

# Legal Precedents and Strategies Shaping Home Schooled Students' Participation in Public School Sports

KATHRYN GARDNER,

*Law Clerk, United States District Court for the District of Kansas*

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ALLISON J. MCFARLAND

*Western Michigan University*

## I. INTRODUCTION

In school districts across the country, a growing number of the exploding population of home schoolers would like to participate in at least some activities at traditional schools. Some want scholastic benefits, while others want extracurricular benefits for social reasons or to burnish their record for college applications. One reason for this recent interest is that students from the initial home school boom of the early 1980s are now in high school. The other reason is an age-old one: kids love after-school activities.<sup>1</sup>

Despite reluctance to expose their children to the academic curriculum and social environment of the public school system, some parents of home schooled students appear eager to embrace the benefits of their children's participation in extracurricular activities. Valuable lessons such as teamwork, sportsmanship, winning and losing, self-discipline, and self-confidence seem to be worth the risk of public school interaction.

This article will examine the historical and current home schooling movement; summarize the arguments for and against permitting access by home schoolers to extracurricular activities; present selected, representative responses of national and state governing associations; and analyze legal theories that have been used and those that may be successful in the future in establishing a right to such participation.

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1. Dana Hawkins, *Home School Battles*, U. S. NEWS & WORLD REP., Feb.12, 1996, at 57-58.

## II. HOME SCHOOLING, GENERALLY

Home schooling, once the backbone of education in this country,<sup>2</sup> has made a comeback. An increasing number of families across the nation have decided that they can provide a better education for their children than the local public or private schools. In the 1980s, home schooling families in many states were prosecuted for not complying with compulsory school attendance laws.<sup>3</sup> Those days appear to be gone. Under steady pressure by lawyers and lobbyists for the home school movement, the majority of states have rewritten compulsory school attendance laws, or enacted new laws specifically addressing home schooling, creating a general consensus that home education is now legal in all 50 states.<sup>4</sup>

Litigation of home school issues in the 1980s was nearly always initiated by the state, which has a recognized interest in compulsory education to "prepare citizens to participate effectively and intelligently in our open political system" for the purpose of preserving freedom and independence, and to prepare individuals to be "self-reliant and self-sufficient participants in society."<sup>5</sup> Cases focused on issues such as compulsory attendance, certification of home school teachers, periodic visits by school officials, curriculum reviews, or standardized testing.<sup>6</sup> Most of these issues have now been resolved either by case law, legislation, or public policy.

In recent lawsuits involving home schoolers it is the parents who are the plaintiffs bringing suit against the state to allow home schoolers' selective participation in public school activities such as band or sports, or to otherwise challenge adverse decisions regarding home schooling.<sup>7</sup> This role reversal in the legal posture of home schoolers, which places

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2. JOHN J. WHITEHEAD & WENDELL R. BIRD, *HOME EDUCATION AND CONSTITUTIONAL LIBERTIES* 23 (1984).

3. *See, e.g.*, *Care and Protection of Charles & Others*, 399 Mass. 324, 504 N.E.2d 592 (1987) (affirming finding that home schoolers were children in need of care because they were home schooled in violation of the compulsory attendance laws).

4. Eugene C. Bjorklun, *Home Schooled Students: Access to Public School Extracurricular Activities*, 109 EDUC. L. REP. 1 (1996). For a comprehensive listing of the 31 state statutes that guarantee the right of parents to educate their children at home, *see* David W. Fuller, *Public School Access*, 82 MINN. LAW REV. 1599, 1612 n.62 (1998).

5. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

6. *HOME SCHOOLING LAWS IN ALL FIFTY STATES* (7th ed.) (Steve Deckard, ed., 1994).

7. *See, e.g.*, *Peterson v. Minidoka County Sch. Dist. No. 331*, 118 F.3d 1351 (9th Cir. 1997) (where an elementary school principal sued after being demoted to a teaching position based upon his statement of intent to home school his own children for religious reasons. The court applied strict scrutiny and found that the district's action violated the free exercise clause).

them at the cutting edge of lawsuits against the state, is but one indicia of the power of the home schooling contingent.<sup>8</sup>

In large part, the strength of the political voice of home schooling families may be due to the increase in the numbers of families choosing to home school their children. Not all states require families to notify state or local officials of their intention to home school a child.<sup>9</sup> As a result, an estimated count of home schooled students in the United States must be substituted for exact numbers. The United States Department of Education recently estimated that more than half a million students are home schooled — about 1% of the total school-age population. That's a 30% jump from their 1991 figure.<sup>10</sup> Despite belief by those who monitor home schooling trends that the "whole thing would phase out,"<sup>11</sup> each year the number of home schooled students continues to rise. Organizations such as the Home School Legal Defense Association (HSLDA) estimate the number of home schoolers at approximately 1.23 million.<sup>12</sup>

Most parents who choose to withdraw their children from the school system, or never send them in the first place, do so for religious reasons.<sup>13</sup> However, more and more parents are choosing home schooling for secular and pedagogical reasons. Concerns about violence, lack of discipline, content of curricula, mediocrity, absence of values, overcrowded classrooms, and an overly structured environment, are common, as is the conviction that children with specific needs can be better

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8. The strength of the home schooling movement was demonstrated on or about February 24, 1994, when parents of home schoolers blitzed the Capitol's telephone system for days, convincing the United States House of Representatives to approve (by a vote of 424 to 1) an amendment to the reauthorization of the Elementary and Secondary Education Act deleting language that would have required school districts receiving federal financial assistance to vouch that all of their full-time teachers were certified to teach the academic subjects to which they are assigned, and adding language (by a vote of 374 to 53) that nothing in the bill would affect home schoolers. Phil Kuntz, *Home-Schooling Movement Gives House a Lesson*, 57 CONG. Q. WEEKLY REP. 479, 480 (1994).

