CRIMINAL LAW; COMPULSORY EDUCATION—Convictions Were Based on Crimes Not Yet Committed Where an Essential Element of the Offense (Failure to Provide 120 Days of Public School Attendance for School Aged Children) Was Completely Omitted from the Charging Instrument—*State v. Trucke*, 410 N.W.2d 242 (Iowa 1987).

Defendants Greg and Karen Trucke began the fall, 1985, public school term by teaching their two school aged children[1] at home.[2] The couple conducted their home school program with little assistance or supervision.[3] Neither parent was a certified teacher.[4] The Truckes continued to teach their children at home throughout the month of September, 1985.[5]

The Superintendent of the Maple Valley School District, the public school district in which the Trucke family resided,[6] contacted the Truckes to determine if they were in compliance[7] with the Iowa compulsory education statute.[8] The statute requires parents to cause their school aged children to attend public school or, in the alternative, to obtain equivalent instruction by a certified teacher elsewhere.[9] The Truckes subsequently failed

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1. The children, Shawn and Wendy Trucke, were between seven and sixteen years old and were subject to compulsory school attendance requirements at the beginning of the 1985-86 school year. State v. Trucke, 410 N.W.2d 242, 244 (Iowa 1987). The parents maintained that their religious beliefs required home schooling of their children. Appellants' Brief at 8-9, State v. Trucke, 410 N.W.2d 242 (Iowa 1987).

2. State v. Trucke, 410 N.W.2d at 243. During the previous school year, 1984-85, the Trucke children had attended public schools. *Id.*

3. *Id.* In addition to instruction provided by the defendants, the Trucke children received approximately four hours of instruction per week from Susan Goodenow, asserted by the defendants to be a certified teacher. *Id.*

4. *Id.* at 244.

5. *Id.* at 243.

6. Dennis Weber was the Superintendent of the Maple Valley School District in which the Truckes resided. Appellants' Brief at 8-9, State v. Trucke, 410 N.W.2d 242 (Iowa 1987).

7. Monitoring to ensure compliance with the Iowa compulsory education statute is the responsibility of all school officers and employees who must promptly report truants to the school boards of the school districts. IOWA CODE § 299.15 (1987). *See also* IOWA ADMIN. CODE § 670, ch. 63.4 (1985) (rules of this chapter took effect on February 6, 1986).

8. State v. Trucke, 410 N.W.2d at 243. *See infra* note 9 for the text of the Iowa compulsory education statute.

9. IOWA CODE § 299.1 (1987):

> Attendance requirements. A person having control of a child over seven and under sixteen years of age, in proper physical and mental condition to attend school, shall cause the child to attend some public school for at least one hundred twenty days in each school year, commencing no sooner than the first day of September, unless the board of school directors establishes a later date, which date shall not be later than the first Monday in December.
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> . . . .
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> In lieu of such attendance such child may attend upon equivalent instruction by

to convince the school board that they had provided equivalent instruction, by a certified teacher, in lieu of public school attendance.[10]

The school board referred the Truckes' non-compliance to the Monona County Attorney.[11] On October 1, 1985, complaints were filed against Greg and Karen Trucke charging them with the simple misdemeanor offenses[12] of failure to cause their two children to attend public schools[13] and failure to file reports of private instruction.[14] At trial before a magistrate,[15] the Truckes were convicted on four counts of failure to cause their children to attend public schools. Appeal of the decision was made to the Iowa District Court for Monona County which affirmed the convictions in the spring of 1986.[16] The Truckes appealed to the Iowa Supreme Court which granted discretionary review.[17]

In the fall of 1986, while the appeal was pending before the Iowa Supreme Court, the Truckes continued to operate a home school for their children.[18] In mid-October, 1986, Karen and Greg Trucke and their children brought suit in United States District Court for the Northern District of Iowa seeking to enjoin members of the school board, the superintendent and the county attorney from prosecuting the Truckes for additional violations of the Iowa compulsory education statute.[19] The United States District

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a certified teacher elsewhere.

10. State v. Trucke, 410 N.W.2d at 243. *See also* IOWA CODE § 299.1 (1987) (unnumbered paragraph 3).

11. Michael Jensen was County Attorney of Monona County, Iowa, at the time of the incidents giving rise to this case. Trucke v. Erlemeier, 657 F. Supp. 1382, 1382 (N.D. Iowa 1987).

