Varsity Blues: A Call to Reconfigure the Judicial Standard for High School Athletic Association Transfer Rules

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INTRODUCTION

On any given day of the week, hundreds of thousands of high school students can be found training for or competing in any number of interscholastic sports. For many teenagers, interscholastic sports are a crucial component of the high school experience. Among other benefits, participation in sports provides a welcome break from academic stress and offers an outlet for students to interact and socialize with schoolmates outside of the classroom. Participation in interscholastic sports also provides an opportunity for students to maintain a healthy, active lifestyle while also providing a structured environment for students to learn such values as teamwork and cooperation, healthy competition, self-discipline and responsibility. Because students benefit tremendously from participation in these activities, it is important to protect the ability of students to take part in them.

For some students, however, the ability to participate in interscholastic sports—either at the varsity level, or in some instances even at all—is threatened when they transfer schools after the beginning of the ninth grade. Transfer rules are promulgated by state activities associations, which govern the regulation of interscholastic sports.[1] Although they vary from state to state, transfer rules, in essence, prohibit transfer students from participating in certain sports unless the student falls under certain enumerated exceptions.[2] One of the primary rationales for the rule is to prevent the recruitment and exploitation of student athletes and the shopping around for schools.[3] In practical effect, however, the rule penalizes

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1. PATRICK K. THORNTON, SPORTS LAW 619 (2011).

2. *See, e.g.*, IND. HIGH SCH. ATHLETIC ASS'N, 2010–2011 ARTICLES OF INCORPORATION §§ 17-8.5, 19-6.1 (2010), *available at* http://www.ihsaa.org/dnn/portals/0/Flip%20Book/2010/By_Laws_II/index.html; CONN. INTERSCHOLASTIC ATHLETIC CONFERENCE, HANDBOOK 2010–2011 § 6.0 II.C #18 (2010), *available at* http://www.casciac.org/pdfs/ciachandbook_1011.pdf; MO. STATE HIGH SCH. ACTIVITIES ASS'N, 2010–11 MSHSAA OFFICIAL HANDBOOK § 238.3 (2010), *available at* http://www.mshsaa.org/resources/pdf/10-11MSHSAAHandbook_web.pdf; OHIO HIGH SCH. ATHLETIC ASS'N, BYLAWS § 4-7-2 (2010), *available at* http://www.ohsaa.org/general/about/bylaws.pdf.

3. THORNTON, *supra* note 1, at 619. *See, e.g.*, Genusa v. Holy Cross Coll., Inc., 389 So. 2d 908,

students who transfer for reasons completely unrelated to athletics. In addition, because the rule is intended to prevent "school shopping," the rule infringes on a parent's choice to decide how to raise his children. Such a rule specifically affects a family's ability to make important family related decisions and strips from the parents the ability to decide in what environment their children should be raised.

In New Jersey, the Hudson County Schools of Technology Board of Trustees voted to cut the district's athletic programs, which would affect County Prep High School and High Tech High School, in light of recent budget cuts.[4] Both schools offer career and vocational training to students in a technology based environment.[5] Because of the schools' focus on technological training, it is conceivable that students chose to attend these schools to take advantage of the very unique course offerings rather than because of the strength of the athletics programs, especially since its sports teams are limited in number and require less of a time commitment than at traditional schools.[6] Because of the New Jersey State Interscholastic Athletic Association's (NJSIAA) transfer rule, students who decided to transfer to a school that has an athletic program will be forced to sit out for at least thirty days unless they can show a change in residence.[7]

If a student chose to remain at either High Tech or County Prep, he may still be allowed to participate in athletics without any delay, but only by electing to play sports for a different school located in his home district.[8] Although, technically, this allows the student to participate in interscholastic sports, in reality, this solution is impractical for the student and his family. The student would have to research trying out and practicing at a school with which he has no relationship, coordinate his own transportation to the school and, if they were able to find transportation, show up on time for practices at the second school immediately following classes at the first school. Nonetheless, the NJSIAA argues, "a transfer is a transfer is a transfer."[9] Thus, in order for a student at County Prep or High Tech High School to continue participating in interscholastic sports, he would either have to take on the heavy responsibilities associated with attending a second school for athletic purposes or his family would have to take on the incredible

909 (La. Ct. App. 1980); Bruce v. S.C. High School League, 189 S.E.2d 817, 818 (S.C. 1972); Sullivan v. Univ. Interscholastic League, 616 S.W.2d 170, 172 (Tex. 1981). For other examples, see also IND. HIGH SCH. ATHLETIC ASS'N, *supra* note 2, § 19(a)(8).

