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## Home Schooling and "Shared" Enrollment: Do Nebraska Public Schools Have an Obligation to Provide Part-Time Instruction?

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# Home Schooling and “Shared” Enrollment: Do Nebraska Public Schools Have an Obligation to Provide Part-Time Instruction?

## I. INTRODUCTION

In the United States approximately one million school-aged children are being educated at home.<sup>1</sup> In Nebraska about 4,700 children are home schooled.<sup>2</sup> Home-schooling is one of the major trends of the 1990s, the effects of which will be felt into the twenty-first century.<sup>3</sup> Families are turning to home education primarily for religious reasons. However, others teach their children at home because they are concerned about the quality of instruction, curriculum, and textbooks in the public schools or about the influences of peer interaction at public schools.

As a result of this growing popularity of home-schooling, public school districts are increasingly being subjected to legal challenges

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- \* University of Nebraska, J.D., 1982; past President of the Nebraska Council of School Attorneys. The author gratefully acknowledges the assistance of Kimberli D. Dawson in the research and preparation of this article. Ms. Dawson graduated in 1997 with distinction from the University of Nebraska College of Law.
1. See Eugene C. Bjorklund, *Home Schooled Students: Access to Public School Extracurricular Activities*, 109 WEST'S EDUC. L. REP. 1 (1996). The number of home-schooled students could actually be higher. The National Home Education Research Institute estimates that there were 1.3 million to 1.7 million children in grades K-12 that were home-schooled during 1999-2000 in the United States. National Home Education Research Institute, *Facts on Home Schooling* (visited Mar. 1, 2001) <<http://www.nheri.org/98/research/general.html>>.
  2. For the 1999-2000 school year there were 4,706 students from 2,591 families who applied for home-school exemptions. See SUE ROBERTS, NEBRASKA DEPT OF EDUC., A REPORT ON PARTICIPANTS IN NEBRASKA EXEMPT SCHOOLS BASED ON SINCERELY HELD RELIGIOUS BELIEFS 4 (2000)(covering the 1999-2000 school year).
  3. See Anita Manning, *Life in '94 Will Offer Glimpse into Next Century*, USA TODAY, Dec. 22, 1993, at 01D. In Nebraska, the number of home-schooled children increased steadily from the 1985-86 school year to the 1998-99 school year. See ROBERTS, *supra* note 2, at 3. The trend, however, may be tapering off as the 1999-00 school year showed a slight decline in the number of exempt students from the prior year. See *id.*

brought by parents of home-schooled students who want to enroll their children in the activities of public schools. The issue has arisen because "[d]espite the variety of sequenced and integrated curriculum materials now available for home schooling, homes simply cannot provide many enrichment activities – such as band, orchestra, choral activities, forensics, and many sports – without cooperation from some established education institution."<sup>4</sup> Eighty-one percent of home educators feel that they need or want to enroll their children in extracurricular activities at public schools, and seventy-six percent of home educators would like to enroll their children "part-time" in academic courses in public or private schools.<sup>5</sup> To date, however, the majority of legal efforts by home-schooled students to gain access to public school activities have failed.

## II. HOME SCHOOLING IN NEBRASKA

Educating children at home has become popular primarily due to state legislative enactments authorizing home instruction.<sup>6</sup> Most state statutes prior to 1980 either prohibited home-schooling or failed to address the issue.<sup>7</sup> Today, however, home-schooling is authorized in some form in every state.<sup>8</sup>

Initially in Nebraska home-schooling was only authorized when the requirements for approval and accreditation required by law and the rules and regulations adopted and promulgated by the State Board of Education<sup>9</sup> violated the sincerely held religious beliefs of the parents.<sup>10</sup> In 1999, however, the Nebraska law on home-schooling was expanded to authorize parents who merely wanted to "direct their child's education" to home school their child.<sup>11</sup> The legislative aggrandizement of the categories of authorized home-schoolers was in response to assertions by some parents that the prior legislative

