

# My Parents, My Sensei: Compulsory Education and a Homeschooling Alternative in Japan

## SUMMARY

I.	INTRODUCTION.....	335
II.	A BRIEF HISTORY OF COMPULSORY EDUCATION IN JAPAN.....	337
	A. <i>Pre-World War II Compulsory Education in Japan</i> .....	337
	B. <i>Postwar Compulsory Education in Japan</i> .....	339
III.	THE CURRENT STATE OF COMPULSORY EDUCATION LAW IN JAPAN.....	340
	A. <i>Children of Foreigners Living in Japan</i> .....	341
	B. <i>Handicapped Children and the "Special School" Alternative</i> .....	343
	C. <i>School-Refusal Syndrome</i> .....	344
IV.	A HOMESCHOOLING ALTERNATIVE IN JAPAN? .....	348

## I. INTRODUCTION

During the 1980s and through the early 1990s, Japan's accelerated rise to economic power caused many in America to focus on one of the perceived roots of Japanese success: their unique and highly disciplined public education system. Western unease at the rate of postwar Japanese economic expansion—coupled with sensationalized observations of the Japanese school system's instruction methods—helped to generate a popular perception that Japanese schoolchildren were “the product of an inhuman regime of forced-march study” and that “Japanese education is dehumanizing and unfair, both to Japanese children and to the American economy.”<sup>1</sup> Those who saw the Japanese education system in less hyperbolic terms tried to understand the direct and indirect connections between Japan's economic success and their schooling methods, and many advocates of school reform in the United States sought to uncover the “secrets” of Japanese education so that their own students might one day experience the academic awakening they felt their own postindustrial society had not yet delivered.<sup>2</sup> And while the recent economic slowdown in Japan has dampened the fears of a Japanese “takeover” of the United States,<sup>3</sup> there still remains an interest in this country in learning from the Japanese education system, if not from the desire to see the United States stay competitive with the Japanese economically then certainly from envy at Japan's continued dominance in international academic standards.<sup>4</sup>

---

1. MERRY WHITE, *THE JAPANESE EDUCATIONAL CHALLENGE: A COMMITMENT TO CHILDREN* 2–3 (1987); see also MICHAEL D. STEPHENS, *EDUCATION AND THE FUTURE OF JAPAN* 11–12 (1991).

2. WHITE, *supra* note 1, at 3.

3. After rapid economic growth from the 1960s through the 1980s, the Japan juggernaut slowed to a crawl, “largely because of the after effects of overinvestment during the late 1980s and contractionary domestic policies intended to wring speculative excesses from the stock and real estate markets.” See CIA, *THE WORLD FACTBOOK* (2003), <http://www.cia.gov/cia/publications/factbook/geos/ja.html> (last visited Jan. 24, 2005).

4. See, e.g., ANGELA WU, U.S. DEP'T OF EDUC., *THE JAPANESE EDUCATION SYSTEM: A CASE STUDY SUMMARY AND ANALYSIS* 1 (1999) (stating that Japan ranks third and second in the world in fourth-grade math

Yet while the Japanese school system maintains an impressive position in terms of international standards and statistical results,<sup>5</sup> not all parents in Japan desire to see their children educated by the state. There are those who, while recognizing that the state has a legitimate interest in overseeing the education of its populace, might not agree with either the methods of instruction or the environment in which it is provided and therefore do not want their children to attend public school. Some parents are concerned about the growing problem of *ijime* (bullying) in Japanese schools.<sup>6</sup> Other parents want to spend more quality time with their children, who are usually required to participate in time-consuming, after-school activities.<sup>7</sup> Some parents may have recently read of nineteen-year-old American novelist Christopher Paolini. Mr. Paolini, who wrote his bestselling novel *Eragon*<sup>8</sup> at the age of fifteen, was homeschooled by his parents and has become an example within the homeschooling movement of the potential of alternatives to the public school system.<sup>9</sup> Still other parents in Japan take a dim view of what some have called the structural-functionalist view of Japanese school socialization<sup>10</sup> and opt for a more individualized orientation to the socialization of their children.

Homeschooling as an alternative to public schooling in Japan is not a clearly defined right that parents have to exercise. Japan—along with other industrialized nations such as the United States and the United Kingdom—recognizes the right of a child to an education as fundamental,<sup>11</sup> and its constitution and laws accord with this international recognition that education should be compulsory and free.<sup>12</sup> Manifest in the Japanese government's interest in the educational development of its populace is its willingness to enact measures that will prevent parents from neglecting their duty to see their children attend school. The compulsory education laws in Japan are part of such measures. These compulsory education laws, however, represent legal barriers to the parent in Japan that chooses to take his or her children out of public education and school them at home—not because the laws are so restrictive, but because they are so vague: for example, the compulsory school requirement for handicapped children is subject to individual interpretation by prefectural

---

and science, respectively; it ranks third in eighth-grade math and science); see also EDWARD R. BEAUCHAMP & RICHARD RUBINGER, *EDUCATION IN JAPAN: A SOURCE BOOK* 258 (1989).

5. See WU, *supra* note 4, at 1.

6. See KAORI OKANO & MOTONORI TSUCHIYA, *EDUCATION IN CONTEMPORARY JAPAN: INEQUALITY AND DIVERSITY* 195–201 (1999); CYRIL SIMMONS, *GROWING UP AND GOING TO SCHOOL IN JAPAN: TRADITION AND TRENDS* 74 (1990).

7. See WU, *supra* note 5, at 5 (noting that “over half of all Japanese junior high students spend 2 to 3 hours per day after school and on weekends in student-organized school clubs”); see also Carol Hui, *Making a Home a School Away from School*, JAPAN TIMES, June 29, 2000, <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?fl20000629a2.htm> (last visited Jan. 24, 2005).

8. CHRISTOPHER PAOLINI, *ERAGON* (2004).

9. See Leslie Brody, *For Home-Schooled Teen, Novel's Success No Fantasy*, WASH. POST, Dec. 31, 2003, at C3. It must be noted, though, that Mr. Paolini himself believes that homeschooling isn't effective without “parents' thoughtful involvement.” *Id.*

10. The structural-functionalist view “assumes that society consists of parts, each of which contributes to the overall societal structure.” This view tends to assume that expressed individuality, when in conflict with the greater social consensus, is somehow “deviant.” OKANO & TSUCHIYA, *supra* note 6, at 6–7.

11. Japan is a signatory to the Convention on the Rights of the Child, which “recognize[s] the right of the child to education.” Convention on the Rights of the Child, art. 28(1), G.A. Res. 44/25, U.N. GAOR, 44th Sess., U.N. Doc. A/RES/44/25 [hereinafter Convention], <http://www.unhchr.ch/html/menu3/b/k2crc.htm> (last visited Jan. 26, 2005). The Convention also calls upon its signatories to “[m]ake primary education compulsory and available free to all.” *Id.* Japan ratified the Convention on May 22, 1994. *Status of Ratifications of the Principal International Human Rights Treaties as of 09 June 2004*, Office of the United Nations High Commissioner for Human Rights [hereinafter *Status of Ratifications*], <http://www.unhchr.ch/pdf/report.pdf> (last visited Jan. 26, 2005).

