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Equal Access

Participation of Homeschooled Students in Public School Activities

I. Introduction

As home education in America continues to grow, the issues facing home educating families continue to evolve as well. No longer are the questions as simple as, “Is it legal?” or “What about socialization?” Now firmly established, some homeschoolers are branching out to fight new battles. One such battle is the question of equal access to public school activities and classes. More specifically, can homeschool students take classes at local public schools? Can homeschool students play on public school sports teams? Do parents have the right to choose not only to exempt their children from public school, but the right to receive free public education services of their own choosing?

The purpose of this analysis is to address the different legal and political issues surrounding the equal access debate.

II. Access Laws and Legislation

Eighteen states currently force public schools to allow homeschoolers access to classes or sports. These include Arizona, Colorado, Florida, Idaho, Iowa, Maine, Michigan, Minnesota, New Hampshire, New Mexico, Nebraska, North Dakota, Oregon, Pennsylvania, Utah, Vermont, Washington, and Wyoming. In both Arizona and Oregon, the law only requires school districts to allow access to “interscholastic” activities. Yet the effect of the laws in these two states generally allows homeschoolers to participate in any activities they choose.

Despite these laws, equal access to homeschoolers is not offered without some strings attached. Although specific requirements vary from state to state, homeschool students can typically participate in public school programs only if certain requirements are met. First, the student must be in compliance with the state homeschool law. Second, the student must meet the same eligibility requirements as a public school student. Finally, the state requires the student to verify that he or she is passing his or her core subjects. Consequently, the homeschooler may be required to provide achievement test scores or periodic academic reports, even if the state’s homeschool statute does not otherwise require them.

Other states have laws which do not require public schools to allow homeschoolers equal access, yet sometimes make it easier for homeschoolers to obtain services. In Illinois, the law allows non-public school students to “request” part-time enrollment in public school classes. Only a handful of state high school athletic associations have adopted by-laws that allow homeschoolers to play on public school sports teams. (Check with your state high school athletic association for its current policy.)

III. Access Litigation

For home educated students who reside in states that do not have an equal access law, the situation is much more complicated. Often non-public¹ school students blocked from participation take the matter to court. Courts heard several private school cases on the access issue in the 1970’s and early 80’s. More recently, a few homeschool cases have come down as well. These cases are generally brought against either the school district or the state high school athletic association.

A. Legal Arguments

There are several constitutional arguments advanced on behalf of non-public students seeking part-time public school participation:

1. Denying non-public students access to part-time classes denies them due process in their property interest in the free public education provided for by state constitutions. (Due Process Clause of the 5th and 14th Amendments)
2. Non-public students excluded from part-time activities are unjustifiably discriminated against, denying these students their right to equal protection under the law. (Equal Protection Clause of the 14th Amendment)
3. If a student is not enrolled in public school because of a sincere religious belief, his right to the free exercise of his religious beliefs is burdened by the prohibition of access to public school activities. (Equal Protection Clause of the 14th Amendment and Free Exercise Clause of the 1st Amendment)

The courts have routinely rejected these constitutional claims. In virtually every case, they have ruled that a school district's refusal to allow access to classes part-time does not violate the student's constitutional rights to due process of law, equal protection under law, or free exercise of religion. In addition, courts have ruled that school districts have the right to set the eligibility requirements for participation in school activities. The courts have found that schools requiring the full-time enrollment of a student are not acting unreasonably.

Only one high court (Snyder, discussed below) has ruled in favor of a non-public student in an access case. In that situation, the Michigan Supreme Court merely clarified an existing state statute which allowed private school students shared-time instruction in public schools. Homeschoolers who pursued access in Massachusetts won several trial court decisions. However, those decisions are probably unique to Massachusetts in that the state's homeschooling law requires homeschoolers to obtain the "approval" of the district superintendent. Since the law technically considers homeschooled students "equivalent" to public school students, school districts usually cannot exclude homeschoolers from part-time classes or athletics.

United States Supreme Court precedent also works against homeschoolers seeking access. Although the Supreme Court has not directly addressed the issue of home education since *Wisconsin v. Yoder*, 406 U.S. 205 (1972), another case the following year dealt with a similar issue. In *Norwood v. Harrison*, 413 U.S. 455, (1973), the Court declared it unconstitutional for school districts to lend state-owned textbooks to racially segregated private schools. The Court said:

In *Pierce*,² the Court affirmed the right of private schools to exist and operate; it said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise. It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause. It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such school must, as a matter of equal protection, receive state aid. 413 U.S. at 462

In addition to addressing equal protection, *Norwood* also addressed the free exercise of religion.

Our decisions ... reflect the internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause ... This does not mean, as we have already suggested, that a State is constitutionally obligated to provide even "neutral" services to sectarian schools. 413 U.S. at 469

These arguments of *Norwood* were reaffirmed a few years later in *Maher v. Roe*, 432 U.S. 464, (1977).

Negative court precedents indicate the equal access issue requires a political rather than legal solution. Thus, the most effective way to obtain access for homeschool students is to campaign for equal access laws or school district policies. As discussed below, taking school districts and athletic leagues to court has proven largely unsuccessful.