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4. Bjorklun, *supra* note 1, at 5 (quoting Betty Jo Simmons, *Classroom at Home*, 181 AM. SCH. BD. J. 47 (1994)).
  5. MARALEE MAYBERRY ET AL., HOME SCHOOLING: PARENTS AS EDUCATORS 73 (1995).
  6. See Bjorklun, *supra* note 1, at 1.
  7. See *id.*
  8. See *id.*
  9. The Nebraska Department of Education has authority to promulgate rules and regulations in furtherance of statutory enactments relating to those schools electing not to meet accreditation or approval requirements. See NEB. REV. STAT. § 79-318(5)(c) (Reissue 1996 & Supp. 1999).
  10. See NEB. REV. STAT. § 79-1601 (Reissue 1996).
  11. Legislative Bill 268, which was introduced by education chairperson Ardyce L. Bohlke, amended NEB. REV. STAT. § 1601 and authorized home schooling where "the requirements for approval and accreditation required by law and the rules and regulations adopted and promulgated by the State Board of Education interfere with the decisions of the parents or legal guardians in directing their child's education." NEB. LEGIS. J. 124 (Vol. 1 1999). Legislative Bill 268 is now codified at NEB. REV. STAT. § 79-1601 (3)(a)(ii) (Reissue 1996 & Supp. 1999).

requirement that parents provide the Department of Education with a sworn statement<sup>12</sup> that their children were being home-schooled due to sincerely held religious beliefs forced them (or tempted them) to submit false statements.<sup>13</sup> Arguably, the ease with which the home-school exception was expanded<sup>14</sup> reveals a legislative fondness for home-schoolers and their parents.<sup>15</sup>

*Nebraska Revised Statutes* section 79-1601 and Rule 13, which was promulgated by the Nebraska Department of Education, delineate the procedures and requirements for parents to follow when they elect not to meet the legal requirements for state approval and accreditation. Rule 12 was adopted by the Nebraska Department of Education in 1999 to address the requirements for students seeking exempt status based on the parents' desire to direct the education of their children.<sup>16</sup> Under either Rule 12 or 13, a home educator must provide a program of sequential instruction in the language arts, mathematics, science, social studies, and health. In addition, the home-educated student

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12. Rule 13 of the Nebraska Department of Education required the parents to submit "Form A", entitled "Statement of Objection and Assurances by Parent or Guardian" to the Department prior to home schooling their children. 92 NEB. ADMIN. CODE, ch. 13 (1984). Form A, which was to be signed under oath before a notary public, required an affirmation that "[t]he requirements for school approval and accreditation required by law and the rules and regulations adopted and promulgated by the State Board of Education violate my sincerely held religious beliefs . . . ." *Id.*
  13. Legislative History of LB 286, p. 55 (Education Committee hearings held January 24, 1999).
  14. On Final Reading of LB 268, the final vote tally was 44 ayes, 0 nays, 3 present and not voting and 2 excused and not voting. See NEB. LEGIS. J. 741 (Vol. 1 1999).
  15. The only real debate on LB 268 centered on parents' ability to "opt out" of immunization requirements imposed by statute. Legislative History of LB 268, Floor Debate, LB 268, p. 559-573 (Feb. 2, 1999). Under LB 268, parents retain the right to forgo immunization of their children if the child's doctor signs a statement indicating the required immunizations would be injurious to the health and well-being of the student, see NEB. REV. STAT. § 79-221 (1) (Reissue 1996 & Supp. 1999) or the student or, if a minor, the student's authorized representative submits a signed affidavit stating that the "immunization conflicts with the tenets and practice of a recognized religious denomination of which the student is an adherent or member or that immunization conflicts with the personal and sincerely followed religious beliefs of the student. NEB. REV. STAT. § 79-221 (2) (Reissue 1996 & Supp. 1999).
  16. 92 NEB. ADMIN. CODE, ch. 12 (1999). Rule 12 and Rule 13 are nearly identical. The primary differentiation is the requirement in Rule 13 that parents seek exempt status because to educate their children in accredited schools violates their sincerely held religious beliefs. Rule 12, on the other hand, requires only that they affirm they wish to direct their children's education. The justification for separate Rules appears to stem from a desire to simplify the keeping of statistics as to which students are exempt based on a sincerely held religious belief as compared with those parents who wish to direct their students' education. Additionally, a number of Rule 13 parents made it known to the Department of Education that they preferred a separation between the Rules as they pertain to exempt status.

may be subject to regular achievement testing by the Nebraska Department of Education.

When parents of children who do not attend the public school are denied access to the activities of the public school, litigation may result. In general, these judicial efforts have been largely unsuccessful for the home-schoolers. Success, however, has been found in the legislative arena where statutes have been enacted permitting home-schooled students to participate in the activities of the public school.