9. Patricia Lines, *Homeschooling Comes of Age*, EDUC. LEADERSHIP, Oct. 1996, at 63-67; Patricia Lines, *Educating A Minority: How Families, Policymakers, And Public Educators View Homeschooling*, J. EARLY EDUC. & FAMILY REV., Jan-Feb. 1998, at 25-28.

10. Hawkins, *supra* note 1, at 57-58.

11. *Id.* (quoting Dr. Patricia Lines).

12. BRIAN D. RAY, HOME EDUCATION ACROSS THE UNITED STATES, FAMILY CHARACTERISTICS, STUDENT ACHIEVEMENT, & LONGITUDINAL TRAITS, NATIONAL HOME EDUCATION RESEARCH INSTITUTE, SALEM, OREGON (1997).

13. See generally, JOHN WHITEHEAD & ALEXIS CROW, HOME EDUCATION: RIGHTS AND REASONS 37-58 (1986).

served in the home on an individual basis.<sup>14</sup> Home schoolers today defy stereotypes, and have been characterized by one who works closely with them, as including those who are "Pentecostal snake handlers in the hills of West Virginia, New Age philosophy professors at Amherst College, and everything in between."<sup>15</sup>

Regardless of their diverse motives or lifestyles, home schoolers are united in their desire to provide the best available educational opportunities for their children.<sup>16</sup> Home schoolers recognize that the best education consists not only of academic subjects, but the benefits of extracurricular activities as well.<sup>17</sup> Because it is not feasible for many home schoolers to conduct activities such as organized sports, band or choral groups in the home,<sup>18</sup> determined home schoolers are increasingly seeking to participate in public school sports or other extracurricular opportunities.

### III. PARTICIPATION BY HOME SCHOOLERS IN PUBLIC SCHOOL ACTIVITIES

Although home schoolers participating in public school programs constitute less than 5% of all students schooled at home,<sup>19</sup> they present an ever growing dilemma for state legislatures, local school boards, athletic directors, and attorneys who may represent them.

Several arguments are commonly raised in support of permitting public school extracurricular participation by home schoolers. These arguments include: that home schoolers pay taxes to support the public school program and should not be barred from the option of participation; that they should be given the opportunity to obtain college scholarships available through sports or other extra-curricular activities in public schools; that those home schoolers gifted in athletic and/or other

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14. Hawkins, *supra* note 1; Brian Robertson, *Is Home Schooling in a Class of Its Own?*, INSIGHT ON THE NEWS, Oct. 17, 1994, at 6; Kristin Davis & Kim Quillen, *The Economics of Teaching Your Kids at Home*, KIPLINGER'S PERS. FIN. MAG., July, 1993, at 30.

15. Hawkins, *supra* note 1, at 58.

16. Jo Anna Natale, *Understanding Home Schooling*, 92 AM. SCH. BD. J. 26 (1992).

17. Betty Jo Simmons, *Classroom at Home*, 94 AM. SCH. BD. J. 47, 48 (1994).

18. *Id.* at 47; *but see* CHRISTOPHER J. KLICKA, THE RIGHT TO HOME SCHOOL: A GUIDE TO THE LAW ON PARENTS' RIGHTS IN EDUCATION 15 (1998) (noting the formation "in nearly every community throughout the country" of local "home school support groups" which sponsor "weekly and monthly activities for the home school students, including physical education classes, special speakers, sports, 4H activities, camping, and trips to museums, industries, farms, parks, historic sites, and hundreds of other activities").

19. MICHAEL SMITH, PARTICIPATION OF HOME SCHOOL STUDENTS IN PUBLIC SCHOOL ACTIVITIES, SCHOLASTIC AND SPORTS ACTIVITIES, HOME SCHOOL LEGAL DEFENSE ASSOCIATION, PAEONIAN SPRINGS, VIRGINIA (1996).

special areas should be able to enhance their talents through controlled interaction with public school programs or competitions; and that home school parents should not have to terminate their home school program and enroll their children in the public schools on a full-time basis just to get the benefit of participating in extracurricular activities.<sup>20</sup>

Other arguments are viable as well. Recent litigation in the divorce/child custody arena demonstrates that when determining whether it is in a child's best interest to be in the custody of a parent who home schools, judges across the nation specifically examine the child's ability to interact with other students or participate in sports as a factor in determining custody of the child.<sup>21</sup> A home schooled child's ability to participate in public school extracurricular activities may thus be a crucial, if not determining factor in custody battles.

Faced with the growing number of students schooled at home, and the increasing interest of this group in participating in public school extracurricular activities,<sup>22</sup> the response of most states and local school districts has been to resist home schoolers' efforts to opt in.<sup>23</sup> Although some perceive that the home school movement is a "slap in the face" of public schools,<sup>24</sup> resistance to home schoolers' participation is based on more than mere animosity. Opposition includes protests of unfairness or that home schoolers "want the best of what the public school has to offer without paying the dues,"<sup>25</sup> concern that limited resources are best spent on enrolled students,<sup>26</sup> and fear of unmanageable administrative burdens

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20. *Id.* at 4-5.

21. *Bowman v. Bowman*, 686 N.E.2d 921 (Ind. App.1997); *Rust v. Rust*, 864 S.W.2d 52, 56-57 (Tenn. App. 1993).

22. As many as 81% of home educators would like their children to participate in extracurricular activities at public schools. Lisa M. Lukasik, *The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools*, 74 N.C.L. REV. 1913, 1915 (1996) (citing a study reported by MARALEE MAYBERRY ET AL., *HOME SCHOOLING: PARENTS AS EDUCATORS* xiii (1995)).

23. Bjorklun, *supra* note 4, at 3.

24. *Id.*

25. Hawkins, *supra* note 1, at 57; John Cloud, *Outside Wanting In*, TIME, Dec. 27, 1999, at 132-33 (noting unfairness to public school students who must follow strict eligibility requirements, and who might be unfairly displaced by home schoolers unwilling to make a full-time social investment in the school community).

