

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND DISTRICT, DIVISION THREE

MAY 19 2008

JONATHAN L. and MARY GRACE L.,
Petitioners,
v.
SUPERIOR COURT OF THE STATE OF
CALIFORNIA, COUNTY OF LOS ANGELES,
Respondent,
and
LOS ANGELES COUNTY DEPARTMENT OF
CHILDREN AND FAMILY SERVICES,
Real Party In Interest.

B192878

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Los Angeles County Superior Court, Juvenile Division, Case No. JD00773
The Honorable Stephen Marpet, Commissioner

APPLICATION OF AMICI CURIAE THE GOVERNOR OF THE STATE OF
CALIFORNIA AND THE ATTORNEY GENERAL OF THE STATE OF
CALIFORNIA FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

EDMUND G. BROWN JR.
Attorney General of the State of California

DOUGLAS M. PRESS
Senior Assistant Attorney General
State Bar No. 168740

KARIN S. SCHWARTZ
Supervising Deputy Attorney General

GREGORY D. BROWN
Deputy Attorney General
State Bar No. 219209

455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5540; 703-5461
Fax: (415) 703-5480

Attorneys for Amici, Governor of the
State of California and Attorney General
of the State of California

INTRODUCTION

Pursuant to Rule 8.200(c) of the California Rules of Court, the Governor of the State of California and the Attorney General of the State of California (collectively, Amici) hereby request the permission of the Presiding Justice to file an amicus curiae letter brief.

AMICI CURIAE

The Governor of the State of California; and

The Attorney General of the State of California.

INTEREST OF AMICI CURIAE

Amici have a direct interest in this case because it raises important issues concerning the legality of home schooling in California. Amici are responsible for the enforcement of California laws and the protection of the general welfare of the State, and Amici have an interest in ensuring that California's statutory scheme governing home schooling is properly interpreted and implemented.

NEED FOR FURTHER BRIEFING

As the Court recognized in its March 25, 2008 letter soliciting amicus curiae briefs in this matter, this case raises important statutory and constitutional issues concerning the practice of home schooling in California. The proposed Amicus Curiae Brief will assist the Court in deciding this matter because of the unique perspective of the Amici, who are charged with enforcing California law and protecting the general welfare of the State. Amici have a strong interest in ensuring that the home schooling statutes are properly interpreted to balance parents' rights to determine how best to educate their children with the State's legitimate interest in ensuring that such education will be provided by capable teachers and will meet certain minimum requirements.

CONCLUSION

For each of the foregoing reasons, the Court should grant Amici's application for leave to file the proposed Amicus Curiae Brief attached hereto as Exhibit A.

Dated: May 19, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

A handwritten signature in dark ink, appearing to read 'Douglas M. Press', is written over the printed name.

DOUGLAS M. PRESS
Senior Assistant Attorney General

KARIN S. SCHWARTZ
Supervising Deputy Attorney General

GREGORY D. BROWN
Deputy Attorney General

Attorneys for Amici

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40254611.wpd

EXHIBIT A



455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CA 94102-7004

Public: (415) 703-5500
Telephone: (415) 703-5540
Facsimile: (415) 703-5480
E-Mail: douglas.press@doj.ca.gov
gregory.brown@doj.ca.gov

May 19, 2008

Honorable Presiding Justice Klein
and Associate Justices
Court of Appeal of the State of California
Second Appellate District, Division Three
Ronald Reagan State Building
300 S. Spring Street, 2nd Floor
Los Angeles, CA 90013

Re: In re Rachel L., Case No. B192878

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE
COURT OF APPEAL:

The Attorney General, on behalf of himself and the Governor of the State of California, submits this amicus brief to address one aspect of this Court's decision, *In re Rachel L.* (2008) 160 Cal.App.4th 624: that home-schooling is permissible under current law, so long as certain statutory requirements are satisfied.

