

HOME SCHOOLED STUDENTS' PARTICIPATION IN PUBLIC SCHOOL EXTRACURRICULAR ACTIVITIES: A PROPOSED SOLUTION FOR GEORGIA

I. Introduction

Sally Schoolgirl lives in Atlanta, Georgia. Sally and her parents recently decided that her educational needs would best be served by removing her from the public school system and educating her at home. For the most part, Sally is pleased with this decision – she receives personalized, tailored instruction; she formulates her own study schedule; and she never has to ride the bus! Sally, however, feels that something is missing from her educational experience. In the public school system, Sally used to play several sports and was in the band, activities that Sally enjoyed and wants to participate in again. At home, her parents have neither the resources nor the training to provide Sally access to these activities. Sally and her parents decide that they will petition the local school board to allow Sally to participate in these extracurricular activities at her old public school. What should the school board tell Sally and her parents?

Although this scenario sounds like a hypothetical fact pattern a law student might see on her Education Law exam, an increasing number of home schooled children are facing this exact situation.¹ Home schooling has been an American tradition since the dawn of our country.² The estimated number of children who were home schooled in the United States during the 2001-2002 school year is 1.725-

¹ See Eugene C. Bjorklun, Home Schooled Students: Access to Public School Extracurricular Activities, 109 **Ed. Law Rep.** 1,1 (1996) (observing new home schooling issue involving home schooled children seeking to participate in public school extracurricular activities not available at home).

² See Darryl C. Wilson, Home Field Disadvantage: The Negative Impact of Allowing Home-Schoolers to Participate in Mainstream Sports, 3 **Va. J. Sports & L.** 1, 3 (2001) (noting that during origins of our country, most individuals were educated at home).

2.185 million, with a growth rate of 7-15% each year.³ Many of these students are currently commencing litigation seeking to opt-in to public schools on a part-time basis to participate in classes or extracurricular activities that can not be provided adequately at home.⁴ This Note examines this recent phenomenon in education law, ultimately focusing on how Georgia should resolve this issue.

Part **II.** of this Note gives a brief history of the right to a home education, the right to a public education, and the general right of students to participate in extracurricular activities.⁵ Part **III.A.** of this Note begins by discussing the cases involving home schooled children seeking to enter public schools to participate in classes and extracurricular activities.⁶ Next, this Part examines the relevant law in Georgia, noting that although Georgia courts have yet to rule directly on this issue, case law and legislation exist that suggest Georgia does not condone part-time participation by home schooled students in the public schools.⁷ Finally, Part **III.B.** advocates that Georgia should not mandate such participation by case law or statute due to considerations of precedent in other jurisdictions, financial constraints, and administrative

³ Home School Legal Defense Association, at www.hslda.org/research/faq.asp#1 (Mar. 11, 2003). This is the most recent estimate available; estimates for the 2002-2003 school year will not be available until the summer of 2003. Id.

⁴ See generally Swanson v. Guthrie Indep. Sch. Dist., 942 F.Supp. 511 (W.D. Okl. 1996) (involving home schooled student seeking to compel school district to allow her to attend public school classes on part-time basis); Bradstreet v. Sobol, 650 N.Y.S.2d 402 (N.Y. App. Div. 1996) (involving parent seeking declaration that home schooled child is eligible to participate in interscholastic athletics).

⁵ See infra notes 9-23 and accompanying text (describing rights to home education, public education, and participation in extracurricular activities).

⁶ See infra notes 24-46 and accompanying text (discussing suits by home schooled children seeking right to participate in public school classes extracurricular activities).

⁷ See infra notes 47-49 and accompanying text (discussing case law and legislation relevant to Georgia's position on home schoolers' participation in extracurricular activities).

burden, but public schools should be able to allow such participation on a voluntary basis if it proves economically and administratively feasible after a case-by-case analysis.⁸

II. Background

One principle that is ingrained in the law of education is that parents have the right to direct the upbringing and education of their children.⁹ Although parents have exercised this right by educating their children in the home throughout this country's history,¹⁰ the legality of home schooling has a tumultuous

⁸ See infra notes 50-68 and accompanying text (detailing proposed solution).