12. KENPŌ [Constitution] art. 26; Kyōiku kihonhō [Fundamental Law of Education], Law No. 25 of 1947, art. 4; Gakkō Kyōikuhō [School Education Law], Law No. 26 of 1947, art. 6.

boards of education—not necessarily unusual, but as shall be discussed later, can lead to wildly different applicative results.<sup>13</sup>

There are also other exceptions to the compulsory education requirement that are not explicitly stated but have been read into the texts of the laws (for example, for children of foreigners living in Japan).<sup>14</sup> There also seems to be a gradual trend toward Japanese governmental acceptance of the so-called school-refusal syndrome,<sup>15</sup> discussed further below, which, it will be argued, represents a potential ad hoc exception to the laws (or at least a demonstration of Japan's inconsistency in enforcing its law) that Japanese parents might be able to exploit. Thus, while some parents in Japan—whose children fall within the more clearly enunciated exceptions to the law—may feel more comfortable when making an argument to school authorities that their children are exempt from the legal mandate to attend public schooling, there are others who stand on considerably shakier ground. Nevertheless, there still remain a number of Japanese parents that may feel—for reasons that range from the ideological to the practical—that taking their children out of the public school system and directly controlling their educational upbringing is worth whatever legal uncertainty that such action brings.

This comment will attempt to clarify the vagaries of compulsory education in Japan, with an aim of helping parents in Japan to realize a right to home instruction that they may already have, but do not yet know how to implement. This comment will not, however, attempt to tailor a cohesive home-instruction plan for use in compliance with Japanese law, for such an endeavor is simply too case specific to lend itself to general analysis; nor will it address the issue of accreditation, that is, conforming the homeschooling curriculum to Japanese standards (to facilitate advancement into secondary schooling) since such an issue assumes that homeschooling is already permitted. Part II will provide a brief historical account of the pre- and post-World War II status of compulsory education laws in Japan. Part III will address the explicit and implied exceptions to the compulsory education requirements in Japan and address how social issues like school-refusal syndrome have influenced the current debate over the enforceability of those laws. Part IV will offer a comparative view of the state of compulsory education law compliance in the United States, from both a state and federal perspective, with a particular focus on the state of New York, which has enacted detailed compliance statutes specifically addressing the phenomenon of homeschooling. It is hoped that by offering a comparative perspective on making homeschooling compliant with compulsory education laws, possible solutions for those who wish to homeschool in Japan will come to light.

## II. A BRIEF HISTORY OF COMPULSORY EDUCATION IN JAPAN

### A. Pre-World War II Compulsory Education in Japan

The first unified, national system of education in Japan came about with the restoration of imperial rule (the Meiji Restoration) in 1868 and marked a sharp contrast with the former Tokugawa *shōgunate* system.<sup>16</sup> During the *shōgunate*, education was class

13. See *infra* Part III.B.

14. See *infra* Part III.A.

15. See *infra* Part III.C.

16. BEAUCHAMP & RUBINGER, *supra* note 4, at 40. The Tokugawa *shōgunate* was a feudal military dictatorship established by Tokugawa Ieyasu in the seventeenth century and lasting until the late 1860s. See LAWRENCE W. BEER & JOHN M. MAKI, FROM IMPERIAL MYTH TO DEMOCRACY: JAPAN'S TWO CONSTITUTIONS, 1889–2002, at 7–9 (2002).

based, with each group within the feudal system learning "the knowledge and skills that they would require in performing the tasks of their respective classes when they reached adulthood,"<sup>17</sup> as compared to the later Meiji education system, which was designed to be open to all children, irrespective of background or class.<sup>18</sup> Though lingering *shōgunate* attitudes delayed immediate implementation of a nationalized elementary school system, the creation of the *Monbusho* (Ministry of Education) in 1871 hastened the development process.<sup>19</sup> Attendance at the newly established schools was compulsory, but there was difficulty in actually compelling parents to send their children to school, especially in rural communities, where families relied on their children for helping with farm work.<sup>20</sup> Poorer families also resented the cost of the imposed schooling, which was not subsidized by the government but was instead borne by the families themselves.<sup>21</sup> This growing resentment culminated in several rural schools being burned down by villagers demanding an end to the tuition costs.<sup>22</sup>

Upon Japanese industrial expansion following the first Sino-Japanese War (1894–95) and the Russo-Japanese War (1904–05), Japan saw primary school enrollment gradually rise, culminating in 1905 when nearly universal attendance was achieved.<sup>23</sup> Increased prosperity had allowed the Japanese government to abolish family-paid tuition in 1900, which no doubt helped to increase primary school enrollment.<sup>24</sup> In 1907, the Japanese government undertook to "improve the nation's capacity to manage advanced technology" by, among other things, amending Article 18 of the Elementary School Act to extend compulsory education from four to six years.<sup>25</sup> Following this period of economic and industrial expansion was a period of recession, which birthed many pro-social reform movements within Japan and a general liberal political movement (the so-called Taishō Democracy, referring to the establishment of the Taishō emperor in 1912).<sup>26</sup> Japan's government saw calls for new educational reform from those who opposed the increasingly nationalist ideology espoused in the curriculum promulgated by the *Monbusho*.<sup>27</sup> The Japanese government responded to what it viewed as a fledgling socialist movement by passing a series of repressive laws<sup>28</sup> and giving the *Monbusho* more direct control over the running of schools.<sup>29</sup> The *Monbusho* exercised its increased control over schools by establishing moral education (*shushin*) as the center of curriculum and abolishing coeducation in middle schools, effectively ending educational opportunities beyond primary school for girls.<sup>30</sup> The onset of the Great Depression at the end of the 1920s and

17. OKANO & TSUCHIYA, *supra* note 6, at 14. "Under the Tokugawa feudal system . . . shōgunate schools offered education for the future ruling elite . . . . For the commoners, temple schools (*terakoya*) offered children the . . . basic skills they would need to become merchants, artisans and farmers." *Id.* Only the *terakoya* allowed girls to attend. *Id.*

18. *Id.*

19. BEAUCHAMP & RUBINGER, *supra* note 4, at 41.

20. OKANO & TSUCHIYA, *supra* note 6, at 15.

21. *Id.*

22. *Id.*; BEAUCHAMP & RUBINGER, *supra* note 4, at 42.

23. BEAUCHAMP & RUBINGER, *supra* note 4, at 42–43.

24. *Id.*; OKANO & TSUCHIYA, *supra* note 6, at 19.

25. OKANO & TSUCHIYA, *supra* note 6, at 19.

26. *Id.* at 21.

27. BEAUCHAMP & RUBINGER, *supra* note 4, at 80; OKANO & TSUCHIYA, *supra* note 6, at 21–24.

28. An example of such legislation was the Peace Preservation Law (1925) in which "it was a crime punishable by imprisonment of up to ten years to be a member or supporter of an organization whose purpose was to propose a change in the 'national polity' (*kokutai*)." Sylvia Brown Hamano, *Incomplete Revolutions and Not So Alien Transplants: The Japanese Constitution and Human Rights*, 1 U. PA. J. CONST. L. 415, 422 n.28 (1999). The government also "banned teachers and students from attending political meetings" and designated some textbooks as "inappropriate" and therefore, prohibited. OKANO & TSUCHIYA, *supra* note 6, at 16.

29. *Id.*

30. *Id.*; BEAUCHAMP & RUBINGER, *supra* note 4, at 80.

