



National School Boards Association

# LEADERSHIP Insider

February 2006

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PRACTICAL PERSPECTIVES ON SCHOOL LAW & POLICY

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## Home-schooling and the Public Schools

*Weighing your district's obligations to students who are educated at home*

By Karla Schultz

The National Center for Education Statistics calculates that, as of 2003, 2.2 percent of the school-age population is home-schooled, up from 1.7 percent in 1999. That translates to about 1.1 million students being educated at home.

If we are to believe the media, and sometimes experience, many of those home-schoolers and our public schools are at odds with, or even hostile to one another. But while the two might not always be singing in perfect harmony, times are certainly changing.

For one thing, public school districts are coming to see that it is just good public relations to work with all parents—even those who are home-schooling—rather than make mortal enemies of them. For another thing, state laws have changed. At least nineteen states (see page 6) now mandate the enrollment of home-schooled students interested in participating in extracurricular activities or academic coursework. Along with the involvement of home-schooled students in such activities, public schools typically receive some por-

tion of the state's full-time equivalent student funding.

But the experience in one New York school district suggests that even when not mandated by law, the relationship between

schooled 13-year-old expressed an interest in taking part in a school play.

The district's board president, Theodore Rejman, told the *Syracuse Post Standard*, "I'm happy to see we are finally

**“Public school districts are coming to see it is just good public relations to work with all parents—even those who are home-schooling—rather than make mortal enemies of them.”**

public school districts and home-schooled students need not be a contentious one. In December, the Southern Cayuga school board voluntarily changed its policy to permit home-schooled students to participate in intramural and school-sponsored activities. The change came about after a home-

involving all families who live in and pay taxes in this district.”

Unfortunately, as NSBA attorney Lisa Soronen reports, not all public school and home-school relations are happy ones. In her article on home-school litigation (page 3), Soronen outlines the areas in

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*Leadership Insider*, is published six times annually by NSBA's National Education Policy Network and its Council of School Attorneys in cooperation with the National Affiliate Program.

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The National School Boards Association is the nationwide advocacy organization for public school governance. NSBA's mission is to foster excellence and equity in public elementary and secondary education in the United States through local school board leadership. Founded in 1940, NSBA is a not-for-profit federation of state associations of school boards and the school boards of the District of Columbia, Hawai'i, and the U.S. Virgin Islands.

#### About the National Affiliate Program

The National Affiliate Program extends NSBA's services directly to local school districts. School districts are eligible to join provided they are members in good standing of their state school boards associations.

#### About the Council of School Attorneys

The Council of School Attorneys provides information and practical assistance to attorneys who represent public school districts. It offers legal education, specialized publications, and a forum for exchange of information, and it supports the legal advocacy efforts of the National School Boards Association.

which school districts have been sued over their policies and practices toward home-schoolers and offers suggestions for avoiding such litigation.

#### Elsewhere in this issue

This issue of *Leadership Insider* also profiles public school options offered to home-schooled students in different states:

- In California, the Orange County Department of Education has voluntarily provided services exclusively for home-schooled students and parents since 1988 (page 4).

- In Virginia, laws permit part-time enrollment of home-schooled students in the public schools; the experience of two of those districts is highlighted on page 3.

- In Pennsylvania, public schools are required, as of Jan. 1, to enroll home-schoolers in extracurricular activities. Policy suggestions for that state's districts, and any other districts who might be contemplating this option, can be found on page 5.

However your district chooses to engage with or offer services to home-schooled families, be aware of relevant state laws. Although the organization takes no official position on home-schooled students' participation in public school classes and activities, the Home School Legal Defense Association is a good source of state-by-state laws and relevant court decisions (see the resources at right).

Many states require home-schooling parents to notify the local district that they are instructing their child at home. Others mandate that home-school parents submit progress reports to the local superintendent in order that the district can ensure the student's satisfactory academic progress. In addition, some states require districts to facilitate home-schooled students' participation in standardized state achievement exams, and others expect districts to make accommodations for them to take Advance Placement, PSAT, or SAT exams.

Another public school policy consideration related to home-schooled students is how to grant credit for those students (usually at the secondary level) who transfer back into the public school system after years of home-schooling. Here, your school attorney or state school boards association staff will be able to help with suggestions for solutions and policy language that complies with your state laws and regulations.

Whether your district is governed by state-mandates about the involvement of home-schooled students or has no requirements at all, it is important to weigh your district's obligations to students who are educated at home. And consider again the example of Southern Cayuga, where the board took to heart the value and importance of bringing together all members of the community and kept the public in public education.