⁹ See Meyer v. Neb., 262 U.S. 390, 400, 403 (1923) (striking down law prohibiting teaching of language other than English, noting Fourteenth Amendment liberty interest in bringing up children and “natural duty” of parents to educate their children); Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 530-535 (1925) (invalidating law requiring parents to send children between ages of 8 and 16 to public school as unreasonable interference with parents’ right to direct education and upbringing of their children); Wis. v. Yoder, 406 U.S. 205 (1972) (holding that state cannot under First and Fourteenth Amendments compel Amish parents to send their children to formal high school due to importance of religion to way of life and long tradition of Amish self-sufficiency and success).

¹⁰ See Robin Cheryl Miller, Validity, Construction, and Application of Statute, Regulation, or Policy Governing Home Schooling or Affecting Rights of Home-Schooled Students, 70 **A.L.R. 5th** 169, 169 (1999) (noting that home schooling has existed since “the beginning of the republic”). Famous American home schooled students include George and Martha Washington, Mark Twain, Robert E. Lee, Benjamin Franklin, Booker T. Washington, and Former United States Supreme Court Chief Justice John Marshall; others include Claude Monet, Agatha Christie, and Amadeus Mozart, just to name a few.
www.ghea.org/ghea_home_school_hall_of_fame.htm (February 24, 2003).

record.¹¹ The early landscape of American education was characterized by primitive transportation, sparse populations, and a lack of standardized education laws, causing home schooling to be not only a success but the norm.¹² Home education became more controversial, however, with the advent of compulsory school attendance laws.¹³ Litigation instituted by parents regarding the right to home school mushroomed in the early twentieth century and continues today.¹⁴ State legislatures consequently intervened,¹⁵ and home schooling is now statutorily authorized in every state.¹⁶

¹¹ See Lisa M. Lukasik, The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools, 74 **N.C. L. Rev.** 1913, 1917-1920 (1996) (describing evolution of acceptance of parents' right to home school their children from early success to contemporary litigation).

¹² See id. at 1917-1918 (observing that nation initially had no compulsory attendance laws or public schools, and early home education was successful); Bjorklun, supra note 1, at 1 (noting that home school was "ordinary means of education" in America); Wilson, supra note 2, at 3 (stating home education necessitated in part by difficulties in transportation and lack of population density).

¹³ See Bjorklun, supra note 1, at 1 (observing home schooling fell into disfavor after compulsory school attendance laws); Lukasik, supra note 11, at 1919 (stating that erosion of right to educate at home came with universal adoption of compulsory attendance laws).

¹⁴ See Lukasik, supra note 11, at 1920 (stating that many lawsuits were commenced in the 1920s and have continued into recent times); Wilson, supra note 2, at 3 (observing that twentieth century litigation challenged compulsory attendance laws).

¹⁵ See Wilson, supra note 2, at 4 (stating that state compulsory attendance laws were modified to accommodate non-public schools in response to home school litigation).

¹⁶ See Ralph D. Mawdsley, Parental Rights and Home Schooling: Current Home School Litigation, 135 **Ed. Law Rep.** 313, 313 (1999) (noting that home schooling is now authorized in every state by express statutory language or statutory interpretation). Efforts to legalize home schooling on a federal constitutional basis have been largely unsuccessful. Bjorklun, supra note 1, at 4.

The right to a public education, like the right to a home education, is governed by state law.¹⁷

The United States Supreme Court has declared that there is no federal constitutional right to a public education.¹⁸ Every state constitution, however, provides for a system of public education to be created and maintained by the state legislature.¹⁹

Although each state has established a public school system, courts generally have held that students do not have a right to participate in extracurricular activities those public schools may offer, such

¹⁷ See David W. Fuller, Public School Access: The Constitutional Right of Home-Schoolers to “Opt In” to Public Education on a Part-Time Basis, 82 **Minn. L. Rev.** 1599, 1602 (1998) (noting that every state constitution provides for public education system).