4. Patrick Villanova, *Canceling Sports Programs at Hudson County Prep and High Tech High Schools Has Kids and Parents Weighing Moves*, NJ.COM (Apr. 24, 2010, 1:00 AM), http://www.nj.com/hudson/index.ssf/2010/04/canceling_sports_programs_at_h.html.

5. *Mission*, HCST: COUNTY PREP HIGH SCH., http://www.hcstonline.org/countyprep/mission.htm (last visited Nov. 3, 2010); HIGH TECH HIGH SCH., http://www.hcstonline.org/main/Default.aspx?alias=www.hcstonline.org/main/hightech (last visited Nov. 3, 2010).

6. *High Tech High—Frequently Asked Questions*, HIGH TECH HIGH, http://www.hightechhigh.org/faq.php#are_there_sports_teams_at_HTH (last visited Nov. 16, 2010).

7. Jim Hague, *Troubles Continue for Former High Tech, County Prep Athletes*, HUDSON REPORTER.COM (Sept. 26, 2010), http://hudsonreporter.com/view/full_story/9638011/article-SCOREBOARD-09-26-2010-Troubles-continue-for-former-High-Tech--County-Prep-athletes-NJSIAA-rules-that-transfer-students-must-sit-for-30-days-?instance=jim_lead_story_left_column.

8. *Id.*

9. *Id.*

burden of uprooting their home and changing residences.

Similarly, in Kanawha County, West Virginia, students who transfer in grades six through twelve must sit out of interscholastic sports for an entire year after the transfer.[10] Jeff Goode, a parent in Kanawha County, spoke to the school board on behalf of his eleven-year-old son, Anthony, about the possibility of transferring schools.[11] The Goode family originally sent Anthony to McKinley Middle School rather than the lower-performing Hayes Middle School for academic reasons.[12] However, after only a few weeks, Anthony wanted to transfer to Hayes Middle School because he missed his friends and his sister.[13] Goode stated that his son played basketball and soccer but acknowledged that his son was "not a sports prodigy."[14] Nonetheless, the school board declined to consider a waiver of the policy for Anthony.[15]

Transfer rules often place students and their families in the unenviable position of having to decide between participation in interscholastic sports and choosing a school on the basis of academic, religious, financial and/or other personal factors that may affect the family. Transfer rules sweep into their purview students who transfer for reasons wholly or partially unrelated to academics, as well as students who have consciously and voluntarily decided to transfer schools only in part because of the new schools' athletic program.[16] In many instances similar to those described in the anecdotes above, the athletic associations' fears of exploitative recruitment are not present.[17] Nevertheless, the majority of courts continue to uphold the legitimacy of the transfer rule and defer to state high school associations on determinations of eligibility.[18] This Note argues that, in light of the benefits received from participation in interscholastic sports and the policy interest in allowing parents to direct the upbringing of their children, current variations of the transfer rule should be discarded and replaced with a new rule focusing solely on the prevention of recruitment.

Part I will introduce readers to the current applications of high school athletics associations' transfer rules. Part II will discuss how transfer rules may infringe upon parental rights to choose how to educate their children. Part III will discuss how courts have treated transfer rules with respect to the equal protection clause. Lastly, Part IV will argue that transfer rules should be evaluated against a heightened rational basis standard and provide an alternative to current rules that

10. Zack Harold, *School Board Debates Transfer Rule*, CHARLESTON DAILY MAIL (Sept. 17, 2010), http://www.dailymail.com/News/Kanawha/201009161311.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *See infra* Part III.