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#### RESOURCES ON HOME-SCHOOLING

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- Hardy, Lawrence. "Learning without School: Who Home-schools and Why." *American School Board Journal*, August 2001; [www.asbj.com/2001/08/0801coverstory.html](http://www.asbj.com/2001/08/0801coverstory.html).

- Home School Legal Defense Association, [www.hslda.org](http://www.hslda.org).

- The Military Homeschooler, <http://www.militaryhomeschoolers.com>.

- National Black Home Educators Resource Network, [www.nbhera.org](http://www.nbhera.org).

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- Rubin, David B., and Perry A. Zirkel. "Home Schooling," in *Religion & Public Schools: Striking a Constitutional Balance*, Naomi E. Gittins, ed. Alexandria, Va.: National School Boards Association, Council of School Attorneys, 2001.

- Talluto, Rebecca. "Accountability for Home-schoolers." *American School Board Journal*, August 2001; [www.asbj.com/2001/08/0801coverstory2.html](http://www.asbj.com/2001/08/0801coverstory2.html).

# Home-schooling and the Law

*Good policy—and good relations with parents—can help avert litigation*

By Lisa Soronen

At first glance, it might not be obvious that home schooling raises legal issues for school boards. After all, home-schooled students are being educated outside the public school system. Often, however, the relationship between home-schooled students and the local public school district is one of at least occasional interaction, rather than simply two ships passing in the night. The small number of reported legal cases between home-schooling parents and school districts suggests those interactions are generally successful.

Nevertheless, four areas of conflict between school districts and home-schooling parents have generated litigation and are of particular consequence to local districts:

1. Regulations about monitoring the home school;
2. The transfer of home-schooled students to public school;
3. The right of home-schooled students to participate in classes and extracurricular activities; and
4. Their right to receive (or avoid) spe-

cial education and related services.

This article discusses typical disagreements and suggests how school boards can address potential conflicts.

## Conflicts over Monitoring

State statutes regulating home schooling vary widely. Some states, such as Colorado<sup>1</sup> and Georgia,<sup>2</sup> regulate almost every aspect of home schooling, while others, such as Illinois, have no state statute recognizing home schools and few regulations governing nonpublic schools.

Moreover, states vary on the board's role in monitoring home schools. For example, 33 states require parents to notify local officials before a child can be home schooled, and eight states require state or local approval before a home school can legally operate.<sup>3</sup> Likewise, in Arkansas<sup>4</sup> a home-schooling program must report its proposed curriculum to the local superintendent, and in Delaware<sup>5</sup> the local superintendent is required to supervise the progress of all home-schooled students.

School boards have been sued occasionally by home-schooling parents who do not

like the state and local monitoring or do not like the way monitoring laws, regulations, or policies have been applied to them. Objections fall into two categories:

**1. Objections to the lawfulness of the monitoring.** Parents have challenged the different types of monitoring specified in home-schooling statutes, especially disputing the constitutionality of standardized testing requirements. Parents frequently argue that the laws violate some provision of the Constitution, usually the First Amendment, on the basis of freedom of religion and privacy concerns. School districts generally win these legal challenges.

A recent case from Maryland is typical.<sup>6</sup> The state requires that home-schooled students be educated in particular subjects, that parents create a portfolio of instructional materials and student work, and that parents sign a consent form stating that they understand the regulations. The student's mother refused to sign the consent form or allow the local district to monitor her daughter's education. She argued that the regulations violated the Religious Freedom Restoration Act and her First Amendment rights to the free exercise of religion.

Regarding the First Amendment claim, the court rejected the mother's arguments that Maryland's education laws were designed to suppress her religion or violated what she called her "fundamental right against standardization of education."

## VIRGINIA: THE PART-TIME ENROLLMENT OPTION

Virginia is among the several states (see "What the Law Says," page 6) that permit public school districts—called divisions in Virginia—the option of offering part-time enrollment to home-schooled students. About a dozen divisions take advantage of this option, ranging from smaller rural districts to the state's largest district, Fairfax County, which enrolls more than 150,000 students.

In Shenandoah County, with just under 6,000 students, only a handful of the district's approximately 150 home-schooled students take advantage of the part-time option. Those who do, says Superintendent D.N. Northern, typically seek to enroll in upper-level high school courses and occasionally in extracurricular activities.

The school board has made the extracurricular option available for students enrolled in at least one class.

The part-time option "is well-known among home-schoolers," says Northern, who adds that the district's hope is that "we will win some of them back." Generally, though, that has not been the case.

In Fairfax County, the district implemented the part-time option for high school students just this school year. The district has approximately 1,600 home-schooled students. Of those, about 20 families expressed interest in the part-time program, and six students have enrolled for this school year.

Joanne Kammerdeiner, the district's health and home instruction specialist, says the district allows students to take up to two core classes, normally at their "base schools," though accommodations will be made when space is limited or unique classes are offered further

from the student's home.

