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THE OPPORTUNITY TO PLAY

Ezekiel Spieker

Southeastern University - Lakeland, easpieker@seu.edu

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Ezekiel Spieker

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The Opportunity to Play

On January 31, 2022, I began my testimony on a Tim Tebow Bill before a committee in the Missouri House of Representatives with the words of NFL player and coach Mike Singletary: “Do you know what my favorite part of the game is? The opportunity to play” (HB 2369). Mike Singletary’s quote speaks to me, as well as countless other homeschool students throughout America and Missouri, on a deeply personal level. In many states, homeschool students play sports and perform in recitals with their public school friends. In other states, however, they are barred from participation. Homeschoolers are welcomed in little league activities and travel teams, but when they reach seventh grade in Missouri, the Missouri State High School Activities Association steps in and excludes them from competing with their friends in their beloved activities. Rules prohibiting homeschool students from the opportunity to partake in community high school and junior high interscholastic competitions violate homeschool students’ rights to due process and equal protection. Allowing these students to participate is the only fair solution; they and their families pay taxes, earn membership in the community, and excel both academically and athletically. The Missouri Legislature should take up and pass House Bill 2369, which would grant homeschoolers equal access to these activities. HB 2369 is legislation resulting from years of hard work, conversations, and compromise. Other states were consulted in the drafting of Missouri’s Tim Tebow Bill, named for Florida football star Tim Tebow, who was allowed to play for his local high school despite being homeschooled. Using the opportunity to sharpen his skills, he gained the attention of scouts, played in college, and then the NFL.

Missouri's current version of this bill is moderated, but maintains the integrity of the mission. Common arguments against Tim Tebow Bills might initially appear valid, but upon closer examination, they prove inadequate. In fact, HB 2369 would help the school system. Missouri Legislators should pass HB 2369, recognizing the constitutional claims, the fairness aspect, the commonly supported sections, and the lack of logical opposition.

“To determine the constitutionality of an athletic organization's eligibility rule, it must be reviewed for purposes of due process and equal protection” (Webb). Due process refers to a clause contained within the Fourteenth Amendment, serving as “an assurance that all levels of American government must operate within the law and provide fair procedures” (Strauss). In this context, due process applies unless there is a rational reason for rejecting homeschool participation, which is nearly nonexistent upon further review. Equal protection is similar, a legitimate state objective for denying equal access must be established, or their equal protection rights are violated. Despite varying outcomes, several lawsuits have successfully opened doors for participation. Prohibiting homeschool students from even trying out for an athletic team or club violates their due process and equal protection rights.

When home-educated students are restricted from participation, they are being denied their due process rights by state action, as prohibitions hinder their opportunities to earn college scholarships. Under the due process clause, if the right in question is found to be a fundamental right, the court will apply “strict scrutiny” when examining the policies (Roberts). If the right is not fundamental, only “rational basis” will be applied (Roberts). The Supreme Court declared that sports are not a fundamental right. As a result, in order to side with a homeschool student's due process claim, the court must deem the exclusionary policies irrational. As the precedent

currently stands, to rule against a homeschool student, “there must only be a rational relation between the ban and a legitimate state objective” (Roberts). Due process has traditionally been used to push back on government infringements and enactments that are “overbroad in their application concerning...protected rights,” especially when there is an obvious, less infringing solution (Webb). As there are obvious alternatives and regulations imposed in other states for this purpose, outright prohibition should not stand (Roberts). Evidence from states successfully allowing homeschool participation demonstrates the lack of “rational basis” for claims of academic ineligibility and therefore, outright prohibition should not withstand this level of scrutiny either (Roberts). Additionally, to fall under due process, the “right in question must either be a liberty or a property interest” (Webb). In the case of *Boyd v Bd. of Directors*, the court rightly found that there was no “legitimate state objective” in denying the plaintiff’s participation (Roberts and Webb). As a result of how vital this would be to Boyd’s college athletic scholarship opportunities, “the court found a property interest protected by due process under the Fourteenth Amendment” (Webb). Prohibiting participation is a due process “property interest” because it impedes a student’s necessary method of paying for college and pursuing “his very important educational development and economic future” (Webb).