17. *Id.*

18. *Id.* For other examples, see also Niles v. Univ. Interscholastic League, 715 F.2d 1027 (5th Cir. 1983); Walsh v. La. High Sch. Athletic Ass'n, 616 F.2d 152 (5th Cir. 1980); Ala. High Sch. Athletic Ass'n v. Scaffidi, 564 So. 2d 910 (Ala. 1990); Ky. High Sch. Athletic Ass'n v. Hopkins Cnty. Bd. of Educ., 552 S.W.2d 685 (Ky. Ct. App. 1977).

will survive such heightened scrutiny.

I. A BRIEF DISCUSSION OF TRANSFER RULES

Rules regulating the eligibility of transfer students to participate in sports are enacted by each state's high school athletic or activities association.[19] Each state, along with the District of Columbia, has an athletics or activities association, which is governed by the National Federation of State High School Associations, the organization that publishes the rules of competition for each sport or activity in which the high schools participate.[20] These state associations have the power "to establish uniform procedures and regulations for interscholastic activities, to protect the welfare of the students, and to establish sensible and educationally sound controls."[21] Both public and private schools may voluntarily decide to join the state's athletic association.[22] By joining, they agree to abide by the association's rules and regulations.[23] Although the school's participation in the association is theoretically voluntary, it is important to note that membership in the association is practically necessary if the school wants to participate in the state's high school athletics programs.[24] Further, the students themselves do not voluntarily join the association and have no voice in the association's rule-making procedures.[25] Through this "voluntary" association, the school and the student, by virtue of his enrollment at a member school, are automatically bound by the rules

19. Robert E. Trichka, *State High School Athletic Associations' Rules and Regulations Pertaining to Transfers and Recruiting*, 5 J. LEGAL ASPECTS SPORT 89, 89 (1995). Some associations regulate only interscholastic sports, while other associations regulate athletics along with other extracurricular activities, such as theater and music. *Compare About LHSAA*, LA. HIGH SCH. ATHLETIC ASS'N, http://www.lhsaafoundation.org/about.php (last visited Nov. 28, 2010) (regulating student athletics), *and AHSAA Mission, History Statement*, ALA. HIGH SCH. ATHLETIC ASS'N, http://www.ahsaa.com/AHSAA/AboutUs/HistoryMissionStatement/tabid/201/Default.aspx (last visited Nov. 28, 2010) (providing that purpose of athletic association is to regulate, coordinate and promote the interscholastic athletic programs among its member schools), *and About the MHSAA*, MICH. HIGH SCH. ATHLETIC ASS'N, http://www.mhsaa.com/AbouttheMHSAA.aspx (last visited Nov. 28, 2010) (providing that purpose of athletic association is to develop rules for athletic eligibility and competition), *with About the UIL*, TEX. UNIV. INTERSCHOLASTIC LEAGUE, http://www.uiltexas.org/about (last visited Nov. 28, 2010) (regulating extracurricular academic, athletic and music contests), *and 2010–2011 Activities*, MISS. HIGH SCH. ACTIVITIES ASS'N, INC., http://www.misshsaa.com/Events/events.htm (last visited Nov. 28, 2010) (regulating athletics as well as activities such as cheer, dance, band, choir, speech and debate). However, in some instances when the state association regulates other activities along with athletics, the transfer rules have only been applied to athletics. *See, e.g.*, Barnhorst v. Mo. State High Sch. Activities Ass'n, 504 F. Supp. 449, 450 (W.D. Mo. 1980).

20. *About Us*, NAT'L FED'N ST. HIGH SCH. ASS'NS, http://www.nfhs.org/Activity3.aspx?id=3260&linkidentifier=id&itemid=3260 (last visited Nov. 3, 2010).

21. Robert E. Trichka & Thomas H. Sawyer, *State High School Athletic Association's Limited Participation Rules: Transfer*, 8 J. LEGAL ASPECTS SPORT 158, 158–59 (1998).