¹⁸ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

¹⁹ Ala. Const. art. XIV, § 256, amended by Ala. Const. amend. 111; Alaska Const. art. VII, § 1; Ariz. Const. art. XI, § 1; Ark. Const. art. XIV, § 1; Cal. Const. art. IX, § 1; Colo. Const. art. IX, § 2; Conn. Const. art. VIII, § 1; Del. Const. art. X, § 1; Fla. Const. art. IX, § 1; Ga. Const. art. VIII, § 1; Haw. Const. art. X, § 1; Idaho Const. art. IX, § 1; Ill. Const. art. X, § 1; Ind. Const. art. VIII, § 1; Iowa Const. art. IX, 2nd, § 1; Kan. Const. art. VI, § 1; Ky. Const. § 183; La. Const. art. VIII, preamble & § 1; Me. Const. art. VIII, § 1; Md. Const. art. VIII, § 1; Mass. Const. pt. 2, ch. 5, § 2; Mich. Const. art. VIII, §§ 1,2; Minn. Const. art. XIII, § 1; Miss. Const. art. VIII, § 201; Mo. Const. art. IX, § 1(a); Mont. Const. art. X, § 1; Neb. Const. art. VII, § 1; Nev. Const. art. XI, § 2; N.H. Const. pt. 2, art. 83; N.J. Const. art. VIII, § 4, para. 1; N.M. Const. art. XII, § 1; N.Y. Const. art. XI, § 1; N.C. Const. art. IX, §§ 1,2; N.D. Const. art. VIII, §§ 1,2; Ohio Const. art. VI, § 2; Okla. Const. art. XIII, § 1; Or. Const. art. VIII, § 3; Pa. Const. art. III, § 14; R.I. Const. art. XII, §§ 1,4; S.C. Const. art. XI, § 3; S.D. Const. art. VIII, § 1; Tenn. Const. art. XI, § 12; Tex. Const. art. VII, § 1; Utah Const. art. X, § 2; Vt. Const. ch. II, § 68; Va. Const. art. VIII, § 1; Wash. Const. art. IX, § 2; W.Va. Const. art. XII, § 1; Wis. Const. art. X, §§ 2,3; Wyo. Const. art. VII, §§ 1,9.

as music or sports.²⁰ A minority of states have held that students do have a right or Due Process property interest in participation in extracurricular activities,²¹ but the majority of jurisdictions have rejected this notion, stating that participation in extracurricular activities is a mere expectation or privilege and not a property interest or property right.²² This general rule has been extended to deny private school students

²⁰ *Nevarés v. San Marcos Consol. Indep. Sch. Dist.*, 111 F.3d 25, 27 (5th Cir. 1997); *Palmer v. Merluzzi*, 689 F. Supp. 400, 408 (D. N.J. 1988); *Haverkamp v. Unified Sch. Dist.*, 689 F. Supp. 1055, 1058 (D. Kan. 1986); 68 **Am. Jur. Schools** § 278.

²¹ *Boyd v. Bd. of Dirs. of McGehee Sch. Dist. No. 17*, 612 F. Supp. 86, 93 (E.D. Ark. 1985); *Moran v. Sch. Dist. #7, Yellowstone County*, 350 F. Supp. 1180, 1184 (D. Mont. 1972); *Grabow v. Mont. High Sch. Ass'n*, 59 P.3d 14, 17-18 (Mont. 2002). The cases declaring a right to participate in extracurricular activities often involve situations where denial of the right would result in deprivation of the student's opportunity to play collegiate athletics, and, consequently, the opportunity to attend college at all. See *Boyd*, 612 F. Supp. at 93 (noting that student's continued participation on high school football team was indispensable to college scholarship and college education); *Moran*, 350 F. Supp. at 1186 (noting that married high school student's future academic success depended on participation in high school football).

