

Articles

EQUAL ACCESS TO PUBLIC EDUCATION: AN EXAMINATION OF THE STATE CONSTITUTIONAL & STATUTORY RIGHTS OF NONPUBLIC STUDENTS TO PARTICIPATE IN PUBLIC SCHOOL PROGRAMS ON A PART-TIME BASIS IN NORTH CAROLINA & ACROSS THE NATION

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I. INTRODUCTION

Brenda is a full-time sixth-grader at Charlotte Christian Academy, a private non-denominational school in Michigan. She has her own musical instrument, but the academy does not offer a band course. Brenda's parents are concerned that their daughter will be denied the opportunity to develop her talent, so they look for an alternative. Her parents soon learn that the Charlotte Public School District offers the desired course.

Brenda and her parents do not ask for special accommodations. Like any other family, they pay property taxes to support the school district in which they live. Her parents are willing to transport their daughter to and from class, and Brenda is able to attend band class at the same time and place as her public school classmates. The school district admits that there is room for Brenda, and moreover, it would receive state school aid to cover the additional cost of her part-time attendance. However, the school district refuses to admit Brenda. It is against school district policy to admit any private or homeschool students. Only full-time, public school students are allowed to take classes in the school district.¹ So, barring a change in the legal status quo, Brenda will have to learn to play her favorite musical instrument on her own. Her parents sue.

Mounting two arguments, Brenda's parents claimed that excluding their daughter violated her (1) state statutory and (2) federal constitutional rights. In a 4-3 decision, the Michigan Supreme Court ruled in favor of Brenda. Though the Justices discussed the federal constitutional issues, they based their decision on a state statute that purported to grant residents, like Brenda, the "right to attend school in [their] district."² The statute did not mention full-time status as a public school student as a prerequisite or requirement for this "right to attend."³ And so, one lawsuit and several appeals later, Brenda got to go to band class.

1. *Snyder v. Charlotte Pub. Sch. Dist.*, 365 N.W.2d 151, 153 (Mich. 1984).

2. *Id.* at 169. See Mich. Comp. Laws § 380.1147 (2007).

3. *Snyder*, 365 N.W.2d at 154.

This true story highlights a winning litigation strategy for private school and homeschool families that want to defend their children's right to participate in public school programs on a part-time basis.⁴ In recent years, countless private and homeschool students have been turned away from public school classes, extracurricular activities, and sports.⁵ Many of their parents have sued under the First and Fourteenth Amendments of the United States Constitution alleging free exercise, due process, and equal protection violations.⁶ However, these federal claims are seldom, if ever, successful.⁷ More often than not, the courts apply a rational

4. See *id.* at 156 (holding that various state statutes, "when read together . . . guarantee children the right to attend neighborhood public schools, but gives them the option of obtaining their education at other facilities"). But see *Thomas v. Allegany County Bd. of Educ.*, 443 A.2d 622, 627 (Md. Ct. Spec. App. 1982) (reaching an opposite conclusion to the *Snyder* court, based on virtually identical state statutory arguments); *Reid v. Kenowa Hills Pub. Schs.*, 680 N.W.2d 62, 66–68 (Mich. Ct. App. 2004) (limiting the *Snyder* court's right to attend by distinguishing between non-core classes, e.g., band class, that are open to nonpublic students and extracurricular activities, e.g., athletics, that are closed to nonpublic students).

5. See Paul J. Batista & Lance C. Hatfield, *Learn at Home, Play at School: A State-by-State Examination of Legislation, Litigation and Athletic Association Rules Governing Public School Athletic Participation by Homeschool Students*, 15 J. LEGAL ASPECTS OF SPORT 213, 223 (2005) (describing how, as of 2005, a majority of states prohibit homeschool students from participating in public school sports). Broken down by category, the data reveals that: "In 16 of the 23 states that allow homeschool students to participate, state legislatures have adopted statutory provisions allowing participation. The states with existing statutes are Arizona, Colorado, Florida, Idaho, Illinois, Iowa, Maine, Minnesota, Nevada, New Hampshire, North Dakota, Oregon, South Dakota, Utah, Vermont and Washington. In the other seven states allowing participation, Alaska, California, Louisiana, Massachusetts, Pennsylvania, Rhode Island and Wyoming, statutes do not exist, but participation is authorized by rules of the state high school athletic/activities association". . . . In 23 states, homeschool students are prohibited from competing on public school athletic teams by virtue of the rules of the state high school athletic/activities association: Alabama, Arkansas, Connecticut, Delaware, Georgia, Hawaii, Indiana, Kansas, Kentucky, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. State courts in four other states (Maryland, Michigan, Montana, and New York) have determined that state law does not allow homeschool students to participate." *Id.* at 224, 240. North Carolina does not permit private or homeschool families to participate in public school athletics. *Id.* at 243. Further, the North Carolina Division of Non-public Education has interpreted section 115C-563(a) of the North Carolina General Statutes to prohibit homeschool students from taking core classes like "language arts, math, science and social studies" in public school. North Carolina Division of Non-Public Education, *Frequently Asked Home School Question Topics*, <http://www.ncdnp.org/hhh114h.htm> (last visited Nov. 5, 2006). See N.C. GEN. STAT. § 115C-563(a) (2007). Finally, local school boards have the discretion to prohibit homeschool students from taking noncore classes. See Lisa M. Lukasik, *The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools*, 74 N.C. L. REV. 1913, 1973 n.368 (1996) (describing how, in the absence of statutory or regulatory authority, section 115C-40 gives local school boards the discretion to accept or deny nonpublic students); NEIL G. PEDERSON AND STEPHEN A. SCROGGS, NON-PUBLIC SCHOOL STUDENT PARTICIPATION IN SCHOOL ACTIVITIES (February 20, 2004), <http://www.chccs.k12.nc.us/Board/03042004Agenda/Nonpublicschcover.pdf> (reviewing the "current policy and law concerning the participation of non-public school students in [public] school activities" for the benefit of a local school board).

6. See, e.g., *Pelletier v. Me. Principals' Ass'n*, 261 F. Supp. 2d 10, 12–13 (D. Me. 2003) (parents and school argued that excluding homeschool students from private school athletics violated the First and Fourteenth Amendments of the United States Constitution); *Jesuit Coll. Preparatory Sch. v. Judy*, 231 F. Supp. 2d 520, 529–35 (N.D. Tex. 2002) (parents and school argued that excluding private school students from joining a public school athletics league violated the First and Fourteenth Amendments of the United States Constitution).

7. See, e.g., *Pelletier*, 261 F. Supp. 2d at 13–17 (holding that excluding homeschool students from

basis review to judge the exclusion of these students, and this low standard of review almost predetermines an unfavorable outcome.⁸

But Brenda's story provides hope. State law can support an alternative theory for contesting the exclusion of private and homeschool students from public school programs.⁹ "[E]very single state's constitution addresses the state legislature's responsibility to provide for a public school system."¹⁰ These educational rights provisions in state constitutions can provide a unique, textual basis to argue for rights apart from and beyond the federal constitution.¹¹ State statutes can also provide a basis for these rights.¹²

Both private and homeschool families have a lot to gain from equal access to public school programs.¹³ Even though many private schools have their own sports leagues and band classes, no institution can offer a perfectly comprehensive curriculum.¹⁴ Inevitably, some private school students will want to participate in programs that are not offered by their institution.¹⁵ Like Brenda, they stand to benefit from equal access to a public school system that does offer the desired class or sport.¹⁶

Homeschoolers often have an even harder time trying to establish

private school athletics did not violate the First or Fourteenth Amendment of the United States Constitution); *Jesuit Coll. Preparatory Sch.*, 231 F. Supp. 2d at 529–35 (holding that excluding private school students from joining public school athletics leagues did not violate the First or Fourteenth Amendment of the United States Constitution); William Grob, *Access Denied: Prohibiting Homeschooled Students From Participating in Public-School Athletics and Activities*, 16 GA. ST. U.L. REV. 823, 836 (2000) (asserting that "parents cannot rely on the First or Fourteenth Amendments when they argue that homeschoolers have a constitutional right to access public-school athletics or activities if the students' primary educational venue is the home").

8. Grob, *supra* note 7, at 831–36 (discussing various cases where the Court found no constitutional violation under the First and Fourteenth Amendment brought by the parents of the nonpublic students seeking equal access). *But see* *Davis v. Mass. Interscholastic Athletic Ass'n*, 3 Mass. L. Rep. 375 (Mass. Super. Ct. 1995) (granting a preliminary injunction to enjoin the Massachusetts public school system from excluding a homeschool student from participating on a public girls' softball team; the court held that excluding the student violated equal protection under a rational basis review because the sole reason she was excluded was her classification as a homeschool student, and legal homeschooling is "academically equivalent" to public schooling in Massachusetts).