Recognizing that home schooling has a long and positive history in California and across the nation, the State of California provides a broad statutory framework that authorizes and regulates the practice.¹ The statutory scheme balances parents' rights to determine how best to

¹For a broad discussion of home schooling see McMullen, *Behind Closed Doors: Should States Regulate Homeschooling?* (2002) 54 So.Car.L.Rev. 75, 78-87. Pro home schooling advocates favor this approach to education: (1) because it enables religious education; (2) because of dissatisfaction with public schools' academic quality; (3) because parents seek a more creative environment; (4) because of concerns about school safety and violence; and (5) because certain students' special needs are not being met. Those opposed to home schooling point to: (1) the benefits of socialization provided by formal schooling; (2) concerns about the curriculum content or lack of quality of some home schooling efforts; and (3) the lack of child-protective functions that are offered by more formal schooling environments. See also Ivan Illich, *De-Schooling Society*, New York, N.Y., Harper & Row (1971).

educate their children with the State's legitimate interest in ensuring that such education will be provided by capable teachers and will meet certain minimum requirements. Consistent with those goals, the Education Code provides that children may be home-schooled in three circumstances:

- (1) the child is instructed by a private tutor or other person who holds a valid California teaching credential (Ed. Code, § 48224);²
- (2) the child is home-schooled as part of a public school independent study program or charter school (§ 51745); or
- (3) the child is home-schooled in a full-time private school. (§ 48222).

The Legislature – no doubt in response to and in recognition of the evolution of successful home-schooling programs in California and the growing number of Californians who have successfully home-schooled their children – repeatedly has taken steps to broaden the potential avenues for legal home schooling. For example, the State enacted a statute in 1986 explicitly recognizing home-schooling by clarifying that parents who educate their own children (but not others) are exempt from the criminal background check requirements otherwise applicable to all non-credentialed private school teachers. (§ 44237, subd. (b)(4).) The State enacted statutes in 1987 and 1989, respectively, broadening the powers of school districts and county boards of education to permit home-schooling through independent study programs. (§§ 35160.1, 51745.) Similarly, the State enacted statutes in 1998 expressly recognizing that a private school can consist of a single “person.” (§§ 33192, subd. (i); and 33193, subd. (d)(1).)

Given this legislative approval of home-schooling in California, the dispositive issue in this case is simply whether the parents have complied with the statutory requirements for home schooling under the Education Code. Because the trial court did not address this issue, this Court should remand this case to the trial court to allow it to develop the record and make that factual determination in the first instance. And because this case can be disposed of entirely on statutory grounds, this Court need not address any of the constitutional issues raised in the petition. For each of the reasons set forth herein, this Court should remand to the trial court for it to determine whether the parents have complied with the requirements for a private home school under section 48222.

I.

CURRENT CALIFORNIA LAW PROVIDES SEVERAL HOME-SCHOOLING OPTIONS FOR CHILDREN

All children between the ages of 6 and 18 must attend a public full-time day school unless otherwise exempted. (§ 48200.) The Education Code, however, provides for three separate avenues by which home-schooled children can be legally exempted from the “public full-time

²All statutory references are to the Education Code unless otherwise noted.

day school” requirement: (1) where taught by a parent or private tutor with a valid California teaching credential (§ 48224); (2) as part of a public school independent study program or charter school (§ 51745); or (3) as part of a private home-based school. (§ 48222.)³ And within these avenues, the Legislature vested school districts and county boards of education with considerable discretion to meet students’ varied needs and circumstances. Section 35160, for example, provides governing boards of school districts with broad discretion to

initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established.

Section 35160.1 further explains that school districts, county boards of education, and county superintendents of schools “should have the flexibility to create their own unique solutions.” (*id.* at subd. (a); and (b) [“It is the intent of the Legislature that Section 35160 be liberally construed to effect this objective.”].)

A. Children May be Lawfully Home-Schooled By a Parent or Other Tutor Who Possesses a Valid California Teaching Credential.