²² See *Nevarés*, 111 F.3d at 27 (denying that there is protected property interest in separate components of educational process); *Palmer*, 689 F. Supp. at 410 (stating that extracurricular participation is privilege and not property interest); *Haverkamp*, 689 F. Supp. at 1057 (rejecting notion that extracurricular activities are federally protected property rights); *Hardy v. Univ. Athletic League*, 759 F.2d 1233, 1234 (5th Cir. 1985) (noting that participation in interscholastic athletics is not interest protected by Due Process clause); *Walsh v. La. High Sch. Athletic Ass'n*, 616 F.2d 152, 159-160 (5th Cir. 1980) (stating that participation in interscholastic athletics is mere expectation and not constitutionally protected claim of entitlement).

the right to selectively attend public schools to participate in extracurricular activities.²³

III. Analysis

A. The Problem

Despite the mandate by most courts that neither public school nor private school students have a constitutional right to participate in extracurricular activities, home schooled children are now commencing litigation to gain access to public school classes and extracurricular activities that cannot be adequately provided by a home education curriculum.²⁴ State legislatures as well as courts have responded to these requests, with mixed results.²⁵ Some state legislatures have been receptive to these claims, and at least ten states now statutorily authorize some form of public school access by home schooled students.²⁶ Most of the courts that have addressed this specific issue, however, have been less

²³ See, e.g., *Jesuit Coll. Preparatory Sch. v. Judy*, 2002 WL 107264 (N.D. Tex. 2002) (holding private school student had no fundamental right to participate in public school extracurricular activities); *Kaptein v. Conrad Sch. Dist.*, 931 P.2d 1311, 1317 (Mont. 1997) (holding private school student's right to participate in public school sports outweighed by school's interest in developing academic potential of students); *Thomas v. Allegany County Bd. of Educ.*, 443 A.2d 622, 625-626 (Md. Ct. Spec. App. 1982) (holding that public school was not required to admit private school student in music program).

²⁴ Bjorklun, supra note 1, at 1.

²⁵ See Fuller, supra note 17, at 1600 (noting that many state legislatures have allowed such participation by home schoolers via statute, but lawsuits to declare right to participate have been unsuccessful).

²⁶ See Ariz. Rev. Stat. Ann. § 15-802.01 (Supp. 1995) (stating home schooled child who resides within attendance area of public school may participate in interscholastic activities); Colo. Rev. Stat. Ann. § 22-33-104.5(6) (West 1995) (allowing home schooled child who attends public school for portion of school day to participate in any extracurricular or interscholastic activity); Fla. Stat. Ann. § 232.425(3)(c) (West Supp. 1996) (providing that home education student may participate in interscholastic extracurricular

optimistic and have denied home schoolers the right to participate in public school classes and extracurricular activities.²⁷

activities of public or nonpublic school); 105 Ill. Comp. Stat. Ann. 5/10-20.24 (West 1998) (allowing part-time attendance by nonpublic school students in regular education program of school district if there is sufficient space in public school desired to be attended); Me. Rev. Stat. Ann. titl. 20-A, § 5021 (West 1993) (providing for participation by student receiving home instruction in public school regular classes and cocurricular and extracurricular activities as well as use of school facilities, equipment, textbooks, and library books); Minn. Stat. § 123B.36 (1999) (authorizing requirement of fees or charges to home schooled students for participation extracurricular activities if fee is same for all students); Nev. Rev. Stat. Ann. 392.070 (West 1999) (authorizing home schooled student to participate in public school class that is unavailable at home school or extracurricular activity, excluding sports); N.D. Cent. Code §§ 15.1-23-16 (1999) (allowing child receiving home education to participate in extracurricular activities); Or. Rev. Stat. § 339.460 (1995) (stating home schooled students shall not be denied by school district right to participate in all interscholastic activities); Va. Code Ann. §§ 22.1-253- 13:1(H) (allowing children receiving home instruction to enroll in public school on less than full-time basis).