### A. Statutes

Fifteen states have enacted statutes, rules, or regulations that specifically guarantee some type of public school access to students educated primarily at home.<sup>17</sup> Nebraska, however, is not one of those

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17. The states that have adopted statutes, rules, or regulations are as follows:

1. ARIZ. REV. STAT. ANN. § 15-802.01 (Supp. 2000)(allowing home-schooled students to participate in interscholastic activities at public schools).
2. COLO. REV. STAT. ANN. §§ 22-33-104.5(6) (2000)(allowing home-schooled students to participate in interscholastic and extracurricular activities at public schools).
3. FLA. STAT. ANN. § 232-425 (Supp. 2001)(allowing home-schooled students to participate in curricular, extracurricular, and interscholastic activities at public schools).
4. IDAHO CODE § 33-203 (Supp. 2000)(allowing home-schooled and other non-public school students to participate in nonacademic activities at public schools).
5. 105 ILL. COMP. STAT. ANN. 5/10-20.24 (1998)(allowing nonpublic school students to request to enroll part-time in public schools).
6. IOWA CODE ANN. § 299A.8 (2001)(allowing home-schooled and other non-public school students to participate in curricular or extracurricular activities at public schools).
7. ME. REV. ANN. tit. 20-A, § 5021 (Cum. Supp. 2000)(allowing home-schooled students to participate in academic, co-curricular, extra-curricular, and special education activities at public schools).
8. N.H. REV. STAT. ANN. § 193A:4(II) (1999)(stating that school districts are to "work with parents upon request" to meet legal subject requirements).
9. N.M. REV. STAT. ANN. 22-5-4.6 & 22-8-2 (1998)(allowing school districts to receive funds from the state for home-schoolers to whom they provide services).
10. N.D. CENT. CODE §§ 15-34.1-06 (Supp. 1999)(establishing a procedure for home schools to submit to school districts a list of extracurricular activities and notice of intent to participate).
11. OR. REV. STAT. § 339.460 (1999)(forcing school districts to allow home-school students access to public school interscholastic activities).
12. Utah State Bd. of Educ. Reg. R277-438-4 (2001)(allowing home-school students to participate in extracurricular activities).
13. VA. CODE ANN. §§ 22.1-253- 13:1(H) (Supp. 2000)(providing state funding to school districts that allow home-schooled students to enroll part-time for "core subjects").

states.<sup>18</sup> Therefore, in Nebraska, a parent of a home-schooled student may feel the need to litigate the issue of the rights of his or her home-schooled child to participate in public school activities.

## B. Case Law

The litigation that has arisen regarding the legal obligation of public schools to allow access to home-schooled students is generally based on the contention that the denial of access was a violation of free exercise of religion, equal protection of law, and due process. Most courts addressing the issue have applied the rational-basis analysis<sup>19</sup> and eventually determined that they should enforce the public school district's policy of full-time enrollment in the public schools as a requirement to participate in public school activities. Further, most of the cases arise as a result of requests to participate in extracurricular activities and not as requests to participate in the public school curriculum.

### 1. Classroom Instruction

Two reported cases have analyzed parents' requests to have their home-schooled children be allowed to participate in the public school curriculum on a limited basis. The two reviewing courts reached opposing conclusions.

In *Swanson v. Guthrie Independent School District No. I-L*,<sup>20</sup> parents who were home-schooling their daughter sought to have her par-

14. Wash. Sch. Provisions 28A.150.350 (providing that school districts must permit part-time enrollment of and provide ancillary services for home-schooled students).
15. Wyoming High Sch. Activities Assoc. Rules 3.1.3, 6.2.0, 6.4 (allowing home-schooled students to play on participating schools' sports teams).
18. Only one Nebraska statute even peripherally addresses the concept of "shared time." See NEB. REV. STAT. § 79-1003 (Reissue 1996 & Cum. Supp. 2000). That statute provides:
- "[f]or purposes of the Tax Equity and Educational Opportunities Support Act:
- (5) Average daily membership means the average daily membership for grades kindergarten through twelve attributable to the local system, as provided in each district's annual statistical summary and includes the proportionate share of students enrolled in a public school instructional program *on less than a full-time basis*.
- Id.* (emphasis added). The statutory reference should not be discounted, however, because in general the Tax Equity and Education Opportunities Support Act determines the amount of state aid available to school districts. See NEB. REV. STAT. § 79-1001 to 79-1033 (Reissue 1996 & Supp. 1999).
19. The Nebraska Supreme Court has indicated that under this approach, for purposes of equal protection analysis, "a classification will be upheld where it is a rational means of promoting a legitimate government interest or purpose." *Hall v. Progress Pig, Inc.*, 259 Neb 407, 418, 610 N.W.2d 420, 430 (2000).
20. 135 F.3d 694 (10th Cir. 1998).