Home-schooled students are not permitted to join the district's extracurricular activities, however, unless they are enrolled in a class with an affiliated club (French or journalism, for example). This year's part-time home-schoolers are largely taking advanced math and sciences classes.

In Virginia, the districts electing to offer the part-time enrollment option for home-school students receive 25 percent of the normal student funding level for students taking one course, and 50 percent for students taking two.

The Virginia-based Home School Legal Defense Association has not taken a position on part-time enrollment and simply presents the pros and cons to parents; some districts speculate that this may be the reason for low participation in the program.—*Karla Schultz*

Regarding her Religious Freedom Restoration Act claim, the court found that she did not have to forgo her religious beliefs to comply with Maryland's monitoring requirements.

While schools have generally won such cases, there are some exceptions. Parents have frequently challenged home-schooling laws claiming they are unconstitutionally vague, and they have occasionally won. However, where home school-

ing laws are more specific or where regulations flesh out ambiguities in the law, parents have been less successful.

For example, parents claimed that a Pennsylvania statute requiring that home-schooled students be taught by a "properly qualified private tutor" was void because of vagueness. Regulations said the superintendent had to approve the tutor and that approval depended on "acceptable evidence of the tutor's ability to teach."<sup>7</sup>

The court found at least 36 different interpretations of this regulation in Pennsylvania's 501 school districts. Some districts required that a "properly qualified private tutor" have a teaching certificate, others required a Pennsylvania teaching certificate, still others required any college degree, while others required only some college education. In short, the court concluded that this disparity in how the law was applied illustrated that it was unconstitutionally vague.

**2. Objections to how monitoring laws are applied.** Occasionally parents complain about how monitoring laws are applied rather than argue that they are unconstitutional. At least one court has been sympathetic to this challenge and has read a home-schooling statute quite literally.

In *Stobaugh v. Wallace*,<sup>8</sup> Pennsylvania law required parents of home schooled-students to put together a portfolio of the students' work, which—at the parents' discretion—could include the results of standardized achievement tests every year. The superintendent said students had to take the standardized test the district offered. When the parents declined, the superintendent asked to see their children's portfolios, citing state law that said a superintendent may see a portfolio if he or she has a reasonable belief that appropriate education is not occurring during home schooling.

According to the court, the superintendent lacked the necessary reasonable belief that the students were not being educated because the statute did not require home-schooled students to take the district's standardized test and that taking the test did not determine "the measure of achievement of the home school program."

### Handling Monitoring Conflicts

There is little a school district can do to avert a challenge to the constitutionality of a state statute that requires the district to monitor home schooling. And applying these statutes and regulations is not always easy, as they are not necessarily models of clarity and may not take into account evolving trends such as the emergence of online education.

When dealing with an ambiguous statute, school districts are well advised to talk to their state school boards association or neighboring districts to determine how the statute is being applied statewide. Likewise, districts may want to ask their state department of education to issue reg-

## CALIFORNIA: COLLABORATION WITH HOME-SCHOOLERS

Most home-schooled children do not spend their entire educational career outside a traditional classroom. So a growing number of school districts are doing what they can to preserve and strengthen their relationship with home-schooling families. The resources schools offer provide benefits to the district in terms of some state funding, and the students and their families get benefits, too: labs, extracurricular activities, and teaching resources.

One such option is the Community Home Education Program, operated by California's Orange County Department of Education, which provides these and other services to 27 public school districts in the Orange County area.

The Community Home Education Program, or CHEP, is a large, public home-study program operating as a resource for students as well as their parents; it serves 1,100 elementary (K-8) and 470 secondary students, about one-quarter of the area's home-schooled students. Underway since 1988, the CHEP has four elementary sites and one high school facility. The program is funded by state revenue, based on the same attendance formula as for the area's public schools.

CHEP provides books (including teacher editions) for home-schooled students. The program's teachers are devoted solely to the school and are paid for by the county office, says Pat Novak, CHEP's principal. They use the state standards to help parents prepare lessons, evaluate student work, and design a curriculum that allows several students of differing ages and ability levels to study the same concept simultaneously.

"We try to help them to not just recreate school at their dining room

table," says Novak. "They came out of that system for a reason."

The program also offers classes and workshops ranging from courses to enrich the students' home schooling—art, drama, science labs, math, and other experiential programs—to programs aimed at helping parents strengthen their own teaching skills. CHEP facilities host the state testing required of all California students, including home-schooled. Novak observes that the services offered by CHEP help home-school parents and student prepare for these exams.