²⁷ Compare Bradstreet v. Sobol, 650 N.Y.S.2d 402, 403 (N.Y. App. Div. 1996) (holding that refusal to allow home schooled student right to participate in public school interscholastic sports did not violate Due Process and Equal Protection provisions), Swanson v. Guthrie Indep. Sch. Dist., 942 F.Supp. 511, 515 (W.D. Okl. 1996) (stating refusal to permit home schooled student to attend public school classes on part-time basis did not deprive student of right to public education), and McNatt v. Frazier Sch. Dist., 1995 WL 568380, *3-4 (W.D. Pa. 1995) (refusing to permit home schooled student to participate in public school athletics pursuant to school district's validly enacted policy), with Davis v. Mass. Indep. Sch. Dist., 1995 WL 808968, *2 (Mass. Super. 1995) (stating that classification created by rule requiring public school attendance for eligibility to play interscholastic sports not rationally related to state purpose).

Bradstreet v. Sobol is a well known case on this issue that demonstrates the view the majority of jurisdictions have assumed.²⁸ Bradstreet involved a home schooled student seeking the right to participate in her local school district's interscholastic sports program, whereas the relevant regulation required regular attendance in the district as a prerequisite for eligibility.²⁹ The New York Supreme Court, Appellate Division, rejected the student's claim that the refusal to allow her participation violated the Due Process provision of the state and federal constitutions, stating that participation in interscholastic sports was a mere expectation, not a fundamental right.³⁰ The court further denied that an Equal Protection violation had occurred, considering the classification created by the school district's regulation reasonably related to a legitimate state purpose.³¹

The home schooled student in McNatt v. Frazier School District met a similar fate.³² The student desired to become member of a basketball team in his local school district, which at that time had no policy concerning participation by home schooled students.³³ Not long after the student was accepted on the team, the local school board voted on and denied a motion to allow participation in extracurricular activities by home schoolers; the student then sued the school district and various of its members under the Equal Protection clause and Civil Rights Act.³⁴ The court denied these claims, noting that the majority of school districts in the state do not permit participation in interscholastic athletics by home

²⁸ Bradstreet, 650 N.Y.S.2d at 403 (denying claim that refusal to allow home schooled student right to participate in public school interscholastic sports violates Due Process and Equal Protection provisions).

²⁹ Id. at 403.

³⁰ Id.

³¹ Id.

³² McNatt, 1995 WL at *3-4 (denying home schooled child right to participate in public school sports due to school district regulation).

³³ Id. at *2.

³⁴ Id. at *1, 3-4.

schooled students and the school district in question does not permit participation by a host of other students not regularly enrolled in the district.³⁵

The most recent case denying a home schooled student the right to participate in public school extracurricular activities is Hrycenko v. Allentown School District.³⁶ The school district in Hrycenko had the discretion to determine its own policy regarding home schoolers' participation in interscholastic activities and had prohibited such participation.³⁷ The plaintiff, a home schooled student who sought to try out for a public school soccer team in the district in question, challenged this policy, but the court determined that the plaintiff had presented no constitutional, statutory, or other principle that would invalidate the policy.³⁸

Home schooled students have also been denied the right to attend public school classes on a part-time basis.³⁹ The student in Swanson v. Guthrie Independent School District was home schooled for religious reasons, but desired to attend the local public school for foreign language, music, and science classes that could not be adequately taught by her parents.⁴⁰ After a year of condoned participation, the new superintendent refused to allow the student to continue attending classes on a part-time basis; subsequently, the school board adopted a policy requiring all students attending public schools to enroll on a full-time basis due to a lack of state funding for part-time students.⁴¹ The student brought suit challenging this policy, but the court held it violated neither the student's Free Exercise rights nor the

³⁵ Id. at *4.

³⁶ 57 Pa. D. & C. 4th 221, 224 (Pa. Com. Pl. 2000).

³⁷ Id. at 223.

³⁸ Id. at 224.

³⁹ Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 698-700 (10th Cir. 1998).

⁴⁰ Id. at 696.