26. In Arlington, Virginia, where the decision to allow home school students access to public school activities is decided by the local school board, a board member articulated a common objection in stating: "We get no county or state money for kids who aren't enrolled . . . We are not a cafeteria. It gets complicated when a family says we don't choose Arlington [public schools], but we want this piece and this piece and this piece." Ellen Nakashina, *Home-Schoolers Miss Sports Participation*, WASH. POST, Nov. 26, 1995, at B1, B3.

such as providing additional supervision, transportation, and scheduling of events.<sup>27</sup>

Home schoolers themselves are not unified in their opinions regarding the desirability of participation in public school activities or events. Some home schoolers view even this limited participation in the public schools as a means of opening the door to the state for further encroachment into their previously well-defined boundaries.<sup>28</sup>

#### IV. NATIONAL AND STATE GOVERNING ASSOCIATION POSITIONS

At the national level, leadership and coordination for the administration of interscholastic athletic programs are facilitated by the National Federation of State High School Associations (NFHS). Although the NFHS acknowledges the current movement towards equal access for home schooled students, it has not made a formal statement of position on this issue. Each state association has the authority to determine policy and apply its state laws and regulations regarding the participation of home schooled students in public school extracurricular activities. When requested, attorneys for the NFHS are available to consult with state association attorneys about the interpretation and application of individual state laws.<sup>29</sup>

At the state level, formal positions towards equal access range from prohibiting all participation by home schoolers, to permitting such participation conditioned on the fulfillment of certain requirements. The following examples from state athletic associations demonstrate this disparity:

##### *Hawaii High School Athletic Association*

Eligibility to participate in Association athletic activities is limited to high school students who meet all the Association's eligibility requirements . . . Students exempted from compulsory education (e.g., work, home schooling) shall not be eligible for HHSAA activities.

##### *Rhode Island Interscholastic League*

For students in home schooling to be eligible for competition in the RIIL, the following requirements must be met: (1) the student must be listed on the rolls of the school and certified to the

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27. Lukasik, *supra* note 22, at 1968.

28. Cloud, *supra* note 25, at 132-33.

29. Personal telephone conversation between author, Dr. Allison McFarland, and John Black, attorney for the National Federation of State High School Associations (Feb. 8, 2000).

Rhode Island Department of Education as a student, (2) the home school must furnish to the school and certify the academic grades and the school must record them on the official school records, (3) the school must approve the request of the home school student to compete on its teams, and (4) all other requirements of the rules must be followed with the regular school certifying the eligibility of the home school student.<sup>30</sup>

The fact that a state athletic association or school district has adopted and published a policy prohibiting or limiting home schoolers' participation in public school activities does not guarantee that such policy is legal or that it will not be challenged in court.<sup>31</sup> As the following analysis demonstrates, there are many avenues available for parents of home schoolers who wish to challenge a school's decision not to permit home schoolers participation in limited activities in public schools.

## V. LEGAL PRECEDENTS

### A. Home Schooling, Generally

The Federal Constitution itself does not explicitly or implicitly address education,<sup>32</sup> and education is generally governed by state law. "[E]ducation is perhaps the most important function of state and local governments."<sup>33</sup> Whenever the state has undertaken to provide education to its people, this right must be made available to all on equal terms.<sup>34</sup>

In some cases where state laws and parental desires conflict, the Supreme Court has acknowledged parents' rights to direct the education of their children as part of their right to privacy.<sup>35</sup> Such cases reveal that "while both the parent and the state have an interest in the education of children, the parent's interest is deemed constitutionally superior to the state's interest under the Due Process Clause of the Fourteenth Amendment."<sup>36</sup>

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30. Personal correspondence between author, Dr. Allison McFarland, and State High School Associations noted (Spring 1999).

31. *Davis v. Massachusetts Interscholastic Athletic Ass'n Inc.*, 3 MASS. L. REP. 375 (MA Super. 1995) (finding MIAA rule which prevented home schooled students from participating on a public high school girls' softball team solely because of such home schooling, to violate equal protection clause of state and federal constitutions).

32. WHITEHEAD & BIRD, *supra* note 13.

33. *Brown v. Topeka Bd. of Educ.*, 347 U.S. 483, 493 (1954).

34. *Id.*

35. WHITEHEAD & BIRD, *supra* note 13.

36. *Id.* at 147.

Arguments that parents have a constitutional right to choose to home school their children for religious reasons are usually based on the only United States Supreme Court case to directly address any issue regarding home schooling. In *Wisconsin v. Yoder*,<sup>37</sup> Old Order Amish parents challenged a Wisconsin statute that required children to attend school until the age of 16, believing that the worldly influences of school would substantially interfere with their children's religious development. The court found that the statute unconstitutionally impeded the parents' free exercise of religion,<sup>38</sup> noting that the children could receive an adequate alternative education at home, and that Old Order Amish were a "highly successful social unit within our society."<sup>39</sup> The same could likely be said about home schoolers today.<sup>40</sup>

Since *Wisconsin v. Yoder*, some courts have acknowledged the right of parents to home school their children whether or not the parents' motivations are religious.<sup>41</sup> Where no religious motivation exists, and the free exercise clause is thus not implicated, home schooling has been found to be a liberty interest protected by the Fourteenth Amendment.<sup>42</sup> This right had its genesis in *Pierce v. Society of Sisters*,<sup>43</sup> in which the court struck down an Oregon statute mandating public school attendance by all children, stating:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right,

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37. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

38. *Yoder*, 406 U.S. at 207, 219-29. It is questionable whether the same result would be reached today, given the intervening change in legal analysis in free exercise cases. *Employment Div. Dep't of Human Res's of Ore. v. Smith*, 494 U.S. 872 (1990) (holding that laws of general applicability that incidentally burden the practice of religion do not violate the First Amendment); *Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (holding that laws that burden religion and are not neutral and generally applicable require compelling justification).

39. *Yoder*, 406 U.S. at 222.

40. CHRISTOPHER J. KLICKA, *THE RIGHT CHOICE: HOME SCHOOLING*, 101, 131-41 (1992) (noting home schoolers' high standardized test scores and college acceptance rates); *id.* at 141-44 (addressing home schoolers' development of social skills); Lukasik, *supra* note 22, at 1918 n.33 (citing studies showing consistent academic success by home schoolers).