ticipate in a public school program on a part-time basis. Annie Swanson sought to participate in foreign language classes, vocal music and some science classes. Annie's parents believed that the public school had a greater ability to teach these classes than they did.<sup>21</sup> The school board denied the parents' request and adopted a policy that required all students enrolling in their school to enroll on a full-time basis only.<sup>22</sup> The parents challenged the board's denial, alleging that the district's policy violated their child's constitutional rights.

The Tenth Circuit held that the child did not have a constitutional or statutory right to attend classes at the public school on a part-time basis.<sup>23</sup> In so holding, the court reasoned that the policy did not restrict the parents' right to the free exercise of religion as the full-time attendance policy was neutral and of general applicability on its face; in that, it applied to all children who wished to attend public schools on a part-time basis.<sup>24</sup> The court further reasoned that the policy did not violate the parents' constitutional rights to direct their child's education in any way they choose because such right is limited in scope and parents may not control every aspect of a child's education to the exclusion of state authority.<sup>25</sup>

In *Snyder v. Charlotte Public School District*,<sup>26</sup> a sixth-grade parochial student wanted to enroll in the band course at the public school. She was denied enrollment because the board's policy limited enrollment in all classes to only full-time public school students. The student's parents filed suit, claiming that the board's policy violated their constitutional rights to free exercise of religion under the First Amendment and to equal protection under the Fourteenth Amendment.

The Supreme Court of Michigan held that the public school was required to offer shared-time programs.<sup>27</sup> The court based its decision on a Michigan statute that gave a resident of the district who was at least five years old the right to attend school in the district.<sup>28</sup> The court reasoned that because this statute was not conditioned upon full-time attendance, part-time attendance must be allowed.<sup>29</sup> The court stated that there was no evidence that part-time attendance would disorganize and disrupt the maintenance of the school, noting that "[i]t would be just as easy, economical and convenient (if not more

21. *See id.* at 696.

22. *See id.*

23. *See id.* at 703.

24. *See id.* at 698.

25. *See id.* at 699.

26. 365 N.W.2d 151 (Mich. 1984).

27. *See id.* at 161.

28. *See also* NEB. CONST. art. VII, § 1 (providing generally for a free public education to those persons between the ages of five and twenty-one years).

29. *See Snyder*, 365 N.W.2d at 158-59.

so) to open these classes to nonpublic school students as it would be to provide these classes to them if they became full-time public school students."<sup>30</sup> The court further stated that *nonessential* elective courses, such as band, art, domestic science, shop, advanced math and science classes, need not be taught in nonpublic schools and are the courses that have traditionally been offered on a shared-time basis.<sup>31</sup> The court ruled that "once these types of courses are offered to public school students in the district, they must also be offered to resident nonpublic school students."<sup>32</sup>

## 2. *Extracurricular Activities*

Five jurisdictions have considered whether home-schooled students can participate in interscholastic sports programs or other extracurricular activities sponsored by public schools. All, save one, have denied home-schoolers the right to participate. The court in *Davis v. Massachusetts Interscholastic Athletic Association, Inc.*<sup>33</sup> found for the home-schooled plaintiff.

In *Davis*, the plaintiff was a home-schooled student who resided in Norton, Massachusetts. She was under the educational jurisdiction of the principal at Norton High School and adhered to an educational plan approved by the Norton School Committee.<sup>34</sup> The action arose when an application for a student waiver of the athletic eligibility rule was submitted to the Massachusetts Interscholastic Athletic Association (MIAA) on behalf of the plaintiff. The plaintiff, a windmill softball pitcher, wanted to try out for and participate on the Norton High School girls' softball team.<sup>35</sup>

The application was denied based on a MIAA rule. The rule required a student to be attending school sessions in order to participate in interscholastic athletics.<sup>36</sup> The MIAA subsequently determined that because the plaintiff was home-schooled, she was not attending

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30. *Id.* at 159.

31. *See id.* at 162. A correlation would seemingly exist between the "nonessential" classes referenced by the Michigan Court to "non-core" classes under Nebraska Department of Education nomenclature. Nebraska Public Schools, however, have not "traditionally" offered such classes on a "shared-time" basis.