9. *See supra* note 4.

10. Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Incultation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 64 n.5 (2002) (paraphrasing MARTHA M. MCCARTHY ET AL., *PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS* 2 (4th ed. 1998)).

11. *See Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997) (holding that the state constitution provides "every child" in North Carolina with the right to "an opportunity to receive a sound basic education" in public school).

12. *See supra* note 4.

13. Brenda's case is a paradigm for why private and homeschool families want to participate in public school programs on a part-time basis. *See Snyder v. Charlotte Pub. Sch. Dist.*, 365 N.W.2d 151, 153 (Mich. 1984). When a child's private school or homeschool does not offer a desired class or sport, but the local public school system does, part-time participation in public school is a logical answer. *See id.*

14. *See id.*

15. *See id.*

16. *See id.*

their own interschool activities and specialized classes.¹⁷ Except in unique circumstances,¹⁸ homeschool families have fewer resources and less coordination than most private schools.¹⁹ Thus, they are even more likely to push the issue of participating in public school programs on a part-time basis.²⁰

Though out-numbered by their public and private school counterparts, the number of homeschoolers in the United States is on the rise.²¹ In 1999, there were an estimated 850,000 students being homeschooled in the United States.²² In 2003, that number increased to 1,096,000.²³ Judging by this upward trend, the actual number of homeschool students is likely much higher today.

What accounts for this upward trend in the number of homeschool students? As the practice of homeschooling becomes more mainstream,²⁴ an increasing number of families are teaching their children at home for the same reasons that others send their offspring to private schools.²⁵ Traditionally, homeschooling has been viewed as an alternative for very religious families,²⁶ who fear that public schools teach a religion (or anti-religion) called secular humanism.²⁷ In 2003, a majority of homeschool students were not members of families that reported religion as their “most important reason” for teaching their

17. In North Carolina, “[h]ome school’ means a nonpublic school in which one or more children of not more than two families or households receive academic instruction from parents or legal guardians, or a member of either household.” N.C. GEN. STAT. § 115C-563(a). As such, the largest homeschools in North Carolina consist of two families, and the curriculum that homeschools can provide is limited to what the members of those two families are capable of offering. *See id.*

18. But some homeschool-sponsored athletic programs do exist. Hal Young, *Extra-Curricular Activities Grow for Homeschoolers*, CAROLINA JOURNAL, April 2006, at 10. North Carolinians for Home Education, “the state’s largest homeschooling organization,” has sponsored basketball tournaments for homeschool students. *Id.*

19. *See supra* note 17.

20. *See supra* note 17.

21. Grob, *supra* note 7, at 825 (“Commentators estimate that the number of parents choosing to homeschool their children has increased five-fold in the past decade.”); DANIEL PRINCIOTTA, STACEY BIELICK, & CHRISTOPHER CHAPMAN, NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEPARTMENT OF EDUCATION, HOMESCHOOLING IN THE UNITED STATES: 2003 2 (February 2006), <http://nces.ed.gov/pubs2006/2006042.pdf> (“Estimated number and 95 percent confidence interval for number of homeschooled students, ages 5 through 17 with a grade equivalent of kindergarten through 12th grade: 1999 and 2003”).

22. PRINCIOTTA, BIELICK, & CHAPMAN, *supra* note 21, at 2.

23. *Id.*

24. Grob, *supra* note 7, at 825 (“What many once called a religious ‘fringe’ movement today has become mainstream.”).

25. *Id.* at 825–26 (detailing how “[p]arents choose to homeschool their children for many reasons . . . includ[ing] general dissatisfaction with the local curriculum, the presence of disruptive behavior in schools, and parents’ need to spend more time interacting with their children”).

26. *Id.* (describing how homeschool was once “called a religious ‘fringe’ movement”).

27. Sheila Jasanoff, *Biology And The Bill Of Rights: Can Science Reframe The Constitution?*, 13 AM. J. L. & MED. 249, 286–287 (1987) (describing “secular humanism” as a movement “from a God-centered to a human-centered view of the universe” that is under attack by some “fundamentalist” students and judges, who label it as a “religion” that is being unconstitutionally imposed in public schools).

children at home.²⁸ Only 29.8% of these students were members of a family which reported that they homeschooled their children “[t]o provide religious or moral instruction.”²⁹ Instead, the most popular reason for homeschooling was “[c]oncern about [the] environment of other schools.”³⁰

In North Carolina, the number of both private and homeschool students is rising.³¹ In the 1973–1974 school term, there were 53,315 students in private school, representing 4.4% of the total student population.³² By 2004–2005, this number had increased to 91,084 students, representing 6% of the student population.³³ By comparison, in 1973–1974, there were no reported students being homeschooled in North Carolina.³⁴ By 2004–2005, however, there were 58,780 students—representing 3.8% of the total student population—being homeschooled.³⁵

These substantial and increasing numbers of nonpublic students represent a powerful interest group that stands to benefit considerably from a state court ruling in its favor. First, this data indicates that there is a large pool of potential litigants for test cases. Second, since North

28. PRINCIOTTA, BIELICK, & CHAPMAN, *supra* note 21, at 13, <http://nces.ed.gov/pubs2006/2006042.pdf> (“Number and percentage of homeschooled students whose parents reported particular reasons for homeschooling as being applicable to their situation and as being their most important reason for homeschooling: 2003”). 31.2% of students were members of a family which reported that their “most important reason” for homeschooling was “[c]oncern about environment of other schools.” *Id.* 29.8% of students were members of a family which reported that their “most important reason” for homeschooling was “[t]o provide religious or moral instruction.” *Id.* 16.5% of students were members of a family which reported that their “most important reason” for homeschooling was “[d]issatisfaction with academic instruction at other schools.” *Id.* 8.8% of students were members of a family which reported that their “most important reason” for homeschooling was “[o]ther reasons” than those listed, including the following: “It was the child’s choice; to allow parents more control over what child was learning; and flexibility.” *Id.* 7.2% of students were members of a family which reported that their “most important reason” for homeschooling was that their “[c]hild has other special needs.” *Id.* And finally, 6.5% of students were members of a family which reported that their “most important reason” for homeschooling was that their “[c]hild has a physical or mental health problem.” *Id.*

29. *Id.*

30. *Id.*

31. Compare North Carolina Division of Non-Public Education, Non-Public & Public School Enrollment Comparisons 2004–2005, <http://www.ncdnpe.org/hhh510p.htm> (last visited Nov. 5, 2006), with North Carolina Division of Non-Public Education, Non-Public & Public School Enrollment Comparisons 1973–1974, <http://www.ncdnpe.org/hhh510a.htm> (last visited Nov. 5, 2006).

32. North Carolina Division of Non-Public Education, Non-Public & Public School Enrollment Comparisons 1973–1974, <http://www.ncdnpe.org/hhh510a.htm> (last visited Nov. 5, 2006).

33. *Id.*

34. *Id.* See *Delconte v. State*, 329 S.E.2d 636, 646–47 (N.C. 1985) (homeschooling was illegal in North Carolina prior to the *Delconte* court’s holding that the state statutory scheme did not prohibit home instruction; the issue of whether the North Carolina General Assembly could validly prohibit homeschooling under the state constitution was not resolved). The North Carolina General Assembly went on to explicitly permit homeschooling by state statute, so the issue of whether homeschooling can be constitutionally prohibited is currently moot. See N.C. GEN. STAT. §§ 115C-563 to -565.

35. North Carolina Division of Non-Public Education, Non-Public & Public School Enrollment Comparisons 2004–2005, *supra* note 31.

Carolínians elect their state judges, this interest group has a recurring opportunity to hold these judges politically accountable for unfavorable decisions.³⁶

Further, the North Carolina judicial system is ideal for testing a state constitutional or statutory right to education, because state court procedural law provides for many opportunities to appeal an unfavorable decision. An educational rights case would originate at the trial court level in District or Superior Court.³⁷ In the event of an unfavorable decision, the litigants would have a mandatory right of appeal to the North Carolina Court of Appeals,³⁸ where a three-judge panel would review the trial court decision.³⁹ If one member of the three-judge panel dissents (or a substantial question arising under the federal or state constitution is involved), then the losing litigants would have a mandatory right of appeal to the North Carolina Supreme Court.⁴⁰ Even if the decision of the three-judge panel is unanimous, the Supreme Court still has discretion to take the case on appeal.⁴¹ Thus, in addition to being the home of a powerful interest group that would benefit from school policy reform, North Carolina provides a very accessible appellate system.⁴²

Finally, the public schools in North Carolina have no satisfactory legal justification for excluding private and homeschool students from participating in public school programs on a part-time basis. Some scholars suggest that public schools fear competition from their nonpublic counterparts, and thus, want to discourage the continuing rise in the number of private and homeschool students.⁴³ Obviously, the fear

36. See N.C. GEN. STAT. § 7A-10(a) (2007) (“The Supreme Court shall consist of a Chief Justice and six associate justices, elected by the qualified voters of the State for terms of eight years.”); § 7A-16 (“The Court of Appeals . . . shall consist initially of six judges, elected by the qualified voters of the State for terms of eight years.”); § 7A-41.2 (“Candidates for the office of regular superior court judge shall be both nominated and elected by the qualified voters of the superior court district for which the election is sought.”); § 7A-140 (“Each district judge shall be elected by the qualified voters of the district court district in which he or she is to serve at the time of the election for members of the General Assembly.”).