41. *Michigan v. DeJonge*, 501 N.W.2d 127 (Mich. 1993) (religious motivation); *Charles*, 504 N.E.2d at 598, 600 (no religious motivation).

42. *Charles*, 504 N.E.2d at 600 (declaring that compulsory attendance laws were designed to ensure "that all children shall be educated, not that they shall be educated in any particular way").

43. *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).



coupled with the high duty, to recognize and prepare him for additional obligations.<sup>44</sup>

The “additional obligations” referred to by the court have been defined to include “the inculcation of moral standards, religious beliefs, and elements of good citizenship.”<sup>45</sup> These elements are among those many home educators find to be lacking in public schools today, providing in part their motive to home school.<sup>46</sup>

Parents who choose to home school for pedagogical, non-religious reasons have found it more difficult to claim a constitutional right to do so than their religious counterparts. Decisions reflect a belief among the judiciary that although parents who home school due to religious convictions may have a fundamental right protected by the Constitution, parents who home school for other reasons do not.

For example, in *Michigan v. DeJonge*, the Michigan Supreme Court held that since religiously-motivated home educators have a fundamental right protected by the First Amendment, the state had to show that its regulation regarding teacher certification was necessary to achieve a compelling state goal before it could restrict the parental rights.<sup>47</sup> Because the state could not meet this high burden, the parents won. In *DeJonge’s* companion case, *People v. Bennett*, a non-religiously motivated home educator challenged the exact law deemed to violate the *DeJonge’s* constitutional rights.<sup>48</sup> The Michigan Supreme Court found that the parental rights asserted under the Fourteenth Amendment were not fundamental, and thus applied the rational relationship test instead

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44. *Id.* at 535. *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (invalidating an English only statute for elementary school because it violated parents’ rights to control the education of their child).

45. *Yoder*, 406 U.S. at 232-33 (noting that the “primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition”).

46. *Klicka*, *supra* note 18, at 3. However, post-*Yoder* cases interpreting the establishment clause demonstrate that it is unconstitutional for a public school to inculcate moral standards and religious beliefs into students. *Edwards v. Aguillard*, 482 U.S. 578 (1987) (invalidating statute that required the teaching of creation-science whenever evolution was taught because its primary effect was to advance religion). Instead, the school’s role is to inculcate elements of good citizenship, permitting neutral discussion of morals or religion, without hostility toward or endorsement of either, solely for the purpose of fostering a “marketplace of ideas.” *Keyishian v. Board of Regents of the Univ. of the State of New York*, 385 U.S. 589, 603 (1967); *James v. Board of Educ. of Cent. Dist. No. 1*, 461 F.2d 566, 573 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972), *reh’g denied*, 410 U.S. 947 (1973) (holding free marketplace of ideas assumptions do apply to school-age children). In practice, this means that teachers are free to communicate objectively about religion, but cannot indoctrinate religion. *School District of Abington Township v. Schempp, et al.*, 374 U.S. 203, 300 (1963) (J. Brennan, concurring).

47. This is commonly known as the “strict scrutiny” or “compelling interest” test.

48. *People v. Bennett*, 442 Mich. 316, 501 N.W.2d 106 (1993).

of the strict scrutiny test.<sup>49</sup> As a result, whatever parental rights are protected by the Fourteenth Amendment could be trumped by any rule found to be reasonably related to a legitimate state purpose.<sup>50</sup> The state easily met its burden to show that the same teacher certification regulation stricken as to the religiously-motivated DeJonges was rationally related to its purpose of educating students, and thus valid as to the pedagogically-motivated Bennetts.<sup>51</sup>

Although some scholars contend that the right to home school is merely legislative, and not constitutionally based,<sup>52</sup> other cases support the contrary proposition that parents have a constitutional right "to rear their own children as they see fit, particularly in the context of schooling decisions," including the decision to home school.<sup>53</sup> The important issue

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49. *Bennett*, 442 Mich. at 319.

50. *Ohio Ass'n of Indep. Sch. v. Goff*, 92 F.3d 419 (6th Cir. 1996) (concluding that secular parental rights do not receive protection of the "compelling interest test" standard of review, but that parental rights do receive such protection when coupled with a free exercise challenge); *Immediato, et al., v. Rye Neck Sch. Dist.*, 73 F.3d 454 (2d Cir. 1996) (holding that parents who objected on moral grounds to a mandatory community service graduation requirement did not have a fundamental right to direct the education of their children, because such concerns were purely secular and not religious in nature); *Herndon v. Chapel Hill-Carrboro City Bd. Of Educ.*, 89 F.3d 174 (4th Cir. 1996) (holding that parents who objected on moral grounds to a mandatory community service graduation requirement did not have a fundamental right to direct the education of their children, because such concerns were purely secular); *Clonlara, Inc. v. Runkel*, 722 F. Supp. 1442, 1456-58 (E.D. Mich. 1989) (finding that the *Pierce* right is not fundamental apart from religious motivation).

51. These companion cases demonstrate that the label the court attaches to the parents' interest - whether it is fundamental, or not - and the test that applies - the compelling interest v. rational relationship test - usually determines the outcome of the case. "Requiring a state to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). When the strict scrutiny test is applied, the state traditionally loses, but when the rational relationship test is applied, the state usually wins.

52. *Natale*, *supra* note 16, at 26; *Bjorklun*, *supra* note 4, at 2; *CB by and through Breeding v. Driscoll*, 82 F.3d 383, *reh. den.*, 99 F.3d 1157 (11th Cir. 1996) (holding that the right to attend school is state created, it is not a fundamental right for purposes of the substantive due process clause); *Null v Board of Educ. of the County of Jackson*, 815 F. Supp. 937 (S.D. W. Va. 1993) (noting that parents have no fundamental right to home school their children); *Hanson v. Cushman*, 490 F. Supp. 109 (D. Kan. 1980) (holding that the parents' right to direct the education of their children is not a fundamental right); *Maine v. McDonough*, 468 A.2d 977 (1983) (applying rational relationship test to home schoolers contention that regulations were onerous); *Scoma v. Chicago Bd. of Educ.*, 391 F. Supp. 452 (N.D. Ill. 1974) (holding there is no constitutional right to home school); *State v. Shaver*, 294 N.W.2d 883 (N.D. 1980) (also holding there is no constitutional right to home school).