22. Trichka, *supra* note 19, at 89.

23. *Id.*

24. *See, e.g.*, Darrin v. H.D. Gould, 540 P.2d 882, 891 (Wash. 1975).

25. Freeman v. Sports Car Club of Am., Inc., 51 F.3d 1358, 1363 (7th Cir. 1995) ("[F]or a student athlete in public school, membership in IHSAA is not voluntary, and actions of the IHSAA arguably should be held to a stricter standard of judicial review.").

of the association.[26]

As previously stated, transfer rules vary in substance from state to state, but they can generally be grouped into three categories. The first category applies a blanket restriction on eligibility to all students who transfer from one school to another.[27] This variation of the rule is arguably the harshest because it blindly penalizes all transfer students without consideration of the circumstances underlying the transfer.[28] The second variation of the rule allows for immediate eligibility of transfer students who can prove that they fall under certain exceptions that the association has enumerated.[29] These exceptions also vary from state to state but may include such circumstances as a bona fide change of residence by the student's family; change of custody; terminal or serious illness of a parent, sibling or self; death of a parent or guardian; bankruptcy and/or loss of principal income of legal guardian; closure of former school or emancipation.[30] Lastly, a few states permit immediate eligibility for transfer students if certain objective criteria are met.[31] An example of such criteria would be "non-participation in a sport at the varsity level at the previous school," so long as "the transfer . . . [occurs] prior to the start of practice in the sport."[32]

Athletics associations justify the transfer rule with a number of reasons, including the protection of opportunities for bona fide resident students (i.e. non-transfer students), the protection of athletics programs at schools that are not on the receiving end of a transfer and the argument that participation in extracurricular activities is a privilege and not a right.[33] The reason most often provided by

26. Trichka & Sawyer, *supra* note 21, at 163.

27. *Id.*

28. *See* Trichka, *supra* note 19, at 90.

29. *Id.* at 91.

30. *Eligibility: Transfer*, W. VA. SECONDARY SCHS. ACTIVITIES COMMISSION, http://www.wvssac.org/eligibility/Eligibility%20Transfer.htm (last visited Nov. 28, 2010); IND. HIGH SCH. ATHLETIC ASS'N, *supra* note 2, §§ 19-6.1(d), (i); N.H. INTERSCHOLASTIC ATHLETIC ASS'N, OFFICIAL HANDBOOK art. II § 19 (2010), *available at* http://nhiaa.org/PDFs/2708/4ByLawArticleIIEligibility.pdf; OHIO HIGH SCH. ATHLETIC ASS'N, *supra* note 2, § 4-7-2 Exception 2. This list is not exhaustive. For other types of exceptions, see, e.g., CONN. INTERSCHOLASTIC ATHLETIC CONFERENCE, *supra* note 2, § 6.0 II.C #18; IND. HIGH SCH. ATHLETIC ASS'N, *supra* note 2, §§ 17-8.5, 19-6.1; MO. STATE HIGH SCH. ACTIVITIES ASS'N, *supra* note 2, § 238.3.

31. Trichka, *supra* note 19, at 91.

32. Trichka & Sawyer, *supra* note 21, at 163.

33. The Supreme Court held in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 37 (1973), that education is not a fundamental right. Other courts have held that the right to participate in interscholastic sports is neither a fundamental right nor constitutionally protected. *See* Miss. High Sch. Activities Ass'n v. Coleman, 631 So. 2d 768 (Miss. 1994). *See also* Wm. Nicholas Chango, Jr., Note, *Constitutional Law—The Right to Participate in Interscholastic High School Athletics Is Not a Constitutionally Protected Right, Therefore, a Rule Suspending the Eligibility of Student-Athletes Who Transfer from One High School to Another Need Only Be Rationally Related to a Legitimate State Objective*—Mississippi High School Activities Ass'n, Inc. v. Coleman, *631 So. 2d 768 (Miss. 1994)*, 6 SETON HALL J. SPORT L. 251, 274 (1996) ("Affording constitutional protection to athletic participation, while education remains a non-fundamental right would seem contrary to public policy."). Even in states where education is a fundamental right afforded by the state constitution, courts have been reluctant to hold participation in interscholastic sports a fundamental right. *See* Steffes v. Cal. Interscholastic Fed'n, 222 Cal. Rptr. 355, 359–63 (Ct. App. 1986).

