] However, the court held that the prosecution's failure to establish whether other means of equivalent education, other than public or private schools, was provided was detrimental to the state's case.[55] Although the defendant's convictions were reversed, the foregoing facts show the existence of the ad hoc enforcement dangers specifically discussed in *Roemhild* and *Popanz*.

Finally, *Hatch* should not be used as precedent to uphold the constitutionality of Oklahoma's statute for two reasons. First, a similar precedent existed in Georgia, and this did not prevent the majority of the court from striking down the Georgia statute. Second, in *Hatch* the vagueness issue was only discussed superficially and no specific mention was made of the constitutionality of the general terms utilized in the statute. The court found the purpose and scope of the statute to be clear. It did not, however, hold that the definition of a private school, other school, or other means of education were likewise clear.

52. Information obtained in a telephone conversation with J.D. Giddens, Assistant Superintendent of Accreditation and Curriculum, Oklahoma State Department of Education.

53. 306 P.2d 346, 356 (Okla. 1957).

54. *Id.* at 351.

55. *Id.* at 356, 357.

Conclusion

Because there is a strong possibility that the Oklahoma compulsory education statute is unconstitutionally vague, the legislature should redraft it to provide more specific guidelines as to what constitutes a private school, "other" school, or other means of education. Provisions setting forth the criteria for determining equivalency should be enacted. In providing such guidelines, the court should consider the suggestions put forth in *Roemhild.*[56] In addition, consideration should be given to requirements for approval of private schools,[57] approval of home education programs,[58] annual competency testing,[59] fire and safety requirements,[60] the language to be used in instructions given in other than public schools,[61] and the possibility of requiring different criteria for different levels of schooling.[62]

By providing such criteria and guidelines, the state legislature can cure the Oklahoma compulsory education statute of its constitutional defects. As a result, parents wishing to provide their children with alternatives to public education will be on notice as to what the law requires of them.[63] Also, law enforcement officials, with specific standards at hand, will be better able to enforce the compulsory attendance statute and promote the state's needs in having such a law.[64]

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56. 251 Ga. 569, 308 S.E.2d at 158.

57. *See* WASH. REV. CODE ANN. § 28A.27.010 (1980).

58. *See* COLO. REV. STAT. § 22-33-104 (1973 & Supp. 1982).

59. *See* OR. REV. STAT. § 339.030(G)(b) (1973).

60. *See* N.D. CENT. CODE § 15-34.1-01 (1981).

61. *See* KY. REV. STAT. ANN. § 158.080 (Bobbs-Merrill 1980).

62. *See* Bangor Baptist Church v. State, 549 F. Supp. 1208, 1230 (Me. 1982) (where the court mentioned that the fact that the approval standards for secondary schools are prescribed by statute did not preclude the Board of Education from adopting like administrative requirements for the approval of elementary schools).

63. Parents may wish to send their children to other than public schools for many reasons. *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205 (1972); Commonwealth v. Renfrow, 332 Mass. 492, 126 N.E.2d 109 (1955); *In re* Falk, 110 Misc., 2d 104, 441 N.Y.S.2d 785 (N.Y. Fam. Ct. 1981); *In re* Thomas H., 78 Misc. 2d 412, 357 N.Y.S.2d 384 (N.Y. Fam. Ct. 1974); State v. Riddle, 285 S.E.2d 359 (W. Va. 1981) (all cases citing religious or moral beliefs against sending a child to a public school). *See also* Gunnison Watershed School Dist. v. Funk, No. 81-JV-3 (Colo. Dist. Ct., Gunnison County, Apr. 17, 1981) (parents chose home education because the nearest public school was 34 miles away); State v. Chavis, 45 N.C. App. 438, 263 S.E.2d 356 (1980), *cert. denied,* 300 N.C. 377, 267 N.E.2d 679 (1980); City of Akron v. Lane, 65 Ohio App. 2d 90, 416 N.E.2d 642 (1979) (parents felt that public schools were too traditional or conservative); *Conformity in the Classroom,* SATURDAY REV., Nov. 1978, at 20 (article stating that the present system of mass education promotes conformity, anti-intellectualism, passivity, alienation, classism, and hierarchy); *Why Our Schools Aren't Making the Grade,* MCCALLS, Sept. 1975; Woods, *supra* note 9 (articles citing academic failure of our public school systems is the cause of their unpopularity).

64. The state has been said to have several interests in compulsory education. *See Should Parents Be Allowed to Educate Their Kids at Home?,* 89 INSTRUCTOR 30 (1979) (this article stated that schools are necessary to ensure a literate populace, which is essential to a democratic society. Schools are the most convenient and inexpensive places for children to learn. Society has the responsibility to ensure that its citizens acquire the minimal competency necessary to function in an increasingly complex economy.).