37. § 7A-240 (“Except for the original jurisdiction in respect of claims against the State which is vested in the Supreme Court, original general jurisdiction of all justiciable matters of a civil nature cognizable in the General Court of Justice is vested in the aggregate in the superior court division and the district court division as the trial divisions of the General Court of Justice. Except in respect of proceedings in probate and the administration of decedents’ estates, the original civil jurisdiction so vested in the trial divisions is vested concurrently in each division.”).

38. §§ 7A-27(b)–(c) (An “appeal lies of right to Court of Appeals” from most final judgments of a superior court and any final judgment of a district court in a civil action.).

39. § 7A-16 (“The Court of Appeals shall sit in panels of three judges each.”).

40. § 7A-30 (“[A]n appeal lies of right to the Supreme Court from any decision of the Court of Appeals rendered in a case” that “directly involves a substantial question arising under the Constitution of the United States or of this State” or “[i]n which there is a dissent.”).

41. § 7A-26 (“The Supreme Court and the Court of Appeals respectively have jurisdiction to review upon appeal decisions of the several courts of the General Court of Justice and of administrative agencies, upon matters of law or legal inference, in accordance with the system of appeals provided in this Article.”).

42. See *id.*

43. See Robert William Gall, *The Past Should Not Shackle the Present: The Revival of a Legacy*

of competition, by itself, does not justify the exclusion of these children.⁴⁴

Nor can it be argued that private and homeschool students are free riders. In the 2003–2004 school term, North Carolina spent nearly \$9.18 billion on operating its public school system.⁴⁵ On average, each child in the system was allocated \$7,000 during the same period.⁴⁶ Private and homeschool families pay the same proportion of these expenditures in taxes as their similarly situated public school counterparts.⁴⁷

Since private and homeschool families pay the same taxes in support of public schools as their similarly situated counterparts in the public school system and they only want to participate in a few of the offered programs. It stands to reason that these families still contribute far more resources to the system than they would consume. Thus, from an economic standpoint, the exclusion of private and homeschool students from public school programs represents a growing inequity in the law that should be addressed.

Fortunately, there is a strong legal argument that this exclusion is not only inequitable, but impermissible under the constitutional and statutory schemes in North Carolina. Though not every court is prepared to enforce or expand existing educational rights, the seminal case of *Leandro v. State*⁴⁸ demonstrates the willingness of the North Carolina Supreme Court to (1) find educational rights in the state constitution and statutes⁴⁹ and (2) enforce these rights, even at considerable expense to the State.⁵⁰

of Religious Bigotry By Opponents of School Choice, 59 N.Y.U. ANN. SURV. AM. L. 413, 425 n.82 (2003) (arguing the “real, unstated goal” of public school interests that oppose nonpublic education is “to preserve a public school monopoly that is threatened by competition from all private schools, religious and non-religious”); Denise C. Morgan, *The Devil is in the Details: Or, Why I Haven’t Yet Learned to Stop Worrying and Love Vouchers*, 59 N.Y.U. ANN. SURV. AM. L. 477, 492 (2003) (“[O]pponents of vouchers [i.e., market competition] imagine that vouchers will result in the demise of public schools.”).

44. See Douglas A. Edwards, *Cleveland and Milwaukee’s Free Market Solution for the “Pedantic Heaps of Sophistry and Nonsense” That Plague Public Education: Mistakes on Two Lakes?*, 30 AKRON L. REV. 687, 692 (1997) (“Growing numbers support competition between private and public schools.”).

45. North Carolina Department of Public Instruction, North Carolina Public Schools Statistical Profile 2005 50, <http://www.ncpublicschools.org/docs/fbs/resources/data/statisticalprofile/2005profile.pdf> (last visited Nov. 5, 2006).

46. *Id.*

47. There is no deduction, credit, exemption, or exclusion under North Carolina law to lessen the tax burden for families that educate their children outside of the public school system.

48. 488 S.E.2d 249 (N.C. 1997).

49. *Id.* at 259–60 (finding that various provisions of the state constitution, and possibly, state statutes as well, “combine to guarantee every child of [North Carolina] an opportunity to receive a sound basic education in [North Carolina] public schools”).

50. See *id.* at 354–55 (remanding case to superior court for proceedings consistent with the holding that North Carolinians have a state constitutional right to a “sound basic education”); *Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365, 372–373 (N.C. 2004) (affirming superior court order that North Carolina must “remedy constitutional deficiencies relating to the public school education”); see Robert H. Tiller, *Equitable and Adequate School Funding—Practice*

This article argues that private and homeschool students in North Carolina have a state constitutional and statutory right to participate in public school programs on a part-time basis. This right is based on the North Carolina Constitution's explicit acknowledgment of nonpublic education and guarantees of equal protection and equal access to public schools. This right is also based on state statutes that mirror the wording and spirit of the state constitution's guarantees. Since the North Carolina Supreme Court has held that equal access to public schools is a fundamental right under the state constitution, this right can only be restricted by a statute or regulation that can survive a strict scrutiny review.

In Part II, this article discusses the law of nonpublic schools and educational rights in North Carolina and how the *Leandro* case affects those laws and rights. Part III outlines how the exclusion of private and homeschool students from public school programs violates the North Carolina Constitution's dual promises of equal protection and equal access to public schools.

II. EDUCATIONAL RIGHTS AND THE LAW OF NONPUBLIC SCHOOLS IN NORTH CAROLINA

In line with every state in the nation, North Carolina's "constitution addresses the [General Assembly's] responsibility to provide for a public school system."⁵¹ However, this responsibility is not merely aspirational in the Tar Heel State—it has bite.⁵² The North Carolina Supreme Court has interpreted the state constitution to grant substantive rights to students and to impose substantial legal requirements on the public school system.⁵³

Perspectives: Litigating Educational Adequacy in North Carolina: A Personal Account of Leandro v. State, 83 NEB. L. REV. 893, 899 (2005) ("During the course of proceedings from 1994 to late 2002, the State increased its program of supplemental funding for low-wealth schools. This program received approximately \$18.2 million in 1994. In 2001, the program received \$85 million. The low-wealth money in Hoke County has paid for teachers, books and equipment that were badly needed, although it has not come close to meeting all the important needs. It is widely thought that the increases in state funding for this program were in large part the result of the Leandro case.").

51. Redish & Finnerty, *supra* note 10, at 64 n.5.

52. See *Sneed v. Greensboro Bd. of Educ.*, 264 S.E.2d 106, 113 (N.C. 1980) (holding that "equal access to participation in our public school system is a fundamental right, guaranteed by our state constitution and protected by considerations of procedural due process."); *Leandro*, 488 S.E.2d at 259 (holding that "the North Carolina Constitution does guarantee every child of the state the opportunity to receive a 'sound basic education'"); *Hoke County Bd. of Educ.*, 599 S.E.2d at 372-73 (affirming superior court order that state must "remedy constitutional deficiencies relating to the public school education").

53. *Sneed*, 264 S.E.2d at 113; *Leandro*, 488 S.E.2d at 259; *Hoke County Bd. of Educ.*, 599 S.E.2d at 372-73.

A. *The Law of Nonpublic Schools in North Carolina*

“The North Carolina Constitution requires the General Assembly to permit children of this state to be ‘educated by other means’ than in the public schools.”⁵⁴ This requirement would seem to necessitate a legal alternative to public school, and raises the question of whether the North Carolina General Assembly can validly prohibit certain types of nonpublic schools under the state constitution.⁵⁵ However, the North Carolina Supreme Court has refrained from giving a strict definition of what “other means” may legally constitute.⁵⁶ In *Delconte v. State*, the court simply held that homeschools are not outlawed by the state statutory scheme without reaching the issue of whether they could be constitutionally prohibited.⁵⁷ However, this issue of constitutional prohibition is largely moot for private schools and homeschools, which are both currently permitted by state statute.⁵⁸

Though nonpublic schools are legal in North Carolina, and this legal status is afforded some level of protection under the state constitution, students who attend these types of schools are currently prohibited from participating in public school athletics,⁵⁹ and have no absolute right to participate in any public school programs.