32. *Snyder*, 365 N.W.2d at 162.

33. No. CA942887, 1995 WL 808968 (Mass. Super. Jan. 18, 1995).

34. Nebraska law does not impose any overview by the public schools in the evaluation or testing of home school students. Rather, both Rule 12, 92 NEB. ADMIN. CODE, ch. 12, and Rule 13, 92 NEB. ADMIN. CODE, ch. 13, provide that the Nebraska Department of Education, and not the local school district, has the right to "visit" the home school and to require periodic achievement testing.

35. *See Davis*, 1995 WL 808968 at \*1.

36. *See id.* The court noted that the implied goal of the MIAA Rule 65 is "to prevent students who are not attending school sessions of *any nature* from participating in interscholastic sports." *Id.* at \*2 (emphasis added).

school sessions within the meaning of the rule. Therefore, the plaintiff was not eligible to try out for the girls' softball team.

Thereafter, the plaintiff filed suit, alleging that the actions of the MIAA were arbitrary and capricious and in violation of the Massachusetts Constitution and the Fourteenth Amendment of the U.S. Constitution. The plaintiff argued that because her home-schooling program was approved by the superintendent of Norton High School and her academic progress was constantly monitored by the school, she attended school sessions at her home that were academically equivalent to those at Norton High School.<sup>37</sup> The plaintiff also argued that because the school program standards were approved and met, the MIAA rule violated her equal protection rights.<sup>38</sup>

In analyzing the plaintiff's arguments, the court utilized a rational basis standard.<sup>39</sup> The court stated that the purpose of the MIAA rule was valid and the school had the right to create regulations for a student's participation in extracurricular activities.<sup>40</sup> The court, however, further stated that despite this authority, "a school should afford all students attending that school the same privileges and advantages."<sup>41</sup> The court determined that the plaintiff was, in fact, attending school sessions.<sup>42</sup>

Thereafter, the court held that the MIAA violated the equal protection rights of the plaintiff because the only difference between the plaintiff and any other Norton High School student was that she attended classes at home rather than at the Norton High School building.<sup>43</sup> According to the court, the classification created by the MIAA rule resulted in disallowing the plaintiff from participating on the Norton High School girls' softball team solely because she was home-schooled.<sup>44</sup> The court concluded that the classification created different treatment of students based upon traditional and home-schooled status, and the classification and varying treatment were not rationally related to a legitimate state purpose.<sup>45</sup>

In *McNatt v. Frazier School District 45*,<sup>46</sup> a case decided two months after *Davis*, a 14-year old boy being home-schooled sought permission to play on the baseball team of the public high school. The student had been a member of the 1993 Pennsylvania State Baseball Team and possessed the necessary skill to qualify for a position on the

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37. *See id.* at \*1.

38. *See id.*

39. *See id.* at \*2.

40. *See id.*

41. *Id.* at \*2.

42. *See id.*

43. *See id.* at \*3.

44. *See id.*

45. *See id.*

46. No. CIV. A. 95-0366, 1995 WL 568380 (W.D. Pa. March 10, 1995).

public high school team.<sup>47</sup> He was denied that permission by the school board so he filed suit in federal court claiming that the board's action violated his constitutional rights. The court upheld the board's action holding that access to extracurricular activities was not guaranteed under the U. S. Constitution.<sup>48</sup>

A year later, in *Bradstreet v. Sobol*,<sup>49</sup> a 14-year old home-schooled student sought to participate in the interscholastic athletic program of the school district in which she resided. She was not allowed to participate because of a state board of education rule that provided only students in regular attendance at the school can participate in interscholastic sports. She filed suit claiming that the rule violated her rights to equal protection and due process.

In regard to the due process claim, the court held that a student's interest in participating in interscholastic sports is not a property right subject to due process protection but, rather, is a mere expectation.<sup>50</sup>

In regard to the equal protection claim, the court applied the rational basis test.<sup>51</sup> The court noted

that the challenged requirement [did] not create a classification based upon the status of plaintiff's daughter as a home-schooled student, but, rather, the classification [was] based upon her lack of enrollment in the public school where she [sought] to participate in the interscholastic sports program, a classification which clearly include[d] other students, such as those who attend private or parochial schools. We see nothing irrational in requiring that a student be enrolled in a public school in order for the student to participate in the school's interscholastic sports program.<sup>52</sup>

The student's assertions that there were instances where students were allowed to participate in one school's program of interscholastic

47. *See id.* at \*4.