Japan's subsequent economic hardships brought about the Japanese "population problem" doctrine of expansionism<sup>31</sup> and its increased interest in the leased territories of Manchuria.<sup>32</sup> With increased militarism within the Japanese policymaking bodies came the onset of military indoctrination at the primary and secondary school levels.<sup>33</sup> The subsequent sequence of events that led Japan into World War II need not be fully recounted here. However, by the time Japan entered the Pacific theater of the war in 1941, primary schools were completely replaced by so-called People's Schools (*kokumin gakkō*) whose aim was to "provid[e] general education and basic training in accordance with the way of [the] imperial state."<sup>34</sup> During the Allied bombing campaigns of the mainland in 1944 and 1945, compulsory attendance laws were abandoned altogether as children were evacuated to the countryside and away from Allied targets.<sup>35</sup> Public schooling had ceased altogether by the end of the war.<sup>36</sup>

### B. *Postwar Compulsory Education in Japan*

The occupation authorities found the Japanese school system in shambles when they began the task of rebuilding Japan's societal institutions.<sup>37</sup> Aside from the massive infrastructure repair that needed to be done, the occupation authority realized that in order to reverse the nationalistic and militaristic indoctrination in the Japanese that had led to so much bloodshed, they needed not only to rebuild but to reform the educational system that had instilled such aggression in the prewar youth.<sup>38</sup> A joint commission of U.S. and Japanese educators and administrators was created to advise the occupation authority as to what kinds of educational reforms were needed to create order out of the chaos that the Japanese school system had become.<sup>39</sup> The commission recommended, among other things, the dismantling of the "highly differentiated multi-track system of prewar days" and a nine-year compulsory education program that would also be free.<sup>40</sup> The commission and the occupation authorities believed that the multitrack system benefited only elites and that by extending compulsory education to nine years, more children would receive a basic education.<sup>41</sup>

While the joint commission was developing the forthcoming education reforms, the occupation authorities were laying the legal framework for education in postwar Japan.<sup>42</sup> After lengthy debate and discussion, in 1947 the new Japanese Constitution (*Kenpō*) came

31. The Japanese "population problem" justification for expansion (by military means) argued that "[Japan's] population was too large to be supported by a restricted and natural resource-poor land" and that therefore, it was in Japan's continued national interest to expand beyond its geographical borders. BEER & MAKI, *supra* note 16, at 45.

32. See *id.* Japan already had troops stationed in Manchuria (the Kwantung Army) as a result of the Treaty of Portsmouth. *Id.* at 39, 45.

33. See OKANO & TSUCHIYA, *supra* note 6, at 24–25.

34. *Id.* at 25; see also BEAUCHAMP & RUBINGER, *supra* note 4, at 80.

35. See BEAUCHAMP & RUBINGER, *supra* note 4, at 80; OKANO & TSUCHIYA, *supra* note 6, at 28.

36. WHITE, *supra* note 1, at 62.

37. OKANO & TSUCHIYA, *supra* note 6, at 30.

38. See BEAUCHAMP & RUBINGER, *supra* note 4, at 86–87.

39. *Id.* at 90–91. The commission was comprised of twenty-seven individuals that made up the First United States Education Mission to Japan (USEMJ), along with their Japanese counterparts. *Id.*

40. *Id.*

41. OKANO & TSUCHIYA, *supra* note 6, at 48.

42. See BEAUCHAMP & RUBINGER, *supra* note 4, at 86–93.

into effect.<sup>43</sup> The new Japanese Constitution specifically guaranteed the right to a free and compulsory education in Article 26, which states:

All people shall have the right to receive an equal education correspondent to their ability, as provided for by law.

All people shall be obligated to have all boys and girls under their protection receive ordinary education as provided for by law. Such compulsory education shall be free.

Two other significant pieces of legislation were passed in 1947 that were in accord with the new Constitution—the Fundamental Law of Education (*Kyōiku Kihonhō*) and the School Education Law (*Gakkō Kyōikuhō*).<sup>44</sup> These important (and largely unchanged) laws reinforced the constitutional foundation of compulsory education in Japan. Article 4 of the Fundamental Law of Education states that “[t]he people shall be obligate[d] to have boys and girls under their protection receive nine years’ general education.” The School Education Law “set down the administrative nuts and bolts of the new school organization”<sup>45</sup> and also provides for compulsory education for primary and secondary school students.<sup>46</sup> However, early implementation of compulsory schooling was problematic due to serious postwar economic conditions.<sup>47</sup> The government budget for education was inadequate, teachers were scarce, and there were not enough school buildings to accommodate the newly created compulsory, secondary-education system.<sup>48</sup> Still, the foundation had been laid, and after the occupation authorities returned sovereignty to Japan in April 1952, the Japanese government “reexamine[d] . . . and then systematically modified . . . those things which they believed were not in harmony with the nation’s political and cultural traditions.”<sup>49</sup> However, since the return of sovereignty to Japan, with some exceptions that will be discussed below, compulsory education laws in Japan have remained essentially the same.

### III. THE CURRENT STATE OF COMPULSORY EDUCATION LAW IN JAPAN

The *Monbusho* itself has recognized that there is a significant and growing number of children in Japan who are not in compliance with the compulsory education laws. For example, according to statistics compiled by the *Monbusho*, the number of children of compulsory school age per year who were legally exempted was as follows: in 1995, 1,511; in 1999, 1,711; in 2000, 1,809; in 2001, 1,924; in 2002, 1,998; and in 2003, 2,214.<sup>50</sup> The number of children who were legally postponed from having to attend public school was as follows: in 1995, 1,118; in 1999, 1,095; in 2000, 1,110; in 2001, 1,170; in 2002, 1,187; and

43. For a more detailed account of the development of Japan’s postwar constitution, see BEER & MAKI, *supra* note 16, at 77–94.

44. See BEAUCHAMP & RUBINGER, *supra* note 4, at 93.

45. *Id.* at 94.

46. Article 22 of the School Education Law states that “[t]he . . . persons who exercise parental authority over the children . . . shall be obliged to send their children to the primary school.” Article 39 of the School Education Law deals with compulsory education in secondary schools.

47. OKANO & TSUCHIYA, *supra* note 6, at 33.

48. *Id.* “The new education system . . . had to rely on donations, voluntary labour and the sale of village properties.” *Id.*

49. BEAUCHAMP & RUBINGER, *supra* note 4, at 95.

50. Japanese Ministry of Educ., Culture, Sports, Sci. & Tech., *Children of Compulsory Education Age Not Attending School(1)* [hereinafter *Monbusho* Statistic I], at <http://www.mext.go.jp/english/statist/index01.htm> (last visited Jan. 31, 2005).

in 2003, 1,279.<sup>51</sup> These relatively small numbers of legally exempted/postponed children contrast greatly with the number of children who were technically in noncompliance with the law. Statistics compiled by the *Monbusho* show that between 1998 and 2002 there were an average of about 226,000 children who were considered "long absentees" of compulsory elementary and lower secondary schools.<sup>52</sup> The *Monbusho* statistics still do not specify whether or not these children, for reasons of legal exemption or noncompliance, were being schooled somewhere other than public schools. Still, since the *Monbusho* does not explicitly recognize the phenomenon of homeschooling as an alternative for those Japanese children who fall within the clearly defined jurisdictional applicability of the compulsory education laws,<sup>53</sup> it might seem that such an alternative is prohibited. There are, however, implied—as well as explicit—exceptions and alternatives to the compulsory education laws that are worth exploring, since they demonstrate how the law has developed with regards to enforcement and applicability.