54. *Delconte v. State*, 329 S.E.2d 636, 646 (N.C. 1985). See also N.C. CONST. art. IX, § 3 (“The General Assembly shall provide that every child of appropriate age and of sufficient mental and physical ability shall attend the public schools, unless educated by other means.”).

55. *Delconte*, 329 S.E.2d at 646–7 (“Finally, it is clear that if we interpreted our present school attendance statutes to preclude home instruction, serious constitutional questions would arise. ““The North Carolina Constitution requires the General Assembly to permit children of this state to be ‘educated by other means’ than in the public schools. Whether these ‘other means’ would include home instruction is a serious question which we need not, because of our resolution of the case, now address. It is clear that the North Carolina Constitution empowers the General Assembly to require that our children *be educated*. Whether the constitution permits the General Assembly to prohibit their education at home is not so clear.”).

56. *Id.* at 648. The court refrained from giving a strict definition of what “other means” may legally constitute, and instead held that: “Whether home instruction ought to be permitted, and if so, the extent to which it should be regulated, are questions of public policy which are reasonably debatable. Our legislature may want to consider them and speak plainly about them. It may determine to continue to permit home instruction relatively unregulated or to prohibit home instruction altogether. On the other hand, the legislature may determine to permit home instruction provided it meets certain minimum, objectively determinable standards relating to curricula, teacher qualifications, testing, scheduling, etc., in addition to those already provided. Whatever the legislature ultimately decides to do, we are satisfied that it would not be appropriate for us to determine whether home instruction may be constitutionally prohibited, or the extent to which it may be constitutionally regulated until the legislature has determined as a matter of public policy to prohibit it or to regulate it more closely than it now does.” *Id.*

57. *Id.*

58. See N.C. GEN. STAT. §§ 115C-547 to -554 (2007) (state statutes permitting and regulating private schools); §§ 115C-563 to -565 (state statutes permitting and regulating homeschools).

59. *Batista & Hatfield*, *supra* note 5, at 243.

1. Athletics

In North Carolina, the State Board of Education (the “Board”) has the authority to “adopt rules governing interscholastic athletic activities conducted by local boards of education, including eligibility for student participation.”⁶⁰ The Board is also statutorily empowered to “authorize a designated organization to apply and enforce the Board’s rules.”⁶¹ Using this power, the Board has authorized the North Carolina High School Athletic Association (the “NCHSAA”) to regulate public school athletics.⁶² The NCHSAA’s eligibility rules require that

[a] student must, at the time of any game in which he or she participates, be a regularly enrolled member of the school’s student body, according to local policy. If there is no local policy, “regularly enrolled” is defined as enrolled for at least one half of the “minimum load.” It is recommended the student be in school the day of the contest.⁶³

Private and homeschool students, who have their own curricula and course loads, are generally unable to meet this requirement of regular enrollment.⁶⁴ As such, in North Carolina, the students of nonpublic schools are effectively banned from participating in public school athletics.⁶⁵

2. Core Classes

No state statute directly addresses the question of whether private

60. N.C. GEN. STAT. § 115C-12(23).

61. *Id.*

62. 16 N.C. ADMIN. CODE 6E.0202 (2007).

63. North Carolina High School Athletic Association, 2005–2006 NCHSAA Handbook, Combined Rules and Regulations, Eligibility 109, <http://www.nchsaa.org/pdf/3766A.pdf> (last visited Nov. 5, 2006).

64. Batista & Hatfield, *supra* note 5, at 243. The General Assembly has delegated its authority to adopt eligibility rules for participation in public school programs, and the state governmental organizations to which this authority has been delegated have effectively banned nonpublic students: “The North Carolina legislature has authorized the State Board of Education to adopt rules governing interscholastic activities, or designate an organization to do so. As a result, the Board of Education has authorized the North Carolina High School Athletic Association (NCHSAA) to regulate interscholastic activities in North Carolina. NCHSAA eligibility rules require that a student must be a regularly enrolled member of the school’s student body, must be in regular attendance for the present semester in order to be eligible for interscholastic competition, and must participate for the school to which the local board of education has assigned him/her based on his/her place of residence.” *Id.*

65. *Id.*

school students may take core classes⁶⁶ in public school. Thus, local school officials get to decide whether private school students are eligible for these classes.⁶⁷ It is also true that “[n]o North Carolina statute directly defines guidelines to govern the possibility of part-time admission of home-schooled students into public school classes.”⁶⁸ However, the North Carolina Division of Non-Public Education (the “NCDNPE”) has interpreted section 115C-563(a) of the North Carolina General Statutes⁶⁹ to prohibit homeschool students from taking core classes in public school.⁷⁰ The statute provides, in relevant part, that: “‘Home school’ means a nonpublic school in which one or more children of not more than two families or households receive academic instruction from parents or legal guardians, or a member of either household.”⁷¹ The NCDNPE holds that this legal definition requires that only (1) parents, (2) legal guardians, or (3) members of a homeschooling household are permitted to give academic instruction (i.e., teach core classes) to their homeschool students.⁷²

Thus, the NCDNPE asserts that allowing a homeschool student to take a core class from someone else, like a public school teacher, would violate his or her homeschool’s status as a legal educational entity under North Carolina law.⁷³ This restriction applies to those between the ages

66. Core classes are classes in “language arts, math, science and social studies.” North Carolina Division of Non-Public Education, Frequently Asked Home School Question Topics, *supra* note 5.

67. *Id.*

68. Lukasik, *supra* note 5, at 1977 n.368. No state statute directly addresses the question of whether homeschool students may participate in public school programs on a part-time basis: “In other states, where no statute or regulation mandates that public school officials maintain discretionary control over part-time enrollment of home-schooled children, state law suggests that such a policy should be the rule. Consider North Carolina, for example. Recognizing that public schools are not required under either the state constitution or the state statutes to accept home-schooled students on a part-time basis does not mean that public schools are prohibited from accepting those home-schooled students in particular circumstances. . . . No North Carolina statute directly defines guidelines to govern the possibility of part-time admission of home-schooled students into public school classes. However, according to North Carolina General Statute 115C-40, ‘local boards of education . . . shall have general control and supervision of all matters pertaining to the public schools in their administrative units.’ N.C. GEN. STAT. § 115C-40 (1994). Therefore, ‘in the absence of any statute or regulation to the contrary, the authority to determine questions regarding the public schools generally rests with local boards of education.’ 57 Op. N.C. Att’y Gen. 26 (1987) (stating that it is within the discretionary power of local boards of education to release public school students for part-time attendance at private (not home) schools). Given the absence of other statutory direction, 115C-40 gives local boards in North Carolina discretion to accept or deny part-time admission to home-schooled students. This conclusion regarding home and public school integration in North Carolina is consistent with the state’s opinion regarding the integration of public and private schools. The North Carolina Attorney General determined that the authority of the local board of education included ‘the power to permit or refuse the release of students to private schools for part of the school day.’ 57 Op. N.C. Att’y Gen. at 26.” *Id.*

69. N.C. GEN. STAT. § 115C-563(a) (2007).

70. North Carolina Division of Non-Public Education, Frequently Asked Home School Question Topics, *supra* note 5.

71. N.C. GEN. STAT. § 115C-563(a).

72. North Carolina Division of Non-Public Education, Frequently Asked Home School Question Topics, *supra* note 5.

73. *Id.*

of seven and sixteen years old.⁷⁴ As such, homeschool students are not permitted to take core classes in public school.⁷⁵

3. Noncore Classes

No state statute directly addresses the question of whether private school students may take non-core classes in public school. Local school officials get to decide whether private school students are eligible for these classes.⁷⁶ The same is true for homeschool students, and the NCDNPE does not assert that allowing a homeschool student to take a non-core class would violate his or her homeschool's status as a legal educational entity.⁷⁷ Local school officials also get to decide whether homeschool students are eligible for these classes.⁷⁸

B. North Carolina Constitutional and Statutory Rights to Education

North Carolina has several educational rights provisions in its state constitution and statutes.⁷⁹ These provisions have bite—state appellate courts have shown a willingness to find and enforce substantive educational rights under the North Carolina Constitution and statutes.⁸⁰ In addition to providing parents the right to educate their children in a nonpublic school, the North Carolina Constitution guarantees a fundamental right of equal access to participation in the public school system⁸¹ and a fundamental right to a “sound basic education.”⁸²

74. *Id.*

75. *Id.*

76. *See id.*

77. *Id.*

78. *Id.*

79. *See* N.C. CONST. art. I, § 15; N.C. CONST. art. IX; N.C. GEN. STAT. § 115C.