Home schooling has the potential to be one more way public schools can help meet the needs of all learners. Since many home-schooled students come back to the classroom at some point, Novak sees the wisdom in building good relations between the district and families that prefer to learn at home. Instead of shoring up a wall between them, Novak prefers to provide parents with the tools they need to design a standards-based curriculum that fits their child's learning style.

"Home schooling is not for everybody, but it's here to stay," she says. "I think we're wise to embrace alternative education methods and realize that it's usually not a permanent situation. Be kind to them and they'll be more likely to come back to the district."

More information about the Community Home Education Program is available at the school's website, [www.ocde.us/chep](http://www.ocde.us/chep). Pat Novak can be reached at (714) 327-1002 or [pnovak@ocde.us](mailto:pnovak@ocde.us).

*Parts of this article originally appeared in the Spring 2003 edition of the California School Boards Association's magazine, California Schools, and are reprinted with permission.*

ulations to clear up confusing issues.

Finally, as always, when laws are clear, school districts are well advised to follow them carefully. This might be particularly true when dealing with parents of home-schooled students, some of whom are predisposed to be skeptical of government authority.

### Conflicts over Transferring

Home-schooled students might decide to transfer to public school, and those who left to be home schooled sometimes come back. Requirements for receiving public school credit can be specified in state statutes or regulations or in district policy and often require that transferring students take proficiency tests.

Some parents have challenged the constitutionality of these requirements, but their concerns have been more practical. Unless the home school and public school instructional materials are identical, home-schooled students will have to study to take these exams—often while they are taking a regular course load.

To date, parents and students have unsuccessfully challenged transfer laws

and policies in two cases:

**1. *Vandiver v. Harbin County Board of Education.***<sup>9</sup> A Kentucky regulation stated that students transferring from a nonaccredited secondary school could earn credit for classes taken there by passing an equivalency test or by performing successfully by week 12 of a “probationary placement” in a higher level of a sequential class such as math or science. The student in this case, who had been home schooled for one year of high school, agreed to take equivalency tests after returning to public school. Realizing the difficulty of taking the test and doing regular course work, however, he asked the board to apply the probationary placement requirement instead. The board refused.

The student claimed that his equal protection rights were violated because the district used the probationary placement method with students transferring from an unaccredited private school. The court disagreed, noting that home-schooled students and private school students are not similarly situated and therefore do not have to be treated the same by the law.

The student also claimed that the regu-

lation violated his free exercise of religion rights. The court found that the statute gave local school boards the authority to choose which method it preferred for granting credit to transferring students. There was no evidence the board choose to apply the equivalency test to home-schooled students on the basis of religion, the court said.

**2. *Hubbard v. Buffalo Independent School District.***<sup>10</sup> A Texas school district’s policy required students from home schools or nonaccredited schools to pass proficiency exams. A home-schooled student challenged this policy, making the same arguments as the student in *Vandiver*, which were likewise rejected by the Texas court.

### Handling Transfer Conflicts

School boards that have the authority to decide on what basis to grant credit to home-schooled students have a difficult task. They must ensure that students have earned the credits they will be granted but not overwhelm them with unnecessary testing.

Testing policies have survived constitutional challenges, but they are better at

## PENNSYLVANIA: NEW STATE LAW ON PARTICIPATION IN EXTRACURRICULAR ACTIVITIES

Effective Jan. 1, 2006, the Pennsylvania School Code requires all school districts to allow students enrolled in home-education programs to participate in the district’s extracurricular activities.

Under the new law, home-schooled students must be allowed to take part in such activities as student clubs and organizations, athletics and games, school publications, debating, forensics, dramatics, and musicals. Also covered are interscholastic athletic programs, including varsity sports and all activities related to competitive sports contests; games; and inter-school and inter-district events or exhibitions involving individuals or teams.

Home-schooled students must meet the same or equivalent participation and tryout criteria required for students enrolled in the school district. They also must comply with the policies and rules of the activity’s governing organization, such as the Pennsylvania Interscholastic Athletic Association for interscholastic athletics.

Eligibility criteria may include academic progress; attendance; insurance;

physical examinations; periodic eligibility reports; adherence to policies, rules, and regulations; and compliance with requirements and directives of district staff. Regardless of the criteria chosen, they must be the same as or equivalent to those for students enrolled in district schools.

Beyond eligibility criteria, Sharon Fissel, director of policy services with the Pennsylvania School Boards Association, recommends that the state’s districts’ policies address the following issues:

1. Home-education students should have equal opportunities to try out for and participate in activities.
2. Home-education students can participate only in the activities of the schools they would be attending if enrolled in the district.
3. The district is not required to provide transportation to the individual student from home to school.
4. A district employee should be designated to receive documents and written verifications concerning eligibility requirements for home-education students, both before and during

participation.