A child may be exempted from the compulsory public school education requirement if he or she is “instructed in study and recitation for at least three hours a day for 175 days each calendar year by a private tutor or other person.” (§ 48224.) The tutor must provide instruction in English, between the hours of 8:00 a.m. and 4:00 p.m., and the instruction must include the branches of study required to be taught in the public schools. (§§ 51210, 51220, 51220.5, & 51221; see footnote 5, *infra.*) The “tutor or other person” shall hold a valid state teaching credential “for the grade taught.” (§ 48224; see also § 48222.5, subd. (c) [credential required for “studio teachers” for children with work permits in the entertainment and allied industries].) And, relevant to this action, the tutoring may occur in the home.

Parents⁴ who possess a valid California teaching credential may tutor their own children at home under this provision. (§ 48224.) Or, parents may employ some other credentialed tutor to teach the child at home.

³Other exemptions and exclusions from the compulsory education law, not at issue here, include those for pupils with temporary disabilities (§ 48206.3, subd. (b)(1) [allows instruction “provided to an individual pupil in the pupil’s home”]) and pupils excluded from school for health reasons pursuant to section 49451 or Health and Safety Code section 120230. So long as these types of statutory exemptions and exclusions set forth above are met, states have broad powers to regulate education. (*Pierce v. Society of Sisters* (1925) 268 U.S. 510, 534; see also *In re Shinn* (1961) 195 Cal.App.2d 683, 686-687 [quoting *Pierce*].)

⁴For the sake of brevity, the term, “parents” in this brief includes legal guardians.

B. Children May be Lawfully Home-Schooled As Part of a Public School Independent Study Program of a Standard School District or Charter School.

Independent study is yet another means by which a student may lawfully be home-schooled. Section 51475, subdivision (a), explicitly authorizes a school district or county office of education to

offer independent study to meet the educational needs of pupils in accordance with the requirements of this article. Educational opportunities offered through independent study may include, but shall not be limited to, the following:

- (1) Special assignments extending the content of regular courses of instruction.
- (2) Individualized study in a particular area of interest or in a subject not currently available in the regular school curriculum.
- (3) Individualized alternative education designed to teach the knowledge and skills of the core curriculum. Independent study shall not be provided as an alternative curriculum.
- (4) Continuing and special study during travel.
- (5) Volunteer community service activities that support and strengthen pupil achievement.

(Added by Stats. 1989, c. 1089, § 5, operative July 1, 1990; see also *Modesto City Schools v. Education Audits Appeals Panel* (2004) 123 Cal.App.4th 1365, 1371 [discussing different types of independent study programs].) The independent study must be “coordinated, evaluated,” or otherwise “under the general supervision of an employee of the school district or county office of education who possesses a valid certification document . . . or an emergency credential.” (§ 51747.5, subd. (a).)

Significant to this action, section 51747.3 recognizes that “home study”—whether by charter school or standard school district—may be one means by which independent study may occur, subject to certain funding limitations:

Notwithstanding any other provision of law, a local educational agency, including, but not limited to, a charter school, may not claim state funding for the independent study of a pupil, whether characterized as *home study* or otherwise, if the agency has provided any funds or other thing of value to the pupil or his or her parent or guardian that the agency does not provide to pupils who attend regular classes or to their parents or guardians.

(*Id.* at subd. (a); 78 Ops.Cal.Atty.Gen. 253, 254 (1995) [A charter school may, subject to terms of

Education Code, § 51747.3, receive state funding for the operation of an independent study program.]; Cal. Code Regs. tit. 5, § 11963.1 [entitled, “Nonclassroom-Based Instruction in Charter Schools”].)