B. Extracurricular Activities Litigation

Equal access cases break down into two major categories: litigation over general extracurricular activities and litigation over interscholastic activities. With cases involving extracurricular activities, the homeschooling family is usually suing the local school district for access to classes like band, higher mathematics, or sciences. These are classes which typically require more students than the average homeschool, specialized equipment, or specialized training to teach.

In Maryland, an intermediate appellate court ruled that it would be an unreasonable burden on the efficient administration of the

public school system to require school districts to allow private school students access to public school programs. *Thomas v. Allegany County Bd. of Ed.*, 443 A.2d 662, (1982).

Just two years later, the Supreme Court of Michigan ruled that a private school student could take an extracurricular class in the public school as long as the private school she attended did not offer that class and the class was not a core subject. (Private and homeschools in Michigan are required to teach core subjects.) However, this case is unique in that a statute in Michigan already existed which required schools to allow “shared-time instruction” with private school students. *Snyder v. Charlotte Public School District*, 365 N.W.2d 151 (Mich. 1984).

More recently in January 1998, the 10th Circuit Court of Appeals ruled against a homeschool student from Oklahoma who wanted to take choir and a math class from her local public school. School district policy forbade homeschoolers from part-time enrollment. The court affirmed the lower federal district court decision stating that there is no federal parental right that would force a local school board to allow parents to dictate that their children will attend the school for only part of the school day. *Swanson v. Guthrie Independent School District No. 1-1*, 942 F.Supp. 511 (W.D. Okla 1996) and *Swanson v. Guthrie Independent School District No. 1-1*, (D.C. No. CIV-95-596M).

C. Interscholastic Activities Litigation

The second major category of litigation is over the issue of interscholastic activities. These cases primarily involve families who are suing the school district or the state athletic association over access to activities involving more than one school, such as sports programs. All public high schools within a state are normally members of the state athletic association. These private, often non-profit, associations have by-laws which participating schools must follow in order to remain in the league. Such by-laws usually forbid public schools from allowing students who are not enrolled full-time in their school from participating on the school sports teams. Such rules effectively keep homeschoolers out even if the school is not opposed to a homeschool student participating.

Several states have applicable federal or state court rulings involving the participation of non-public students in high school interscholastic activities. Most of these cases, however, deal with racial discrimination, gender discrimination, or transfer rules, rather than straight private or homeschool discrimination. Most courts rule that eligibility for a high school sports team is a privilege, not a right.

The Louisiana Court of Appeals ruled in 1970 that a state athletic association policy of disallowing non-enrolled students to participate on a public school sports team was not so arbitrary that it warranted the court’s interference in the matter. The court also said the private school student did not suffer the loss of a significant property right by being kept off the team. *Sanders v. Louisiana High School Athletic Association*, La.App., 242 So.2d 19.

In 1996, a New York appellate court ruled against a homeschooler whose local school district denied him access to interscholastic sports. The court held that, “[P]articipation in interscholastic sports is merely an expectation and no fundamental right is involved. . .” *Bradstreet v. Sobol*, 650 N.Y.S.2d 402, 403 (A.D.3 Dept 1996).

Referring to other case precedent around the country (including Thomas, Snyder, and Swanson discussed above) the Supreme Court of Montana decided that “participation in extracurricular activities was not a fundamental right.” (supra. 1316) The court was unable to conclude “a private school student’s interest in participating in public school extracurricular activities is more important than the school district’s policy decision . . . that it needs to restrict participation to those students who are enrolled in the public school system.” *Kaptein v. Conrad School District*, 931 P.2d 1311, 1317 (Mont 1997).

IV. States Without Access Laws

Obtaining access often presents technical problems which homeschoolers must consider. In states that do not have laws forcing schools to allow homeschoolers access, it is up to local schools and school districts to set a policy. In many cases, these policies do not favor the homeschoolers looking for access.

A school board’s decision to write an equal access policy is rarely free from outside influence. State departments of education often discourage districts from allowing part-time students access. Most schools in these states have no way of counting part-time students in the enrollment for purposes of receiving state funding. This was one reason for the negative school district policy in the *Swanson* case. In addition, the homeschoolers who oppose access often end up campaigning against suggested policies.

A homeschool student seeking to participate should contact the local superintendent or make a presentation to the local school board requesting an equal access policy.

A. Interscholastic Sports Associations

Establishing sports access for homeschoolers tends to be more complicated than other access issues. Homeschool students seeking to play public school sports may encounter a state athletic association policy unfavorable to homeschoolers. Although they have a great deal of influence over public schools, athletic associations are typically private organizations. As such, they enjoy much more freedom with their own rules and regulations than would a government entity. Courts and legislatures have historically been more reluctant to interfere with the inner workings of private organizations than those of government bodies.

In many cases, schools and school districts that would otherwise allow homeschool athletes to play on teams have their hands tied. Most athletic associations require students to show that they are passing a minimum number of classes before permitting them to participate on sports teams. Thus, association rules are often designed to keep students who are failing in school from playing sports. This effort to keep below-average students and high school dropouts off sports teams also tends to categorically eliminate homeschool students as well. If a school violates these rules, the association can remove the school from the league or make the team forfeit its games.