Whatever board policies and eligibility criteria a school board adopts, the policies and criteria must apply equitably to all participants. They must be written and distributed to everyone they affect, such as district administrative and professional staff, club advisors, coaches, students, and parents or guardians. In addition, all documents stating the eligibility criteria—board policies, administrative regulations, school rules, student handbooks, athletic handbooks, postings, websites—must contain consistent information.

The law will initially apply to any extracurricular activity or interscholastic athletic program that begins after Jan. 1, 2006, such as tryouts for a school musical to be held in February. The law does not require districts to hold tryouts during mid-season or to open activities that began before Jan. 1, 2006, for participation by home-schooled students.

*This article is adapted, with permission, from the Policy News Network, Pennsylvania Schools Boards Association, [www.psb.org](http://www.psb.org).*

allaying the former concern than the latter. Less-onerous alternatives to testing include allowing a probationary placement, as in *Vandiver*, or reviewing a student's portfolio. Regardless of what method a district uses to award credit, it should make sure that religion does not play a role in how credit is awarded.

For example, the court in *Vandiver* suggested that the case might have turned out differently had the school board treated students who were home schooled for religious reasons differently than students who home schooled for other reasons.

### Conflicts over Participation in Classes and Extracurriculars

Whether home-schooled students may participate in classes and extracurricular activities—particularly sports—has generated more media attention than all the other legal issues involving public schools and home-schooled students combined. According to the Home School Legal Defense Association, 15 states currently allow home-schooled students access to classes and sports.<sup>11</sup>

In theory, there should be no controversies over home-schooled students' participation in these states, but as HSLDA points out, the students typically have to meet certain conditions, such as eligibility requirements and proof of passing core subjects.<sup>12</sup>

In the majority of states, local districts decide whether home-schooled students can participate on athletic teams or take classes at the district. When districts do

not allow the students to participate on athletic teams, it is often because of athletic association requirements rather than the school board's preference.

School districts and athletic associations have won practically every challenge to policies disallowing home-schooled students from attending classes or participating on sports teams. Parents typically have argued that denying access violates a number of constitutional rights, but so far only a Massachusetts trial court has agreed.<sup>13</sup> Even HSLDA admits, "Negative court precedents indicate the equal access issue requires a political rather than legal solution."<sup>14</sup>

Nevertheless, parents continue to sue over school district policies and athletic association rules that keep home-schooled students out of public school classrooms and extracurricular activities. These battles have not been entirely fruitless, as a recent Maryland case illustrates.

A private school's wrestling coach and parents of home-schooled students brought a lawsuit against the Maryland Public Secondary Schools Athletic Association after the coach's team was barred from a MPSSAA tournament because home-schooled students participated on the team.<sup>15</sup>

At the time, MPSSAA rules stated that public school teams could only compete against other high school teams whose athletes were enrolled at the school and were of high school age, effectively precluding home-schooled students.

In response to the lawsuit, MPSSAA

changed its regulations to state that home-schooled students can participate on athletic teams if their county recognizes them as being home schooled, if they can prove they are in good academic standing, and if they are registered in a certified home-schooling program.

The coach and the parents went ahead with their lawsuit despite the rule change. Although they and lost at the district court level, the coach told the *Washington Post* he still viewed the case as a victory because of the regulation change.<sup>16</sup>

The judge in the case commended MPSSAA for "recognizing the legitimacy of these concerns" and for "responding to this lawsuit, not reflexively, but by forging a constructive solution that furthers the public interest in safe and ethical athletic competition."<sup>17</sup>

### Handling Participation Conflicts

In states where districts can choose whether to allow home-schooled students to participate in classes and extracurricular events—or can pressure athletic associations to adopt more favorable rules—the district must balance a number of policy concerns.

On the one hand, districts may receive no state aid for home-schooled students, public school students may be kept off of teams because of competition, and schools may have difficulty (and may not want the burden of) verifying that home-schooled students meet academic standards.

See *Home-schooling on page 8*

## WHAT THE LAW SAYS, STATE BY STATE

Following are the state laws regarding the participation of home-schooled students in public school activities:

**Arizona:** Home-instructed students are allowed to participate in the public schools' interscholastic activities. *Arizona Revised Statutes* § 15-802.01.

**Colorado:** Children participating in a nonpublic, home-based education program are allowed equal access to the public school's extracurricular and interscholastic activities. *Colorado Revised Statutes* § 22-33-104.5(6).

**Florida:** Home-educated students are eligible to participate in the public school's interscholastic, curricular and extracurricular activities. *Florida Statutes* § 232.425.

**Idaho:** Nonpublic school students

are permitted dual enrollment in public schools to participate in nonacademic activities. *Idaho Code* § 33-203.

