

# Home Schooled Students' Opportunities to Participate in Interscholastic Sport:

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## Legal Issues and Policy Implications for Secondary Education

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### I. Introduction

Within the past few years, increasing numbers of parents are choosing to home school their children. Estimates nationwide indicate that anywhere from a half million (Cordova, 1995) to 900,000 to 1.2 million (Nakashima, 1995) children were being home schooled in 1995. Examples from specific states include Pennsylvania, where 3541 students were home schooled in 1989-1990 compared to 11,027 in 1993-94 (Cordova, 1995), Virginia, where in 1985, 500 students were home schooled compared to 7900 in 1995 (Nakashima, 1995), and Florida, which counts more than 19,000 home schoolers (Marks, 1995). The reasons why parents choose to home school their children are many, but usually include highly individualized learning, flexibility, one-on-one attention, increasing access to technology in the home (Cordova, 1995), the opportunity for students to work at their own pace (Padgett, 1994) as well as for religious reasons (Bell, 1994).

When students are home schooled, the education they receive in their classroom may be solid, but the vast majority of home school situations do not offer any type of traditional extracurricular activities. There is now a growing groundswell among home school families to have access to extracurricular activities, especially interscholastic sports, in the local public schools which the children would have attended

had their parents not chosen to home school them. Currently, approximately 5% of home schooled students, which may mean between 25,000 and 50,000, participate in high school activities in general. At present, there are no numbers available as to how many of these students participate in interscholastic sports (Zlatos, 1995).

This issue is very complex. When decisions are made as to whether or not to allow home school students to participate in interscholastic sports, there are a number of considerations including State High Association eligibility policies or rules, state education statutes related to athletic eligibility and any local school district eligibility policies or rules. The argument made most often by parents of home schooled children is that they (the parents) pay taxes which support the public schools while they receive no benefits from those tax dollars (Bell, 1994; Bradley, 1996; Herman, 1996; Hutchinson, 1995; Nakashima, 1995; Zlatos, 1995). On the other side, those opposing home schoolers' chance to play argue there is the question of a home schooled child "bumping" a regularly enrolled student from a team and taking that regularly enrolled student's place on the team (Bell, 1994; Zlatos, 1995). There is the question of a double standard where public school students have to follow attendance and academic guidelines while home schooled students do not (Henry,

1996). Opponents also argue that home schoolers cannot "have it both ways". To quote a member of the Arlington, VA, School Board, "We are not a cafeteria" when it comes to allowing home schoolers to pick and choose the benefits they want to receive from the public schools while choosing not to attend classes there (Nakashima, 1995). The bottom line question is: How much access should home school students have to public school activities?

## II. State Statutes

A number of states have begun addressing this issue in their state legislatures. In the first regular session of 1995, the Idaho Legislature passed HB 171, which added "Dual Enrollment", Idaho Code § 33-203 (1996) to the Idaho Code. Section 33-203(1) allows a parent or guardian of a child of school age enrolled in a nonpublic school (a nonpublic student) to enroll that child in a public school for dual enrollment purposes. A "nonpublic student" is defined in section 33-203(9) as any student who receives educational instruction outside a public school classroom where such instruction can include, but is not limited to, a private school or a home school. According to section 33-203(2) a dual enrollment student may enter into any program in the public school available to other students subject to compliance with the same rules and requirements that apply to any student's participation in the activity. The academic standards for the nonpublic student are the responsibility of the primary education provider for that student. In order for the nonpublic student to participate in nonacademic public school activities, by section 33-203(4), the nonpublic student must achieve a minimum test score on the achievement test required annually by the state board of education, and that score will be used to determine eligibility for the following year. The student will be eligible if the minimum composite test score places the student within the average or higher than average range as established by the testing service. Finally, section 33-203(6) points out that the nonpublic school stu-

dent participating in nonacademic public school activities must reside within the attendance boundaries of the school in which the student participates. This legislation has caused concern for the Idaho High School Activities Association, which according to its President Nolan Mecham, would be glad to comply with the law but they don't know how because specific policy guidelines for implementation have not been set forth (Jacobs, 1995).