Similar to the due process analysis, “equal protection requires only a rational relationship to a legitimate state interest if the regulation neither infringes upon fundamental rights nor burdens an inherently suspect class” (Webb). As home-educated students have rarely been found a suspect class, and as no general right to sports has been found, courts simply apply the “mere rationality” standard when evaluating equal protection claims (Webb). Courts should rule that there is no legitimate state interest in prohibiting participation of homeschool students, and that

policies doing so are pointedly targeted to affect one group differently than another, which is legally unacceptable. The right of homeschool students to enroll part-time in public school classes has been established, resulting in a Michigan Supreme Court ruling in favor of a student who sued for access (Batista). Despite this favorable ruling, when another family sued for sports, the courts differentiated between school classes and school activities (Batista). While this is how the court ruled, the individual state activities associations disagree. They contend that extracurricular activities are, in fact, essential to education, but do not apply this same logic in the legal setting when a homeschool student is seeking access. The Missouri State High School Activities Association Class 5 Football State Championship started with this announcement: “The purpose of this game is to promote education.” The South Dakota High School Activities Association’s website proclaims: “Activities are essential to education, they are an integral part in the total curriculum for...schools” (South). Based on this unjustified separation of athletics from education, many legal scholars argue that although some courts have ruled against homeschool students, their rulings are incorrect, and homeschool students are, in fact, being denied equal protection and due process (Webb).

To better understand the current situation, some court precedent must be addressed. In the case of *Thomas v. Allegany County Board of Education*, three parochial school students were denied access to participation in band. They argued this violated their religious and due process rights. The court ruled that because the students were allowed to enroll in a religious school, religion was not an issue. The court also ruled against the due process violation because there was “legitimate interest” for the denial “based on potential administrative disruption” (Batista). However, the court did explicitly open the door for any school to allow non-public students to

participate if they so desired. A case decided by the Michigan Supreme Court, *Synder v. Charlotte Public School District, Eaton County*, contained essentially the same facts as *Thomas v. Allegany*, but the court ruled in favor of the student seeking access to band class (Batista). Allowing non-public students to participate, the court ruled, would not unduly burden the school system. In *Reid v. Kenowa Hills Public Schools*, however, a lower court differentiated between non-core classes and extracurriculars, seeming to argue that extracurricular activities are not a part of education (Batista). A religious student lost her suit in *Kaptein v. Conrad School District* (Batista). Ruling in favor of a high school student, the court decided in *Boyd v. Bd. of Directors* that Boyd was protected by a due process property interest “because participation in high school sports was an ‘indispensable and integral part’ of his attempt to receive a scholarship and college education” (Webb). The court decided in *Anderson v. Indiana High School Athletic Ass’n* that a student has the right to try out (Webb). In Iowa, a Principal and School Board denied a homeschool student participation under a rule (Anderson). The family sued, and in *Stone v. Ankeny Community School District*, successfully convinced the court to abolish the rule preventing participation. With a wide range of outcomes from different lawsuits regarding participation, the outcome of each individual, obscure case is unpredictable.

There is no “rational basis” for homeschool exclusion from interscholastic activities (Roberts). A legitimate state interest in denying homeschool students does not exist, and because access to public education is a right, all students should have access to these educational opportunities. If they are not educational, then the various state high school athletic associations are wrong, and they should have no place in the taxpayer funded school system. Lastly, although

legal outcomes have varied, the correct outcome is undoubtedly that homeschool students denied access are at a minimum being denied their due process and equal protection rights.

In addition to the legal arguments, the Missouri Legislature should pass HB 2369 simply because it is fair. Homeschool families pay taxes, which fund the school, and the school would receive more money by enrolling the homeschool student in a class. Communities are centered around sports, college scholarships are won through interscholastic competitions, strong relationships are built in little leagues, and these should extend into junior high and high school. Although public school students are held to certain standards of academic eligibility, these standards are extremely low and homeschoolers, as a whole, perform higher academically.