53. *Fuller*, *supra* note 4, at 1609; *Klicka*, *supra* note 18, at 27; *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (alluding to the fundamental liberty interest of natural parents in the care, custody, and management of their child); *Board of Dir's of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987) (the freedom to carry on certain intimate or private relationships including child rearing and education is a fundamental element of liberty

of whether parents have a constitutional right to home school their children is often decided differently, depending on the state the home schoolers live in, or the personal convictions of the judge deciding the matter, illustrating that the rights of parents of home schoolers are more equivocal than in the past, and "the role of parents as arbiters of their children's education has undergone significant redefinition over the past half-century."<sup>54</sup>

The law regarding a student's right to participate in extracurricular events is clearer. The majority of cases hold that parents have no clearly established right to have their children compete or participate in extracurricular activities.<sup>55</sup> However, most of these cases have arisen in the context of a parent seeking to force their public school student's participation in an extracurricular activity at the public school, and have not examined whether the result would be different if the student is home schooled.

### B. Opt-In Cases

Few cases have addressed whether private or home school students have a constitutional or other legal right to "opt-in" to extracurricular events in public school. Attempts to base such a right on principles of federal constitutional law have met with little success. Those principles include the rights under the Fourteenth Amendment to equal protection and due process and the right under the First Amendment to the free

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protected by the Bill of Rights); *Ohio v. Whisner*, 351 N.E.2d 750, 769 (1976) (the right of a parent to guide the education of his or her children is a fundamental right guaranteed under the Fourteenth Amendment); *Jeffery v. O'Donnell*, 702 F. Supp. 513, 515 (M.D. PA 1988) (finding parents have a substantial constitutional right to direct and control the upbringing and development of their minor children); *Mazanec v. North Judson-San Pierre Sch. Corp.*, 614 F. Supp. 1152, 1160 (N.D. Ind. 1985) (holding that parents have a constitutional right to educate their children in a home environment).

54. Ralph Mawdsley, *Parental Rights and Public Education*, 59 EDUC. L. REP. 271-73 (1990).

55. *Palmer v. Merluzzi*, 689 F. Supp. 400 (D.N.J. 1988), *aff'd*, 868 F.2d 90 (3d Cir. 1989) (participation in extracurricular activities is a privilege, not a right protected by procedural due process); *Haverkamp v. Unified Sch. Dist. No. 380*, 689 F. Supp. 1055, 1058 (D. Kan. 1986) (no federally protected property right exists in participation in extracurricular activities); *McFarlin v. Newport Special Sch. Dist.*, 980 F.2d 1208 (8th Cir. 1992); *Gonyo v. Drake Univ.*, 837 F. Supp. 989 (S.D. IA 1993); *Farver v. Board of Educ. of Carroll County*, 40 F. Supp. 2d 323 (D. Md. 1999); *but see Boyd v. Board of Dir's of the McGhee Sch. Dist. No. 17*, 612 F. Supp. 86, 93 (D. Ark. 1985) (finding a student's participation in interscholastic activities to be a privilege important to the student's education and economic development, and thus a property interest protected by the due process clause).

exercise of religion.<sup>56</sup> Cases based upon state constitutions or statutes have met with greater success. Examples of such cases follow.<sup>57</sup>

### 1. Equal Protection

The Fourteenth Amendment to the United States Constitution provides that the state shall not "deny to any person within its jurisdiction the equal protection of the laws." Under this equal protection clause, state action not involving a suspect classification or deprivation of a fundamental right will be upheld if it is rationally related to a legitimate state purpose.<sup>58</sup> Home schoolers do not constitute a suspect class. Thus, where education is not viewed as a fundamental right,<sup>59</sup> regulations governing participation in school athletics or other extracurricular events are subject to the rational relationship test under the Fourteenth Amendment.<sup>60</sup>

In *Thomas v. Allegheny County Board of Education*, parochial school students sought access to a public school extracurricular band program, alleging a right to do so under the Equal Protection and Free Exercise Clauses.<sup>61</sup> The school district took the position that only full-time students could participate in such programs, and the court agreed. Although the court noted that students and parents had a "constitutional right to choose where they would receive their education," it found that once they had chosen private schooling, they could not be heard to complain of lack of access to the public school.<sup>62</sup> Citing the *de minimus* burden on the students' freedom of religion, and the school's legitimate interest in avoiding administrative inefficiency, the court upheld the rule.<sup>63</sup>

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56. Other theories, such as a hybrid rights theory, and the parental right to direct the upbringing of a child, have been unsuccessful and are not discussed herein. See *e.g.*, *Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694 (10th Cir. 1998) (denying part-time access to public school classes for home school student).

57. Legal theories have been segregated herein for sake of clarity, but in a typical case, numerous legal arguments would be raised. *Swanson*, 135 F.3d 694.

58. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

59. *Supra* note 51.

60. *Bush v. Dassel-Cokato Bd. of Educ.*, 745 F. Supp. 562 (D. Minn. 1990).

61. *Thomas v. Allegheny County Bd. of Educ.*, 51 Md. App. 312, 443 A.2d 622 (Md. Ct. Spec. App. 1982). Although this case and certain other cases cited herein involve private school students instead of home schoolers, it provides a useful analogy for the relationship between home schoolers and public schools. Further, in many states, a home school is considered to be a private school.

62. *Thomas*, 443 A.2d at 627.