In Utah, state legislation allows dual enrolled students to participate in academic as well as extracurricular activities, based on "Dual Enrollment" from Utah Code Ann. section 53A-11-102.5. According to section 53A-11-102.5(1) a person having control of a minor under this part who is enrolled in a regularly established private school or a home school may also enroll the minor in a public school for dual enrollment purposes. Athletics are dealt with in section 53A-11-102.5(6) which states the State Board of Education shall determine the policies and procedures necessary to permit students enrolled under Subsection (1) to participate in public school extracurricular activities.

North Dakota also has legislation dealing with participation by students in home-based instruction in extracurricular activities in general in "Home Based Education" from N.D. Cent. Code section 15-34.1-06. Home-based instruction is defined as an educational program for students based in the child's home and supervised by the child's parent or parents. It is the parents supervising the home-based instruction who are responsible for maintaining an annual record of courses taken by the child and the child's academic progress including standardized tests. The parent intending to supervise the student also must file an annual statement with the superintendent of the public school district in which the child resides. Information on this statement includes: the child's name, address, date of birth, the parents' qualifications, and a list of courses or extracurricular activities in which the child intends to participate in the public school district.

In Oregon, the conditions for home school students to participate in interscholastic activities are set forth in "Home School Students..." ORS §339.460. In order to be eligible, home school students must document that they are in compliance with all rules governing home schooling and must meet all school district eligibility requirements except class attendance requirements or the Oregon High School Activities Association attendance requirements. Section 339.460 (c) states the student must achieve a minimum score on the achievement test required annually of all home schooling students which determines eligibility for the following year. The minimum composite test score required shall not be higher than the 50th percentile of national norms. Interestingly 339.460(e) spells out that any public school student unable to maintain academic eligibility to participate in interscholastic activities shall be ineligible to participate in interscholastic activities as a home schooler for the duration of the school year in which the student becomes academically ineligible. Finally, 339.460(g) indicates the home school student participating in interscholastic activities must reside within the attendance boundaries of the school for which the student participates.

Other states are at various places with proposed legislation. In Arizona, the State Board of Education has adopted a policy which is to be implemented in conjunction with A.R.S. 15-802.01. This policy states that the individual responsible for the primary instruction of a student who is schooled in the home shall provide written verification to the district superintendent that the student is receiving the equivalent of a passing grade in each subject being taught. Such written verification is required prior to the student's participation in interscholastic athletic competition (Arizona Interscholastic Association, 1996). In Florida, a bill passed the legislature in May 1995 which would have allowed home schoolers to participate in interscholastic sport, but the bill was vetoed by the Governor. The Governor has indicated, however, that he will

sign the bill into law if passed by the state legislature again. This is despite the fact that in October 1995 the Florida High School Activities Association rejected a proposal that would have allowed home schooled students to participate in athletics at their nearest school (Knight, 1995). In April 1996, the Florida state Senate approved a bill, CS/HB 2505, allowing home schooled students to participate if they meet the same academic and residency standards as those students attending public schools ("High School Sports", 1996). In April 1995 the Texas House Public Education committee discussed revisions in a number of state education laws, including a proposal to allow home school students to participate in sports and academic competition sponsored by the University Interscholastic League ("Capital Calendar", 1995). In May 1995, the House Education Committee in South Carolina decided to delay until next year voting on a bill to allow home schooled students to participate in public school extracurricular activities ("Legislative Roundup" 1995).

### III. Court Cases

Three court cases where home schooled students have brought their challenges to be eligible to participate in interscholastic sport are Bradstreet v. Sobol (1995), McNatt v. Frazier School District (1995) and Davis v. Massachusetts Interscholastic Athletic Association (1994). These cases will be outlined in the following section.