athletics associations for the transfer rule, however, is to prevent the recruitment and exploitation of student athletes by coaches, high schools and even fans, who may place social pressure on star athletes to transfer to particular athletics programs.[34] Although the current variations of the transfer rule arguably serve to solve the issue of recruitment, they do so at the expense of many other students who have not been subject to recruitment. Rather than focusing on whether the student has been recruited to the school, the rule may make presumptions that the student's transfer was not bona fide.[35] At worst, as in a state using the blanket transfer rule, the student is prohibited from competing without even being presented any opportunity to rebut the presumption.[36]

Even though some athletic associations have attempted to account for some legitimate reasons to transfer, no list can hope to include each of the overwhelming number of potential legitimate reasons. Although athletics may play a part in a decision to transfer, a student may also opt to transfer for any number of personal, financial, academic or social reasons. For instance, a student's home life may be so unstable and/or dangerous that it would be better for him to move to live with another relative; a student whose parents are divorced may decide to live with the other parent, without a legal court order or change in custody for personal reasons; a student may want to take certain courses or participate in certain academic programs not offered at his current school or a student may be so unhappy at his current school that he becomes depressed or unmotivated to participate in school, to interact with classmates or even to attend. These are some of the legitimate reasons that may motivate a student or his parents to decide that another school is better suited for the student. However, these reasons, and many others like them, are often not represented in the list of exceptions to the transfer rule delineated by athletic associations.

In addition, the fact that athletic associations may be open to both private and public schools implicates a number of other circumstances under which a student may decide to transfer. Aside from religious reasons, some private schools may have more academically challenging curricula that may attract students and/or parents. In other cases, a family may have suffered a job loss or some other form of financial trouble that may cause the parents to be financially unable or unwilling to continue to send the student to private school.

Notwithstanding the fact that the rules' exceptions are often under-inclusive, some exceptions also leave broad discretion for athletic associations to determine if the student has proven that he or she falls under the exception at issue. For example, many athletic associations have "hardship" exceptions.[37] Some of these

34. *See* CONN. INTERSCHOLASTIC ATHLETIC CONFERENCE. *supra* note 2, § 6.14 ("The intent of the transfer rule Is [*sic*] to discourage schools and/or adults from exploiting the student athlete or allowing or enabling that student to benefit improperly from his own act or the acts of others.").

35. *See, e.g.*, COLO. HIGH SCH. ACTIVITIES ASS'N, TRANSFER RULE BOOKLET, *available at* http://www.chsaa.org/home/pdf/Transfer%20Rule%20Booklet.pdf.

36. *See, e.g.*, Sullivan v. Univ. Interscholastic League, 616 S.W.2d 170, 173 (Tex. 1981).

37. *See, e.g.*, IND. HIGH SCH. ATHLETIC ASS'N, *supra* note 2, § 17-8.5; N.H. INTERSCHOLASTIC ATHLETIC ASS'N, *supra* note 30, § 19(d).

associations outline a specific list of factors that will give rise to a hardship exception, such as the death or serious illness of a family member, change of custody or legal guardianship by a court order or an unstable home environment.[38] Other associations simply describe the event that will trigger a hardship exception as an "unforeseeable" or "unavoidable" condition or event beyond the control of the student and his or her family.[39] The amorphous definitions of the hardship exceptions leave plenty of room for athletics associations to deny a student's transfer request when it believes that a student's particular circumstances fail to meet the association's standard for "hardship."[40] Even Eric Sondheimer, a strong advocate of restrictive transfer rules, has expressed his confusion regarding how hardship waivers are granted.[41] He reported that basketball player Michael Avery was denied a hardship waiver even though his situation arguably presented a financial hardship.[42] Avery had attended one school freshman year, received a financial aid package to attend another school his sophomore year, but then returned to the first school when the financial aid package was not delivered.[43] This example, and many others like it, shows that the ambiguous language of hardship provisions allows athletics associations unfettered discretion in making hardship determinations and places them in the powerful position of passing judgment on a student's specific difficulties.