**Illinois:** Nonpublic school students may request to enroll part time in public schools. *Illinois Compiled Statutes* § 5/10-20.24.

**Iowa:** Students receiving "competent public instruction" may dual enroll with the public school to participate in any academic, instructional, or extracurricular activities offered by the school district. *Iowa Code* § 256.46, 299A, *Iowa Administrative Code* § 281-31.5.

**Louisiana:** Louisiana Court of Appeals ruled against the participation of students enrolled in a private school. *Sanders v. Louisiana High School Athletic Association*, La. App., 242 So.2d 19.

**Maine:** Students receiving home instruction may enroll in any specific classes at the appropriate public school. This includes all academic, cocurricular, and extracurricular activities, as well as special education services. *Maine Revised Statutes* 20-A § 5021.

**Maryland:** An intermediate appellate court ruled against private school students who sought to participate in a public school extracurricular activity. *Thomas v. Allegany County Board of Education*, 443 A.2d 622 (1982). However, a federal court memorandum prohibits the Maryland Public Secondary Schools Athletics Association from excluding from competition private schools with home-schooled athletes. *Bressler v. Maryland Public Schools*

*Secondary Athletics Association (2005).*

**Massachusetts:** Several trial court decisions have ruled that home-schoolers must be allowed to participate based on the fact that superintendents are allowed to approve home-school programs. These cases only apply to the districts in question, not the entire state. Massachusetts interscholastic Athletic Association allows home-schoolers to participate on public school teams. MIAA Handbook Rule 54.

**Michigan:** The Supreme Court of Michigan ruled that nonessential elective courses offered to the public school students must be offered to resident nonpublic school students on a shared-time basis. *Snyder v. Charlotte Public School District*, 365 N.W.2d 515 (1984).

**Minnesota:** School districts "shall allow all resident pupils receiving instruction in a home school ... to be eligible to fully participate in extracurricular [but not cocurricular] activities on the same basis as public school students." *Minnesota Statutes Annotated*, 123B.49, Subd. 4(a).

**Montana:** The Supreme Court of Montana ruled that a school district policy that kept nonpublic students from participating in sports programs was "reasonable." The district's interest in developing full academic potential in each student outweighed the students' right to play sports. *Kaptein v. Conrad School District*, 931 P.2d 1311 (Mont. 1997).

**Nebraska:** Schools not approved or accredited by the Nebraska Department of Education are not "entitled to any benefits, privileges, or services accorded or provided to approved or accredited schools by the Department." *Nebraska Administrative Code*, Title 92, 13 § 001.02.

**Nevada:** The Nevada Interscholastic Activities Association (NIAA) adopted a regulation on June 19, 2002, providing that home-schoolers are eligible for athletics within their district of residence on the same basis as public school students, provided they submit a qualifying standardized test result. Schools will assess a participation fee of \$100 per sport for each home-schooled student. NIAA G.2070

**New Hampshire:** Home-educated students are eligible to attend public school curricular courses and programs, including athletics. School dis-

tricts may adopt policies regulating home-school participation, as long as the policies are not more restrictive than those governing public school students. *New Hampshire Revised Statutes* § 193:1-c.

**New York:** An appellate court ruled against home-schoolers who sought access to public school interscholastic sports. *Bradstreet v. Sobol*, 650 N.Y.S.2d 402 (A.D. 3 Dept. 1996). The Commissioner of Education's Regulations pertaining to interscholastic athletic competitions, Section 135.4(c)(7)(ii)(b)(2), requires that students in grades 9-12 must be a "bona fide student, enrolled during the first 15 days of such semester, is registered in the equivalent of three regular courses, is meeting the physical education requirement, and has been in regular attendance 80 percent of the school time..." to be eligible for interscholastic competition in public school sports.

**North Dakota:** A child receiving home education may participate in extracurricular activities either under the auspices of the child's school district of residence or under the auspices of an approved nonpublic school, if permitted by the administrator of the school. A home-schooled student is subject to the same standards for participation as required of full-time students at these schools. *North Dakota Century Code* § 15.1-23-16.

**Oklahoma:** Federal District Court ruled against a home-schooled student seeking to compel the school to allow part-time enrollment. *Swanson v. Guthrie Independent School District No. 1-1*, 942 F. Supp. 511 (W.D.Okl. 1996) The 10th Circuit Court of Appeals upheld this decision. 135 F.3d 694 (10th Cir. 1998).

**Oregon:** School districts must allow home-schooled students access to public school interscholastic activities. *Oregon Revised Statutes* § 339.460.