#### A. *Children of Foreigners Living in Japan*

There are currently no domestic acts in Japan that govern the rights of children of foreigners with regards to education.<sup>54</sup> Article 26 of the Japanese Constitution, the fundamental basis for compulsory education in Japan, obliges "[a]ll people . . . to have all boys and girls under their protection receive ordinary education."<sup>55</sup> Does adherence to this constitutional edict and the codified requirements of Japanese education law require those foreigners who legally reside in Japan to send their children to public schooling? The answer is no: the dominant interpretation of this provision is that it only applies to Japanese citizens.<sup>56</sup> Since the time of the postoccupation educational reforms, the *Monbusho* has "reiterated its position that foreign parents have no legal obligation to send their children to school, nor d[o] local public schools have a duty to provide foreign children with free education."<sup>57</sup> Consequently, when the time arises for local school authorities to send out notifications to attend school (*shūgaku tsūchi*),<sup>58</sup> only Japanese nationals receive them.<sup>59</sup> However, this does not necessarily mean that all children of foreigners living in Japan cannot attend the free compulsory schooling provided by the Japanese government if their parents so desire. The *Monbusho* takes the position that all foreign children residing in Japan have a right to free, compulsory education.<sup>60</sup> In harmony with this position is the fact that Japan has ratified both the Convention on the Rights of the Child<sup>61</sup> and the

51. *Id.*

52. See Japanese Ministry of Educ., Culture, Sports, Sci. & Tech., *Children of Compulsory Education Age Not Attending School(2)* [hereinafter *Monbusho* Statistic II], at <http://www.mext.go.jp/english/statist/index01.htm> (last visited Jan. 31, 2005).

53. See, e.g., School Education Law, Law No. 26 of 1947, arts. 22, 39.

54. OKANO & TSUCHIYA, *supra* note 6, at 137.

55. KENPO, art. 26(2).

56. OKANO & TSUCHIYA, *supra* note 6, at 135; *Initial reports of States parties due in 1996, Addendum, Japan*, Convention on the Rights of the Child, para. 216, U.N. Doc. CRC/C/41/Add.1 (1996), <http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/CRC.C.41.Add.1.En?OpenDocument> (last visited Feb. 7, 2005).

57. Sumi Shin, *Newcomer Migrants: Implications for Japan's Administration of Social Services and Nationality*, 6 UCLA J. INT'L L. & FOREIGN AFF. 313, 351 (2001).

58. In Japan, when children reach the age of compulsory schooling, their parents "receive a 'notice regarding entering school' which specifies their child's school and the start date of the school year." *Id.*

59. OKANO & TSUCHIYA, *supra* note 6, at 135–36.

60. Shin, *supra* note 57, at 352.

61. See sources cited *supra* note 11.

International Covenant on Economic, Social and Cultural Rights,<sup>62</sup> both of which guarantee a free, compulsory education to all,<sup>63</sup> regardless of nationality or legal status.<sup>64</sup> These international agreements, coupled with the *Monbusho*'s 1965 notice "enabling South Korean children eligible for permanent residency under the Agreement and non-permanent resident North Korean children to receive free compulsory education" has helped to "solidif[y] foreign children's access to free compulsory education."<sup>65</sup> In 1991, the *Monbusho* issued a directive to local governments that all foreign legal residents with school-age children were to be sent "information on attending school" (*shūgaku an'nai*) guides that "outline[] the availability of local schools and the procedures to be taken to enrol [sic] [their] children."<sup>66</sup> Local boards of education determine which families to send the guides to by compiling a list from the alien registration roll.<sup>67</sup> However, families that do not appear on the roll are automatically excluded from the right to receive the guides.<sup>68</sup> Since receiving a guide is essential to enrolling a child in public schooling,<sup>69</sup> this exclusion leads to a serious dilemma for foreigners whose names are not registered (read as, illegally living in Japan). In order to enroll their children in school, undocumented foreign workers in Japan "must bring documentation to the local school board to prove that they live within the jurisdiction and that their child is of school age."<sup>70</sup> Such an act might expose the foreign parents' undocumented status to the authorities.<sup>71</sup> This creates a dilemma beyond the scope of this comment.

Are foreigners (legal or not) allowed to homeschool their children in Japan? The answer is a definite yes: "Homeschooling is not a new trend and has always been practiced by foreign parents in Japan, particularly those on Christian missions."<sup>72</sup> However, since Japan has not addressed the legality of homeschooling directly, the answer seems to hinge on compliance with the compulsory education laws. The *Monbusho* takes the position that even though children have a right to education in Japan, it is a right that is given "by the 'permission' or 'favor' of the central government."<sup>73</sup> Does it not follow that when a person has a legal right to do something—and that right is elective—in the absence of a law to the contrary, that person may opt not to exercise that right? Does a person not have a right to refuse a "favor?" Moreover, some scholars have argued that the difference in the terminology used for the two different devices to alert both citizens and foreigners of their educational responsibilities/options (notification versus guides, respectively) is an affirmation of the "Japanese citizens' legal obligation to send their children for compulsory education, and foreigners' lack of such a legal duty."<sup>74</sup> It is precisely this lack of legal duty that, in the absence of legislation to the contrary, gives foreigners living in Japan the "right" to homeschool.

62. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter *Covenant*], available at [http://www.unhchr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhchr.ch/html/menu3/b/a_ceschr.htm) (last visited Jan. 26, 2005). Japan ratified the *Covenant* on September 21, 1979. *Status of Ratifications*, *supra* note 11.

63. Convention, *supra* note 11, art. 28(1); *Covenant*, *supra* note 62, art. 13(2).

64. Convention, *supra* note 11, art. 2(1); *Covenant*, *supra* note 62, art. 2(2).

65. Shin, *supra* note 57, at 351. This decision by the *Monbusho* was brought about by the normalization of diplomatic ties between Japan and South Korea on December 18, 1965. *Id.*

66. OKANO & TSUCHIYA, *supra* note 6, at 136.

67. Shin, *supra* note 57, at 352.

68. *Id.*

69. *Id.*

70. *Id.* at 353.

71. *Id.*

72. Hui, *supra* note 7.

73. Shin, *supra* note 57, at 351.

74. *Id.* at 352.