Missouri schools receive less than 10% of their funding from the federal government, leaving the state and local districts to come up with the remaining 90% (Missouri Education). Missouri spends \$11,249 per pupil, which means \$10,124.10 must come from state and local governments (U.S.). State funding comes mostly from income tax, sales tax, and the lottery, whereas local revenue comes mainly from property taxes (Missouri Education). Since state funding is per enrolled student, local districts do not necessarily receive state money for unenrolled homeschool students living in their district. They do, however, still receive the locally collected taxes, such as property tax. If these schools allowed homeschool participation and required the student to enroll in a class, they would receive more state funding for the pupil as they could count the student's school hours in their average daily attendance number (Missouri Education). Funding the school through taxes, families, who choose to homeschool, should be able to access the opportunities they are required to support financially.

Not only do community members fund the local school district, but they often attend local sporting events. Allowing homeschool participation in public school activities builds stronger communities, increases the skill of local sports teams, and increases a homeschool student's chance at a college scholarship. Athletes from all educational backgrounds are welcome in local little leagues, especially when they are talented. They build connections, skills, teamwork, work ethic, and friendships with their peers from public school. Families function the same way; they develop relationships with the people they sit next to every week at sporting events. Why is it then, that when these athletes reach seventh grade, they are cut off from their community? These kids are prohibited from participation after reaching this age because the Missouri State High School Activities Association begins regulating school sports and forbids homeschool involvement whatsoever in Junior High (Board). Only a few years ago, MSHSAA created provisions for high school age homeschoolers, requiring a minimum attendance of two classes at the high school, while allowing individual districts to disallow it altogether (Board). These families have formed friendships, built relationships, made each other better, worked hard, suffered through tough seasons, and celebrated amazing victories together. They should not be denied the opportunity to continue investing in their community, promoting unity, and building team spirit. Further, outside of public school opportunities, college athletic scholarships are exponentially harder to earn.

Some people argue that allowing home-educated students to participate is not fair to full time public school students, who are required to meet certain academic standards. In Missouri, unless a student fails two classes with two F's, they are eligible (Board). This low standard of eligibility, coupled with the fact that homeschool students do better academically, is sufficient to

infer that academics should not be an issue. Opponents of participation also claim that a student may drop out of school and claim to homeschool in order to avoid the academic requirements (HB 2369). This is unrealistic, as MSHSAA already has punitive rules preventing dropouts from being eligible for an entire year (Board). Published in 2017, Brian Ray authored a peer-reviewed study of 14 peer-reviewed studies on homeschooling (Ray). “In 11 of the 14 peer-reviewed studies on academic achievement, there was a definite positive effect on achievement for the homeschooled students” (Ray). Even statistics provided by the state show homeschool students perform better when tested (Ray). As will be expounded upon in greater detail, states that allow participation have very rarely had issues with homeschool students failing to meet requirements (Sieck).

Denying homeschool students access to activities offered through the school is unfair to the taxpaying families, the community as a whole, and to high achieving students. Homeschool families pay taxes that fund the public school, and therefore, should have access to the activities offered by it. A community’s unity is very often intertwined with local high school athletics. Forbidding homeschool participation excludes them from this vital part of the community. Lastly, homeschoolers have repeatedly proven their academic superiority, so academic eligibility arguments are weak at best.

Methods of determining eligibility vary by state. When debating proposed legislation, politicians want to know how the law will affect those involved, and how similar legislation has been implemented in other states. Tebow Bills have existed for a few decades, and as a result, their successful implementation in other states argues vehemently for their acceptance in Missouri as well. Understanding the different eligibility standards, requirements, or lack thereof,

in the respective states will aid in one's understanding of the evolution of the Tebow Bill in Missouri. This will culminate in the conclusion that HB 2369, currently in front of the Missouri House, is an artfully crafted compromise that respects everyone involved and thus, deserves passage through the Missouri Legislature.