48. *See id.* at \*5. The court's memorandum opinion, although setting forth detailed findings of fact, fails to address or delineate the legal or philosophical justifications for the court's decision.

49. 650 N.Y.S.2d 402 (1996).

50. *See id.* at 403. In Nebraska, a student's interest in participating in interscholastic sports is given greater deference. In *Braesch v. DePasquale*, 200 Neb. 726, 265 N.W.2d 842 (1978), the Nebraska Supreme Court noted that the State of Nebraska, as a part of its program for public education, has provided athletic opportunities to all public school students. Although acknowledging that "[p]articipation in interscholastic athletics ordinarily has significantly less important constitutional dimensions than does participation in traditional academic education. A student's interest in participation in high school athletics is nevertheless a *significant* one." *Id.* at 731-32, 265 N.W.2d at 845 (citing *Brendan v. Independent School Dist.*, 477 F.2d 1292 (8th Cir. 1973)(emphasis added)); *see also French v. Cornwell*, 202 Neb. 569, 571, 276 N.W.2d 216, 218 (1979)(making the same proposition as found in *Braesch* and *Brendan*).

51. *See Bradstreet*, 650 N.Y.S.2d at 403.

52. *Id.*

activities while remaining enrolled in a neighboring school district appeared too undeveloped for the court to consider.<sup>53</sup>

One of the most exhaustive analyses of home schooled children's rights to participate in public schools extracurricular activities arose in a 1982 Maryland case. In *Thomas v. Allegany County Board of Education*,<sup>54</sup> students who attended a parochial school wanted to participate in an All-County Music Program sponsored by the Allegany County Public School System. By policy, the music program was open only to full-time students enrolled in the public schools. The students filed suit, claiming that the policy violated their right to free exercise of religion and their rights to equal protection and freedom of educational choice.

In regard to the free exercise claim, the students contended that the limitation of participation to only those enrolled in public schools interfered with their right to attend a religious school and their right to free exercise.<sup>55</sup> The court, however, ruled that limiting participation to public school students did not prohibit parents from sending their children to parochial schools nor did it prevent them from following the practices of their religion.<sup>56</sup> The court stated: "[t]he rule merely prevents a child from reaping the benefits of a public school activity once the constitutional right to a private school education is exercised."<sup>57</sup> The court further stated that the board had a compelling state interest justifying the policy because it prevented administrative disruptions of the school.<sup>58</sup> According to the court,

[w]ith the opening of such a "Pandora's Box," there would be no device to preclude, for example, a private school having difficulty securing a qualified chemistry teacher from unilaterally deciding to transport the entire student body to a nearby public school for their chemistry education. The potential for administrative disruption is obvious.<sup>59</sup>

In regard to equal protection, the students claimed that private school students must be treated similarly to public school students with respect to participation in public school extra-curricular activities. The court rejected this contention, holding that the compelling state interest in avoiding administrative disruption justified the unequal treatment.<sup>60</sup>

The students also claimed that the board's policy interfered with their right to freedom of educational choice by excluding only those students who chose to attend a religiously affiliated school. The court

53. *See id.* at 403 n.1

54. 443 A.2d 622 (Md. Ct. Spec. App. 1982).

55. *See id.* at 625.

56. *See id.*

57. *Id.*

58. *See id.*

59. *Id.* at 626.

60. *See id.*

cited a decision by the New York Supreme Court that held that parents clearly have the right to send their children to nonpublic schools but there is no corresponding right to equal aid or even to any aid at all unless authorized specifically by legislation.<sup>61</sup> The court said: "[w]e agree with the rationale of the New York court that parents and children had a constitutional right to choose where they would receive their education, the choice has been exercised, and now they cannot be heard to complain."<sup>62</sup>

Finally, the students claimed that a Maryland statute which stated that the public schools are open to all individuals who are at least 5 years old and under 21 gave them the right "not merely to be admitted to the public schools of this state, but to any part or portion of the public school system which they choose."<sup>63</sup> The court rejected this contention in view of the unreasonable burden such construction of the statute would place on the efficient administration of the public school system.<sup>64</sup>