80. *See* *Leandro v. State*, 488 S.E.2d 249, 259 (N.C. 1997) (remanding case to superior court for proceedings consistent with the holding that North Carolinians have a state constitutional right to a “sound basic education”); *Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365, 372–73 (N.C. 2004) (affirming in part superior court order that North Carolina must “remedy constitutional deficiencies relating to the public school education”).

81. *Sneed v. Greensboro Bd. of Educ.*, 264 S.E.2d 106, 113 (N.C. 1980) (“[E]qual access to participation in our public school system is a fundamental right, guaranteed by our state constitution and protected by considerations of procedural due process.”).

82. *Leandro*, 488 S.E.2d at 255 (“Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a

1. *Sneed*: Fundamental Right of Equal Access to Participation in the Public School System

“[E]qual access to participation in our public school system is a fundamental right, guaranteed by our state constitution and protected by considerations of procedural due process.”⁸³ Article IX, section 2(1) of the North Carolina Constitution provides that “[t]he General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.”⁸⁴ Article I, section 15 provides that “[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.”⁸⁵ In *Sneed v. Greensboro Board of Education*, the North Carolina Supreme Court held that together, these two state constitutional provisions elevate the right of equal access to fundamental status.⁸⁶ Notably, the court also cited a since repealed state statute to assert that the North Carolina General Assembly recognized the “force of these constitutional provisions.”⁸⁷

Equal access to public schools is a fundamental right in North Carolina has not garnered much attention from legal scholars.⁸⁸ However, in *Britt v. North Carolina State Board of Education*, the North Carolina Court of Appeals cited *Sneed* and reiterated its guarantee: “The fundamental right that is guaranteed by our Constitution, then, is to equal access to our public schools—that is, every child has a fundamental right to receive an education in our public schools.”⁸⁹ The *Britt* court added bite to this guarantee, holding the State of North Carolina responsible “for overseeing [its] public schools . . . to ensure that every student in the State receives the education to which he or she is entitled.”⁹⁰ Thus, in North Carolina, there is a fundamental right of equal access to public

sound basic education in our public schools.”).

83. *Sneed*, 264 S.E.2d at 113.

84. N.C. CONST. art. IX, § 2(1).

85. N.C. CONST. art. I, § 15.

86. *Sneed*, 264 S.E.2d at 113. The court held that: “Article IX, Section 2(1) of our constitution guarantees a uniform public school system ‘wherein equal opportunities shall be provided for all students.’ Additionally, Article I, Section 15 provides that ‘[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.’ . . . It is clear, then, that equal access to participation in our public school system is a fundamental right, guaranteed by our state constitution and protected by considerations of procedural due process.” *Id.*

87. *Id.*

88. To date, no law review article or student note that is published on LexisNexis is solely devoted to analyzing *Sneed*’s seminal mandate that equal access to public schools is a fundamental right in North Carolina.

89. *Britt v. N.C. State Bd. of Educ.*, 357 S.E.2d 432, 436 (N.C. Ct. App. 1987).

90. *Id.*

schools, and the State is responsible for ensuring this right is vindicated.⁹¹

2. Equal Protection under the North Carolina Constitution

“[T]he principle of the equal protection of the law, made explicit in the Fourteenth Amendment to the Constitution of the United States, was also inherent in the Constitution of [North Carolina]” prior to the adoption of the current article I, section 19.⁹² Post-adoption, this principle of equal protection is also explicit⁹³ in the North Carolina Constitution, which guarantees that “[n]o person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.”⁹⁴

Furthermore, in North Carolina, state courts use the same test as federal courts when “applying the equal protection clause of the state and federal constitutions to challenged classifications.”⁹⁵ In line with the federal test, the North Carolina Supreme Court has held that “[a] claim that legislation violates the Equal Protection Clause is to be evaluated under one of two levels of review.”⁹⁶

First, strict scrutiny review is “required when the challenged legislation [or regulation] impacts upon a ‘suspect class’ or a ‘fundamental right.’”⁹⁷ This high level of review “requires the government to demonstrate that the classification is necessary to promote a compelling governmental interest.”⁹⁸ “[A] challenged governmental action is unconstitutional if the State cannot establish that it is narrowly tailored” to promote that interest.⁹⁹ In sum, strict scrutiny “demand[s] searching judicial inquiry to ensure that the regulatory means chosen by government promote the public ends sought without needless overinclusion or suspicious underinclusion, thereby favoring the use of the least restrictive alternative.”¹⁰⁰ Notably, education is not a

91. *Sneed*, 264 S.E.2d at 113; *Britt*, 357 S.E.2d at 436.

92. *S. S. Kresge Co. v. Davis*, 178 S.E.2d 382, 385 (N.C. 1971).

93. *Id.* (holding that the principle of equal protection had been “expressly incorporated in Art. I, § 19, of the Constitution of North Carolina, effective 1 July 1971”).

94. N.C. CONST. art. I, § 19.

95. *State ex rel. Utils. Comm’n v. Carolina Util. Customers Ass’n*, 446 S.E.2d 332, 346 (N.C. 1994) (quoting *Duggins v. N.C. State Bd. of Certified Pub. Accountant Exam’rs*, 240 S.E.2d 406, 413 (N.C. 1978)).

96. *Id.*

97. *Id.*

98. *Id.* (quoting *Texfi Indus., Inc. v. Fayetteville*, 269 S.E. 2d 142, 149 (N.C. 1980)).

99. *Stephenson v. Bartlett*, 562 S.E.2d 377, 393 (N.C. 2002).

100. Louis D. Bilionis, *Liberty, The “Law of the Land,” and Abortion in North Carolina*, 71 N.C. L. REV. 1839, 1850 (1993).

“fundamental right” under the federal constitution.¹⁰¹ However, equal access to public schools is a fundamental right under the North Carolina Constitution.¹⁰² Therefore, legislation or regulations that impact this right of equal access would have to survive strict scrutiny review to be constitutional in North Carolina.

Second, rational basis review “is used when the legislation [or regulation] at issue does not impact upon a suspect class or a fundamental right.”¹⁰³ This lower level of review “involves a determination of whether the ‘challenged classification bears *any* reasonable relation to the purpose of the statute,’”¹⁰⁴ and if it does “it will not be set aside merely because it results in some inequalities in practice.”¹⁰⁵ Though most lawsuits for equal access to public school programs fail when judged under rational basis review,¹⁰⁶ it is possible to win, even under this lower standard.¹⁰⁷ However, an educational rights case that is based on equal protection is far more likely to succeed under strict scrutiny review.

3. *Leandro*: Fundamental Right to a Sound Basic Education and a Revivification of State-level, Educational Rights in North Carolina

Leandro did “not involve issues of equal access to available educational opportunities.”¹⁰⁸ However, *Leandro* is relevant to a discussion on whether an equal access case would succeed in North Carolina, because its seminal and far-reaching holding demonstrates a willingness on the part of the North Carolina Supreme Court to find and enforce educational rights in the state constitution, even at considerable expense to the State.¹⁰⁹ In the words of former Justice Robert Orr, a co-

101. *Plyler v. Doe*, 457 U.S. 202, 223 (1982) (“Nor is education a fundamental right . . .”).

102. *Sneed v. Greensboro Bd. of Educ.*, 264 S.E.2d 106, 113 (N.C. 1980) (“[E]qual access to participation in our public school system is a fundamental right, guaranteed by our state constitution and protected by considerations of procedural due process.”).

103. *State ex rel. Utils. Comm’n v. Carolina Util. Customers Ass’n*, 446 S.E.2d 332, 346 (N.C. 1994).

104. *Id.* (quoting *Duggins v. N.C. State Bd. of Certified Pub. Accountant Exam’rs*, 240 S.E.2d 406, 413 (N.C. 1978)) (emphasis in original).

105. *Duggins*, 240 S.E.2d at 413.

106. See *Grob*, *supra* note 7, at 831–36 (discussing various cases where rational basis review was applied to First and Fourteenth Amendment claims and the parents subsequently lost).

107. See *Davis v. Mass. Interscholastic Athletic Ass’n*, 3 Mass. L. Rptr. 375 (Mass. Super. Ct. 1995) (holding that excluding a nonpublic student from a public school sports team violated equal protection under rational basis review).

108. *Leandro v. State*, 488 S.E.2d 249, 254 (N.C. 1997).