12. IOWA CODE § 299.6 (1987):

> Violations. Any person who shall violate any of the provisions of sections 299.1 to 299.5, inclusive, shall be guilty of a simple misdemeanor.

13. IOWA CODE § 299.1 (1987). The Truckes were charged with one violation per child, per parent, for a total of four charges.

14. IOWA CODE §§299.3-.4 (1987). Reports which detail private instruction must be furnished by the principal of the private school upon request of the school board of the school district in which the private school is conducted. IOWA CODE § 299.3 (1987). A certificate which states the names, dates and details of instruction and the names of teachers of school aged children who attend private schools must be furnished by the parents of the children upon the request of the school board. IOWA CODE § 299.4 (1987). Greg and Karen Trucke were each charged with one count of failure to file reports of private instruction. Appellants' Brief at 6-7, State v. Trucke, 410 N.W.2d 242 (Iowa 1987). The two charges were dismissed by the magistrate. *Id.*

15. State v. Trucke, 410 N.W.2d at 244. Magistrate Michael McGrane presided. Appellants' Brief at 9, State v. Trucke, 410 N.W.2d 242 (Iowa 1987).

16. State v. Trucke, Nos. 7-189 to 7-192 (March 3, 1986). Richard J. Vipond, J., presided over the district court appeal. State v. Trucke, 410 N.W.2d 242, 242 (Iowa 1987).

17. *Id.* at 243.

18. Trucke v. Erlemeier, 657 F. Supp. at 1385.

19. *Id.* Greg and Karen Trucke and their children filed the action under 42 U.S.C. § 1983 seeking damages, declaratory judgments, an injunction and attorney's fees. *Id.*

Court refused to grant an injunction.[20]

The Iowa Supreme Court subsequently reached a decision in the state action: *held*, reversed.[21] Where an essential element of the offense, the failure to provide for 120 days of public school attendance for school aged children, was completely omitted from the charging instrument, the convictions were based on crimes not yet committed.

The Iowa Supreme Court began its discussion of the challenges raised by the Truckes to the Iowa compulsory education statute by recognizing a "duty to avoid constitutional questions when the merits of a case may be fairly decided without facing them."[22] With these words the court set aside the Truckes' contention that the compulsory education statute, taken in its entirety, violated their constitutional rights under the first and fourteenth amendments to the United States Constitution.[23]

With similar brevity, the Iowa Supreme Court recognized and set aside the Truckes' challenge to the constitutionality of the "equivalent instruction" component of the Iowa compulsory education statute.[24] The Truckes asserted that the equivalent instruction requirement was unconstitutionally void for vagueness.[25] The Iowa Supreme Court responded to the assertion in a portion of its procedural history of the case by referring to the district court's treatment of the void for vagueness issue.[26] The district court had conceded that the term equivalent instruction "may be unconstitutionally vague" and had affirmed the convictions upon the "defendants' failure to have their children attend a school which provides instruction by a certified

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20. *Id.* The United States District Court, Donald E. O'Brien, C.J., presiding, denied plaintiffs' motion for a temporary restraining order or preliminary injunction. *Id.* The court abstained from deciding the constitutionality of IOWA ADMIN. CODE § 670, ch. 63.4 (1986) (regulation vesting local school board with the responsibility to determine whether or not private instruction was equivalent to public instruction). Trucke v. Erlemeier, 657 F. Supp. at 1387-88. The court opened discovery and allowed the filing of additional pleadings in preparation for considering the constitutionality of the compulsory school attendance statute, IOWA CODE § 299.1 (1987). Trucke v. Erlemeier, 657 F. Supp. at 1389, 1394.

21. State v. Trucke, 410 N.W.2d at 245. The appeal was considered en banc. *Id.* at 243. Justice Neuman wrote for the majority. *Id.*

22. *Id.* at 243 (quoting *In re* J.A.N., 346 N.W.2d 495, 498 (Iowa 1984) (order suppressing the confession of a juvenile was affirmed on statutory grounds while avoiding constitutional issues)).