⁴¹ Id. at 696-697.

parents' right to direct the education of their child.⁴²

At least one court has held that a home schooler is allowed to participate in public school extracurricular activities.⁴³ Davis v. Massachusetts Interscholastic Athletic Association involved a rule promulgated by the state Interscholastic Athletics Association that required students to attend school sessions to be eligible to participate in interscholastic sports.⁴⁴ A home schooled student who was denied participation on the high school girls' softball team brought suit, claiming the denial violated her state and federal equal protection rights.⁴⁵ The court agreed, holding that the rule had no rational relationship to the state's purpose of preventing students who were not attending any school sessions from participating in interscholastic athletics, noting that the student's home education curriculum was equivalent to that of the public schools.⁴⁶

There is no recorded case declaring Georgia courts' position on the issue of participation by home schooled children in public school classes and extracurricular activities. In fact, there is very little case law and no statute in Georgia regarding participation by any student in extracurricular activities, although the Georgia Supreme Court has held that participation in interscholastic sports is not essential to the prescribed curriculum Georgia children are entitled to and is therefore not a constitutional right or a

⁴² Id. at 698-700. The court also noted that parents have no constitutional right to control each and every element of their child's education. Id. at 699. The court in Jesuit College Preparatory School v. Judy, involving a private school student seeking to participate in public school extracurricular activities, similarly observed that a parent's right to educate his or her child applies to the entire educational process and not to its separate components. 2002 WL 107264 (N.D. Tex. 2002).

⁴³ Davis v. Mass. Interscholastic Athletic Ass'n, 1995 WL 808968, *2 (Mass. Super. 1995).

⁴⁴ Id. at *1.

⁴⁵ Id. at *2.

⁴⁶ Id.

protectable property interest.⁴⁷

The Georgia legislature, in contrast, has contemplated the specific issue of home schoolers' participation in public school extracurricular activities: it recently considered and rejected a Senate bill that would have entitled home schooled students whose curriculum meets statutory requirements to participate in any extracurricular activity in the public school that the student would otherwise be authorized to attend.⁴⁸ Ironically, the majority of home schoolers in Georgia seem opposed to that type of legislation and public school access in general, especially due to the fear that legislation on this issue might spawn increased regulation of the entire home schooling regime in Georgia, which does not strictly

⁴⁷ Smith v. Crim, 240 S.E.2d 884, 885-886 (Ga. 1977).

⁴⁸ S.B. 349, 148th Gen. Assem., Reg. Sess. (Ga. 2002). The relevant provision of the bill states:

A student who attends a home study program which meets the respective requirements therefore specified in Code Section 20-2-690 shall be eligible to participate in any extracurricular program offered in the public school which that student would otherwise be authorized to attend if that student meets the same requirements established for public school students in that program, other than attendance at that school. A public school shall have no obligation to provide transportation to or from that school for a student eligible for extracurricular programs pursuant to this Code section except that such student shall be eligible for transportation from the school to and from any extracurricular program in which the student is eligible to participate under the same conditions as public school participants in that program.

Id.

There was a concern that the bill as worded would not cover music, drama, lab sciences, special education, and therapy services, services desired by many home schooled students, since the bill specified only "extracurricular" activities. Public School Access for Georgia Homeschoolers?, at <http://www.kkorner.freeyellow.com/access.html> (February 24, 2003).

regulate home education.⁴⁹

B. The Solution

This Note advocates that Georgia should not mandate by case law or statute public school access by homeschoolers due to considerations of precedent, inadequate funding, and potential administrative burden. Initially, as a matter of precedent, although there is no pertinent case in Georgia regarding part-time attendance by home schooled children at public schools for classes or extracurricular activities, most courts that have addressed this narrow issue have rejected the cause of action.⁵⁰ Moreover, the majority of jurisdictions, including Georgia, have held that participation by any student in extracurricular activities is a mere expectation or privilege rather than a fundamental right or property interest.⁵¹ Indeed, it would

⁴⁹ Id.