C. Children May Be Lawfully Home-Schooled As Part of a Private Home-Based School.

The Education Code provides that “[c]hildren who are being instructed in a private full-time day school by persons capable of teaching shall be exempted” from compulsory public school education. (§ 48222.) A private home school can qualify under this exemption as long as the home school complies with the requirements of section 48222, which include (1) that the children shall be taught “by persons capable of teaching”; (2) that the instruction “shall . . . be taught in the English language”; (3) that the school “shall offer instruction in the several branches of study required to be taught in the public schools of the state”; (4) that the attendance of the pupils “shall be kept by private school authorities in a register”; and (5) “that the private school has complied with the provisions of Section 33190 requiring the annual filing by the owner or other head of a private school of an affidavit or statement of prescribed information with the Superintendent of Public Instruction.” (*Ibid.*) Notably, there is no requirement that the teachers in such schools have a California teaching credential, only that they be “persons capable of teaching.” (*Ibid.*)

Section 33190 and related sections of the Code require that each of these private schools must annually file an affidavit or statement, under penalty of perjury, with the State Superintendent of Public Instruction that sets forth the following information: basic descriptive information about the school itself (the name of the school, the school’s address, its enrollment); as well as information about the content of the school’s educational program (attendance records, courses of study offered,⁵ faculty qualifications, and criminal record summaries of staff). (§§ 33190, 44237, 48222.) Section 33190 cautions, however, that this verification requirement should not be construed to mean that the State of California, the Superintendent of Public Instruction, the State Board of Education, or the California Department of Education “has made any evaluation, recognition, approval, or endorsement of the school or course unless this is an

⁵Section 51210 sets forth the required course of study for grades 1 through 6, and sections 51220, 51220.5, and 51221 prescribe the course of study for grades 7 through 12. For grades 1 through 6, all schools must “include instruction” in English, mathematics, social sciences, science, visual and performing arts, health, and physical education. (§ 51210.) For grades 7 through 12, schools are required to “offer courses in” English, social sciences, foreign languages, physical education, science, mathematics, visual and performing arts, applied arts, career technical education, automobile driver education, and parenting skills. (§§ 51220, 51220.5.) Instruction in the social sciences at all grade levels must “provide a foundation for understanding” the history and government of California and the United States, economics, the environment, eastern and western cultures and civilizations, contemporary issues, and “the wise use of natural resources,” and in grades 7 through 12 such areas of study must also include the legal system and human rights issues. (§§ 51210, subd. (c), 51220, subd. (b), & 51221.)

actual fact.” (See also § 48222 [same caveat].)

Nothing in the Education Code precludes home-based private schools from qualifying as private schools under these provisions.

Other sections of the Education Code further make clear that a “private full-time day school” under section 48222 can include a private home school. The Code variously defines a private school as “a *person*, firm, association, partnership, or corporation offering or conducting private school instruction on the elementary or high school level.” (§§ 33192, subd. (i) & 33193, subd. (d)(1) [emphasis added]; see also § 44237, subds. (a) & (b)(1).) Additionally, the Code explicitly exempts a “parent or legal guardian working exclusively with his or her children” from section 44237’s criminal record clearance requirement. (§ 44237, subd. (b)(4).) Thus, the Education Code expressly recognizes that at some of these private schools, the teacher and pupil population may be comprised entirely of a parent and his or her child.⁶

On the surface, there appears to be tension in the law between these code provisions, which make clear that a private, home-based school may exist pursuant to section 48222 (so long as the various requirements are satisfied and verification filed), and two decisions from the Second and Fourth District, respectively, *People v. Turner* (1953) 121 Cal.App.2d Supp. 861 and *In re Shinn, supra*, 195 Cal.App.2d 683. However, these case authorities are fully reconcilable with current statutory law.

In *Turner*, the parents were charged with violating former section 16601 because they neglected and refused to send their children to a public school. The Second District upheld the convictions on the basis that the children were neither being educated at a public school nor by any of the statutorily exempted means. Although the parents asserted that they came within the exemption as a private school (as defined by former §16624), the court disagreed, noting an apparent contradiction in the statute: “if a ‘private school’ as the term is used in section 16624 necessarily comprehends a parent or private tutor instructing at home, there was no necessity to make specific provision exempting the latter.” (*Turner, supra*, 121 Cal.App.2d Supp. at p. 868.) However, *Turner* was decided in 1953, and since that time the Legislature has clarified the ambiguity that *Turner* identified.

