

## Chalk Talk—

# Dispelling the Rational Basis for Homeschooler Exclusion from High School Interscholastic Athletics

## I. INTRODUCTION

The United States has long embraced a tradition of strong parental involvement in the educational development of our children, and it is not surprising that the concept of homeschooling is as old as the nation itself. However, as the existence of the homeschooling movement demonstrates, Americans have widely divergent views about what is important in education. Parents decide to homeschool their children for a variety of reasons, but, certainly, all who do so would agree that they homeschool because they desire the best educational experience for their children. In recognition of this goal, the United States Supreme Court and all states recognize the right of parents to homeschool their children.<sup>1</sup> This recognition has facilitated an exponential growth in the number of children being educated at home, and statistics indicate this number will increase.<sup>2</sup>

Although homeschooling is on the rise, some homeschoolers have found that they lack certain benefits of public education. Chief among them is participation in interscholastic athletics. Stark disagreement exists as to whether the voluntary decision to homeschool should bring with it a forfeiture of the opportunity for involvement in public school athletics. The question is certainly one of controversy as parents who support participation may ultimately have to submit to some form of educational oversight, which undermines the reasoning behind the deci-

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1. *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972); Paul J. Batista & Lance C. Hatfield, *Learn at Home, Play at School: A State-by-State Examination of Legislation, Litigation and Athletic Association Rules Governing Public School Athletic Participation by Homeschool Students*, 15 J. Legal Aspects Sport 213, 217-18 (2005).

2. See National Home Education Research Institute, *Research Facts on Homeschooling*, <http://www.nheri.org/content/view/199/> (last updated July 2, 2008).

sion to homeschool. In fact, full-time enrollment requirements for athletic participation may compel some parents to abandon homeschooling altogether. At the same time, school administrators express financial, academic, and ethical reasons for disallowing students, who are not enrolled, to represent the school in athletic competition.

## II. CONSTITUTIONAL CLAIMS

The pivotal issue in this ongoing controversy is whether restricting homeschooled students' eligibility is acceptable under the Constitution. Parents have a protected liberty interest in the upbringing and education of their children.<sup>3</sup> However, homeschooled students argue that they have a right guaranteed by the federal or their respective state's Constitution to participate in interscholastic athletics and any infringement of this right violates their due process rights.

### A. Due Process

When bringing a substantive Due Process Clause claim, the Court will decide whether the proper standard of review is strict scrutiny or rational basis.<sup>4</sup> The Court will apply a strict scrutiny analysis if it finds that the state's action infringes on a fundamental right but will apply only rational basis analysis if no fundamental right is involved.<sup>5</sup> The Supreme Court has firmly rejected the notion that participation in interscholastic athletics is a fundamental right.<sup>6</sup> However, a conclusion that a right is not fundamental under the federal Constitution does not automatically preclude it from being considered fundamental under a state's constitution.<sup>7</sup>

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3. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

4. Erwin Chemerinsky, *Constitutional Law* p. 818 (2d ed., Aspen 2005).

5. *Id.* at 820.

6. Johnathan Pucci Diggin, *Constitutional Law-Equal Protection-School District Policy that Restricts Participation in Extracurricular Activities to Public School Students Does Not Violate a Private School Student's Equal Protection Rights*, 8 Seton Hall J. Sport L. 327, 329-330 (1998). See also *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (holding that education itself is not a fundamental right. By extrapolation, athletics provided through the education system would also not be considered fundamental).

7. See *Bartmess v. Board of Trustees of Sch. Dist. No. 1*, 726 P.2d 801 (Mont. 1986).

The constitution of every state provides for a system of public education,<sup>8</sup> and several states have concluded that education is a fundamental right under their respective constitutions.<sup>9</sup> Homeschoolers argue that this right to an education encompasses the right to participate in interscholastic athletics. Yet, even where the right to education has been deemed fundamental, the right has not been extended to include participation in interscholastic athletics.<sup>10</sup> Participation is uniformly considered to be merely a privilege.<sup>11</sup> Therefore, while the importance of participation in interscholastic athletics requires scrutiny as a matter of law, only a rational basis for excluding homeschooled students must be demonstrated.<sup>12</sup> In order to be upheld, there must only be a rational relation between the ban and a legitimate state objective.<sup>13</sup> Under this deferential standard of review, courts have routinely refused to allow homeschooled students access to public school athletics.<sup>14</sup>

The question still remains whether this is the correct conclusion. This Note maintains that where an outright blanket exclusion of homeschooled students is in place, those rules and regulations should not survive even the rational basis standard of review and the exclusion of homeschooled students violates due process principles. Perhaps the strongest evidence that full-time attendance rules are not truly rationally related to the furnishing of public education is the number of states with statutes that successfully allow homeschoolers access to public school athletics.