23. *Id.* Challenges to the Iowa compulsory education statute based on the first and fourteenth amendments of the United States Constitution are presented at considerable length in Appellants' Brief. Appellants' Brief at 29-49, State v. Trucke, 410 N.W.2d 242 (Iowa 1987).

24. State v. Trucke, 410 N.W.2d at 244. *See supra* note 9 for the text of the equivalent instruction component of the compulsory education statute, IOWA CODE § 299.1 (1987) (unnumbered paragraph 3).

25. State v. Trucke, 410 N.W.2d at 244. The void for vagueness challenge is extensively presented in Appellants' Brief. Appellants' Brief at 13-19, State v. Trucke, 410 N.W.2d 242 (Iowa 1987).

26. State v. Trucke, 410 N.W.2d at 244.

teacher for at least one hundred twenty days during the school year."[27]

In a footnote to the above quotation the Iowa Supreme Court made reference to its own treatment of the vagueness issue in *Johnson v. Charles City Community Schools Board*,[28] and the subsequent application of the decision by the United States District Court for the Southern District of Iowa in *Fellowship Baptist Church v. Benton*.[29] In *Charles City*, the parents of the children attending a school operated by a fundamentalist church were charged with violating the Iowa compulsory education statute after having unsuccessfully sought exemption from the statute through the State Board of Public Instruction.[30] The parents brought a declaratory judgment action challenging Iowa's compulsory education statute, including the reporting requirements of the statute, and sought judicial review of the decision of the State Board of Public Instruction.[31] The Iowa Supreme Court recognized that the state has authority to intrude into the operation of private religious schools at least in order to set basic parameters for curriculum and teacher qualifications.[32] In its holding the court found that failure to exempt fundamentalist Christian parents from the compulsory education statute did *not* violate either appellants' first amendment rights or their fourteenth amendment right to equal protection.[33] With regard to the void for vagueness argument, the court in *Charles City* noted that the issue was not raised on appeal because the plaintiff parents might have been reluctant to challenge the lack of administrative standards providing definition to the compulsory education statute while contending that the state had no right to set standards in the first place.[34]

In *Fellowship Baptist Church v. Benton*, the United States District Court for the Southern District of Iowa rejected the request of parents of children enrolled in two Christian schools for relief from prosecution under the Iowa compulsory education statute.[35] However, the court specifically held the equivalent instruction requirement to be unconstitutionally vague, after the plaintiffs had raised the issue.[36] On appeal the United States Court

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27. *Id.* (footnote omitted).

28. Johnson v. Charles City Comm. Schools Bd., 368 N.W.2d 74 (Iowa 1985), *cert. denied*, 106 S. Ct. 594 (1985).

29. Fellowship Baptist Church v. Benton, 620 F. Supp. 308 (S.D. Iowa 1985), *aff'd in part, rev'd in part*, 815 F.2d 485 (8th Cir. 1987).

30. The exception in this context refers to the "Amish Exception" to the requirement that private schools have state certified teachers. IOWA CODE § 299.24 (1987). This exception has been granted only to one Conservative Mennonite school and several Amish schools, which educate children belonging to religious sects which follow a lifestyle of separateness from modern society. Fellowship Baptist Church v. Benton, 620 F. Supp. at 319.

31. Johnson v. Charles City Comm. Schools Bd., 368 N.W.2d at 76.

32. *Id.* at 76-78.

33. *Id.* at 83-84.

34. *Id.* at 79.

35. Fellowship Baptist Church v. Benton, 620 F. Supp. at 320.

36. *Id.* at 318.

of Appeals for the Eighth Circuit reversed and remanded the district court's void for vagueness holding with instructions to review the statutory equivalent instruction requirement in light of recently promulgated administrative rules giving definition to the statute.[37]

Instead of examining the constitutional challenges presented by the appellants in *State v. Trucke*, the Iowa Supreme Court resorted to a finding of an anticipatory violation of the compulsory education statute to overturn the Truckes' convictions.[38] The court found that the anticipatory violation occurred when complaints were filed against the Truckes prior to the date when a violation of the Iowa compulsory education statute actually occurred.[39]