The most recent judicial pronouncement on home schooled children's participation in extracurricular activities came in *Kaptein v. Conrad School District*<sup>65</sup> In *Kaptein*, the Supreme Court of Montana held that a private school student did not have a state constitutional right to participate in a public school sports program.<sup>66</sup> In so holding, the court upheld a board policy limiting participation in the district's sports programs to students enrolled full-time in public school. The plaintiffs challenged the board policy as violating the provisions of the Montana Constitution<sup>67</sup> which provided that "[i]t is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state."<sup>68</sup>

The court stated that a student's right to participate in extra-curricular activities, "although not a fundamental right, is clearly subject to constitutional protection."<sup>69</sup> As a result, the court applied a "middle-tier" analysis balancing the child's right against the school board's interest.<sup>70</sup> In so doing, the court placed great emphasis on the school district's interest in providing a unified and integrated program of academic courses, elective courses, and extracurricular activities and de-

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61. *See id.*

62. *Id.* at 627.

63. *Id.* Note the similarities between the Maryland statute and Article VII, section 1 of the Nebraska Constitution.

64. *See Thomas*, 443 A.2d at 627.

65. 931 P.2d 1311 (1997).

66. *Id.* at 1317.

67. *See id.* at 1313.

68. MONT. CONST. art. X, §1.

69. *Kapstein*, 931 P.2d at 1316.

70. *Id.*

terminated that the child's interest in participating in the athletic program did not outweigh the district's policy restricting participation to full-time students in order to effectively integrate academics and extra-curricular activities.<sup>71</sup>

### III. APPLICABLE NEBRASKA CASE LAW

In *State ex rel. School District of Hartington v. Nebraska Board of Education*,<sup>72</sup> the Hartington School District entered into a lease with a Catholic high school to provide instructional activities and services for educationally deprived children in two of the Catholic high school's classrooms. The classes were to be conducted and funded pursuant to the Federal Elementary and Secondary Education Act of 1965.<sup>73</sup> The school district was to have full control over the classrooms and educational program and no religious objects were to be displayed. The program and lease were upheld against state and federal constitutional challenges raised by the state board of education.<sup>74</sup>

The constitutionality of allowing parochial school children to participate in the educational program was also raised. Federal law and regulations required that educationally deprived private school children within the public school district be allowed to participate in programs comparable to those provided to public school children. The Nebraska Supreme Court stated:

The Constitution of Nebraska specifically provides that no religious test or qualification shall be required of any student for admission to any public school. Art. VII, § 11, Constitution of Nebraska. It would seem that an attempt to prohibit a student enrolled in a parochial school from participating in a program conducted by the public schools, solely because the student was enrolled in a parochial school, would violate this provision of the Constitution of Nebraska.<sup>75</sup>

The Nebraska Supreme Court further stated:

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71. *See id.* at 1317.

72. 188 Neb. 1, 195 N.W.2d 161 (1972).

73. The Act was originally found at 20 U.S.C. § 5241. The 1965 Act, having been repeatedly amended, is now found at 20 U.S.C. § 6301. The Act has enjoyed considerable attention in the United States Supreme Court. For instance, in *Agostini v. Felton*, 521 U.S. 203 (1997), the Supreme Court approved a program under Title I of the Act that provided public employees could teach remedial classes at religious and other private schools.

74. The Supreme Court opinion was far from unanimous, however. Judge Boslaugh wrote the majority opinion in which Judges Smith and Clinton joined. Chief Justice White filed a lengthy dissent in which Judge Spencer joined. Judge McCain filed a concurring opinion in which Judge Clinton joined. Judge Newton concurred in part and dissented in part. In a rare showing of judicial foot-stomping, Chief Justice White, along with Judge Spencer, filed a response to the concurring opinion.

75. *Hartington*, 188 Neb. at 4, 195 N.W.2d at 164.

The record show[ed] that the classes which would be conducted by the Hartington School District in the leased classrooms would include both students enrolled in the public schools and students enrolled in nonpublic schools. It would seem that to deny a student the right to participate in a program offered by a public school district solely because that student is enrolled in a parochial school would violate that student's right to a free exercise of religion and to equal protection of the law.<sup>76</sup>

Based on *Hartington*, a public school district may not be able to deny access to a home-educated student if the reason for the exclusion is based solely on the fact that the student is being home-educated for religious reasons. The *Hartington* case, however, does at least implicitly suggest that a school district may be able to prohibit the participation of a home-educated student so long as the reason for the exclusion promotes a rational purpose. Such rational purpose could include the efficient administration of the public school system or the public school's interest in the provision of a unified program requiring academic courses, elective courses, and extracurricular activities to be integrated.