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8. Ala. Const. art. XIV, § 256, amended by Ala. Const. amend. 111; Alaska Const. art. VII, § 1; Ariz. Const. art. XI, § 1; Ark. Const. art. XIV, § 1; Cal. Const. art. IX, § 1; Colo. Const. art. IX, § 2; Conn. Const. art. VIII, § 1; Del. Const. art. X, § 1; Fla. Const. art. IX, § 1; Ga. Const. art. VIII, § 1; Haw. Const. art. IX, § 1; Idaho Const. art. IX, § 1; Ill. Const. art. X, § 1; Ind. Const. art. VIII, § 1; Iowa Const. art. IX, 2nd, § 3; Kan. Const. art. VI, § 1; Ky. Const. § 183; La. Const. art. VIII, preamble & § 1; Me. Const. art. VIII, § 1; Md. Const. art. VIII, § 1; Mass. Const. pt. 2, ch. 5, § 91; Mich. Const. art. VIII, §§ 1 & 2; Minn. Const. art. XIII, § 1; Miss. Const. art. VIII, §§ 201 & 205; Mo. Const. art. IX, § 1(a); Mont. Const. art. X, §§ 1, 2; Neb. Const. art. VII, § 1; Nev. Const. art. XI, § 2; N.H. Const. pt. 2, art. 83; N.J. Const. art. VIII, § 4; N.M. Const. art. XII, § 1; N.Y. Const. art. XI, § 1; N.C. Const. art. IX, §§ 1, 2; N.D. Const. art. VIII, §§ 1, 2; Ohio Const. art. VI, § 2; Okla. Const. art. XIII, § 1; Or. Const. art. VIII, § 3; Pa. Const. art. III, § 14; R.I. Const. art. XII, § 1, 4; S.C. Const. art. XI, § III; S.D. Const. art. VIII, § 1; Tenn. Const. art. II, § 12; Tex. Const. art. VII, § 1; Utah Const. art. X, § 1; Vt. Const. ch. II, § 68; Va. Const. art. VIII, § 1; Wash. Const. art. IX, § 2; W.Va. Const. art. XII, § 1; Wis. Const. art. X, §§ 2, 3; Wyo. Const. art. VII, §§ 1, 9.

9. See Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 Temp. L. Rev. 1325, 1330-35 (1992).

10. *Kite v. Marshall*, 661 F.2d 1027, 1030 (5th Cir. 1981); See also *Ind. High Sch. Athletic Assn., Inc. v. Carlberg by Carlberg*, 694 N.E.2d 222, 236-37 (Ind. 1997).

11. See e.g. *M.H. v. Mont. High Sch. Assn.*, 280 Mont. 123, 136 (1996).

12. Chemerinsky, *supra* n. 4, at 818.

13. *Id.* at 815.

14. See e.g. *Bradstreet v. Sobol*, 165 Misc. 2d 931, 932 (N.Y. 1995).

## B. Rational Basis Analysis

Public school administrators express concerns over accepting "non-students" as participants citing limited resources, fair competition, and control over the school activities for which the administrators are responsible as the rational basis for the exclusion of homeschooled students from interscholastic sports.<sup>15</sup> The principal justification offered in denying homeschoolers participation is the state's interest in promoting academics over athletics.<sup>16</sup> The state's interest is implemented by making a student's athletic eligibility contingent upon achieving certain academic standards. Officials claim to be unable to satisfactorily monitor the classroom activities, grades, and attendance of homeschooled students.<sup>17</sup> Ensuring academic standards and prioritizing academics over extracurricular sports are valid objectives. Nevertheless, the level of response to the perceived inequities in measuring academic eligibility between public school students and homeschooled students oversteps rational bounds. The mechanism used to ensure academic standards (full-time enrollment) automatically excludes homeschooled children regardless of the child's actual academic ability. The ability or inability to meet academic standards, not enrollment, should serve as the distinguishing factor. If the objective is to ensure academic standards, the blanket prohibition has more to do with an arbitrary distinction than it does with ensuring a requisite educational level.

The school could easily provide objective standards, such as nationally standardized achievement tests, to assess a homeschooled child's academic progress. Requiring a homeschooled student to take and obtain a certain score on such a test would meet the need for ensuring proper and accurate academic standards with little difficulty. For example, in Oregon, homeschooled students can meet academic eligibility by taking an Oregon Board of Education approved achievement test,<sup>18</sup> and the student's score must be at or above the 23rd percentile based on national averages.<sup>19</sup> Therefore, the legitimate goal of prioritizing academics cannot provide a rational basis for the total exclusion of homeschooled students from interscholastic sports when unproblematic measures exist to ensure that each homeschooled child who participates in school athlet-

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15. Batista & Hatfield, *supra* n. 1, at 223.