It is of interest that the court raised the issue of anticipatory violation *sua sponte*.[40] The court relied upon Iowa Rule of Criminal Procedure 10(2)(b) which provides that an objection for failure to charge an offense in the indictment shall be noticed by the court at any time during the proceeding.[41] No Iowa cases were cited in support of the application of the Iowa rule by the court.[42] However, the court referred to the counterpart to Iowa Rule 10(2)(b) in the Federal Rules of Criminal Procedure and to two federal cases in support of the conclusion that lack of a proper charge in the indictment is properly noticed at any time.[43] A federal court in one of the two cases cited, *United States v. Purvis*, specifically stated: "[t]he court can raise the issue [of failure to allege each material element of an offense] *sua sponte*."[44]

To reach the conclusion that an anticipatory violation had occurred the Iowa Supreme Court developed a new interpretation of the language of the compulsory education statute.[45] The relevant language of the Iowa compulsory education statute states:

> A person having control of a [school aged] child . . . shall cause the child to attend some public school for at least 120 days in each school year, commencing no sooner than the first day of September, unless the board of school directors establishes a later date, [no] later than the first

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37. Fellowship Baptist Church v. Benton, 815 F.2d 485, 496, 500 (8th Cir. 1987). The text of regulations designed to implement the equivalent instruction requirement may be found at IOWA ADMIN. CODE § 670, ch. 63 (1986).

38. State v. Trucke, 410 N.W.2d at 244.

39. *Id.*

40. *Id.* at 243.

41. *Id. See* Iowa R. Crim. P. 10(2)(b).

42. State v. Trucke, 410 N.W.2d at 243.

43. *Id.* The Iowa Supreme Court cited United States v. Manusak, 234 F.2d 421 (3d Cir. 1956) (conviction for theft of goods from interstate shipment overturned for lack of specifically enumerated places or facilities, from which goods were allegedly taken, in the indictment); United States v. Purvis, 580 F.2d 853 (5th Cir. 1978) (indictment not deficient for lack of words alleging specific intent of defendant sheriff and deputies to violate the civil rights of an inmate shot during a jail escape attempt).

44. United States v. Purvis, 580 F.2d at 858.

45. State v. Trucke, 410 N.W.2d at 244.

> Monday in December.
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> In lieu of such attendance such child may attend upon equivalent instruction by a certified teacher elsewhere.[46]

The court interpreted the phrase "in each school year" to apply to an entire year which runs from September 1 of a base year to August 31 of the following year[47] and stated that:

> *[N]o* parent—including the Truckes—could be in compliance with the statute by September 30 of any given school year, inasmuch as only thirty days of the school year has passed. Excluding weekends and holidays, the Truckes still had approximately 220 days left in the year to comply with the statute.[48]

The majority conceded that given a different set of facts the state could demonstrate that a given defendant would be unable to meet the 120-day attendance requirement.[49] But, the court reiterated, no effort was made to show that the Truckes were unable to meet the 120-day attendance requirement as interpreted by the court.[50]

Before the court concluded, it made a brief comparison of the interests of the state and the appellants. The court recognized that education is "perhaps the most important function of state government."[51] But the court found the goals of the state to be outweighed by the rights of parents accused of violating the compulsory education statute: "where criminal sanctions are invoked to further this noble purpose, the State cannot dispense with adherence to fundamental rules of criminal procedure."[52] Concluding that the instant case did not meet the requirement that all material elements of an offense be set out in the charging document, the Iowa Supreme Court reversed and remanded to the district court with instructions to dismiss the prosecutions.[53]

The Iowa Supreme Court's approach of avoiding the constitutional challenges to Iowa's compulsory education statute drew fire from Justice Harris in his dissent: "[i]t is wrong to go so far as voiding a statute in order to avoid a constitutional question. I would address the merits of defendants' constitutional challenge."[54]

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46. IOWA CODE § 299.1 (1987).
47. State v. Trucke, 410 N.W.2d at 244.
48. *Id.* (emphasis in original).
49. *Id.* In a hypothetical example, using the September 1, 1987, to August 30, 1988, school year, the court would require that parents not be held criminally responsible for withholding their children from public schools until approximately March 14, 1988. If children were not required to attend school until March 14, 1988, it would not be possible for them to attend 120 days of school in the remainder of the school year as defined by the court.
50. *Id.*
51. *Id.* at 244-45 (quoting Brown v. Board of Educ., 347 U.S. 483, 493 (1954)).
52. *Id.* at 245.
53. *Id.*
54. State v. Trucke, 410 N.W.2d at 247 (Harris, J., dissenting) (Reynoldson, C.J., and