Charlotte Bradstreet was a 14 year old who was being home schooled by her parents, and who wished to participate in interscholastic sports on the teams in her resident school district. The defendant, Thomas Sobol was the Commissioner of Education for the state of New York. The defendant has a regulation stating only students in regular attendance at school can participate in interscholastic sport. Bradstreet claimed the regulation should be annulled for the following reasons: 1) it violated the equal protection clauses of both the Federal and State Constitutions; 2) it violated the due process

clauses of the Federal and State Constitutions; and 3) it conflicted with section 301 of the Education Law. The plaintiff sought summary judgment and the defendant brought a cross motion seeking summary judgment for an order declaring 8 NYCRR 135.4(c)(7)(ii)(b)(2) did not violate the due process and equal protection clauses of the Federal and State Constitutions and did not contradict section 301 of the Education Law (Bradstreet v. Sobol, 1995).

Regarding the due process issue, in order for there to be a due process violation a person must be deprived of a liberty or property interest. In this particular case, the plaintiff did not make a liberty interest claim and so the court focused on whether a non-student has a property interest in participating in interscholastic sports. The court was clear in reiterating "a student's interest in participating in interscholastic sports is a mere expectation" and not a property right subject to due process protection (Matter of Caso v. New York State High School Athletic Association, 1980).

On the equal protection claim, since there was no suspect class involved, the test the court used was if the regulation bore some rational relationship to a legitimate state purpose. The Commissioner made the case that the regulation furthered legitimate state purposes, including the following:

1. requiring a youngster to be a member of a student body of the school and meet the obligations and requirements inherent in being a public school student;
2. promoting loyalty and school spirit that leads to cohesion of the student body of a school;
3. securing role models for other students, which cannot be accomplished if the student athlete has little contact with the general student population of the school;
4. maintaining academic standards for participation in interscholastic sports;
5. interschool athletics may be accepted by a public school for credit in fulfillment of the physical education requirement for

graduation and therefore because of the quasi-curricular nature of interschool athletics there may be no statutory authority of the Education Department to extend eligibility for interscholastic athletics to students not enrolled in public school; and 6. havoc may be wreaked upon the public school system if home schoolers are permitted to opt out of the public school program generally and yet selectively participate in interschool athletics and then extend that ability to select courses of instruction as well" (pages 5 and 6 of Defendant Memorandum of Law).

In this case, the court held that a regular student does not have a property interest in participating in interscholastic sport, and therefore Bradstreet, a nonstudent, has no property interest either. The court also held that the defendant established that the policy of allowing only students who are actually attending school furthered a number of legitimate state interests regarding education. Finally, the court found no conflict between the regulation and section 301 of the Education Law. Therefore, summary judgment for the Bradstreet was denied, the cross-motion of the defendant was granted, and Bradstreet was not allowed to participate.

Jeremy McNatt, a ninth grade student living in the Frazier (PA) School District, wanted to try out for the District's junior high basketball team in November 1994. His parents felt that participating in interscholastic sport would help his home schooling by addressing his physical education and conditioning needs. At the time McNatt made his request to try out, the Frazier School District policy regarding student eligibility in cocurricular activities did not specifically address home schoolers' participation. The School Board requested the Superintendent to find out additional information about home schoolers' participating in interscholastic sports, to see if such participation was consistent with Pennsylvania Interscholastic Athletic Association (PIAA) rules. In fact the PIAA did not prohibit the participation of home educated students in

interscholastic sport. The PIAA policy permitted member school districts to adopt and implement their own individual policies regarding the participation of home educated students in interscholastic sport with regard to being enrolled at the member school (McNatt v. Frazier School District, 1995).