Similarly, some athletics associations permit immediate eligibility for transfer students who have a "bona fide change of residence."[44] However, in having the power to determine what is or is not "bona fide," the athletics associations have essentially granted themselves unfettered discretion in determining whether a student's move was "legitimate."[45] Such a rule places immense pressure on families to uproot their lives in order for the student to have full eligibility in interscholastic sports—even if the student desired to transfer for reasons unrelated to sports, such as academics or social well being. These rules, in effect, force students and their families to choose between participation in interscholastic sports and other important aspects of the student's or the family's lifestyle. None actually

38. *See, e.g.*, OKLA. SECONDARY SCH. ACTIVITIES ASS'N, HARDSHIP WAIVER MANUAL 2010–2011, at 3 (2010), *available at* http://www.ossaa.com/Portals/0/docs/OSSAA%20Forms/Forms%20and%20Applications%20Book/Eligibility%20Forms/hardship_waiver_manual.pdf.

39. *See, e.g.*, ARIZ. INTERSCHOLASTIC ASS'N, 2010–2011 CONSTITUTION & BYLAWS 51 (2010), *available at* http://www.aiaonline.org/story/uploads/2010_2011_AIA_Bylaws_Book_1280372828.pdf (defining "hardship").

40. *See, e.g.*, KY. HIGH SCH. ATHLETIC ASS'N, BYLAWS § BL-6-2 (2010), *available at* http://www.khsaa.org/handbook/bylaws/bylaw6.pdf; N.H. INTERSCHOLASTIC ATHLETIC ASS'N, *supra* note 30, art. II, § 4; WASH. INTERSCHOLASTIC ACTIVITIES ASS'N, OFFICIAL HANDBOOK § 18.11.0 (2010), *available at* http://www.wiaa.com/ConDocs/Con358/Entire2010-11Handbook.pdf.

41. Eric Sondheimer, *Boys' Basketball: Say What?*, L.A. TIMES (Oct. 18, 2010, 8:05 AM), http://latimesblogs.latimes.com/varsitytimesinsider/2010/10/boys-basketball-say-what.html.

42. *Id.*

43. *Id.*

44. *See, e.g.*, *Eligibility: Transfer*, *supra* note 30; OHIO HIGH SCH. ATHLETIC ASS'N, *supra* note 2, § 4-7-2, Exception 1.

45. *See, e.g.*, Johansen v. La. High Sch. Athletic Ass'n, 916 So. 2d 1081 (La. Ct. App. 2005) (upholding the association's decision to declare the student ineligible, even though her family purportedly changed its residence in order to serve the special educational needs of a minor son).

limit the scope of the rule to cover only those students who have actually engaged in recruiting activities, even though the rules purportedly exist to reach those particular students.[46] The current variations of the transfer rules should thus be re-examined and rewritten in order to create rules that are better measured to directly address the issue of exploitative recruitment of student athletes.

II. THE CURRENT TRANSFER RULES VIOLATE PARENTS' RIGHT TO DIRECT UPBRINGING OF THEIR CHILDREN

High school athletics associations have articulated various reasons for the restrictions on transfer students. The most significant justifications are to prevent the recruitment of student athletes and "school-hopping" by students and parents.[47] Secondary reasons include keeping the focus on education first and participation in athletics secondary, preserving the opportunities of bona fide resident students from being replaced and promoting the stability and harmony of member schools.[48] This Note argues that the state's primary goal, however, should be to protect the interests of student athletes and the rights of their parents to make decisions regarding childrearing with limited governmental regulation. In light of this interest, this Note will conclude that the only legitimate rationale to continue enforcing transfer rules is to prevent the exploitation of student athletes through athletic recruitment. All other reasons are either out of the scope of the school's authority or contrary to the right of parents to direct the upbringing of their children.