*B. Handicapped Children and the "Special School" Alternative*

Article 23 of the School Education Law states that children who are of compulsory schooling age but "who are acknowledged as being difficult to attend school because of their invalidity, imperfect growth or other unavoidable obstacles . . . may [be] allow[ed] . . . to postpone the fulfillment of their [compulsory schooling] obligation."<sup>75</sup> However, the School Education Law also mandated the creation of special schools for the handicapped<sup>76</sup> and allowed for primary, secondary, and high schools to establish special classes to accommodate students with mental or physical handicaps.<sup>77</sup> The decision by the *Monbusho* to create a system of special schools for the handicapped was guided in part by a fear by educators that disabled children might not be getting enough special care in regular public schools, which in turn might discourage them from even attending school at all.<sup>78</sup> However, the School Education Law did not specify that attendance at the special schools was compulsory: in the applicable cross-provisions section of the chapter dealing with education for the handicapped, the applicable cross-provisions relating to the compulsory attendance requirement are not included.<sup>79</sup>

In 1979, schooling was made compulsory for *all* students of the requisite age, and as a result, the *Monbusho* left it up to prefectural boards of education to decide what interpretation of the directive on special classes in the School Education Law to follow.<sup>80</sup> Most boards of education have interpreted the directive to mean that all handicapped children should *not* attend public school and instead should only be compelled to attend the mandatory special schools.<sup>81</sup> This has caused some problems among families who want to see their disabled children integrated into normal public schooling.<sup>82</sup> Whereas a family would not be forced to send their disabled child to public school, a family who instead might want to integrate their child into public school would be barred, based on the interpretation of the law the *Monbusho* promulgated through the prefectural boards of education charged with implementing the policy.<sup>83</sup> The *Monbusho* remarked that with the implementation of compulsory special-school attendance "the number of children postponing or being exempt from compulsory education [has] decreased steadily."<sup>84</sup> Indeed, according to the *Monbusho* statistics, the number of compulsory-age children obtaining legal exemptions from public schooling has decreased from 13,088 in 1975 to just 1,809 in 2000.<sup>85</sup> However, the *Monbusho* does not reconcile these statistics with those showing a dramatic increase in the number of students who are simply not legally complying with the compulsory education laws—from 50,166 in 1975 to 229,062 in 2000.<sup>86</sup> Such an omission makes one wonder if parents who are now faced with the

75. School Education Law, Law No. 26 of 1947, art. 23.

76. *Id.* art. 74.

77. *Id.* art. 75.

78. Marilyn P. Goldberg, *Recent Trends in Special Education in Tokyo*, in JAPANESE SCHOOLING: PATTERNS OF SOCIALIZATION, EQUALITY, AND POLITICAL CONTROL 176, 177 (James J. Shields, Jr. ed., 1989).

79. See School Education Law art. 76.

80. Goldberg, *supra* note 78, at 176–77.

81. *Id.* Perhaps this view has been widely held due to the elective nature of the law's instructions on establishing special classes within normal public schools. See School Education Law art. 75.

82. Goldberg, *supra* note 78, at 177.

83. See *id.* at 176–84.

84. JAPANESE MINISTRY OF EDUC., CULTURE, SPORTS, SCI. & TECH., JAPANESE GOVERNMENT POLICIES IN EDUCATION, CULTURE, SPORTS, SCIENCE & TECHNOLOGY 2001, at § 3(3) (2001), <http://www.wpi.mext.go.jp/wp/jsp/search/IndexBodyFrame.jsp?sd=hpac200101&id=null&no=> (last visited Jan. 31, 2005).

85. See *Monbusho* Statistic I, *supra* note 50.

86. See *Monbusho* Statistic II, *supra* note 52.

undesirable prospect of being required to send their disabled children to special schools are not among those who the *Monbusho* has indicated are not seeing to their legal responsibility to send their children to school.

The fact that the Japanese government (1) does allow for some families to avoid compulsory schooling for their disabled children and (2) established a separate-but-equal system of schooling reflects a consensus among Japanese educators that so-called mainstreaming (putting disabled children into regular public schools) "may violate the rights of handicapped students because there are no special services for them in the regular school environment."<sup>87</sup> This suspicion of the benefits of "mainstreaming" children who for some reason require extra time and effort to educate has broader applications toward the homeschooling movement. This application is discussed more fully in the next section dealing with one of the most pressing current issues in Japanese education: school-refusal syndrome.

### C. School-Refusal Syndrome

Few issues in Japan's educational system are more troubling than the phenomenon known as school-refusal syndrome (*futōkō* or *tōkō kyōhi*). Simply put, school refusal refers to scores of Japanese children who have stopped going to school altogether. The *Monbusho* defines school refusal as "the phenomenon where students do not go to school or cannot go to school despite a desire to go to school, due to some psychological, emotional, physical, or social factor and environment, exempting illness or economic factors."<sup>88</sup> Various categories of school refusal have been identified by those who study the phenomenon: "school phobia,"<sup>89</sup> refusal caused by mental disorder; and truancy (whether due to laziness or active, intentional refusal) being among them—though symptoms within each category are not always exclusive of the others.<sup>90</sup> The *Monbusho* began compiling data on school refusal in 1966; since then, Japan has seen a steady rise in the instances of school refusal among its children of compulsory school age.<sup>91</sup> Statistics published by the *Monbusho* show that in 2001 the number of elementary and lower secondary students who missed school (for more than thirty days without excuse) was 138,722, "the highest level recorded since the start of the survey."<sup>92</sup> A separate statistic published by the *Monbusho* shows that the number of students considered "long absentees" (absent for a total of thirty days or more in the school year) from school for reasons other than illness and poverty was closer to 150,000 (though the statistics are not entirely clear as to what year the numbers refer to, or if they are an average calculation).<sup>93</sup> However, it has been argued elsewhere

87. Goldberg, *supra* note 78, at 182–83.

88. Miki Y. Ishikida, *Education for Students with School Refusal Syndrome in Japan*, Center for U.S.-Japan Comparative Social Studies (2001–2003), at <http://www.usjp.org/jpeducation/SchoolRefusalSyndrome.htm> (last visited Jan. 24, 2005).

89. For a basic explanation of this term's usage, see ARTHUR S. REBER & EMILY S. REBER, *THE PENGUIN DICTIONARY OF PSYCHOLOGY* 652 (3d ed. 2001).

90. OKANO & TSUCHIYA, *supra* note 6, at 201–03.

91. *Id.* at 203. High school in Japan is not part of compulsory schooling, so the *Monbusho* does not keep track of school refusal for older students (though it seems obvious to some that "many students drop out of high school for the same reasons younger children refuse to attend [elementary and lower secondary school].") Alice Gordenker, *When One-Size-Fits-All Schooling Doesn't Fit*, JAPAN TIMES, May 3, 2002, <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?ek20020503ag.htm> (last visited Jan. 24, 2005).

92. JAPANESE MINISTRY OF EDUC., CULTURE, SPORTS, SCI. & TECH., JAPANESE POLICIES IN EDUCATION, CULTURE, SPORTS, SCIENCE, AND TECHNOLOGY 2002, ch. 3, § 2(2), <http://www.mext.go.jp/wp/jsp/search/IndexBodyFrame.jsp?sd=hpac200201&id=null&no=> (last visited Jan. 31, 2005).