At the December School Board meeting, a resolution to allow home schooled students to participate in interscholastic sport was voted down. The McNatts asked the School Board to reverse its decision, but the School Board stayed with its decision stating the denial of home educated students' participation in cocurricular activities was appropriate and lawful. This decision appeared to be based on the fact that majority of Pennsylvania school districts did not allow home educated students to participate in interscholastic sport, and also on the fact that the Frazier School District did not allow parochial students, privately tutored students, drop-out students in adult education programs or private school students to participate in public school interscholastic athletic programs.

The McNatts presented a state law claim, that the School District, School Board and School Superintendent acted in an unreasonable, arbitrary and capricious manner in violation of Pennsylvania law in denying Jeremy the right to try out for the team. The McNatts sought declaratory judgment in the case. In this unpublished opinion, on March 29, 1995, judgment was entered in favor of the School Board, and Jeremy McNatt was not allowed to participate (McNatt v. Frazier School District, 1995).

Melissa Davis was a home schooled student wishing to try out for the Norton High School girls' softball team. Davis applied for a student waiver of the athletic eligibility rule which was denied by the Massachusetts Interscholastic Athletic Association (MIAA). The MIAA denied the waiver based on Rule 65 of the MIAA rules which requires a student to be attending classes in order to participate in interscholastic athletics. The MIAA determined that since Davis was being home schooled she did not attend school ses-

sions within the meaning of Rule 65 and was declared ineligible. The application was denied in September and since try-outs for the softball team were to be held in January and February of the upcoming year, Davis sought a preliminary injunction which would enjoin the MIAA from refusing her the right to try out for the team (Davis v. Massachusetts Interscholastic Athletic Association, 1994).

As the action involved the request for a preliminary injunction, the court first examined Davis' claim of injury and chance of success on the merits. If the failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, the court must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party (Packaging Industries Group, Inc. v. Cheney, 1980). The MIAA denied Davis' application because she was not attending school sessions. However the Supreme Court of Massachusetts held that home schools must meet all the same state requirements as public schools (Care and Protection of Charles, 1987), and by "School Attendance", M.G.L.A.c. 76 §1 (1992 ed.) private schools must meet the same educational requirements as public schools. Davis' home school program had been approved by the local superintendent for Norton High School, her academic progressed was monitored by Norton High School and she had taken all the required standardized tests, scoring equal to or higher than high school levels.

Davis' argued that MIAA Rule 65 violated her equal protection rights. The standard used by the court was "absent a showing that a statute burdens a suspect group or fundamental interest, it will be upheld as long as it is rationally related to the furtherance of a legitimate state interests" (Dickerson v. Attorney General, 1986). Since the opportunity to try out for a high school team is not a fundamental interest and Davis was not being classified as a member of a suspect group, the claim was tested under the rational basis standard. Here the Court ruled that Davis' claim had a substantial likelihood of

success on the merits. The Court recognized that the implied goal of Rule 65 of the MIAA was to prevent students who do not attend school from playing interscholastic sport was valid and that a school has the right to set regulations for participating in extracurricular activities. However, a school should afford all students attending the school the same privileges and advantages. Here the Court ruled that Davis was in fact attending school sessions and the only difference between her and any other Norton High School student was that she attended classes at home instead in the Norton High School building. Therefore, Rule 65 created a classification which disallowed Davis' participation solely because she was homeschooled. The creation of such a classification, the Court ruled, resulted in varying treatment of in-school and home school educated students and the classification and varying treatment were not related to a legitimate state purpose. Finally, the Court also ruled that since try-outs were to be held in January and February, if Davis had to wait for a final judgment, she would not be able to try out, thus causing her irreparable harm.

In the case, the Court allowed Davis' request for a preliminary injunction. The MIAA was enjoined from refusing Davis' right to try out for the team, and if she qualified, play for the Norton High School softball team. The injunction also barred the MIAA from penalizing the Norton High School team, coaches or representatives for fielding a team with Davis as a member.

## **IV. Freshman Eligibility Standards for Home Schooled Students**

### **A. NCAA**

What happens when home schooled students wish to participate in athletics when they go to college? How are their academic records evaluated?