Previous challenges to the constitutionality of the Iowa compulsory education statute have been met head-on by the courts. In *Charles City*, the appellant parents asserted that the state could not intrude into the certification of teachers or the makeup of the curriculum of the private schools their children attended because such intrusions would be violative of the first amendment.[55] The Iowa Supreme Court rejected the argument "out of hand" and stated that the "state has a clear right to set minimum educational standards for all of its children and a corresponding responsibility to see to it that those standards are honored."[56] Because of its scope, the *Charles City* decision would appear to set aside the challenges to the certification and reporting elements of the Iowa compulsory education statute. The sole remaining element to be challenged was the equivalent instruction requirement, which was not raised by the appellant parents in *Charles City*.[57]

The alternative instruction requirement was challenged by appellants in *Fellowship Baptist* on the ground that the requirement was unconstitutionally vague.[58] *Fellowship Baptist* was factually similar to *Charles City* in that parents of children enrolled in fundamentalist church schools challenged the statute.[59] Both the federal district and appeals courts rejected appellants' challenges to the teacher certification and reporting requirements.[60] With regard to alternative instruction, the United States District Court for the Southern District of Iowa agreed with appellants that the requirement was unconstitutionally vague, despite the argument by the state that other statutes sufficiently defined alternative instruction.[61] The Eighth Circuit Court of Appeals agreed with the conclusion that the other statutes were not curative, but remanded the issue for reconsideration in light of regulations recently promulgated by the State Board of Public Instruction to define equivalent instruction.[62]

In *Fellowship Baptist* the Eighth Circuit Court of Appeals applied a balancing test in order to analyze each constitutional challenge to the compulsory education statute.[63] Specifically, the burden that the components of the statute placed upon the appellants' freedom of religion was weighed

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McGiverin, J., joined in the dissent).

55. Johnson v. Charles City Comm. Schools Bd., 368 N.W.2d at 76-77.

56. *Id.* at 79.

57. *Id.* at 79-80.

58. Fellowship Baptist Church v. Benton, 620 F. Supp. at 317.

59. *Id.* at 310.

60. Fellowship Baptist Church v. Benton, 815 F.2d at 492, 494.

61. Fellowship Baptist Church v. Benton, 620 F. Supp. at 318.

62. Fellowship Baptist Church v. Benton, 815 F.2d at 495-96. The new regulations were developed in response to the *Charles City* litigation. *Id.* The regulations took effect February 6, 1986. IOWA ADMIN. CODE § 670, ch. 63 (1986).

63. Fellowship Baptist Church v. Benton, 815 F.2d at 491, 494, 497-98.

against the state's interest in the education of its school aged children.[64] In *Trucke* the Iowa Supreme Court majority briefly compared the interests of the parents in avoiding the misdemeanor prosecutions (which lacked the proper procedural safeguards of providing material elements of the offense charged) with the state's primary interest in securing an adequate education for its children.[65] The court's comparison amounted to a balancing of the constitutional interests of the parties, despite the fact that the court had explicitly stated it would avoid constitutional issues.[66] Such a balancing of individual rights and state interests could have been explicitly acknowledged in the *Trucke* case if the court had seen fit to do so. With regard to the certification and reporting elements of the compulsory education statute, state interests have already been found to prevail over private interests.[67]

The dissenting opinion did not shrink from a balancing of interests.[68] Justice Harris chose to focus on the rights of Iowa children, instead of those of the parents or the state: "a basic education is every child's birthright and . . . this right takes precedence over the conflicting wishes of the child or the child's parents."[69]

The *Trucke* majority found a material element to be missing from the charging document in that not enough time had elapsed for the Truckes to violate the compulsory education statute.[70] The court's conclusion was based on an interpretation of the language of the statute which effectively delays the filing of charges for non-compliance until a typical school year is almost over. The dissenting opinion was sharply critical of the majority interpretation and suggested another approach.[71] While conceding that the language of the statute is awkward, Justice Harris stated:

> An appellate court can react to a poorly drafted statute in either of two ways. It can seize upon the awkward language, give it an impractical interpretation and blame the resulting devastation on the legislature. Or it can seek out the legislative intent in a reasonable and practical manner. . . .
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> We have a duty to consider the objects sought to be accomplished and attempt a reasonable construction of the provisions that will give effect to their purposes. We must avoid a strained, impractical or absurd construction.[72]

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64. *Id.*
65. State v. Trucke, 410 N.W.2d at 245.
66. *Id.* at 243.
67. *See supra* notes 4, 8-9 and accompanying text.
68. State v. Trucke, 410 N.W.2d at 245 (Harris, J., dissenting).
69. *Id.*
70. *Id.* at 243-44.
71. *Id.* at 245 (Harris, J., dissenting).
72. *Id.* at 246 (Harris, J., dissenting) (quoting *In re* Keegan, 369 N.W.2d 447, 449-50

Justice Harris found the intent of the legislature was to compel school attendance for all Iowa children so that they might obtain the basic education which is their birthright.[73]

Using standard rules of statutory construction Justice Harris produced what he termed "a more rational interpretation" of the compulsory education statute.[74] Justice Harris' interpretation would set the beginning of the school year between September 1st and December 1st at the direction of the school board, require school to meet regularly thereafter for a 180-day school year, and mandate 120 days of actual attendance by students.[75]

In contrast, the majority's interpretation does not compel attendance (regular or equivalent in nature) to commence until 120 calendar days before the next school year begins.[76] Consequently, parents could not be prosecuted for violations of the statute until only a few weeks remained in the regular school year.

To require that authorities wait to prosecute until mid-spring of a school year presumes that avoidance of the compulsory education requirements (including equivalent instruction by a certified teacher) cannot be established at an earlier date. But, where statements of intent are made by parents in combination with the absence of their school aged children from public schools for a period of several weeks or more, sufficient evidence exists to establish a *prima facie* violation of the statute.[77] The Trucke children had been absent for one month when their parents were charged with violations of the statute and for two and one-half months when their parents were tried before the magistrate.[78]

The result reached by the majority is based upon an interpretation which is at best novel and at its worst strained, impractical and absurd. Justice Harris termed it "preposterous."[79]

The majority decision will have a serious impact if enforced throughout Iowa. In the words of Justice Harris the majority interpretation "completely gutted" the compulsory education statute.[80] The impact will be felt by many individuals other than the Truckes. Enforcement against the parents of truants, who are not absent for religious reasons, will be delayed until the truant children have missed most of a school year—which will have to be

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(Iowa 1985)).

73. *Id.* (Harris, J., dissenting).

74. *Id.* (Harris, J., dissenting).

75. *Id.* The 180-day school year requirement is set out at IOWA ADMIN. CODE § 670, ch. 3.3(5).

76. State v. Trucke, 410 N.W.2d at 246 (Harris, J., dissenting). See note 45, *supra*, for a hypothetical application of the majority interpretation of the requirement of 120 days attendance per school year.

77. State v. Trucke, 410 N.W.2d at 246 (Harris, J., dissenting).

78. *Id.* at 246, n.1 (Harris, J., dissenting).

79. *Id.* at 246 (Harris, J., dissenting).

80. *Id.* at 245 (Harris, J., dissenting).

made up later.[81] For example, the children of migrant workers might never be educated if enforcement against their parents had to wait until the final weeks of the regular school year.[82] In the words of Justice Harris:

> [It is hard to calculate] how many children will be denied minimum educational requirements by [the majority decision], but for them the tragedy is incalculable . . . . Given a choice, we should not deny children this crucial preparation [*i.e.*, a basic education] merely because we perceive some explainable flaw in the statutory word scheme.[83]

The *Trucke* decision is likely to draw a response from the Iowa Legislature during the upcoming 1988 session, in the form of an amendment to the Iowa compulsory education statute.

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81. *Id.* (Harris, J., dissenting).
82. State v. Trucke, 2d Brief of Appellee, at 11, 410 N.W.2d 242 (Iowa 1987).
83. State v. Trucke, 410 N.W.2d at 245 (Harris, J., dissenting).