At the time *Turner* was decided, there was no private school verification requirement. This verification requirement first came into being in 1967, enacted as former section 29000.5. Former section 29000.5 provided, as its successor, section 33190, does now, that the verification requirement is imposed upon “[e]very *person*, firm, association, partnership, or corporation offering or conducting private school instruction on the elementary or high school level.” (Emphasis added.) Based upon the information from these verifications, the “Superintendent of

⁶The Vehicle Code similarly defines a private school as “*any school*, whether conducted for profit or not, giving a course of training similar to that in a public school at or below the twelfth grade.” (Veh. Code, § 492 [emphasis added].) A home-based private school clearly falls within this definition as well.

Public Instruction shall prepare and publish a list of private elementary and high schools.” (Former § 29000.5, subd. (f).) Thus, the concern articulated in *Turner* – “the difficulty in supervising without unreasonable expense a host of individuals, widely scattered, who might undertake to instruct children in their homes as compared with the less difficult and expensive supervision of teachers in organized private schools” (121 Cal.App.2d Supp. at p. 867 [citing *State v. Hoyt* (1929) 146 A. 170]) – finds a legislative answer in the verifications.

The Legislature’s use of the word, “person” in its definition of private school (and in defining who must file the private school verifications) also post-dates *Turner* and further clarifies that home-based private schools may exist so long as the many other statutory prerequisites are satisfied. Section 44237, subdivision (b)(4)’s criminal record clearance exemption for parents or guardians who “work exclusively” with their own children – a description that certainly contemplates a home-based private school – post-dates *Turner* as well, as this provision was first enacted in 1986. (Added by Stats. 1986, c. 72, § 4, eff. April 25, 1986.)

In re Shinn, decided subsequent to *Turner* (but before the statutes cited in this section were enacted), also left room for home-based private schools. The question before the Court then was: “Did the Shinn educational program fall within the exceptions created by [former] Education Code, sections 12152 and 12154?” (195 Cal.App.2d at p. 692.) *Shinn* held, perhaps unremarkably, that a course of self-study from an out-of-state correspondence school could not be properly classified as a private full-time day school. The children were allowed to “self-educat[e]” while their parents “acted as proctors and considered themselves instruments for the International Correspondence School.” (*Id.* at pp. 689-690.) Thus, they were not being taught by “persons capable of teaching” (*id.* at p. 694), nor did the correspondence school have any “parental school in [their] county.” (*Id.* at p. 686.) And content-wise, “[t]he children had no instruction in history of California nor any formal courses in civics,” both of which are required basic subjects for all schools, public and private. (*Id.* at p. 690.)

Thus, the Education Code has evolved to provide, consistent with *Turner* and *Shinn*, that children may be lawfully home-schooled as part of a private home-based school under section 48222.⁷

⁷While the case law varies among the states, some states, construing their private school exemptions, have come to a similar conclusion. (See, e.g., *Texas Education Agency v. Leeper* (Tex. 1994) 893 S.W.2d 432, 443-444 [home school can be a private school within the meaning of Texas’s compulsory attendance law, so long as the children are taught in a bona fide manner from a curriculum designed to meet state’s basic education goals]; *People v. Levisen* (Ill. 1950) 90 N.E.2d 213, 215 [court held that a home school could be deemed to be a private school where the child was taught grade-appropriate subjects, had regular hours of study and recitation, and “show[ed] a proficiency comparable with average [same grade] students”].)

II.