**Pennsylvania:** Home-schooled students meeting the same eligibility criteria as public school students may participate in extracurricular activities of their public school district of residence. Such activities include, but are not limited to, clubs, musical ensembles, athletics, and theatrical productions. 24 *Pennsylvania Statutes Annotated* § 13-1327.1(f.1).

**Rhode Island:** Home-schooled students are eligible to compete in activi-

ties sponsored by the Rhode Island Interscholastic League if they comply with RILL Rule 3.1.1.

**South Dakota:** If the school board or governing body of an accredited school approves, a student receiving alternative instruction is eligible to participate in any interscholastic activity sponsored by the South Dakota High School Activities Association. South Dakota Codified Laws § 13-36-7.

**Utah:** Home-educated students are eligible to participate in public school extracurricular activities, *State Board of Education Regulation R277-438-4*, and in any academic activity in the public school available to students in their grade or age group, subject to compliance with the same rules and requirements that apply to a full-time student's participation in the activity. *Utah Code* § 53A-11-102.5.

**Vermont:** School boards are required to adopt rules to integrate home-study students into school courses, (cocurricular and extracurricular) and use of facilities. *Vermont Statutes Annotated* 16 § 563(24). School boards must follow Vermont Department of Education guidelines found in Code of *Vermont Rules* 22-000-009, Sec. 4401-4405.

**Washington:** School districts must permit enrollment of and provide ancillary services for part-time students enrolled in home-based education programs. *Washington Revised Code* § 28A.150.350

**West Virginia:** The West Virginia Supreme Court ruled that home-schooled students could be prohibited from participating in interscholastic athletics with public school students. The ruling held that there was no violation of equal protection to home-schoolers in permitting the West Virginia Secondary School Activities Association to require eligible students to be enrolled full-time in a member school. *Jones v. West Virginia State Board of Education, et al.*

**Wyoming:** The Wyoming High School Activities Association allows home-educated students to play on participating schools' sports teams. *WHSAA Rules* 3.1.3, 6.2.0, 6.4

**Note:** States not mentioned in this memorandum do not have statutory law or case law addressing the situation of equal access for nonpublic students.

**Source:** The Home School Legal Defense Association, [www.hslda.org/docs/nche/000000/00000048.asp](http://www.hslda.org/docs/nche/000000/00000048.asp).

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On the other hand, home-schooling parents pay taxes, and their children may have just as much talent and receive as much benefit from taking classes or playing sports as public school students. Moreover, verifying academic credentials is not impossible. The Maryland example illustrates that compromises can be reached.

### Conflicts over Special Education

HSLDA claims that more than 10 percent of its members teach a child with “special learning needs,” so it is not surprising that some of these parents seek special education services from the school district.<sup>18</sup> The Individuals with Disabilities Education Act requires school districts to provide special education and related services to three categories of students:

1. Students in public schools;
2. Children placed in private schools by a state agency; and
3. Children placed in private schools by their parents.<sup>19</sup>

Two courts have considered whether school districts have an obligation to provide special education and related services to home-schooled students.<sup>20</sup> The cases were *Forstrom v. Bryne*, from New Jersey, and *Hooks v. Clark County School District*, from Nevada.

Both courts held that it depends on whether these students are considered private school students under state law. Neither Nevada nor New Jersey defined private schools to include home-schooled students. In a number of states, however, home schools are defined as private schools (California, Nebraska, Illinois, Kansas, Texas, Indiana, and Kentucky); in others, they can operate under a home school option or a private school option (Washington, Florida, Utah, Colorado, North Dakota, Louisiana, and Maine).<sup>21</sup>

Even if state law does not define private schools to include home schools, the *Forstrom* case indicates that school districts may have to provide special education and related services to home-schooled students under certain circumstances.

Specifically, the court held that the home-schooled student's equal protection rights under the New Jersey Constitution were violated when he was denied speech therapy services at school even though the district provided speech therapy services at district schools to other nonpublic school students. According to the court, the district's concerns that limited special

education resources should not be spent in the unregulated environment of a home school “vanished” in this case because the student could receive the services at the school district, and the district would receive the same funding for the home-schooled student as the other nonpublic school students.

While the Ninth Circuit did not find an equal protection violation in *Hooks*, it noted that after the lawsuit commenced, Nevada changed its state law to require school districts to provide special education and related services to home-schooled students.

Conflicts have also arisen in instances where home-schooling parents are trying to avoid special education evaluation (much less special education and related services). IDEA's “child find” provision mandates that public and private school students with disabilities are evaluated to determine eligibility under IDEA.<sup>22</sup> Current IDEA regulations state that if parents refuse to consent to an evaluation, the school district may initiate due process procedures seeking an order to override the parents' refusal to consent.<sup>23</sup>

The Eighth Circuit Court of Appeals recently heard oral argument in a case in which the school district was seeking to evaluate a home-schooled student under IDEA over the parents' objection. In this case—*Fitzgerald v. Camdenton R-III School District*—the parents argued that IDEA's “child find” provisions do not apply to home-schooled students and are unconstitutional because they violate the parents' rights to free exercise of religion.