109. See *id.* at 254–59 (finding that various provisions of the state constitution and possibly state statutes “combine to guarantee every child of [North Carolina] an opportunity to receive a sound basic education in [North Carolina] public schools”).

author of *Leandro*,

The NC Supreme Court has strongly reaffirmed the state's long standing constitutional commitment to public education in the *Leandro* and *Hoke County* decisions. This constitutional right of the opportunity for a sound basic education extends to all our children regardless of age or circumstance. It will be vigorously enforced by the courts and the legislative and executive branches will be expected to adequately comply with that right regardless of the cost or inconvenience to the government.¹¹⁰

a. Plaintiffs' Case

The plaintiffs in *Leandro* were a group of public school students and their guardians, who alleged that North Carolina's funding system for public schools violated the state constitution.¹¹¹ Specifically, the plaintiffs argued that they were constitutionally entitled to (1) "adequate educational opportunities," and (2) "equal educational opportunities."¹¹²

First, the plaintiffs alleged that "children in their poor school districts are not receiving a sufficient education to meet the minimal standard for a constitutionally adequate education."¹¹³ As proof, they listed how the schools in poor districts were deficient.¹¹⁴ According to the plaintiffs, their schools had poor test scores and "inadequate" facilities, local salary supplements for teachers, book collections, and technology.¹¹⁵

Second, the plaintiffs asserted that "children in their districts are denied an equal education because there is a great disparity between the educational opportunities available to children in their districts and those offered in more wealthy districts of [the] state."¹¹⁶ The plaintiffs contended that "North Carolina's system of school funding, based in part on funding by the county in which the district is located, necessarily denies the students in . . . relatively poor school districts educational opportunities equal to those available in relatively wealthy districts."¹¹⁷ This disparity in local funding, they argued, is impermissible under the

110. E-mail from former Justice Robert Orr of the North Carolina Supreme Court, Executive Director and Senior Counsel, North Carolina Institute for Constitutional Law, to John T. Plecnik, Associate, Thacher Proffitt & Wood LLP (October 9, 2006, 17:28:20 EST) (on file with author).

111. *Leandro*, 488 S.E.2d at 251–52.

112. *Id.* at 252.

113. *Id.*

114. *Id.* at 252–53.

115. *Id.*

116. *Id.* at 252.

117. *Id.* at 256.

state constitution.¹¹⁸

b. Fundamental Right to Sound Basic Education

The North Carolina Supreme Court agreed with the plaintiffs that children in North Carolina are entitled to adequate educational opportunities, but disagreed that these opportunities need to be equal.¹¹⁹ The court concluded “that Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in [public school].”¹²⁰ It based this conclusion on the finding that “at the time [article IX, section 2(1)] was originally written in 1868 providing for a ‘general and uniform’ system [of public schools] . . . the intent of the framers was that every child have a fundamental right to a sound basic education.”¹²¹

What is the qualitative content, if any, of this fundamental right to a sound basic education? The court purported to acknowledge that “the legislative process provides a better forum than the [judiciary] for discussing and determining” what constitutes a “sound basic education.”¹²² However, it held that “[e]ducational goals and standards adopted by the legislature” are merely “factors which may be considered.”¹²³ They are not determinative on the issue of whether an education is constitutionally adequate.¹²⁴ Instead, the court provided its own definition of what constitutes a “sound basic education” under the state constitution:

For purposes of our Constitution, a “sound basic education” is one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student’s community, state, and nation; (3) sufficient academic and vocational skills to enable

118. *Id.* at 252.

119. *Id.* at 257.

120. *Id.* at 255.

121. *Id.*

122. *Id.* at 259.

123. *Id.*

124. *Id.*

the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.¹²⁵

As such, the plaintiffs' first argument was successful. There is a fundamental right to a sound basic education in North Carolina, and that right has a qualitative content that is enforceable in court.¹²⁶

However, only Justice Robert Orr, in partial dissent, agreed that the plaintiffs had a right to equal educational opportunities that was violated by the disparity in local funding.¹²⁷ The North Carolina Supreme Court pointed to article IX, section 2(2)¹²⁸ in determining that no right to equal opportunities had been violated:

Because the North Carolina Constitution expressly states that units of local governments with financial responsibility for public education may provide additional funding to supplement the educational programs provided by the state, there can be nothing unconstitutional about their doing so or in any inequality of opportunity occurring as a result.¹²⁹

Thus, the plaintiffs' second argument was unsuccessful. "[T]he equal opportunities clause of Article IX, Section 2(1) does not require substantially equal funding or educational advantages in all school districts."¹³⁰

c. State Statutes Show Legislative Intent to Enforce Educational Rights

The plaintiffs also cited four state statutes as support for their

125. *Id.* at 255.

126. *Id.* at 259 ("We have concluded that some of the allegations in the complaints of plaintiff-parties state claims upon which relief may be granted if they are supported by substantial evidence. Therefore, we must remand this case to the trial court to permit plaintiff-parties to proceed on those claims.")

127. *Id.* at 261 (Orr, J., dissenting) ("I dissent from the portion of the majority opinion that holds that the alleged disparity in the educational opportunities offered by different school districts in this state does not violate Article IX, Section 2(1) of the North Carolina Constitution. I believe . . . that if the allegations in plaintiffs' complaint are proven at trial, then the state's funding plan for public education would violate the 'equal opportunities' clause set forth in our Constitution.")

128. N.C. CONST. art. IX, § 2(2) ("The General Assembly may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate. The governing boards of units of local government with financial responsibility for public education may use local revenues to add to or supplement any public school or post-secondary school program.")

129. *Leandro*, 488 S.E.2d at 256.

130. *Id.*

claims:

Specifically, plaintiff-parties allege in their complaints that the education system of North Carolina as currently maintained and operated violates the following requirements of chapter 115C: (1) that part of N.C.G.S. § 115C-1 requiring a “general and uniform system of free public schools . . . throughout the State, where an equal opportunity shall be provided for all students”; (2) that part of N.C.G.S. § 115C-81(a1) requiring that the state provide “every student in the State equal access to a Basic Education Program”; (3) that part of N.C.G.S. § 115C-122(3) requiring the state to “prevent denial of equal educational . . . opportunity on the basis of . . . economic status . . . in the provision of services to any child”; and (4) that part of N.C.G.S. § 115C-408(b) requiring that the state “assure that the necessary resources are provided . . . from State revenue sources [for] the instructional expenses for current operations of the public school system as defined in the standard course of study.”¹³¹

Though the North Carolina Supreme Court held that none of these statutes was a basis for an argument that a disparity in local funding is impermissible, it recognized that they might “reiterate the constitutional requirement that every child in the state have equal access to a sound basic education.”¹³² This provides a state statutory, as well as a constitutional, basis for the plaintiffs to recover.¹³³ As in *Sneed*, these statutes are evidence that the North Carolina General Assembly has recognized the force of the educational rights provisions in the state constitution.¹³⁴

This part of the holding is potentially beneficial to private and homeschool families that want to defend their children’s right to participate in public school programs on a part-time basis. Section 115C-1 of the North Carolina General Statutes is practically a codification of article IX, section 2(1)¹³⁵—the constitutional provision

131. *Id.* at 258–59.

132. *Id.* at 259.

133. *Id.* (“To the extent that plaintiff-parties can produce evidence tending to show that defendants have committed the violations of chapter 115C alleged in the complaints and that those violations have deprived children of some districts of the opportunity to receive a sound basic education, plaintiff-parties are entitled to do so.”).

134. *Sneed v. Greensboro Bd. of Educ.*, 264 S.E.2d 106, 113 (N.C. 1980) (“The force of these constitutional provisions is recognized in the declared policy of this state ‘to ensure every child a fair and full opportunity to reach his full potential.’”).

135. *Compare* N.C. GEN. STAT. § 115C-1 (2007) (“A general and uniform system of free public schools shall be provided throughout the State, wherein equal opportunities shall be provided for all students, in accordance with the provisions of Article IX of the Constitution of North Carolina. Tuition shall be free of charge to all children of the State, and to every person of the State less than 21 years old, who has not completed a standard high school course of study. There shall be operated in every local school administrative unit a uniform school term of nine months, without the levy of a

that also supports the fundamental right of equal access to public schools.¹³⁶ Thus, private and homeschool families actually have two possible legal foundations for their case: the state constitution and state statutes. Further, if an argument were made that recognizing equal access by court decree is judicial activism, and that such a significant change in the law should only come from the legislative branch, then the plaintiffs could counter that the North Carolina General Assembly has already recognized the force of their argument by statute.