⁵⁰ Compare *Bradstreet v. Sobol*, 650 N.Y.S.2d 402, 403 (N.Y. App. Div. 1996) (holding that refusal to allow home schooled student right to participate in public school interscholastic sports did not violate Due Process and Equal Protection provisions), *Swanson v. Guthrie Indep. Sch. Dist.*, 942 F.Supp. 511, 515 (W.D. Okl. 1996) (stating refusal to permit home schooled student to attend public school classes on part-time basis did not deprive student of right to public education), and *McNatt v. Frazier Sch. Dist.*, 1995 WL 568380, *3-4 (W.D. Pa. 1995) (refusing to permit home schooled student to participate in public school athletics pursuant to school district's validly enacted policy), with *Davis v. Mass. Indep. Sch. Dist.*, 1995 WL 808968, *2 (Mass. Super. 1995) (stating that classification created by rule requiring public school attendance for eligibility to play interscholastic sports not rationally related to state purpose).

⁵¹ See *Nevares v. San Marcos Consol. Indep. Sch. Dist.*, 111 F.3d 25, 27 (5th Cir. 1997) (denying that there is protected property interest in separate components of educational process); *Palmer v. Merluzzi*, 689 F.Supp. 400, 410 (D. N.J. 1988) (stating that extracurricular participation is privilege and not

be ironic to hold that home schooled students have a constitutional right to participate in extracurricular activities offered by a public school when the public school students themselves enjoy no such right.⁵²

In addition to precedent, funding considerations support the conclusion that Georgia should not mandate public school access. In Georgia, taxes may be used for educational purposes.⁵³ Specifically, these funds may be validly used for extracurricular and interscholastic activities, including literary events, music, and athletic programs.⁵⁴ Allowing home schooled students to participate in public school extracurricular activities would necessarily increase the number of children the school boards would have to fund and consequently increase the financial burden on the limited pool of educational resources.⁵⁵ In fact, many states faced with recent educational budget cuts have been forced to eliminate extracurricular activities.⁵⁶ Furthermore, the basis of the school board's decision in Swanson v. Guthrie Independent

property interest); Haverkamp v. Unified Sch. Dist., 689 F. Supp. 1055, 1057 (D. Kan. 1986) (rejecting notion that extracurricular activities are federally protected property rights); Hardy v. Univ. Athletic League, 759 F.2d 1233, 1234 (5th Cir. 1985) (noting that participation in interscholastic athletics is not interest protected by Due Process clause); Walsh v. La. High Sch. Athletic Ass'n, 616 F.2d 152, 159-160 (5th Cir. 1980) (stating that participation in interscholastic athletics is mere expectation and not constitutionally protected claim of entitlement); Smith, 240 S.E.2d at 885-886.

⁵² See, e.g., Bradstreet v. Sobol, 650 N.Y.S.2d 402, 403 (N.Y. App. Div. 1996) (refusing to hold home schooled child has right to participate in interscholastic sports in local school district, noting that participation in interscholastic sports is mere expectation, not fundamental right).

⁵³ **Ga. Const.** art. 8, § 7, para. 1.

⁵⁴ O.C.G.A. § 20-2-411.

⁵⁵ Of course, the counter-argument to this premise is that parents pay taxes to fund the public school system and thus should have these activities available to their children. Mawdsley, supra note 16, at 324.

⁵⁶ See, e.g., Mike Strain & Andrew Gilman, Every \$ Counts: Schools Face More Cuts; Athletics No Exception, The Daily Oklahoman, November 25, 2002, at 1B (detailing cuts in athletic programs

School District was that part-time students were not counted for state financial aid purposes; the board worried that allowing home schoolers to attend public school classes would increase the number of students using the school's facilities without a corresponding increase in state funds.⁵⁷

Finally, permitting home schooled students to attend public schools on a part-time basis creates an administrative burden.⁵⁸ For example, it is uncertain whether the public school would be responsible for the transportation of the home schooled student to and from the school.⁵⁹ Moreover, the school may have to employ more teachers if the home schooled student's attendance would exceed the maximum class capacity, resulting in an inefficient use of the school's funds.⁶⁰ Furthermore, there is the possibility of home schooled students or their parental educators exploiting the opportunity to enter the public schools.⁶¹ The court in Thomas v. Allegany noted the obvious potential for administrative disruption when it rejected private school students' claims of entitlement to participation in public school music program.⁶²

Despite these concerns, Georgia school districts and/or their constituent public schools should

necessitated by financial crisis facing Oklahoma schools); John Milburn, Schools Expect Cuts Despite Pledge, **Wichita Eagle**, November 17, 2002, at 1 (predicting elimination of clubs and sports due to budget problems in Kansas); Jennifer Hardy, Take a Serious Look at Arts in the Schools, **The Californian, Salinas**, November 12, 2002, at 6 (noting elimination of district-funded music teacher position due to budget constraints in California).