Allowing homeschoolers access to these activities is not a new idea. Many states, with varying levels of restrictions, have successfully done this for years. In a few states, the statewide activities association has allowed homeschool participation of their own accord. Tennessee voluntarily approved participation beginning in the 2011-2012 season, and Ohio did in 2013 (Sieck). Homeschoolers in Colorado have unrestricted access to the opportunities offered by the public school (Colorado). In fact, any school that denies participation is not eligible to receive funding from the state (Colorado). In order to participate, home-educated students must be in compliance with Colorado's homeschool laws, be in compliance "with all eligibility requirements imposed by the school of participation," and adhere to the same behavioral standards (Colorado). A student who has been enrolled in a public or private school for more than fifteen days during a given school year, is ineligible to participate under homeschool rules for the rest of the year (Batista). If a homeschool student's local district doesn't offer a particular activity they are interested in, the law allows them to enroll in and participate through non-local schools that do offer their desired activity (Colorado). In Idaho, standardized tests are necessary for activities that require academic qualifications, but the homeschool student is not mandated to attend any class at the school in order to participate (Idaho). Due to a recent South Dakota law, homeschoolers have the ability to participate with no strings attached, and schools are even legally obligated to let homeschool families borrow their textbooks (South Dakota). This

movement all started in Florida, where Tim Tebow, a homeschool student, participated in local public school athletics and went on to play in the National Football League. Florida law permits homeschoolers access if they abide by the state's homeschool laws, "meet the same residency requirements," "standards of acceptance, behavior and performance" as their public school peers (Batista). In order to prevent someone failing academically to drop out and claim to homeschool for sports, the Florida law mandates ineligibility for one grading period (Batista). Further, any homeschool extracurricular teams that exist are allowed to enlist in the statewide activities association (Batista). Homeschoolers in Arizona are allowed to participate if they meet all the "registration, age eligibility requirements, fees, insurance, transportation, physical condition, qualifications, responsibilities, event schedules, standards of behavior and performance" required of full time students (Arizona). The student must be "receiving a passing grade in" every class and maintain "satisfactory progress towards advancement or promotion" (Arizona). Written verification of these achievements is provided by "the individual providing the primary instruction" of the child (Arizona). A wide range of requirements, penalties, and states allow for homeschool participation in one form or another. In Missouri, State Representatives working on this issue initially drew great inspiration from the Arizona law.

After reviewing the work done to support homeschool access in other states, an in depth look at the evolution of Missouri's Tim Tebow Bill is warranted to understand how HB 2369 respects all stakeholders involved. State Representative Elijah Haahr, who was homeschooled himself and would go on to become the Speaker of the House, filed HB 1347 and HB 232 in 2014 and 2015 respectively (HB 1347 and HB 232). These two bills specifically targeted the Missouri State High School Activities Association, and asserted that public school members of

this association would be required to “provide a student that attends a homeschool...the opportunity to participate...in the same manner” as a public school student (HB 1346 and HB 232). These bills mirror the Arizona bill with stunning similarity. Just like in Arizona, homeschool students who wanted to participate in Missouri would be subject to “policies regarding registration, age eligibility, fees, insurance, transportation, physical condition, qualifications, responsibilities, event schedules, standards of behavior, and performance” (HB 1346 and HB 232). Copying further language from Arizona, the Missouri student must be “receiving a passing grade in” every class and maintain “satisfactory progress towards advancement or promotion” (HB 1346 and HB 232). Written verification of these achievements are provided by “the individual who primarily provides instruction to the student” (HB 1346 and HB 232). In 2016, Representative Kirk Matthews, who chaired one of Missouri’s prominent Rules Committees, filed legislation verbatim (HB 2802). Representative Rone filed similar language in 2017’s HB 1084, leaving most of the same requirements as the previous bills, but removing the written verification requirement. (HB 1084). Representative Rone secured an agreement with the Missouri State High School Activities Association, canceled a previously scheduled hearing for the bill, and MSHSAA changed their policy to allow public high schools to allow homeschool students that age to participate while taking a minimum of two classes at the school. This policy resulted in the vast majority of districts across the state outright banning participation. When MSHSAA voted in 2018 to keep their total prohibition of homeschool students at the Junior High level, it became apparent that a law was necessary. Even though MSHSAA allows high school participation with two classes, if the individual schools remain opposed to allowing participation, like most are, the rule change is of no benefit to