For NCAA competition, students who are

home schooled are subject to the same initial eligibility standards as any other student, including minimum ACT or SAT scores. However, home schooled students must have an initial eligibility waiver application filed on their behalf by an NCAA institution in order for their home school courses to be approved as NCAA required core courses. Each application is evaluated on a case-by-case basis by the NCAA Council Subcommittee on Initial Eligibility Waivers. In cases where the parents alone have instructed the child, the subcommittee asks for additional information related to any independent assessment of the student's course work and test administrations. A random selection of tests taken by the student in the core course areas may be requested so the subcommittee can have a sampling of the types of tests the student has taken. The subcommittee also requests documentation in writing from the state department of education that the student is in compliance with the state's home schooling requirements. If a student has completed some course work in a traditional school those transcripts must be evaluated by the NCAA Initial eligibility Clearinghouse, just as any other student (M. Russkamp, personal communication, January 25, 1996).

The NCAA Council Subcommittee on Initial Eligibility Waivers has expressed the need to examine new review guidelines for home schooled waiver cases in order to create consistency in the area (Subcommittee Recommendations, 1995). Given the fact that the Subcommittee has reviewed cases in which the student's high school grade assessment ranged from no independent assessment (schooled exclusively by parents) to complete independent assessment (correspondence and independent study in which all grading is done by third parties), the Subcommittee has developed a set of review guidelines (Subcommittee Recommendations, 1995).

In the past three years, the NCAA has received approximately 10 requests per year from home schooled students wishing to be eligible to participate in intercollegiate athletics. Through

1995, only one home school student has been denied eligibility to participate (M. Russkamp, personal communication, January 25, 1996).

### **B. NAIA**

For NAIA competition, Article V, Section C, item 2 of the NAIA Bylaws addresses the freshman eligibility standards all students must meet in order to participate in intercollegiate competition during their first two terms at an NAIA member institution. Home schooled students' eligibility is specifically addressed in Casebook Reference #58, which states "Home schooled students must receive the certificate (or equivalent) granted by the appropriate state verifying successful completion of home schooling requirements and achieve the minimum ACT/SAT score to meet the freshman requirements" (NAIA, p. 68, 1995). According to Robert Rhoads (personal communication, January 26, 1996), Assistant Vice President for Legislative Services at the NAIA, it is difficult for the NAIA to determine the number of home schooled students participating at NAIA institutions because the national office normally does not hear of such cases. This is because the requirements for eligibility are printed in the NAIA Handbook, enabling institutions to verify eligibility standards without contacting the national office.

### **C. NJCAA**

The NJCAA has not adopted specific initial eligibility guidelines regarding home schooled student-athletes. Home schooled students must meet the same initial eligibility standards as any other incoming student-athletes, as outlined in Article V, Section 3 of the NJCAA By-Laws which states students must be high school graduates or must have received a high school equivalency diploma or must have been certified as passing the GED. Since documentation of these requirements is handled on an institutional basis, the NJCAA national office has not yet dealt with any cases concerning home schoolers, according to Mary Ellen Leicht, Assistant Executive Director (personal communication, February 7, 1996).

## **IV. Policy Considerations**

When high school activities associations, school districts or state legislators begin to formulate policies for participation by home schooled students, there are a number of concerns they must keep in mind. Policy makers must consider the social, legal, economic, educational, political and ethical implications their decisions may have (W. Moore, personal communication, 1990).

Socially, a question arises as to how home schooled students will be accepted by many groups, including teammates, coaches, other students at the regular school, parents and the community in general. There may be resentment on the part of teammates, parents and other students if the home schooler is perceived as having "taken the spot" of a student who is attending the regular school. Small communities may view the home schooler as someone from "outside" the traditional high school team, which could lead to nonacceptance. Coaches would play a key part in helping the home schooler be accepted by others although they may be pressured by parents or administrators to play, or conversely not to play, the home schooler. Finally, would an athletically gifted home schooler be viewed as a great addition to the team since the team may win more, while a marginally skilled home schooler may be seen as just taking the spot of a regular student on the team?