.d. Revivification of State-level Educational Rights

Leandro revived and reaffirmed state-level educational rights in North Carolina. Specifically, *Leandro* found the fundamental right to a sound basic education in the text of article I, section 15 and article IX, section 2(1) of the North Carolina Constitution, the same two provisions that support the fundamental right of equal access to public schools.¹³⁷ This opens the door for private and homeschool families to argue that their children’s fundamental right of equal access has been burdened by the rules and interpretations that exclude them from participating in public school programs on a part-time basis. Therefore, private and homeschool families can argue that these exclusionary rules violate equal protection under the North Carolina Constitution.

Fundamentally, *Leandro* was a seminal decision that demonstrates the willingness of the North Carolina Supreme Court to find and enforce educational rights in the state constitution,¹³⁸ even at considerable expense to the State.¹³⁹ The decision in *Leandro* is not directly on point as to the question of whether private and homeschool families have a right to participate in public school programs on a part-time basis.¹⁴⁰ However, the court based its decision—that children have a fundamental right to a sound basic education—on the same constitutional provisions that support the *Sneed* court’s holding that children have a fundamental

State ad valorem tax therefor.”) with N.C. CONST. art. IX, § 2(1) (“The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.”).

136. *Sneed*, 264 S.E.2d at 113.

137. *Id.*; see also *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997).

138. *Leandro*, 488 S.E.2d at 254–59 (holding that various provisions of the state constitution and possibly state statutes “combine to guarantee every child of [North Carolina] an opportunity to receive a sound basic education in [North Carolina] public schools”).

139. See *id.* at 259 (remanding case to superior court for proceedings consistent with the holding that North Carolinians have a state constitutional right to a “sound basic education”); *Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365, 372–73 (N.C. 2004) (affirming superior court order that North Carolina must “remedy constitutional deficiencies relating to the public school education”); Tiller, *supra* note 50, at 899.

140. *Leandro*, 488 S.E.2d at 254 (“The present case does not involve issues of equal access to available educational opportunities . . .”).

right of equal access to public schools.¹⁴¹ This alone strongly suggests that *Sneed* is still good law and that its holding will be rigorously enforced.¹⁴²

The decision to recognize a state-level right to a sound basic education was more groundbreaking, and more costly, than simply allowing nonpublic students to participate in a few public school classes and sports. *Leandro* has already cost North Carolina tens of millions of dollars.¹⁴³ By comparison, recognizing the right of nonpublic students to participate in public school programs almost seems like a modest reform. Thus, *Leandro* can be seen as more than just a guarantee that students have a fundamental right to a sound basic education. It can be interpreted as a statement by the North Carolina Supreme Court that it will enforce the educational rights provisions in the state constitution, even at great cost.¹⁴⁴ Therefore, it can be seen as a reaffirmation and revivification of state-level educational rights.¹⁴⁵

III. STATE CONSTITUTIONAL & STATUTORY RIGHTS TO PARTICIPATE IN PUBLIC SCHOOL PROGRAMS ON A PART-TIME BASIS

A. *Equal Protection: State Constitutional Right to Participate in Public School Programs*

North Carolina law classifies students into two groups: public and nonpublic students. Public school students are granted a sound basic education by the state,¹⁴⁶ and the state has recognized an enforceable right to this free education.¹⁴⁷ However, private and homeschool students are classified as nonpublic students and are treated very differently from public school students. All nonpublic students are excluded from public school athletics.¹⁴⁸ Homeschool students are also excluded from taking core classes in public school.¹⁴⁹ In all other instances, a nonpublic student's access to public school programs is within the sole discretion of local school officials. Therefore, nonpublic

141. Compare *Leandro*, 488 S.E.2d at 254, with *Sneed v. Greensboro Bd. of Educ.*, 264 S.E.2d 106, 113 (N.C. 1980).

142. See *Sneed*, 264 S.E.2d at 113.

143. See Tiller, *supra* note 50, at 899.

144. *Id.*

145. *Id.*

146. *Leandro v. State*, 488 S.E.2d 249, 254 (N.C. 1997).

147. *Id.*

148. Batista & Hatfield, *supra* note 5, at 243.

149. North Carolina Division of Non-Public Education, Frequently Asked Home School Question Topics, *supra* note 5.

students currently have no absolute right to participate in any public school program.¹⁵⁰ At best, they can ask their local school board for a favor.¹⁵¹

1. Is the Fundamental Right of Equal Access to the Public Schools Implicated?

“[E]qual access to participation in our public school system is a fundamental right, guaranteed by our state constitution.”¹⁵² Specifically, the North Carolina Supreme Court has held that article I, section 15 and article IX, section 2(1) of the North Carolina Constitution combine to give children in the state a fundamental right of equal access to public schools.¹⁵³ Neither constitutional provision requires that a child must be a full-time public school student to exercise this right, nor does any state statute.¹⁵⁴ The state constitutional and statutory scheme in North Carolina seems analogous to the situation in *Snyder v. Charlotte Public School District*, where the Michigan Supreme Court held that nonpublic students are entitled to participate in some public school programs on a part-time basis in the absence of an explicit full-time attendance requirement.¹⁵⁵

However, some negative precedent should be noted: the *Snyder* court did not extend this right of equal access to all public school programs.¹⁵⁶ Rather, it held that nonpublic students are prohibited from taking core classes, using largely the same rationale the NCDNPE posits for excluding homeschool students from core classes in North Carolina:

However, not every class offered by a public school must be made available on a shared time basis. In order to meet the compulsory attendance laws, a nonpublic school child must attend “a state approved nonpublic school, which teaches subjects comparable to those taught in the public schools to children of corresponding age and grade” MCL 380.1561(3)(a); MSA 15.41561(3)(a). This implies that the nonpublic school must provide a “core curriculum” for its students, such as basic reading, mathematics, writing, English, etc. If shared time instruction were required for all courses, it would be possible for a nonpublic school to offer a

150. *Id.*

151. *Id.*

152. *Sneed v. Greensboro Bd. of Educ.*, 264 S.E.2d 106, 113 (N.C. 1980).

153. *Id.*

154. *See* N.C. CONST. art. I, § 15; N.C. CONST. art. IX, § 2(1); N.C. GEN. STAT. § 115C-1 (2007).

155. *Snyder v. Charlotte Pub. Sch. Dist.*, 365 N.W.2d 151, 158–59 (Mich. 1984).

156. *Id.* at 161–62.

full curriculum to its students while conducting only a small percentage of the classes at the nonpublic school. This would thwart the Legislature's requirement that nonpublic and public schools offer comparable basic education to their respective students.¹⁵⁷

Furthermore, in a later decision that has not been reviewed by the Michigan Supreme Court, the Michigan Court of Appeals held that participating in extracurricular activities, like athletics, is legally distinct from participating in public school classes.¹⁵⁸ Participating in athletics is a privilege, not a right.¹⁵⁹ Thus, nonpublic students can be excluded from public school athletics in Michigan.¹⁶⁰

Finally, in *Thomas v. Allegany County Board of Education*, the Court of Special Appeals of Maryland was presented with a case that was legally and factually analogous to *Snyder*, where a state statute purported to grant a right of equal access to public school programs to all children, without mentioning a full-time attendance requirement.¹⁶¹ According to the *Thomas* court, the families of nonpublic students argued that their children "are entitled 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."¹⁶² This argument failed, and the *Thomas* court held that it could not "adopt such a strained construction."¹⁶³

However, this article argues that *Snyder* provides a more rational principle of construction for educational rights provisions¹⁶⁴ than *Thomas*, which reads an additional requirement of full-time attendance into a statute that, on its face, does not distinguish between full and part-time students.¹⁶⁵ Furthermore, this article argues that North Carolina's educational rights scheme is stronger than Michigan's because the North Carolina Supreme Court must interpret its state constitution and statutes, whereas the *Snyder* court was only basing its holding in favor of equal access on a statutory provision.¹⁶⁶ As such, it would be reasonable to assert that nonpublic students in North Carolina have a more robust right of equal access to public schools. Hence, there is a stronger argument

157. *Id.*

158. *Reid v. Kenowa Hills Pub. Sch.*, 680 N.W.2d 62, 66–68 (Mich. Ct. App. 2004).

159. *Id.* at 68 ("[O]ur courts have also held that participation in interscholastic sports is a privilege, not a right.").

160. *Id.* (holding "that Michigan statutes do not require public schools to admit homeschooled students to their athletic programs and that plaintiffs do not have a statutory right to participate in extracurricular interscholastic athletic events").

161. *Thomas v. Allegany County Bd. of Educ.*, 443 A.2d 622, 627 (Md. Ct. Spec. App. 1982).

162. *Id.*

163. *Id.*

164. *Snyder v. Charlotte Pub. Sch. Dist.*, 365 N.W.2d 151, 158–59 (Mich. 1984) (granting nonpublic students access to some public school programs on the basis of an equal access statute).