homeschoolers seeking access. For this reason, in 2019, homeschooled Representative Dirk Deaton filed HB 857, which maintained the requirements contained in the previous bills, but removed the registration requirement (HB 857). Additionally, Representative Deaton's bill required the "individual who primarily provides instruction" to submit written verification "that the student is proficient in each course or subject taught" (HB 857). Due to resistance from a homeschool lobbyist, HB 2273 filed the following year was completely reworded to place the language in an area of the law that did not change the homeschool statute (HB 2273). The requirement for written verification was also not included in this bill. HB 2273, like the Colorado law, included a penalty provision, prohibiting state funds from going to schools excluding homeschoolers from participation. This bill, unlike the others proposed in Missouri, would allow the school district to require one class directly related to participation in an activity. The one year period of ineligibility was also removed because MSHSAA's existing rule preventing dropouts from involvement would not be affected by the bill. Requiring band class to participate in band, or weights to participate in sports, came in response to a concern raised by the Missouri Alliance for Arts Education (HB 2273). As is the case with Florida's law, this bill would require the statewide activities association, MSHSAA, to allow homeschool teams to compete with member schools. Unfortunately, although progress was made every year, these Representatives were unable to pass legislation providing homeschoolers the opportunity to participate in activities through their local public school.

Despite the unsuccessful attempt to bring about change year after year, the citizens of Missouri, devotedly led by my family for six years, have not given up the fight. The most recent Representative to file legislation in Missouri is Representative Josh Hurlbert, who was himself

homeschooled and now homeschools his children. He filed HB 494 in 2021 (HB 494). This bill, which was perfected on the floor of the Missouri House, is almost identical to Representative Deaton's HB 2273 with the added provision that all usual disciplinary policies would apply, and an added protection for the privacy of homeschooled students. When HB 494 was discussed in 2021, Representatives primarily raised objections over the penalty provision of the bill, which they failed to mention previously. Taking all these things into account, Representative Hurlbert filed HB 2369 this year. HB 2369 is similar to HB 494, but does not contain a penalty provision. Additionally, while several states do not require academic oversight of homeschoolers desiring to participate, and while it was not included in Representative Deaton's bills, HB 2369 clarifies that "the parent or legal guardian providing primary instruction of a student...is responsible for oversight of academic standards relating to the student's participation in an activity" (HB 2369). HB 2369 is a true compromise bill that is fair to all the parties involved. Unlike Colorado, HB 2369 requires the homeschool student to participate in the district where they live. Homeschool students in Idaho, Florida, Iowa, and Arizona can participate in interscholastic activities without taking a class at the public school. HB 2369 contains a compromise which requires the students to attend one class related to their activity, which earns more money for the school through increasing their average daily attendance number (HB 2369 and Missouri Education). MSHSAA raised some issues with the provision allowing homeschool teams to compete against MSHSAA member schools, and the provision was removed as part of yet another concession. To summarize, this is a moderate bill that accomplishes the purpose of granting homeschool participation, while safeguarding homeschool rights in Missouri and benefitting public schools at the same time. A stronger version of this bill passed the Senate Education Committee

unanimously in 2020, and a weaker version in 2022. In March of 2022, HB 2369 passed the General Laws Committee 13 to 1, and the Rules Legislative Oversight Committee unanimously (HB 2369 and SB 875). Therefore, the Missouri Legislature should recognize HB 2369 for the true compromise bill that it is, and vote to allow homeschool students access.

States across America of all political leanings have found unity in the issue of homeschool access. While the implementation and writing of these laws are different depending on the state, they all contain lessons from which current legislators can learn. Initially mirroring Arizona's law, Missouri's proposed legislation contains some elements from many states, providing precedent and resources. HB 2369 is the culmination of many years of progress, a willingness to work with the opposition, and the reasonableness of both sides to come together in compromise on this issue of great importance. As a result, the Missouri Legislature should pass HB 2369.

As is the case with almost every proposed law, there are those who argue in opposition. Although support for homeschool students gaining access to these activities is widespread, some people, mainly public education lobbyists, will fight these proposed changes. They claim it forces the schools to use their already scarce funds to finance opportunities for students not even enrolled in the school. They claim that homeschool students should not be allowed to participate because they will not be academically eligible. The last major argument against involvement actually comes from homeschoolers themselves, who are wary of any relationship that might exist between them and the public school.