#### IV. APPLICABLE NSAA REGULATIONS

To determine whether a policy prohibiting a home-schooled student from participating in public school extra-curricular activities would be proper in Nebraska, the Nebraska School Activities Association (NSAA) regulations must be reviewed. The NSAA is a "voluntary" organization of the public and parochial schools of Nebraska, organized for the purpose of promoting and regulating the competition between schools in extracurricular activities.<sup>77</sup> The NSAA regulations govern interscholastic competition in athletics, debate, play production, speech, music, and journalism.<sup>78</sup>

As presently drafted, the NSAA Constitution and Bylaws prohibit home-schooled students from participating in Nebraska interscholastic extracurricular activities. The NSAA Constitution limits membership to only those school districts "approved" or "accredited" by the Nebraska Department of Education.<sup>79</sup> Therefore, because home-schooled students are "exempt" from accreditation requirements, by definition, they cannot be members of the NSAA.

Other impediments exist as well. NSAA imposes requirements on participants and indicates that participants are individuals who are bona fide students of a member high school.<sup>80</sup> Bona fide students of a member high school include students who have not graduated from any high school or its equivalent and students of a middle-level school

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76. *Id.* at 5, 195 N.W.2d at 164.

77. NSAA CONST. § 1.1.2.

78. See NSAA Bylaws art. 3-8.

79. NSAA CONST. § 1.2.1.

80. See NSAA Bylaw § 2.2.1.

which is part of a member high school's system who compete or practice with a member high school's team. It is only these students who are permitted to participate in activities of the NSAA. Further, participating students, in order to remain eligible, must be continuously enrolled in at least twenty credit hours of instruction per semester at the school the student represents in interscholastic competition.<sup>81</sup>

A home-schooled student is allowed to participate in activities of the NSAA but only if he becomes a bona fide student, thus requiring that the home-schooled student actually transfer from the home school to a member school.<sup>82</sup> Thus, it appears that the NSAA regulations preclude the participation of a home-schooled student in the extracurricular activities of member public or private school. Absent voluntary modification of the NSAA's Constitution and Bylaws, a home-schooler's only remedy would be a legal claim against the NSAA asserting violations of state and federal Constitutional rights.<sup>83</sup> As indicated previously, however, most efforts to set aside state athletic or activities association rules excluding home-schoolers have failed.<sup>84</sup>

## V. CONCLUSION

Although Nebraska law is somewhat unclear, it appears that a Nebraska court could conclude that a public school district has the ability and perhaps even the obligation to provide instruction to home, parochial or privately-schooled children to the extent that the instruction is in non-core areas. Efforts by school districts to exclude such students may be bolstered by a district policy that neutrally restricts such participation and which articulates the need for a unified and integrated program of academic courses, elective courses and extracurricular activities. In regard to extracurricular activities, school

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81. See NSAA Bylaw § 2.5.1.

82. See NSAA Bylaw § 2.7.6.

83. In 1976, NSAA was enjoined from enforcing its Rule 18(c) which provided that girls and boys may not compete on the same athletic team and that girls and boys may not compete against each other. See *Bednar v. Nebraska School Activities Association* 531 F.2d 922 (8th Cir. 1976).

84. Some of the principle arguments made by school districts or activities associations in supporting their positions that home schools may not participate include the argument that academic courses and extracurricular activities should be integrated into a unified program of education. This argument is undercut in Nebraska where NSAA Bylaw § 2.13.4 provides for "member schools" to "co-op" interscholastic competitive teams. Under this section, schools with too few students can participate on competitive teams of neighboring school districts. The students remain enrolled and academically married to their resident districts but are able to participate in extracurricular activities of a different district. Thus, the asserted concern about an integrated program of academic education and extracurricular activities is reduced. Additional arguments concerning eligibility rules for minimum academic and attendance standards would remain intact.

districts are bound by NSAA regulations that generally restrict participation by students other than those who attend school full-time.

Because of the number of home and private-schooled children in the state, the issue of educating those children on a part-time basis in the public schools will not go away quietly. Schools need to prepare for the day when the parent of a home or private-schooled student requests participation in limited classes or activities. Only by addressing the legal, logistical and philosophical issues in advance of a request will a district be able to objectively and evenhandedly respond.