16. See e.g. *Jones v. West Virginia State Bd. of Educ.*, 218 W. Va. 52, 59 (W. Va. 2005).

17. *Id.*

18. Or. Rev. Stat. § 339.460 (1) (b) (A) (2003).

19. *Id.*

ics has satisfactorily achieved the state's determined requisite level of education.

Administrators also express concern that parents of students with poor academic performance might withdraw those students from public school and begin homeschooling in order to maintain their athletic eligibility. While preventing such manipulation of the system is a legitimate objective, this potential problem does not provide a rational basis for a blanket prohibition that keeps homeschooled children out of interscholastic athletics altogether. In states that allow participation, many have devised appropriate measures to ensure that homeschool cannot be used solely as a means to maintain the athletic eligibility of an otherwise academically ineligible public school student. For example, in Idaho, a public school student who is ineligible to participate in nonacademic activities is not allowed to participate as a homeschooled student for the remainder of the school year, or in the following year,<sup>20</sup> in which he or she became ineligible. Thus, if homeschoolers are allowed access, simple measures are available to ensure that homeschooling will not become a loophole to skirt public school academic requirements.

School districts also cite avoiding the "administrative nightmare," which would result if homeschool students were allowed access, as a rational basis for exclusion.<sup>21</sup> School administrators argue that being required to ensure that homeschoolers meet the same criteria as full-time students would place an unreasonable burden on them.<sup>22</sup> While this presents a genuine concern on the part of public educators, access for homeschoolers would not be exceedingly difficult to provide. In every state there already exists an institutional system specifically designed to provide public education to all children within the state.<sup>23</sup> "[R]ather than seeking substantial alteration of the status quo, homeschoolers are simply asking for a subset of an existing benefit in the context of a society with functioning institutions well suited to grant it."<sup>24</sup>

School administrators also claim that the state's interest in allocating limited financial resources provides a rational basis for the decision to

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20. Idaho Code Ann. §33-203 (5) (2002).

21. See Lisa M. Lukasik, *The Latest Home Education Challenge: The Relationship Between Home-Schools and Public Schools*, 74 N.C. L. Rev. 1913, 1967-69 (1996).

22. William Grob, *Access Denied: Prohibiting Homeschooled Students from Participating in Public-School Athletics and Activities*, 16 Ga. St. U. L. Rev. 823, 841 (2000).

23. *Supra* n. 8.

24. David W. Fuller, *Public School Access: The Constitutional Right of Home-Schoolers to "Opt In" to Public Education on a Part-Time Basis*, 82 Minn. L. Rev. 1599, 1627 (1998).

bar homeschooled students from athletic programs.<sup>25</sup> Unquestionably, athletic programs involve costs for facilities, maintenance, coaches, officials, uniforms and equipment. Nevertheless, there is no reason to believe the involvement of a homeschooled student will result in increased costs. In fact, the bulk of the expenses related to an athletic team, such as costs for facilities and coaching staff, are fixed at the time the school decides to field a team. Also, most athletic programs are structured to offer only a limited number of available roster spots. Therefore, costs would not be increased by a homeschooled child's participation because the homeschooled child would simply be filling a roster spot on the team which, even if no homeschoolers were allowed access, would still be occupied by another public school student.

Perhaps the real, underlying objective is to ensure that limited financial resources be spent only on full-time students. It is not difficult to imagine public school parents upset that their child has lost a spot on the team or playing time as a result of a homeschooled student. While the wise expenditure of limited educational dollars is a legitimate objective, ensuring that limited athletic resources or spots be used only for the benefit of full-time students is not. In fact, many homeschool parents view participation in interscholastic athletics as an obligation already owed their children because parents who choose to homeschool are still required to pay the taxes which ultimately support and fund their local public school. Without the sought-after access, homeschoolers are essentially paying for a benefit they never receive. As one commentator noted, homeschool families receive little more than the social and economic benefits of a well-educated citizenry on their tax investment in public education.<sup>26</sup> Yet, administrators still express concern over the loss of certain funding that is allocated only in terms of full-time enrollment attendance and various additional costs associated with allowing homeschool students part-time access.<sup>27</sup> However, the costs associated with limited access are often viewed against the backdrop of a total lack of costs represented by homeschoolers' complete absence from public schools. Even though public schools receive tax revenue that includes homeschool families' contributions, public schools do not have to assume the expenses associated with educating homeschooled children.<sup>28</sup> Instead, the costs should be viewed

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25. *Jones*, 218 W. Va. at 59-60.