According to the lower court, in Missouri, home schooled students are private school students under IDEA; therefore, the “child find” provision of IDEA applies to them.<sup>24</sup> The lower court likewise found that IDEA is a “neutral law of general applicability” that does not infringe on parents' free exercise rights.

Regardless of how *Fitzgerald* is decided on appeal, it is unlikely that school districts have heard the last of this issue. HSLDA lobbied for a change in the new IDEA regulations to specify that home-schooled students cannot be evaluated for IDEA eligibility without parental consent, and school districts cannot override home schooling parents' failure to consent. The proposed regulations contain this change.<sup>25</sup>

### Good Policies, Good Relations

Given the number of potential legal issues and the relative infrequency of litigation, a school board need not worry

excessively about conflict with home-schooling parents before it arises.

Nevertheless, a comprehensive home schooling policy that is up to date, based on state law, mindful of ambiguities and concerns of home schooled parents, and applied evenhandedly will go along way in averting legal trouble before it begins.

Moreover, cultivating positive relationships with home-schooling parents will lessen the possibility of conflict and lead to a better education for home-schooled students—a goal public schools and parents share.

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### Endnotes

- 1 COLO. REV. STAT. §§ 22-33-104, et seq.
- 2 GA. CODE ANN. § 20-690 (c).
- 3 Brad Colwell & Brian D. Schwartz, Implications for Public Home Schools: LEGAL ASPECTS OF HOME SCHOOLS, EDUC. 173 LAW REPORTER 381, 393 (Mar. 27, 2003).
- 4 ARK. STAT. ANN. § 6-15-503.
- 5 Del. Code Ann. tit.14, § 2703.
- 6 *Battles v. Anne Arundel County Bd. of Educ.*, 904 F.Supp. 471 (D. Md. 1995).
- 7 *Jeffery v. O'Donnell*, 702 F.Supp. 516 (M.D. Pa. 1988).
- 8 757 F.Supp. 653 (W.D. Penn. 1990).
- 9 , 925 F.2d 927 (6th Cir. 1991).
- 10 20 F.Supp.2d 1012 (W.D. Tex. 1998).
- 11 Equal Access: Participation of Homeschooled Students in Public School Activities, CURRENT ISSUES ANALYSIS (Home School Legal Defense Association), Nov. 10, 2005, available at <http://www.hsllda.org/docs/nche/000000/00000049.asp.121d>.
- 13 *Davis v. Massachusetts Interscholastic Athletic Ass'n*, 3 Mass. L. Rptr. 375 (Dist. Ct., Bristol County 1995).
- 14 See supra note 11.
- 15 Adam Rubenstein, New Home-School Rules Won't Stop Lawsuit, GAZETTE.NET, July 21, 2005, available at, [http://gazette.net/gazette\\_archive/2005b/200529/hyattsville/sports/285898-1.html](http://gazette.net/gazette_archive/2005b/200529/hyattsville/sports/285898-1.html).
- 16 Judge Rules in Favor of Maryland Schools, WASHINGTON POST, Sept. 9, 2005, at E09.
- 17 *Bressler v. Maryland Public Secondary Schools Athletic Ass'n*, No. 05-783 (D. Md. Sept. 7, 2005), available at <http://www.mdd.uscourts.gov/Opinions152/Opinions/Bressler7Sept2005.pdf>.
- 18 Erasing the Barriers for Children with Special Learning Needs, THE HOME SCHOOL COURT REPORT (Home School Legal Defense Association), Nov./Dec. 2000, available at, <http://www.hsllda.org/courtreport/v16n6/v16n601.asp>.
- 19 20 U.S.C. § 1412(i) (1994).
- 20 *Hooks v. Clark County Sch. Dist.*, 228 F.3d 1036 (9th Cir. 2000); *Forstrom v. Byrne*, 775 A.3d 65 (N.J. Super. Ct. App. Div. 2001).
- 21 See HSLDA's website for a list of each states' home schooling laws: <http://www.hsllda.org/laws/default.asp>.
- 22 20 U.S.C. § 1412.
- 23 34 C.F.R. § 300.505.
- 24 *Fitzgerald v. Camdenton R-III School District*, No. 03-04086 (W.D. Mo. Aug. 18, 2004).
- 25 Education of Children with Disabilities, 70 Fed. Reg. 35,782, 35,861 (June 21, 2005) (to be codified at 34 C.F.R. § 300.300(a)(3)).