165. *Thomas*, 443 A.2d at 627 (denying nonpublic students access to public school programs despite an equal access statute).

166. *Snyder*, 365 N.W.2d at 158–59 (basing decision to grant equal access on state statute).

that they should be entitled to participate in core classes, athletics, and noncore classes.

Thus, there is a strong argument under the state constitution that when nonpublic students in North Carolina are excluded from participating in public school programs on a part-time basis, their fundamental right of equal access is implicated. Since a fundamental right is implicated, their classification and exclusion should be reviewed under strict scrutiny.¹⁶⁷

2. Do the Rules and Interpretations That Exclude Nonpublic Students Burden Their Right to Equal Access More Than the Right of Public School Students?

In North Carolina, the rules and interpretations that exclude nonpublic students from participating in public school programs burden their right of equal access more than the right of public school students. Nonpublic students are prohibited from most public school programs and have no absolute right to participate in any of them. Public school students, however, have full access to all public school programs. Thus, this article argues that these rules and interpretations disproportionately burden the rights of nonpublic students.

However, the counterargument is explicit in *Thomas*.¹⁶⁸ Arguably, all children have the right of equal access to public schools, but once students choose to attend a nonpublic school they forego this right.¹⁶⁹ In line with the reasoning in *Snyder*, this article argues that this counterargument should fail in the absence of an explicit constitutional or statutory requirement of full-time attendance.¹⁷⁰ Therefore, nonpublic students' right of equal access is disproportionately burdened.

3. Is There a Compelling State Interest to Burden the Right of Nonpublic Students?

If the State of North Carolina decided to oppose a litigant who asserts that excluding nonpublic students violates equal protection, it

167. *State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n*, 446 S.E.2d 332, 346 (N.C. 1994).

168. *Thomas*, 443 A.2d at 626–27.

169. *Id.*

170. *Snyder*, 365 N.W.2d at 158–59 (holding that since a state statute purports to give right of equal access to public school without requiring full-time status, nonpublic students have the right to participate in some public school programs on a part-time basis).

would have to cite a “compelling government interest” for burdening the fundamental right of equal access to public schools.¹⁷¹ Though it is impossible to speculate on every conceivable interest the State might posit, two such interests are likely candidates.

a. Burden of Exclusion is Necessary to Promote Efficient Administration of Public Schools

In *Thomas*, the Court of Special Appeals of Maryland refused to recognize a right to attend public school programs in order to avoid placing an “unreasonable burden . . . on the efficient administration of the public school system.”¹⁷² The State could argue that recognizing a right to attend or right of equal access would financially drain the public school system. However, as of late, the North Carolina Supreme Court has been willing to enforce educational rights in the face of high budgetary costs.¹⁷³

More fundamentally, the State could argue that it is simply impossible to administrate the inclusion of tens of thousands of nonpublic students, who each get to pick and choose a few public school programs. However, since twenty-three states already allow nonpublic students to participate in public school athletics,¹⁷⁴ and Michigan allows them to participate in some classes, this argument would likely fail.

b. Burden of Exclusion is Necessary to Promote Patriotic and Civic Indoctrination

In *Pierce v. Society of Sisters*, the United States Supreme Court held that a state’s interest in promoting patriotic and civil indoctrination was a sufficient justification for passing a compulsory public school attendance law.¹⁷⁵ Possibly, the State could argue that it wants to maximize the number of students exposed to the public school system to promote the same indoctrination. Equal access for private and

171. *State ex rel. Utilities Comm'n*, 446 S.E.2d at 346 (quoting *Texfi Indus., Inc. v. Fayetteville*, 269 S.E.2d 142, 149 (N.C. 1980)).

172. *Thomas*, 443 A.2d at 627.

173. See *Leandro v. State*, 488 S.E.2d 249, 259 (N.C. 1997) (remanding case to superior court for proceedings consistent with the holding that North Carolinians have a state constitutional right to a “sound basic education”); *Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365, 372–73 (N.C. 2004) (affirming superior court order that North Carolina must “remedy constitutional deficiencies relating to the public school education”); Tiller, *supra* note 50, at 899.

174. *Batista & Hatfield*, *supra* note 5, at 224.

175. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

homeschool students would arguably make a nonpublic education more desirable. Thus, equal access might lessen the number of full-time students in public school and defeat the State's goal of indoctrination.

However, this argument should fail for two reasons. First, it is impossible to predict if allowing part-time participation would spark a mass exodus of students from public to nonpublic education. Second, many nonpublic students, who might have never set foot in a public school, would be exposed to some of the State's patriotic and civil indoctrination. Thus, including these students could actually further the State's interest.

4. Is There a Less Restrictive Means of Achieving the State Interest?

There probably are less restrictive alternatives to promote the efficient administration of public schools than simply excluding nonpublic students. First, the rules and interpretations that exclude nonpublic students are not narrowly tailored to their supposed purposes. If money is the concern, the State could require that private and homeschool families pay a nominal fee to compensate for the additional administrative cost of registering their children. In terms of workability, North Carolina could simply mimic the procedures of other states with successful programs that allow a degree of equal access to public educational facilities.¹⁷⁶ Second, there probably are less restrictive alternatives to promote patriotic and civil indoctrination than simply excluding nonpublic students. For example, the State could require that a nonpublic student must enroll in one civics class to be eligible for participation in other classes or sports.

In sum, the rules and interpretations that exclude nonpublic students from public school programs implicate their fundamental right of equal access to public schools and burden their right disproportionately in relation to public school students. Furthermore, the State likely cannot show this burden of exclusion is necessary to promote a sufficiently compelling interest and there are less restrictive alternatives to promote the State's goals and interests. Thus, the rules that exclude nonpublic students violate equal protection under the North Carolina Constitution.

¹⁷⁶ Many states currently allow varying degrees of equal access to public educational facilities. See *supra* notes 5 and 155 and accompanying text.

B. State Statutory Right to Participate in Public School Programs

In North Carolina, private and homeschool families could advance the same argument that partially succeeded in *Snyder*.¹⁷⁷ Section 115C-1 of the North Carolina General Statutes grants “all children” and “every person of the State less than 21 years old, who has not completed a standard high school course of study” the right to attend public school for free, without mentioning full-time status as a requirement.¹⁷⁸ Thus, under *Snyder’s* reasoning, any nonpublic student that would otherwise qualify under the statute has a right of equal access to public schools.¹⁷⁹

IV. CONCLUSION

North Carolina is the perfect testing ground for private and homeschool families to assert their state-level rights to participate in public school programs. In North Carolina, equal access to public schools is a fundamental right,¹⁸⁰ and any laws or regulations that burden this right must survive strict scrutiny review.¹⁸¹ Strict scrutiny is fatal in fact,¹⁸² and, under the circumstances, it would render most arguments against equal access virtually untenable.

Granting equal access to nonpublic students would be a watershed moment in the educational rights movement in North Carolina, and some courts might be unwilling to effect such a massive change in the legal status quo. However, the *Leandro* decision indicates a willingness on the part of the North Carolina Supreme Court to enforce the educational rights provisions in the state constitution, even if enforcement costs the State tens of millions of dollars. Finally, since every state constitution in the nation has educational rights provisions, a state-level argument for equal access can be made in virtually any American jurisdiction.¹⁸³ Though this article focuses on the specific state constitutional and statutory scheme in North Carolina and, to a lesser extent, in Michigan, the implications of my argument are national. Today, there are millions

177. See *Snyder v. Charlotte Pub. Sch. Dist.*, 365 N.W.2d 151, 158–59 (Mich. 1984) (holding that since a state statute purports to give right of equal access to public school without requiring full-time status, nonpublic students have the right to participate in some public school programs on a part-time basis).

178. N.C. GEN. STAT. § 115C-1 (2007).

179. See *Snyder*, 365 N.W.2d at 158–59.

180. *Sneed v. Greensboro Bd. of Educ.*, 264 S.E.2d 106, 113 (N.C. 1980).

181. *State ex rel. Utils. Comm’n v. Carolina Util. Customers Ass’n*, 446 S.E.2d 332, 346 (N.C. 1994).

182. *Johnson v. California*, 543 U.S. 499, 514 (2005) (“Strict scrutiny is not ‘strict in theory, but fatal in fact.’”).

183. Redish & Finnerty, *supra* note 10, at 118 n.5.

of private and homeschool children, like the aforementioned Brenda of Charlotte Christian Academy, who stand to benefit from equal access. Arguably, the law and equity are on their side. The time has come to recognize their state constitutional and statutory rights to participate in public school programs on a part-time basis, and give every child the chance to have the best of both worlds—private and public.