*With this column,* North Carolina Insight *launches a new regular feature designed to examine policymaking by the judicial branch of state government. Each issue will highlight a recent and significant opinion handed down by the state's courts. This initial effort takes a close look at the court's recent decision in* Larry Delconte v. State of North Carolina, *which upheld the right of parents to teach their children at home in lieu of attending public or conventional private schools. In the future, this column will examine other decisions by the N.C. Supreme Court or the N.C. Court of Appeals.*

# *When is a school a school?*

by Katherine White

Larry and Michele Delconte's legal battle against the state to educate their two children at home ended on May 7, 1985. The N.C. Supreme Court ruled that state law allows home instruction, so long as the home meets certain standards.[1]

The decision focused on a narrow interpretation of state statutes, but at the same time raised fundamental questions about constitutional rights—including freedom of religion and whether that freedom outweighs the state's responsibility to guarantee each child an education. The decision even raised the basic question of what precisely constitutes a school.

The Delconte's home instruction program, called the "Hallelujah School," gained Supreme Court approval because the Harnett County couple met statutory guidelines for private schools, according to the unanimous Court decision written by Associate Justice James Exum.

In 1969 and again in 1979, the N.C. Attorney General had held in two separate formal opinions that the state's compulsory school attendance laws prohibited home instruction[2] and required that public and nonpublic education be conducted in an institutional setting.[3] The Supreme Court's *Delconte* ruling nullified these opinions.

"We find nothing in the evolution of our compulsory school attendance laws to support a conclusion that the word 'school,' when used by the legislature in statutes bearing on compulsory attendance, evidences a legislative purpose to refer to a particular kind of instructional setting," ruled the Court. "Indeed, the evident purpose of ... recent statutes is to loosen, rather than tighten, the standards for nonpublic education in North Carolina."[4]

But the Court invited the General Assembly to reassess the statutes that allowed the Court to reach its conclusion that home instruction is permissible as long as certain academic criteria are met. "Whether home instruction ought to be permitted, and if so, the extent to which it should be regulated, are questions of public policy which are reasonably debatable. Our legislature may want to consider them and speak plainly about them," the Court said.

The legislature may choose to do just that. Even before the May 7 opinion, two state legislators—Sens. Helen Marvin (D-Gaston) and Dennis Winner (D-Buncombe) introduced a bill directing a study commission to evaluate the state's position on home instruction.[5] Winner explained, "Home education was at least worth looking at if you could ensure they (children) were getting a good education." Of the Court's ruling, Winner said he thought "the legislature never intended (to allow) home education."

The motivation for the study commission came from several of Winner's constituents, he said, including former public school teachers who complained that their children did not get an adequate education in public schools. Because of inadequate public instruction, he said, they wanted the option of teaching their children at home.

But until and unless the legislature takes formal action, the Court decision means that parents in North Carolina can teach their children as long as they meet certain criteria, including maintaining attendance records, immunizing against diseases, keeping a regular schedule, conducting safety and health inspections, administering annual tests and maintaining test scores, and providing information on operations to the appropriate state agencies.

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Beyond the Delcontes' argument that existing state statutes allow home instruction, the couple offered several constitutional reasons for justifying their position. The court did not have to rule on the constitutional questions in order to decide the *Delconte* case, but gave a strong signal that the justices would, in the right circumstances, lean toward the rights of individuals. The plaintiffs raised these constitutional points:

- The N.C. Constitution seems to permit children to be "educated by other means" than in public schools.[6] "It is clear that the North Carolina Constitution empowers the General Assembly to require that our children *be educated.* Whether the Constitution permits the General Assembly to prohibit their education at home is not clear," Exum wrote. The legislature historically has insisted only that the teaching setting, whatever it is, meet certain, objective standards, he added.
- The First Amendment to the U.S. Constitution, establishing freedom of religion, can take precedence over state compulsory schools laws.[7] Exum wrote that the U.S. Supreme Court "seems to consider the right of parents to guide both the religious future and the education generally of their children to be fundamental so as not to be interfered with in the absence of a compelling state interest."

At the same time, the Court recognized "that the state has a compelling interest in seeing that children are educated and may, constitutionally, establish minimum educational requirements and standards for education."

The Delcontes did not limit their arguments to religious beliefs, citing what they called "socio-psychological" reasons as other, nonreligious reasons for teaching their children at home. Mr. Delconte also testified at a Superior Court hearing that his family could not afford to send the children to a private school. And, he declared, he objected to the school's use of corporal punishment.

Because of these nonreligious objections to compulsory public school attendance, the Delcontes do not present a clean case for a court's decision on whether an individual's freedom of religion outweighs the state's interest in requiring education.

State Rep. Frank D. Sizemore III (R-Guilford), who filed a friend of the court brief in the case for The Christian Legal Society, a national group of lawyers and judges, said that the balancing of the two constitutional interests "would inevitably get involved into considering what kinds of responses—short of closing (a home school)—were reasonable to accommodate the state's interest.... Where those two cross, the basic (individual) right would still prevail. But I don't think we've had to cross that threshold."

State courts generally have been divided on a parent's right to educate a child at home simply because the parent believes state schools are inadequate. One friend of the court brief, noting the fact that at last count, 39 states allow some form of home instruction, cited the example of the state of New Jersey. That state has developed a model approach, placing the burden on the school system to show non-attendance first; then the parents must show that their home teaching is of equal quality to that of the public school. Finally, the school system must prove that home teaching deprives the child of an education. "The balanced approach takes account of both the state's interest in education and the parents' freedom to choose. In addition, and perhaps most important, it permits a greater focus on the best interests of the individual child," write Tobak and Zirkel in *Home Instruction: An Analysis of the Statutes and Case Law.*[8]

Should North Carolina adopt this approach? That is a question of public policy that the legislature must tackle. Choosing between the sometimes-competing demands of individual freedoms and the state's responsibility to educate its citizens guarantees that the next session of the General Assembly will have to make decisions that the N.C. Supreme Court could not. And that includes defining exactly what constitutes a "school" in North Carolina. □

FOOTNOTES

[1] *Larry Delconte v. State of North Carolina,* No. 9PA84, dec. May 7, 1985, 313 N.C. 384 (1985); 329 S.E.2d 636 (1985).

[2] 40 Op. Attorney General 211 (1969); 49 Op. Attorney General 8 (1979), on compulsory attendance laws.

[3] The Court relied on the legislature's definition of qualified nonpublic schools. NCGS 115C-555 requires that a nonpublic school have one of four characteristics, including that "it receives no funding from the state of North Carolina." The Delcontes' home school received no public funding.

[4] *Delconte v. State,* pp. 20-21.

[5] Senate Joint Resolution 224, introduced April 11, 1985: "The Legislative Research Commission is authorized to study whether home study programs should satisfy the requirement of compulsory school attendance." The study was authorized in chapter 790 of the 1985 Session Laws (SB 636), section 1 (24).

[6] Article IX, Section 3, North Carolina Constitution: "The General Assembly shall provide that every child of appropriate age and of sufficient mental and physical ability shall attend the public schools, unless educated by other means." The Court commented, "Whether these 'other means' would include home instruction is a serious question which we need not ... now address."

[7] *Wisconsin v. Yoder,* 406 U.S. 205 (1972).

[8] Tobak & Zirkel, *Home Instruction: An Analysis of the Statutes and Case Law,* 8 U. Dayton Law Review. 1 (1982). pps. 59-60.