26. Grob, *supra* n. 25, at 839.

27. See e.g. *Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 698 (10th Cir. 1998).

28. See *Lukasik*, *supra* n. 21, at 1627-1628.

in relation to the cost of having homeschooled students attend on a full-time basis. If there were additional costs, the costs would fall well short of the cost of providing the full-time education homeschoolers are free to demand at any time. Recognizing that homeschool students represent a net monetary savings undermines the argument that it is too costly to accommodate participation in school athletics.

Additionally, school administrators contend that allowing homeschooled students to participate in public school athletics will undermine loyalty and school spirit.<sup>29</sup> Make no mistake, homeschool students would not automatically garner participation merely because they express an interest and a desire. Homeschool students would be required to tryout and make the team just as any other student. If a homeschool student is able to make the team and earn playing time, the only logical reason would be that the student makes the team better. For that reason, it is difficult to believe that fellow students or teammates would not be supportive of the student's efforts on the team's behalf. Also, in the vast majority of states that do allow participation, the student must still play for the high school district in which he or she lives. In most instances, homeschooled students are eligible to participate only if they reside within the attendance boundaries of the public school for which they participate<sup>30</sup> or only in the school district in which the student's custodial parent or guardian resides.<sup>31</sup> Therefore, it is not as though a veritable "outsider" who is not at all representative of that particular high school district or city will be falsely competing under the school's banner. As such, it would seem as though fellow students and the community would rally behind any member of a team rightly wearing their school's uniform and no disruption of the school's sense of community or diminution of school loyalty would result.

Many seem to view homeschool participation as granting homeschoolers the untethered freedom to determine when and how they will use the public education system.<sup>32</sup> The thinking seems to be that once a path contrary to public education has been chosen, that decision is absolute and comes with unwavering consequences. Homeschooled children may not then later burden the public education system they have shunned by seeking access only when they themselves cannot pro-

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29. *Jones*, 218 W. Va. at 69 (Starcher, J., dissenting).

30. Or. Rev. Stat. § 339.460 (1) (f) (2003).

31. Utah Admin. Code r. 277-438-4(B)(May 19, 2005).

32. See Fuller, *supra* n. 24, at 1600.

vide the activity adequately. This line of thought essentially tells homeschoolers, "You've made your bed, now lie in it." Just as you chose to establish your own learning environment, now you can establish your own sports environment.<sup>33</sup> However, the homeschooled child has not "rejected" public education. Rather, the child is being educated in a manner chosen by his or her parents and approved by the state as a legitimate alternative to public education. As a result, there appears to be valid reason to question whether the refusal to allow homeschooler participation in interscholastic athletics flows, either in some degree or wholly, from this insular attitude than any of the expressed concerns said to satisfy rational basis. Perhaps terms such as "school spirit" and "sense of community" are merely proffered, seemingly acceptable terms that serve only to mask and legitimize this underlying attitude.

### III. CONCLUSION

Although rational basis is a highly deferential standard of review dealing with rights deemed non-fundamental, "[d]eference does not mean obeisance."<sup>34</sup> Rational basis review should not be transformed into a judicial rubber stamp approving state action so long as the state can conjure up seemingly legitimate rationales before the start of trial. While the Court is not permitted to simply substitute its judgment, the inquiry still demands judicial responsibility and is to be searching. The rationales for denying homeschooled students the privilege to participate in athletics are unpersuasive and appear as nothing more than mere pretexts. For example, officials have argued that excluding homeschooled students is rationally related to the legitimate objective of securing role models for other students, which, they say, could not be accomplished if the student athlete had little contact with the general student population of the school.<sup>35</sup> This rationale and others previously discussed fail to meet the requirement of being a bona fide rational basis for absolute exclusion. Therefore, the blanket prohibition on homeschooled students' participation in interscholastic athletics should fail the rational basis test and, thus, violate homeschooled students' substantive due process right.

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33. See Darryl C. Wilson, *Home Field Disadvantage: The Negative Impact of Allowing Homeschoolers to Participate in Mainstream Sports*, 3 Va. J. Sports & L. 1, 10 (2001).

34. *Sierra Club v. Marita*, 46 F.3d 606, 619 (7th Cir. 1995).

35. *Bradstreet*, 165 Misc. 2d 931 at 487.



Frustrated home educators have continually asked courts to force schools to accept their children on a part-time basis. So far, most of these lawsuits have proven unsuccessful, but the issue is unlikely to disappear. Perhaps as time goes by, homeschooling will be seen less as a fringe movement and more as a legitimate educational alternative. As a result, homeschooled children seeking limited access to the public education system through participation in interscholastic athletics, will not be seen as homeschooled children trying to have their cake and eat it too.

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