93. See *Monbusho* Statistic II, *supra* note 52.

that "[a]ctual numbers [of school refusers] are probably higher because school officials sometimes classify absences as medical to protect the child (or the school) from the stigma of school refusal."<sup>94</sup>

What is the cause of this so-called syndrome? There is no clear consensus. The *Monbusho* has blamed school refusal on "the rapidity of social change, the proliferation of the nuclear family, loss of community feelings, affluence, and urbanization."<sup>95</sup> The *Monbusho* has also suggested that school refusal and other prevalent difficulties facing education in Japan today (such as bullying) are caused by "a growing tendency to overemphasize respect for individual rights and disregard the broader picture of the community, and the propensity of youths to be drawn into their own worlds," making reference to the belief that children in Japan are increasingly becoming alienated from school, be it due to social or structural problems.<sup>96</sup> One report on the Japanese school system prepared for the U.S. Department of Education seems to pin the blame of school refusal solely on socialization problems with the students, making no reference to a student's feelings towards school itself.<sup>97</sup> Some, however, have taken the view that the Japanese school system itself is to blame, arguing that because it "is theoretically designed so that all children of the same group stay at the same level and work at the same pace," the "practical result . . . is 'great strain on the slower children,'"<sup>98</sup> others have argued that the difficulty of the curriculum in the elementary and secondary schools has driven students away.<sup>99</sup> Some have even claimed that the rise in consumption of junk food by Japanese youth is to blame.<sup>100</sup>

Whatever the causes of school refusal syndrome—and it is highly unlikely that there is a singular one—the repeated references to the problem in proposals for school reform within Japan demonstrate that it remains of significant concern to the *Monbusho*. The *Monbusho*, through the Central Council for Education<sup>101</sup> as well as other administrative bodies, has proposed educational reforms designed to address school refusal, though the current statistics on school refusal show that whatever reforms have already been put into place have not yet had a significant impact on the numbers of school refusers, which are at their highest recorded levels.<sup>102</sup> Some institutional reforms have been suggested, such as the introduction of professional subjects (as opposed to teaching subjects) into the training curriculum of new teachers, ostensibly to teach them to deal with current student problems like school refusal.<sup>103</sup> Another important step toward reform has been the implementation

94. Gordenker, *supra* note 91.

95. BEAUCHAMP & RUBINGER, *supra* note 4, at 260.

96. JAPANESE MINISTRY OF EDUC., CULTURE, SPORTS, SCI. & TECH., EDUCATION REFORM PLAN FOR THE 21ST CENTURY, [http://www.mext.go.jp/english/org/f\\_reform.htm](http://www.mext.go.jp/english/org/f_reform.htm) (last visited Jan. 31, 2005).

97. See WU, *supra* note 5, at 7.

98. BEAUCHAMP & RUBINGER, *supra* note 4, at 260.

99. See HARRY WRAY, JAPANESE AND AMERICAN EDUCATION: ATTITUDES AND PRACTICES 148, 292 (1999).

100. WHITE, *supra* note 1, at 136 (noting that "[s]ome Japanese experts say the . . . 'junk food' . . . ingested by children . . . produce[s] lethargy and 'nervous exhaustion'").

101.

The Central Council for Education is an organization that carries out research and deliberations on important matters related to the promotion of education, lifelong learning, sports and other matters in response to requests from the Minister of Education, Culture, Sports, Science and Technology and provides its opinions to the Minister.

Japanese Ministry of Educ., Culture, Sports, Sci. & Tech., *Central Council for Education*, at <http://www.mext.go.jp/english/org/councils/69a.htm> (last visited Jan. 31, 2005).

102. See *supra* notes 91–92 and accompanying text.

103. See Press Release, Japanese Ministry of Educ., Culture, Sports, Sci. & Tech., *Program for Educational Reform* (Revised on August 5, 1997) [hereinafter *Reform Program*],

of the so-called Special Zones for Structural Reform law.<sup>104</sup> The Special Zones law essentially allows municipalities to make individualized requests for exemptions or exceptions to regulations promulgated by the central government under the auspices of “stimulat[ing] the Japanese economy.”<sup>105</sup> The *Monbusho* website has posted some of the requests made by local governments under the law that have concerned education reforms—some of which specifically relate to the problem of school refusal:

- Accept the formation and implementation of the curriculums which do not necessarily conform to the Courses of Study through the Special Zones for Structural Reform Experimental Schools System;
- Make the curriculum more flexible through the establishment of new types of schools for children who do not attend school;
- Enable learning activities utilizing [information technology] for children (including those who are in a state of social withdrawal) who do not attend school;
- Accept the establishment of schools by NPO [Special Nonprofit Corporations] with designated results for the education of children who do not attend school;
- Enhance the flexibility of educational courses with regard to the establishment of upper secondary schools for children who do not attend school.<sup>106</sup>

This focus by local education authorities on taking innovative and flexible steps toward addressing the problem of school refusal (e.g., special schools or new curriculum strategies) indicates an apparent willingness to look past the compulsory education laws and to try instead to cultivate a system of reforms that will entice children back to school instead of punishing them (or their parents) for staying away in the first place. Local boards of education are not entirely loathe to permit exceptions to the compulsory education laws either—in fact, in some instances, local school authorities have even set up special “alternative schools” (*tekiyokyoshitsu*) designed specifically for school refusers.<sup>107</sup> One can already observe changes in the attitudes and approaches towards school refusal syndrome by the *Monbusho* itself. As some have noted, “[t]he [*Monbusho*] has . . . [begun to] recognize[] that school refusal is a societal problem rather than an individual problem. As a result, there is less pressure to force children to attend school when they aren’t willing or able.”<sup>108</sup> Indeed, the *Monbusho*, in outlining its recommendations for dealing with the problem, has explicitly stated that parents and teachers of children who refuse to go to

---

<http://www.mext.go.jp/english/news/1997/10/971002.htm> (last visited Jan. 31, 2005). One such professional subject is “student guidance” (*seitoshidō*). OKANO & TSUCHIYA, *supra* note 6, at 220. Some critics have noted that the introduction of such professional courses in the teacher education curriculum creates new problems, since such courses “may not be based on solid academic disciplinary studies” or create “excessive burden[s] for teacher education students.” *Id.* Some critics have contended that this emphasis on professional, nonteaching training provides only simplified solutions to problems with complicated causes, like school refusal. *Id.* at 229.

104. Office for the Promotion of Special Zones for Structure Reform, *Special Zones for Structural Reform* (Apr. 2003), [http://www.kantei.go.jp/foreign/policy/kouzou2/sanko/030326setumei\\_e.pdf](http://www.kantei.go.jp/foreign/policy/kouzou2/sanko/030326setumei_e.pdf) (last visited Jan. 31, 2005).

105. *See id.*

106. Japanese Ministry of Educ., Culture, Sports, Sci. & Tech., *Special Zones for Structural Reform*, at <http://www.mext.go.jp/english/org/councils/72.htm> (last visited Apr. 2, 2004).

107. Gordenker, *supra* note 91.

108. *Id.*

school "should not focus their concern on when the child [will] resume going to school."<sup>109</sup> Rather, they are encouraged to accept "the refusal as a process of . . . [the child's] mental development."<sup>110</sup> Recommendations by the *Monbusho* for remedying the problem at the school level include:

- (i) Working closely with experts inside and outside of school and educational counseling organizations; making the most of the class specializing in children's adaptation problems; providing supplementary instruction via multimedia resources.
- (ii) Promotion of practical research on outdoor hands-on learning activities for those children who refuse to go to school.
- (iii) Making the most of the "Test of Lower Secondary School Graduation Certificate" as a bypass for those children.
- (iv) Upper secondary schools are expected to base their evaluation substantially on students' applications rather than the school reports, when they select new students from among those who refuse to go to school. In the application, those students and their guardians describe the reason why they choose that school and what they want to study there.<sup>111</sup>