63. *Id.*

The court conceded that “the administrative impact of a decision mandating the participation of the parochial school students into the public school program appears to be trivial,”<sup>64</sup> but nonetheless accepted at face value the Board’s speculation that permitting students to opt-in could open a Pandora’s box, causing administrative morass in the future.<sup>65</sup> This judicial deference demonstrates application of the well-established principle that “local school boards have broad discretion in the management of school affairs” and the courts’ reluctance to “intervene in the resolution of conflicts which arise in the daily operation of school systems.”<sup>66</sup> Such deference by courts to public schools’ determinations of administrative inconvenience poses a substantial obstacle to home schooling parents who wish to challenge public schools’ full-time only policies.

Among the interests articulated by states in justification of full-time only policies are; promoting loyalty and school spirit leading to cohesion in the student body, providing role models for other students, maintaining academic standards, and avoiding the administrative havoc which may result if home schooled students are permitted to selectively participate in public school programs.<sup>67</sup> Although these same assertions of interest could easily be made by any school board, most courts do not accept testimonial assertions of future burdens without evidentiary proof.<sup>68</sup> Where a school can show that part-time students cannot be counted for state financial-aid purposes, a rational basis for their exclusion will be found, and an equal protection challenge will be unsuccessful.<sup>69</sup>

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64. *Id.* at 626.

65. *Id.*

66. Board of Educ. Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982). In fact, the United States Supreme Court has instructed lower courts to defer to the judgment of school boards when considering board policies or practices, and to “refrain from attempting to distinguish between rules that are important to the preservation of order in schools and rules that are not,” absent any suggestion that the rule violates a substantive constitutional guarantee. *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.9 (1985).

67. *Bradstreet v. Sobol*, 630 N.Y.S.2d 486 (1995).

68. *Schail v. Tippecanoe County Sch. Corp.*, 679 F. Supp. 833 (N.D. Ind.), *aff’d*, 864 F.2d 1309 (7th Cir. 1988); *but see Davis*, 3 MASS. L. REP. 375 (striking regulation that prevented home schooler from participating in athletics because it violated equal protection analysis and failed to pass the rational relationship test where the purported justification for the regulation was speculative).

69. *Swanson*, 135 F.3d 694. However, many state school finance statutes provide for adjusted enrollment figures or “program weighting” which account for part-time students. *See, e.g.*, KAN. STAT. ANN. § 72-6407 (2000) (stating that a “pupil in attendance part-time shall be counted as that proportion of one pupil (to the nearest 1/10) that the pupil’s attendance bears to full-time attendance”).

## 2. Due Process

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." Similarly, the Due Process Clause of the Fifth Amendment guarantees that "[n]o person shall. . . be deprived of life, liberty, or property, without due process of law." Accordingly, to state a due process claim, a student must show a violation of his or her liberty or property interest without appropriate process.<sup>70</sup>

In *Boyd v. Board of Directors of the McGhee School District No. 17*, the federal court for the District of Arkansas found a student's participation in interscholastic activities to be important to the student's education and economic development and deemed the privilege of participating to be a property interest protected by the due process clause.<sup>71</sup> The majority of cases which have addressed the issue disagree with *Boyd*, holding that no federally protected property interest exists in participating in extracurricular activities.<sup>72</sup> These cases demonstrate that whether the privilege of extracurricular participation warrants the protection of law may depend on the importance the particular judge attributes to the role of sports in the student's overall education.

## 3. Free Exercise of Religion

The free exercise clause is found in the First Amendment's provision that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Home school cases since *Wisconsin v. Yoder* have not been successful in arguing that the free exercise clause protects or creates any right to opt-in to public school activities. Such cases have found that even if a student who is home schooled for religious reasons and is prohibited from participating in public school activities because of a full-time student rule, that student is still free to

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70. Board of Regents of State Coll's, et al. v. Roth, 408 U.S. 564 (1972).

71. *Boyd v. Board of Dir's of the McGhee Sch. Dist. No. 17*, 612 F. Supp. 86, 93 (D. Ark. 1985); see also Cloud, *supra* note 25, at 132-133 (noting the Michigan state court's preliminary injunction against a school, finding that although participation in interscholastic athletics is a privilege and not a right, there is no reason taxpaying home school families should not enjoy that privilege).

72. *McNatt v. Frazier Sch. Dist.*, 1995 WL 568380 (W.D. Pa. 1995) (finding extracurricular activities not a right or privilege protected by the federal constitution, where a home schooled student sought to play baseball with the public school team); *Bradstreet*, 630 N.Y.S.2d at 487 (finding home schooler's participation in interscholastic sports to be a mere expectation, instead of a legitimate property interest protected by the due process clause).

practice his or her religion.<sup>73</sup> Accordingly, no violation of the Free Exercise Clause is generally found.<sup>74</sup>

In the last decade, there has been a substantial change in legal analysis in free exercise cases, increasing the burden on persons alleging free exercise violations.<sup>75</sup> Accordingly, challenges today to full-time only policies, based on the free exercise clause, are unlikely to succeed.

#### 4. Unconstitutional Conditions Theory

Although no case to date has been decided on the theory of unconstitutional conditions, this theory provides another legal basis for contending that a federal constitutional right requires home schoolers to be able to opt-in to public school activities. This theory provides that once the government has created a generally available public benefit, it cannot condition the enjoyment of that benefit in a way that impinges upon a person's ability to exercise a constitutional right.<sup>76</sup> As applied to opt-in cases, the theory is that because the government has created the generally available benefit of free public education, it cannot condition a student's enjoyment of that benefit on relinquishment of the constitutionally protected right to home school.<sup>77</sup> In other words, a student cannot be forced to give up home schooling in order to be permitted to attend public school, as is required under rules mandating that students be enrolled full-time at public school before being permitted to participate in any public school activities.

The fact that a substantial number of states already have statutes mandating that home schoolers be permitted to attend classes or extra-curricular activities on a part-time basis provides good evidence that full-time attendance rules are not essential to the provision of public education.<sup>78</sup> Additionally, many public schools already accommodate non-

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73. *Thomas*, 443 A.2d 622.