While some parents make the case that sports fulfill an important part of the social development needs of children, for many other parents, this is a complete nonissue. They home school their students for educational purposes, and interscholastic sports do not matter. Other social outlets such as church events, recreational sports, or family gatherings aid in social development in lieu of interscholastic sports.

Legally, a number of questions arise. First are the challenges to play from both sides. Home schoolers already have initiated court cases in order to gain eligibility, and the courts have ruled both to allow participation and to deny partici-

pation. If a home schooler does make a team, will a regular school student who does not make the team turn around and bring a court action? While it has been established in the courts that "a student's interest in participating in interscholastic sports is a mere expectation" and not a property right subject to due process protection (Matter of Caso v. New York State High School Athletic Association, 1980), there is the definite possibility this may be challenged.

College sport governing bodies such as the NCAA and the NAIA currently are dealing with the increased numbers of home schooled students wanting to play college sport. Both organizations have written and are continuing to refine the rules and regulations for initial eligibility for home schooled students.

Economic issues arise as well. For example, what about the talented home schooled athlete who wants to try for a athletic scholarship to play in college? State laws prohibiting participation may deny that student a chance to qualify for an athletic scholarship if the student cannot participate in interscholastic sport. Will the question of economic gain enter into a school district's decision to allow a talented home schooled athlete to play, if that means the team will be more successful and draw bigger crowds which increases gate receipts? The biggest question which arises in the economic realm is the argument made by parents of home schooled athletes that they pay taxes which support the public schools in their home states, but their children do not derive the benefits of those payments if they are excluded from participation.

The educational issues involved are extremely complex. What type of statement is being made about public education if, for home schooled students, public school classes are not acceptable, but public school sports teams are? Sports are supposed to be an extension of a student's total educational experience. If home schoolers participate, is that relationship somehow disjointed or disrupted? As the political winds shift, will home schooling be seen as just a fad, or is it an educational trend which is here

to stay?

The political ramifications must be considered, especially the interrelationship between state legislatures and high activities associations. In some states, the activities association acts separately from the legislature, while in other states, the state legislature, via educational statutes, governs the activities association. In a state such as Florida, conflict has already arisen where the activities association has voted against eligibility for home schoolers, while the governor has said that if the state legislation passes a bill permitting home schoolers to play, he will sign the bill. Given the supposed conservative shift in the political climate, will more state legislatures be inclined to begin to consider such legislation, despite the feelings of the activities associations? How might potential funding for activities associations be tied to such legislation?

Finally, athletic administrators must consider the ethical questions which may arise as well. What happens if a student-athlete who has poor grades decides to declare himself or herself as a home schooler? If the state allows home schoolers to participate, does that student-athlete become eligible immediately by changing enrollment status? What guidelines need to be established for such a change? Another issue which could arise is the recruiting of highly skilled home schooled student-athletes. Much to the chagrin of many people in athletics, younger and younger athletes are being recruited by high schools to play sports. How will home schooled student-athletes fit into this trend? How will coaches and administrators respond to pressures to "go after" a skilled home schooled student-athlete who could help a team win? The list of issues could go on and on.

## V. Conclusion

Ultimately, there is one basic underlying question - just how much access to organized school activities should home schoolers have if their parents or guardians have made the conscious decision not to have them attend regular school sessions? This is the question being



discussed by state legislatures, state high school activities associations, the courts, school administrators, athletic administrators, coaches, and parents. Athletic administrators need to keep current with developments not just in their states, but in other states as well so as to be prepared to discuss this complex issue. Whether to include home schoolers into extracurricular activities in general, and specifically interscholastic athletics, promises to be an on-going debate which athletic administrators and coaches must follow closely.

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