Money is a big motivator to many people, and school administrators are no different. In Missouri, however, allowing homeschoolers to participate under HB 2369 would actually

increase the amount of money they receive from the state. Missouri distributes school funding according to the foundation formula (Missouri Education). Average daily attendance is included in this formula. The homeschool student's family will also likely attend games, pay admission, buy concessions, donate to fundraisers, and ultimately provide increased revenue for the school. In Missouri, the schools will benefit financially.

Arguably, the most common opposing argument is that of academic eligibility. According to the MSHSAA by-laws, a student is ineligible only if they receive an F in more than one of their classes (Board). This academic standard would be satisfied by one F, as long as the rest of the classes were D's (Board). Overall, homeschool students prove better academically equipped than their public school counterparts (Ray). The hypothetical student who would drop out of school because of failing grades and claim to homeschool to continue playing sports is an extremely rare situation, of which I have heard no concrete example. The fact is that already existing regulations from MSHSAA would not allow a dropout to participate for 365 days, which no serious athlete would do (Board). Further, the coach and administration could see through this potential scenario, and if the homeschool parent is not in compliance with Missouri's homeschool law, they could receive jail time as a punishment. Those, who are worried about educational or other types of neglect that some homeschooled children may suffer, should welcome this as a possible avenue of recruiting them into the school building to be seen by more people and potentially shed light upon an unacceptable situation. Even in the state of Iowa, where participation has been allowed since 1997, allowing homeschoolers access "has rarely been cause for concern" (Sieck). In fact, the Iowa High School Athletic Association "has encountered very few problems with homeschooled students," according to their executive

director Alan Beste (Sieck). The academic requirements for public school students are extremely low, homeschool students are statistically better academically, and these hypothetical situations almost never occur, even according to the head of Iowa's statewide activities association.

Surprisingly enough, homeschool families themselves often oppose Tebow Bills. They view the involvement of their children with the public school in any way as a form of "comingling," and the students that engage in cooperation for participation as "quasi" homeschool students (HB 857 and SB 875). Many of them still remember fighting for the right to homeschool in the first place (Johnson). As a result, they want to retain the maximum amount of homeschool freedom they can, and will fight any attempt to impose a standardized testing requirement. Sometimes they will even oppose Tebow Bills when testing would be required for participation, but the participation would be voluntary. In HB 2369, no testing requirement exists (HB 2369). Instead, the compromise allowing the school to require one class was added as well as the section specifying that the homeschool instructor will have oversight of academic eligibility standards. Home School Legal Defense Association Lobbyist Scott Woodruff testified that in every state where homeschoolers have gained access to participation, the state has never reversed their decision. Additionally, he noted that no state's homeschool laws have been harmed by this legislation (HB 875). In fact, he noted to the contrary that oftentimes these laws are strengthened following a Tebow Bill's passage (HB 875). He argued that hostile homeschoolers are not aware of history, as history has shown no loss of freedom in the states where they have gained these rights (HB 857).

While certain versions of Tim Tebow Bills receive support from both Republicans and Democrats, some still argue against allowing homeschoolers access. The argument that it would

cost the schools money is false, as the schools would actually receive extra funding for enrolling the homeschool student. The argument of academic ineligibility is inadequate because of the incredibly low standard of academic achievement required, and because HB 2369 does require academic eligibility, overseen by the primary instructor of the student. Some misguided homeschool families believe passing a Tebow Bill will hamper their freedom to homeschool, but this argument is not supported by history. At the end of the day, many arguments against HB 2369 may seem reasonable at first glance, but when they are dissected, the arguments do not hold up.

HB 2369 should be passed, and homeschool students should be allowed to participate in local, taxpayer-funded activities. They are eligible to participate and build friendships in Missouri until they reach Junior High, yet their community is ripped from them at this age just because of their parent's choice of schooling. Outright prohibition of participation violates the equal protection and due process clauses of the United States Constitution. Enabling participation is the only fair response to this issue. It is fair because homeschoolers hold up academically, they fund the schools, and they are members of the community. HB 2369, as it currently stands, is true compromise legislation, granting provisions for academic oversight, requiring one class, and containing no penalty provision. It has passed three committees so far in 2022, with only one negative vote all year. The Missouri legislature should take note and vote HB 2369 into law, empowering homeschool students, like me, with Mike Singletary's favorite part of the game, which is "the opportunity to play" (HB 2369).

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