⁵⁷ 135 F.3d 694, 697 (10th Cir. 1998).

⁵⁸ Lukasik, supra note 11, at 1955. The likely response to this argument is that schools cannot evade their responsibility of educating children merely by claiming an administrative burden.

⁵⁹ Id. at 1967.

⁶⁰ Id. at 1968.

⁶¹ Id.

⁶² 443 A.2d 622, 626 (Md. Spec. App. 1982).

have the option of allowing home schooled students to participate in public school extracurricular activities if a case-by-case analysis demonstrates that there is adequate funding to support such participation and it will not pose an unreasonable administrative burden.⁶³ In Georgia, local boards of education are entrusted with the management and control of school systems.⁶⁴ These entities would best be able to gage the feasibility and desirability of voluntary participation programs, as opposed to state or federal legislatures or courts, which most likely would be unfamiliar with the conditions in a particular school district.⁶⁵ In fact, although no provision in Georgia's laws requires schools to allow participation, nothing prevents them from voluntarily assisting parents and students.⁶⁶ Furthermore, giving public schools the discretion, instead of a mandate, to allow home schooled students to participate in the activities and classes they offer would likely be a favorable solution from the perspective of the home

⁶³ Although the court in Thomas v. Allegany held that a public school was not required to permit a private school student to attend its music program, it saw no impediment if a legislature or school board wished to permit private school students to attend selected classes or programs, noting that this function should not be assigned to courts. Id. at 627. This Note agrees with the Thomas court's dicta that no obstacle is posed if a school board desires to permit non-traditional students to attend public schools part-time. It disagrees, however, with the references to legislatures, since a state legislature likely would be as unaware of local conditions as a court would.

⁶⁴ **Ga Const.** art. 8, § 5, para. 2.

⁶⁵ See Thomas, 443 A.2d 622, 627 (noting that it is not court's role to mandate participation by private school student in public school music program); Lukasik, supra note 11, at 1971 (noting that public school officials have discretionary and regulatory authority to decide whether part-time attendance comports with state interests).

⁶⁶ Georgia Department of Education, at www.doe.k12.ga.us/communications/homeschool.html (February 20, 2003).

schooled community, which seeks to avoid increased regulation of Georgia's home school regime.⁶⁷ Many commentators also favor this solution.⁶⁸

IV. Conclusion

Home schooling is now recognized as a valid educational alternative in every state. A current trend is for home schooled students to seek access to public schools to attend classes or participate in extracurricular activities that cannot be adequately provided by a home education curriculum. Although a public education system is provided by every state, the majority of jurisdictions have rejected the notion that any student, whether educated in a public, private, or home school, has a constitutional right to participate in extracurricular activities that may be offered through that public education system. Georgia should follow this precedent by not mandating that home schoolers be allowed to participate in public school extracurricular activities. The legislature and home school communities of Georgia seem to advocate this position. The best solution for Sally Schoolgirl and other home schooled students in Georgia is a case-by-case analysis by local school boards of the facts and circumstances of a particular home schooled student's situation to determine whether part-time access to public schools will be economically and administratively feasible.

⁶⁷ See Public School Access for Georgia Homeschoolers?, at <http://www.kkorner.freeyellow.com/access.html> (February 24, 2003) (stating that majority of Georgia home schoolers are opposed to public school access due to fear of increased regulation of home schooling).

⁶⁸ See, e.g., Lukasik, supra note 11, at 1958-1977 (advocating case-by-case analysis of home schooled students' desire to attend public schools on part-time basis).