**THIS COURT SHOULD REMAND THIS CASE FOR A DETERMINATION
OF WHETHER THE PARENTS HAVE MET THE STATUTORY
HOME-SCHOOLING REQUIREMENTS**

Because the trial court addressed only the constitutional issues, it never considered the primary question of whether the parents had met the statutory requirements for home schooling under the Education Code. Accordingly, this Court should remand to the trial court for proper consideration of that question in the first instance.

A. The Parents Cannot Meet the Requirements of the Private Tutor or Public School Independent Study Exemptions.

The record demonstrates that as a matter of law the parents cannot meet the home-schooling requirements under either the private-tutor or public school independent-study exemptions. First, it is undisputed that the parents do not have a teaching credential, and thus they cannot satisfy the requirements of the private tutor exemption. (§ 48224.) Second, it is undisputed that neither the parents nor Sunland Christian School (“Sunland”) is a public school or affiliated with a public school, and thus they cannot satisfy the requirements of the public school independent study exemption.⁸

B. The Trial Court Should Determine in the First Instance Whether the Parents Have Met the Requirements of the Private School Exemption.

Whether the parents have met the statutory requirements of the private school exemption under section 48222 is a factual question that should be decided by the trial court in the first instance. Specifically, on remand the trial court should develop the factual record to determine (1) whether the parents are “persons capable of teaching” (§ 48222); (2) whether the parents “offer instruction in the several branches of study required to be taught in the public schools of the state” (*ibid.*); (3) whether the parents keep a proper record of attendance as required by section 48222; (4) whether the parents have “complied with the provisions of section 33190 requiring the annual filing by the owner or other head of a private school of an affidavit or statement of prescribed information with the Superintendent of Public Instruction” (*ibid.*);⁹ and (5) whether the parents’ affiliation with Sunland is sufficient to meet any of the above requirements.

⁸As the earlier decision from this Court correctly noted (*In re Rachel L.*, *supra*, 160 Cal.App.4th at p. 634, fn. 5), since Sunland is a sectarian school, as a matter of law it cannot be a charter school. (*Richard Wilson v. State Board of Education* (1999) 75 Cal.App.4th 1125, 1131.)

⁹The Clerk’s March 25, 2008 letter to counsel states on page two that “[t]he mother has apparently not filed an affidavit with the Superintendent of Public Instruction under Education Code section 33190, which is required of all persons conducting private school instruction.”

Based on the trial court's prior findings, these parents may not be able to satisfy the requirements of section 48222. (See *In re Rachel L.* (2008) 160 Cal.App.4th 624, 628 [noting that the trial court found "that the home schooling the children were receiving was 'lousy,' meager,' and 'bad,'" and that "keeping the children at home deprived them of situations where (1) they could interact with people outside the family, (2) there are people who could provide help if something is amiss in the children's lives, and (3) they could develop emotionally in a broader world than the parents' 'cloistered' setting"]; see also *In re Rachel L.* (2007) 2007 WL 4112168 [setting forth the factual background in this case].) Nonetheless, because the trial court simply ruled on the constitutional issues and did not make any factual findings regarding whether the parents had complied with any of the relevant home-schooling statutes, this Court should remand the case to the trial court to allow the trial court to fully develop the record and make appropriate factual findings in the first instance.

III.

THE COURT NEED NOT DECIDE ANY CONSTITUTIONAL QUESTIONS AT THIS TIME

It is a "well-established principle that this Court will not decide constitutional questions where other grounds are available and dispositive of the issues of the case." (*Santa Clara County Local Transp. Auth. v. Guardino* (1995) 11 Cal.4th 220, 230, citations and internal quotation marks omitted.) "That principle is itself an application of the larger concept of judicial self-restraint, succinctly stated in the rule that 'we do not reach constitutional questions unless absolutely required to do so to dispose of the matter before us.'" (*Ibid.*, quoting from *People v. Williams* (1976) 16 Cal.3d 663, 667.) "As the United States Supreme Court reiterated, 'A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.'" (*Guardino, supra*, 11 Cal.4th at p. 230, quoting from *Lyng v. Northwest Indian Cemetery Prot. Assn.* (1988) 485 U.S. 439, 445.) "Applying that principle, the high court observed that if statutory relief had been adequate in the case before it, 'a constitutional decision would have been unnecessary and therefore inappropriate.'" (*Guardino, supra*, 11 Cal.4th at p. 231, quoting from *Lyng*, 485 U.S. at p. 446.)