Nowhere is it suggested by the *Monbusho* that the problem of school refusal can be fixed by a stricter enforcement of the compulsory education laws. In fact, the *Monbusho's* position on school refusal, that it is a natural part of the development of the individual child's mind and personality, essentially amounts to an implicit acceptance of the abrogation of the parent's duty to educate their child vis-à-vis the public schooling system, albeit temporarily. This is not to say that the *Monbusho* would not like to see such problematic children stay out of school indefinitely. The recommendations for school reform by the *Monbusho* necessarily involve reintegrating children into some sort of schooling, whether by expert help within public schools or by bypass-testing for students to allow them to advance into secondary schooling without having attended regular public schools.<sup>112</sup> Mainstreaming school refusers back into public schooling as the eventual goal of educational reform is still on the agenda of the *Monbusho*.<sup>113</sup> And, like the controversy of mainstreaming handicapped children,<sup>114</sup> there are those who worry that such an approach to school refusers ignores an indisputable fact: "not all children are best served by Japan's highly standardized public schools."<sup>115</sup>

It is established that "[h]omeschooling is . . . done by Japanese parents, but it is often a reactive decision propelled by circumstances such as bullying or school refusal."<sup>116</sup> It is often suggested by parents who homeschool in Japan that the first course of action should

109. Press Release, Japanese Ministry of Educ., Culture, Sports, Sci. & Tech., To Cultivate Children's Sound Minds That Develop a New Era [sic] (Interim Report of the Central Council for Education (Outline)) (Mar. 31, 1998), <http://www.mext.go.jp/english/news/1998/06/980609.htm> (last visited Jan. 31, 2005).

110. *Id.*

111. *Id.*

112. See *id.* In fact, in 1997 the *Monbusho* "ease[d] the restriction on the qualification for taking [the] lower secondary school equivalency examination, which grants upper secondary school entrance qualifications to those who have passed." Reform Program, *supra* note 103.

113. "[W]hat hasn't changed [about the *Monbusho's* views towards school refusal] . . . is the attitude that it is normal for children to want to go to school and abnormal for them not to want to go to school. Children are still under tremendous pressure to be like everyone else and go to a regular school." Gordenker, *supra* note 91.

114. See *supra* note 87 and accompanying text.

115. Gordenker, *supra* note 91.

116. Hui, *supra* note 7 (emphasis added).

be to contact their local boards of education to secure permission.<sup>117</sup> But does the fact that some maintain that they have secured permission from their local boards of education to school their children at home mean that it is generally legal to homeschool in light of the compulsory education laws? The answer is most likely no. Perhaps if a board of education has specifically requested to have their jurisdiction exempted from the compulsory education laws—through the use of the Special Zones for Structural Reform Law, for instance—there would be an ironclad argument for legality.<sup>118</sup> Regardless of the seeming legal uncertainty, though, securing permission from the local board of education, which, as mentioned earlier, is responsible for sending out the notifications of compulsory school attendance, seems to be the most logical first step in removing one's child from public schooling.<sup>119</sup> For parents of children who are already refusing to go to school, the argument to the boards of education for exemption from the laws carry added persuasiveness: the *Monbusho's* liberal approach to the problem of school refusal represents educational reform by the carrot, not the stick, placing focus on the needs of the child to develop their individual personality as tantamount to the needs of the state to enforce compulsory attendance at school.<sup>120</sup> For the parent of a child who does not suffer from school refusal, the argument seems to hinge on whether or not a school board can be convinced that what education can and will be provided for the child will comport with similar standards of curriculum offered by the public schools. It is by such guidelines that homeschooling in the United States is made possible.<sup>121</sup> However, such guidelines for a home curriculum have not been identified by the *Monbusho*—which presents a potentially fatal flaw in an argument for a homeschooling exemption from an unsympathetic board of education—and which brings us to an argument for structural reform in Japanese education law.

#### IV. A HOMESCHOOLING ALTERNATIVE IN JAPAN?

In Japan, homeschooling is not explicitly mentioned by the *Monbusho* as an alternative to compulsory education; the same is not so for the United States. In the United States, homeschooling is explicitly recognized by many state governments (as well as the federal government) as an alternative to regular public schooling. The U.S. Department of Education's Office of Educational Research and Improvement, utilizing the Parent Survey of the National Household Education Surveys Program (1999), has compiled a "comprehensive set of information that may be used to estimate the number and characteristics of homeschoolers in the United States."<sup>122</sup> Homeschooling, as considered in the report, is defined as "[s]tudents . . . [whose] parents reported them being schooled at home instead of a public or private school . . . [whose] enrollment in public or private schools did not exceed 25 hours a week, and . . . [who] were not being homeschooled solely because of a temporary illness."<sup>123</sup> The report finds that in 1999, approximately

117. See Jean Pearce, *Home schooling*, JAPAN TIMES, June 14, 1998; see also Dave Carlson, *Homeschooling in Japan: Our Arrangements with the Local School Authorities*, 12 BILINGUAL JAPAN 16 (Sept./Oct. 2003), [http://www.asahi-net.or.jp/~ja8i-brtl/hs\\_stories.htm#Local](http://www.asahi-net.or.jp/~ja8i-brtl/hs_stories.htm#Local) (last visited Jan. 24, 2005).

118. See *supra* notes 104–06 and accompanying text.

119. See *supra* note 58.

120. See *supra* notes 101–11 and accompanying text.

121. See *infra* Part IV.

122. NAT'L CTR. EDUC. STATISTICS, U.S. DEP'T OF EDUC., HOMESCHOOLING IN THE UNITED STATES: 1999 (2001) [hereinafter *Homeschooling Report*], <http://nces.ed.gov/pubs2001/2001033.pdf> (last visited Jan. 24, 2005).

123. *Id.* at iv. The *Homeschooling Report* mentions a split among authorities over an exact definition of homeschooling. On the one hand, homeschooling as an educational alternative can be defined as a "grassroots home education movement." *Id.* at 18. On the other hand, it can be strictly defined in a legal sense by reference to "the laws and requirements that govern homeschooling from state to state." *Id.*

850,000 students were being homeschooled in the United States (or 1.7% of all U.S. students, aged five to seventeen).<sup>124</sup>

How are homeschooling laws in the United States promulgated? Essentially, only the state governments have the power to implement homeschooling laws. The Tenth Amendment of the U.S. Constitution provides that "[t]he powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>125</sup> The Department of Education notes quite bluntly that "[n]othing specific is said about education in the Constitution; therefore it falls outside federal authority."<sup>126</sup> Congress, in creating the Department of Education, made it explicitly clear that its establishment "shall not increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States and the local school systems and other instrumentalities of the States."<sup>127</sup> Since the federal government is expressly forbidden to "exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system,"<sup>128</sup> this leaves the implementation of a legal system of homeschooling to the state and local governments. States like New York have implemented detailed statutes and regulations that govern the homeschooling exceptions to their own compulsory education laws; the following is a brief explanation of the legalities of homeschooling in New York.

The compulsory education law in New York provides that one may homeschool one's children as long as the instruction provided is "given by a competent teacher" and is "at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where [the child] resides."<sup>129</sup> For the first eight years, the homeschooled child must also receive instruction in at least twelve subjects, including arithmetic, reading, writing, history, and other fundamental courses.<sup>130</sup> A homeschooled child must attend instruction for the same amount of time as students in public school, unless school authorities find that the instruction is of the requisite "substantial equival[ence] in amount and quality" to the public school instruction.<sup>131</sup> Before 1988, there was not a solid consensus among the courts in New York as to what exactly needed to be proven by the potential homeschooler in order to show that he/she has provided "substantially equivalent" instruction to his/her child. One case, *In re Falk*, in which parents were charged with educational neglect—the term for failing to provide adequate schooling for children under the meaning of the law<sup>132</sup>—, a New York court stated that "the words 'substantially equivalent' should be given their common and ordinary

124. *Id.* at 3. The methodology of the survey is not of interest for purposes of this comment.