74. *Traverse City Sch. Dist. v. Attorney Gen.*, 384 Mich. 390, 185 N.W.2d 9 (1971) (holding that if public school district offered "shared time" instruction to public school students at public school, non-public school students would also have the right to receive such instruction at public school and to do otherwise would burden religion and equal protection, and would not be justified by any compelling state interest).

75. *Smith*, 494 U.S. 872 (holding that laws of general applicability that incidentally burden the practice of religion do not violate the First Amendment).

76. *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that when a university creates an "open forum" for speech, it cannot prevent religious groups from using it on an equal basis without violating the free speech clause).

77. See *Fuller*, *supra* note 4, at 1621. This theory is based upon the premise that there is a constitutional right to home school one's own children.

78. *Id.*

traditional students who work part-time, participate in work-study programs, attend some classes at another location such as a community college, are special needs home-based students, or for other reasons attend public school less than full-time. Accordingly, courts may find that full-time attendance policies are severable from and/or non-essential to the benefit of education because of the inherently flexible nature of the educational enterprise.<sup>79</sup>

Under the unconstitutional conditions theory, the contention that permitting home schoolers to opt-in would be too difficult or too costly is likely to fall upon deaf ears given the fact that school funding structures are often already designed to take part-time attendance into account,<sup>80</sup> and home schoolers are already paying for the benefit of attending public school full-time.<sup>81</sup> Although some administrative expenses may arise when home schoolers attend public school on a part-time basis, "the costs of accommodating opt-in requests would usually fall far short of the costs of providing full-time education — which home schoolers, like all other citizens, are already free to demand at any time if they decide to quit home education."<sup>82</sup> The administrative ability to accommodate opt-in requests should be no different than the ability, already established in many states by statute, to accommodate students electing to opt-out of certain courses based upon content,<sup>83</sup> to the extent both impact upon scheduling flexibility, curricular choice, and the delicate balance between administrative control and parental authority over students.<sup>84</sup>

This theory, not yet tested in the courts, may provide a viable legal alternative for home schoolers challenging full-time only policies, and seeking a right to opt-in to public school extracurricular activities.

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79. *Id.* at 1621-22.

80. John E. Roberts, Enrollment Comes First: A Call to Protect School Sports, Michigan State High School Activity Association News Release (Mar. 23, 1999) (on file with authors).

81. Fuller, *supra* note 4, at 1627-29.

82. *Id.* at 1628.

83. See e.g., MINN. STAT. § 126.699 (1996) (renumbered as MINN. STAT. § 120B20 (2000)) (giving parents the right to arrange for reasonable alternative instruction to objectionable curricular content); KAN. STAT. ANN. § 72-1111(e) (2000) (giving parents the right to opt their children out of "any activity which is contrary to the religious teachings of the child" upon written request).

84. Many states already provide by law that public school students can be released from the regular school day to participate in religious instruction, for hours a week, further demonstrating the possibilities for flexibility within the existing public school system. See, e.g., MICH. COMP. LAWS § 380.1561(3)(d), recodified as M.S.A. § 15.41561(3)(e) (2000). (This is traditionally referred to as "released time.")



### 5. State Constitutions or General Education Statutes

Proponents of the right to opt-in have found the most success to date by basing that right on state constitutions or statutes. Although some states have constitutions whose provisions for due process, equal protection, or free exercise are similar to those in their federal counterpart, other states' constitutions have sufficient differences in wording of such provisions, or additional provisions regarding education, to give rise to different claims.

In *Snyder v. Charlotte Public School District*, a parochial student who wished to take an instructional band class at the public school was prohibited from so doing on the basis of the school's full-time student policy.<sup>85</sup> Although the student's suit was premised on federal claims, the Michigan Supreme Court relied on a general education statute which guaranteed public education to "all children" in finding that the student had a right to attend part-time.<sup>86</sup> The same result would likely have occurred if the student had been home schooled.

The court found that the school board's right to determine public school curriculum and operating procedures did not trump the students' right to attend school part-time.<sup>87</sup> The statutory right to public education was not conditioned on full-time attendance, and practices already in place demonstrated the possibility of a student's receiving an education from more than one institution. The court found that administrative difficulties were minimal, part-time attendance was not disruptive, and full-time attendance had not been shown to be "educationally advantageous."<sup>88</sup> Instead, the court found that:

A diverse student body would result in new perspectives to problems, stimulate the educational process, and engender respect and understanding for other students' beliefs and upbringing. Part-time students would still be subject to the school board's reasonable rules and regulations, thus minimizing disruption, and disorganization.<sup>89</sup>

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85. *Snyder v. Charlotte Pub. Sch. Dist.*, 421 Mich. 517, 365 N.W.2d 151 (1984).

86. *Snyder*, 365 N.W.2d at 157-159.

87. *Id.* at 159.

88. *Id.*

89. *Id.*

Similarly, in *Duffley v. New Hampshire Interscholastic Athletic Association*,<sup>90</sup> the court found a due process right to participate in extracurricular activities under the state constitution.<sup>91</sup>

Because the constitutions and general education statutes of every state address education in some manner, and vary greatly from state to state, administrators, board members, and their counsel must conduct a careful review of their own state's governing provisions to determine whether a full-time only policy is likely to withstand constitutional challenge.

### 6. Opt-In Statutes

Due to the strength of the home schooling lobbying efforts, at least thirteen states have recently enacted statutes specifically creating rights for home schoolers to participate in extracurricular activities under certain circumstances.<sup>92</sup> Under such statutes, home schoolers are generally required to meet the following conditions before they are allowed to participate in public school programs: (1) the student must be legally registered under the home school law; (2) the student must meet all the eligibility requirements of a public school student (but for full-time attendance); and (3) the student's test scores or periodical academic reports must be submitted to the public school.<sup>93</sup>

Idaho currently has one of the most liberal laws allowing home schooled students to participate in extracurricular sport activities.<sup>94</sup> This law enables home schoolers to comply with the state's compulsory attendance laws without attending the public school on a full-time basis as

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90. *Duffley v. New Hampshire Interscholastic Athletic Ass'n*, 122 N.H. 484, 446 A.2d 462 (1982).