Like most bureaucracies, state athletic associations are reluctant to change their rules. Especially since the majority of school districts are not especially helpful to homeschoolers. One Texas poll revealed that out of 914 public school superintendents questioned, only 21 supported the idea of allowing homeschoolers on public school teams.³

B. Private School States

At least nine states do not have homeschool statutes. In these states homeschools are legally considered private schools. Consequently, homeschoolers usually have more freedom from burdensome state requirements. It is difficult to write a law allowing equal access for homeschoolers when a “homeschool” is not defined by statute. In these situations, homeschoolers do not want to lose the freedoms they have as private schools, and state officials are not usually willing to throw access open to all private school students. Access legislation can be worded so that it does not change the private school status of home educators, but such a bill has yet to pass in a private school state.

C. Extended Government Regulations

Many fear that pushing for access laws will only bring more government regulation on homeschoolers in general. Although to date no access law has directly affected any homeschoolers who have chosen not to receive services from public schools, this is a legitimate concern. Taking government money or services almost always invites government control.

In Utah, the state board of education passed regulations to allow private and homeschools access to public schools activities. However, Utah statutes or regulations had never previously defined a “private school.” Problems then arose when the board of education introduced more regulations to define what a private school really was. With these new regulations, private schools had a new set of requirements to follow which had not been an issue prior to the access regulation.

In 1996, some Georgia homeschoolers campaigned for access to the state-funded college scholarships given to public school students by introducing two equal access bills. The following year, the state legislature introduced a new, more intrusive homeschool law which would have required parents to have a college degree, as well as testing and portfolio reviews for homeschool students. The prevailing attitude among legislators and public school advocates was, “If homeschoolers want state money for education, we must make sure they are doing a good job teaching their children.”

V. Arguments

The issue of equal access is being debated even among the homeschooling community. Many homeschoolers oppose equal access, because they are against any government involvement in education. Others assert it is unfair to keep homeschoolers out of public school programs when their taxes help pay for these programs. Below is a summary of the most common arguments, both pro and con, from homeschoolers.

A. Pro

Homeschool families are members of the community and pay the same taxes as families who send their children to public schools. These taxes fund public schools, too, whether homeschoolers elect to use them or not. It is unacceptable to exclude homeschool students from other public institutions such as libraries, hospitals or parks. Likewise, it should be unacceptable to keep them out of public school programs.

Allowing homeschoolers access to public school activities will increase the numbers of children home educated. There are many parents across the country who do not homeschool their children because they or their children want access to a specific program available only at public schools.

A student is a student whether he attends a public school, private school, or homeschool. Specific economic and career advantages are available to public school students. A homeschool student should not be denied the opportunity to take part in these advantages if he or she meets the qualifications.

Homeschoolers participating in classes will not cause the increase in taxes that some claim. In states that have access laws it is estimated that only 3 to 5 percent of homeschoolers actually take advantage of public school services.

Parents should be allowed to choose selected public school activities if it is what they think is best for their own children.

B. Con

We should not trade our freedom for services. Government services never come without strings attached. Because we've been fighting so long to get away from the government, it is illogical to go back to government handouts.

If states begin mandating that school districts open their doors to homeschoolers who want access, school officials and legislators will want to define and regulate all homeschoolers.

Paying taxes which support government programs does not automatically give someone the right to participate in that program. Adults who have no children, but own property, pay the same taxes as property owners who do have children.

Individuals who receive the services will become more and more dependent on the government and more likely to accept new regulation limiting their freedom.

What ultimately happens when any individual goes to the government for services that the private sector can better perform, is that the government sector chokes out private enterprise and individual initiative. Private alternatives for homeschoolers will be less likely to arise if the government allows access.

VI. Conclusion

Do parents have the right to choose the amount of public education their children receive? Although the courts have said "no," the state legislatures are beginning to say "yes." Courts do not find any "right" for homeschoolers to receive access to government funded educational services. State legislators, however, seem open to allowing homeschoolers the privilege of access to public school activities.

Part of the reason for this trend is financial. School districts in some areas are beginning to feel a decrease in funds due to the increasing number of students leaving public schools for private and home education. Schools may try to compete with private education by luring those students back with sports and academic classes, in order to regain at least partial funding for those students.

The access trend is not without potential hazards. Access supporters must remember to guard the right of parents to remain free from extraneous government regulation when they receive no government services. Despite both legal and political controversies, opening access to homeschoolers appears to be a growing trend.

Prepared by the legal staff of the Home School Legal Defense Association. Permission to reprint granted.

1. Cases involving private school students are relevant to the discussion since they advance the same legal arguments as situations involving home educated students.
2. The case referred to in this quote is *Pierce v. Society of Sisters*, 268 U.S. 510, (1923), in which the Supreme Court held that the state's role in the education of its citizens must yield to the right of parents to provide an equivalent education for their children in a privately operated school of the parents' choice.
3. Elizando, Juan B., "Proposal for homeschoolers in UIL dies" Associated Press, reported in the Fort Worth Star-Telegram, October 22, 1996.

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