125. U.S. CONST. amend. X.

126. U.S. Dept. of Educ., *An Overview of the U.S. Department of Education: What the Department of Education Does Not Do*, at [http://www.ed.gov/about/overview/focus/what\\_pg5.html#doesnot](http://www.ed.gov/about/overview/focus/what_pg5.html#doesnot) (last visited Jan. 24, 2005).

127. 20 U.S.C. § 3403(a) (2004).

128. *Id.* § 3403(b).

129. N.Y. EDUC. LAW § 3204(2) (2001). The law literally refers to "[i]nstruction given to a minor elsewhere than at a public school," but for applicative purposes it governs the legal requirements for homeschooling children in New York. See *Blackwelder v. Safnauer*, 866 F.2d 548, 549 (2d Cir. 1989).

130. N.Y. EDUC. LAW § 3204(3) (2001).

131. *Id.* § 3210(2)(d).

132. See N.Y. FAM. CT. ACT § 1012(f)(i) (2004) (defining "neglected child" as one "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care . . . in supplying the child with adequate . . . education in accordance with the provisions of part one of article sixty-five of the education law").

meaning, which is equal in worth or value."<sup>133</sup> The cases in New York seemed to suggest that some things a court will look at to determine equivalence are (1) the quantity of the instruction, (2) the quality of the instructor, and (3) the consistency of the instruction in making a determination.<sup>134</sup> Of course, different courts are known to take different approaches to what equality means, and this caused some uncertainty in the law.

In 1988, Regulation 100.10 of the Commissioner of the New York Education Department<sup>135</sup> was enacted in order to clear up uncertainties in the law by "provid[ing] a basis for an objective determination of substantial equivalence."<sup>136</sup> According to the New York Department of Education, "[a] home instruction program that adheres to the standards of . . . [Regulation] 100.10 at each stage of the process should be deemed *substantially equivalent*."<sup>137</sup> Regulation 100.10 contains a notice requirement for parents to inform the school authorities of their intention to homeschool and also a requirement for an Individualized Home Instruction Plan (IHIP).<sup>138</sup> Regulation 100.10 describes the required form and content of an IHIP, which a homeschooling parent must submit to their school district and which a school board, through the superintendent, must utilize in order to make a determination of "substantial equivalence."<sup>139</sup> Section (d) of Regulation 100.10 contains four requirements as to the content of an IHIP:

- (1) the child's name, age and grade level;
- (2) a list of the syllabi, curriculum materials, textbooks or plan of instruction to be used in each of the required subjects listed in subdivision (e) of this section;
- (3) the dates for submission to the school district of the parents' quarterly reports . . . . These reports shall be spaced in even and logical periods; and
- (4) the names of the individuals providing instruction.<sup>140</sup>

The Regulation also outlines requisite quarterly reports to the school district, requisite annual achievement assessments (or enunciated suitable alternative assessment methods), and the penalties for failure to comply with the aforementioned reports and assessments.<sup>141</sup> The penalties include having the homeschooling program put on probation and,

[i]f, during the period of probation, the superintendent of schools has reasonable grounds to believe that the program of home instruction is in substantial noncompliance with these regulations, the superintendent may require one or more home visits . . . [t]he purpose of [which] shall be to ascertain areas of noncompliance with [the] regulations and to determine methods of remediating any such deficiencies.<sup>142</sup>

133. *In re Falk*, 441 N.Y.S.2d 785, 789 (N.Y. Fam. Ct. Lewis County 1981).

134. *See id.*; *In re Franz*, 390 N.Y.S.2d 940 (N.Y. App. Div. 1977); *In re Thomas H.*, 357 N.Y.S.2d 384 (N.Y. Fam. Ct. Yates County 1974).

135. N.Y. COMP. CODES R. & REGS. tit. 8, § 100.10 (LEXIS current through Sept. 30, 2002).

136. U. of the St. of N.Y., St. Educ. Dept., *Home Instruction in New York State*, at <http://www.emsc.nysed.gov/nonpub/homeinstruction.html> (last visited Jan. 26, 2005).

137. *Id.*

138. N.Y. COMP. CODES R. & REGS. tit. 8, § 100.10(b), (d).

139. *See Appeal of White*, 28 ED. DEPT. REP. 511, 514 (N.Y. St. Commr. of Educ. Op. 12368, 1990).

140. N.Y. COMP. CODES R. & REGS. tit. 8, § 100.10(d).

141. *Id.* § 100.10(g)-(i).

142. *Id.* § 100.10(i)(3).



This, of course, is somewhat of a simplification of the procedure for full compliance with the compulsory education requirements for New York, but it serves as a useful example of how state education authorities can seek to address the needs of those members of the community who choose a homeschooling alternative for their children by eliminating uncertainty to the extent possible by legislation. Offering detailed guidelines on how compliance with the education law can be achieved fulfills a dual purpose: (1) it helps the education authorities determine that the home instruction being offered to children meets the standards of education that the law in New York designates as necessary for children (to avoid educational neglect) and (2) it helps the parents of homeschooled children fulfill their own obligation to see that the education being provided at home meets the requisite standards provided to students in public schools.<sup>143</sup> Though the law is not entirely free of uncertainty, the question of the legality of homeschooling in New York is a nonissue: as long as the letter of the law is followed, parents can homeschool their children with impunity.

Unfortunately, this does not seem to be the case with Japan. While, as mentioned earlier,<sup>144</sup> homeschooling is done by some parents in Japan without being in noncompliance with the compulsory education laws—with the permission of local boards of education or along the clearly enunciated exceptions (like children of foreigners)—there is not real certainty as to its legality. Japan has a real and growing problem with children who do not want to attend public school, which the *Monbusho* recognizes and is in the process of addressing.<sup>145</sup> Perhaps one reform that it should consider implementing is creating a clear exception to the compulsory education laws for those parents who are willing to educate their children on their own, at home. If the *Monbusho* is willing to relax its enforcement of the compulsory education laws ad hoc for the growing trend of school refusal, then it may be prepared to do the same for homeschooling. By following the detailed compliance procedures that some states in the United States have enacted in order to ensure that children are receiving a proper education at home, Japan can eliminate the pervasive uncertainty caused by the number of students who refuse to go to school, to the detriment of their own educational advancement as well as the advancement of Japan. Of course, there might be a significant administrative burden placed on the education authorities in Japan in implementing such a hands-on method of ensuring compliance with whatever new regulations might come out of compulsory education reform in Japan. It is, however, a cost that Japan might find less expensive in the long run than the alternative.

Benjamin G. Kemble\*

---

143. See *id.* § 100.10(a).

144. See *supra* notes 116–21 and accompanying text.

145. See *supra* Part III.A.

\* Benjamin G. Kemble is a 2005 J.D. candidate at The University of Texas School of Law. The author would like to thank his parents, without whose support and encouragement none of this would be possible. He would also like to thank his future wife, Betsy Jones, for her love and inspiration.

Copyright of Texas International Law Journal is the property of University of Texas at Austin School of Law Publications and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.