91. *State ex rel Sch. Dist. v. Nebraska State Bd. of Educ.*, 188 Neb. 1, 195 N.W.2d 161, 164, *cert. denied*, 409 U.S. 921 (1972) (stating, *in dicta*, that an attempt to prohibit a parochial school student from participating in programs conducted by the public schools, solely because of the student's enrollment in parochial school, would violate the state constitution).

92. Fuller, *supra* note 4, at 1615 n.73 (summarizing the state statutes addressing rights to participate in extracurricular activities).

93. Smith, *supra* note 19.

94. Idaho has not always supported this movement. In January of 1995, the school principals who make up the Idaho High School Activities Association voted unanimously to banish home schooled students from public school activities because home schoolers could not be held to the same academic and attendance requirements as public school students. Four months later, an Idaho state representative whose own children are home schooled presented a "dual enrollment" bill which would allow the state's home schooled students (and those in private schools) to attend regular public school classes, as well as compete in extracurricular activities. This bill passed, with revisions. See Diane Brockett, *Home School Kids in Public School Activities*, 61 EDUC. DIG. 67 (1995).

long as they meet all the requirements of regularly enrolled students, and achieve a minimum score on an annual standardized test.<sup>95</sup> The statute addresses administrators' concerns about limited financial resources by permitting the school district to include dual-enrolled school students for purposes of receiving state funding, to the extent that the student actually participates in the public school programs.<sup>96</sup>

Florida and Oregon have statutes similar to Idaho's in conditioning home schoolers' extracurricular participation on the student's compliance with certain factors.<sup>97</sup> Florida's statute is unique because it expressly recognizes the state's interest in permitting home schoolers access to public school extracurricular activities by expressly recognizing that interscholastic activities are important as a complement to the academic curriculum and that such activities contribute to the development of social and intellectual skills necessary to become a well-rounded adult.<sup>98</sup>

Other states have chosen to enact statutes which place the decision to permit or disallow home schoolers' participation in extracurricular activities in the hands of local school districts. For example, Maine conditions home schoolers' participation on approval from the superintendent of the district, which approval may not be unreasonably withheld.<sup>99</sup> This approach retains local control, and vests the superintendent with the power to balance the potentially competing interests on a case-by-case basis, but may prove to be a time-consuming process capable of producing inconsistent results both within and outside the district. Statutes such as these do little other than codify the procedure already being used by home educators in states having no statute mandating access.

## VI. CONCLUSION

The number of home schooled students is growing phenomenally.<sup>100</sup> As the number of high school age students schooled at home increases, so will requests for participation in extracurricular activities offered by the public schools.<sup>101</sup> How legislatures and local school boards respond

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95. IDAHO CODE § 33-203 (1995).

96. *See id.*

97. FLA. STAT. ANN. § 232.425 (2000); OR REV. STAT. § 339.460 (2000).

98. FLA. STAT. ANN. § 232.425.

99. ME REV. STAT. ANN. TIT. 20-A §5021 (West 1995).

100. Hawkins, *supra* note 1.

101. The technical issue of mootness, which has worked in favor of public schools on this issue, will occur less often as the home schooling population increases, enabling a steady stream of home schoolers to bring substantive legal challenges which courts have previously

to these requests will become increasingly visible and controversial, and subject to challenge in the courts.<sup>102</sup>

Regardless of the outcome of equal access cases, the community is the loser. Vast and valuable financial resources that could be better spent on legitimate educational pursuits are required to fund a case. The parties and witnesses undergo significant stress and emotional trauma inherent in the trial and pretrial process, and administrators lose multiple days preparing for and defending the case which could be better spent in meeting the administrative needs of the school system. The delay of months, or even years, before a final decision can be made is not in the best interests of either the home schoolers or the public school administration. Furthermore, in most litigation a final decision does little to resolve the animosity between the parties. Instead, the losing party remains unconvinced that he is wrong, and chooses to believe that the judge who decided the case erred. Legal battles may thus increase, rather than diminish, the animosity between the school district and its supporters, and home schoolers and their supporters, serving to divide, rather than to unite the community.

All educators, at home and at school, maintain a viable interest in enriching children's education by the provision of extracurricular activities. Currently, the flexible nature of the educational enterprise accommodates numerous students on a part-time basis. As the number of high school age home schooled students continues to increase, so must communication regarding equal access between school and athletic administrators, state representatives, and the home school community.

#### ABOUT THE AUTHORS

KATHRYN GARDNER, Esquire. Mrs. Gardner is a law clerk to the Honorable Sam A. Crow, of the United States District Court for the District of Kansas. Before rejoining Judge Crow in April of 2000, she was a trial lawyer for approximately twelve years at a firm where she practiced predominantly in federal court in the areas of civil rights, employment law, and products liability. While in private practice, she worked part-time to accommodate her three small children and one large husband. She has previously served as Judge Crow's law clerk, as an Assistant

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avoided on procedural grounds. *See, e.g.,* Gallery v. West Virginia Secondary Sch. Activities Comm'n, 205 W. Va. 364, 518 S.E.2d 368 (W. Va. 1999) (dismissing challenge to Secondary Schools Activities Association's ban on home schooled students' participation in interscholastic athletics because student was no longer home schooled, rendering the issue moot).

102. Cloud, *supra* note 25, at 132-133.

Attorney General to the State of Kansas, as a Research Attorney to a judge on the Kansas Court of Appeals, and as a high school English and French teacher.

ALLISON J. MCFARLAND, Ph.D. is an assistant professor of Sport Management at Western Michigan University, Kalamazoo, Michigan. She is an active member of the North American Society for Sport Management, and the National Interscholastic Athletic Administrators Association. Her research focuses on interscholastic sport, and she has authored numerous articles on the effect of the homeschool movement on high school athletic programs.

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