Here, this Court need not reach any constitutional issues because this petition can be decided entirely on statutory grounds. The Education Code provides a broad statutory basis for home schooling in California, setting forth three different avenues through which parents may legally home-school their children. Because the trial court addressed only the constitutional issues, it never considered the preliminary question of whether the parents had met the statutory requirements for home schooling under the Education Code. Accordingly, this Court should remand to the trial court for proper consideration of that question in the first instance, and the constitutional issues should not be decided until such time that such a resolution is "absolutely required . . . to dispose of the matter." (*Guardino, supra*, 11 Cal.4th at p. 230.)

CONCLUSION

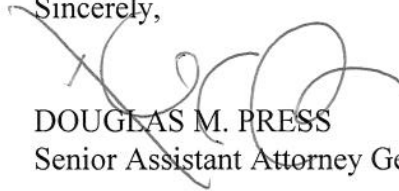
For each of the foregoing reasons, the Attorney General, on behalf of himself and the

May 19, 2008

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Governor, respectfully requests that this Court remand to the trial court for consideration of whether the parents have met the statutory requirements for home schooling under the Education Code.

Sincerely,



DOUGLAS M. PRESS
Senior Assistant Attorney General

GREGORY BROWN
Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

DMP:

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *In Re Rachel L.*

No.: **B192878**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On May 19, 2008, I served the attached **APPLICATION OF AMICI CURIAE THE GOVERNOR OF THE STATE OF CALIFORNIA AND THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF**; and **[PROPOSED] ORDER** by placing a true copy thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail at San Francisco, California, to each addressed as follows:

Cameryn Schmidt, Esq.
Jessica Iovenko, Esq.
Children's Law Center of Los Angeles
201 Centre Plaza Drive., Suite #9
Monterey Park, CA 91754

Judith Luby, Esq.
Lloyd W. Pellman, County Counsel
Office of the County Counsel
Edelman Children's Court
201 Centre Plaza Drive, Suite #1
Monterey Park, CA 91754

Kevin T. Snider, Esq.
Pacific Justice Institute
P.O. Box 276600
Sacramento, CA 95827

Lori A. Fields, Esq.
11041 Santa Monica Boulevard, PMB #702
Los Angeles, CA 90025

Gary George Kreep, Esq.
United States Justice Foundation
932 "D" Street, Suite 3
Ramona, CA 92065

Darold M. Shirwo, Esq.
8484 Wilshire Boulevard, # 605
Beverly Hills, CA 90211

Aida Aslanian, Esq.
2419 East Harbor Boulevard, #139
Ventura, CA 93001

Marsha A. Bedwell, General Counsel
California Department of Education
Office of Legal Services
1430 "N" Street
Sacramento, CA 95814-5901

Los Angeles Unified School District
Office of the General Counsel
333 So. Beaudry Ave., 24th Floor
Los Angeles, CA 90017

Los Angeles County Board of Education
9300 E. Imperial Highway
Downey, CA 90242

California Federation of Teachers
2550 No. Hollywood Way, Suite 400
Burbank, CA 91505

CTA State Headquarters
P.O. Box 921
Burlingame, CA 94011

United Teachers of Los Angeles
3303 Wilshire Blvd., 10th Floor
Los Angeles, CA 90010

The Honorable Stephen Marpet
Edmund D. Edelman Children's Court
Dept. 401
201 Centre Plaza Drive
Monterey Park, CA 91754

California Supreme Court
[4 copies]

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 19, 2008, at San Francisco, California.

Marlene Dong
Declarant

Marlene Dong
Signature