Parents undoubtedly have the right to direct the educational and moral upbringing of their children. Beginning with *Meyer v. Nebraska*, a slew of Supreme Court cases have continuously reaffirmed this principle.[49] In *Meyer*, the Supreme Court reversed the conviction of a teacher who had provided instruction on the German language in violation of a Nebraska statute that prohibited the

46. *See* Genusa v. Holy Cross Coll., Inc., 389 So. 2d 908, 909 (La. Ct. App. 1980); Bruce v. S.C. High School League, 189 S.E.2d 817, 818 (S.C. 1972); Sullivan v. Univ. Interscholastic League, 616 S.W.2d 170, 172 (Tex. 1981); IND. HIGH SCH. ATHLETIC ASS'N, *supra* note 2, §19(a)(8); THORNTON, *supra* note 1, at 619.

47. *See* Genusa v. Holy Cross Coll., Inc., 389 So. 2d 908, 909 (La. Ct. App. 1980); Bruce v. S.C. High School League, 189 S.E.2d 817, 818 (S.C. 1972); Sullivan v. Univ. Interscholastic League, 616 S.W.2d 170, 172 (Tex. 1981); IND. HIGH SCH. ATHLETIC ASS'N, *supra* note 2, §19(a)(8); THORNTON, *supra* note 1, at 619.

48. *See e.g.*, KY. HIGH SCH. ATHLETIC ASS'N, *supra* note 40, § BL-6-2; N.H. INTERSCHOLASTIC ATHLETIC ASS'N, *supra* note 30, art. II, § 4; WASH. INTERSCHOLASTIC ACTIVITIES ASS'N, *supra* note 40, § 18.11.0.

49. *See* Meyer v. Nebraska, 262 U.S. 390 (1923) (holding parents have right to control education of their children); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (finding parents have right to direct upbringing and education of children); Prince v. Massachusetts, 321 U.S. 158 (1944) (standing for proposition that parents have priority in custody, care and nurture of their children); Wisconsin v. Yoder, 406 U.S. 205 (1972) (affirming idea that parents have primary role in upbringing of children, particularly in areas of moral standards, religious beliefs and elements of good citizenship); Troxel v. Granville, 530 U.S. 57 (2000) (holding that parents' interest in care, custody and control of their children is a fundamental liberty interest).

teaching of any language other than the English language.[50] The Court held that it was unconstitutional for the State to prevent a teacher from teaching the German language and to prevent the parents from engaging him to do so.[51] In reversing the conviction, the Court noted, "[I]t is the natural duty of the parent to give his children education suitable to their station in life."[52]

Subsequently, the Supreme Court in *Pierce v. Society of Sisters* recognized that the right of parents to choose whether to send their children to a private or public school is important to the exercise of their right to direct the upbringing of their children.[53] In *Pierce*, the plaintiffs were private organizations that challenged a compulsory education statute requiring parents and guardians to send their children to public schools, with certain limited exceptions.[54] One plaintiff, the Society of Sisters, maintained schools that taught the subjects usually taught in Oregon public schools along with religious and moral teachings based on the tenets of the Roman Catholic Church.[55] The Society of Sisters claimed that the compulsory education law conflicted with the right of parents to choose where their children would receive "appropriate mental and religious training."[56] The other plaintiff was the Hill Military Academy, which operated, a for-profit elementary school, a college preparatory school and a military training school for boys.[57] Along with the courses required by the state board of education, the Military Academy also provided military instruction and training.[58] Because the statute mandates attendance at public schools, parents refused to renew their contracts to send their boys to the Military Academy.[59] The Supreme Court held that a public school compulsory attendance requirement "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[60] The Court further noted that "the child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[61]

Pierce stands for the notion that parents have a choice whether to send their children to public or private schools.[62] Although some of the parents in *Pierce* objected to the public school requirement for religious reasons, the Supreme Court

50. *Meyer*, 262 U.S. at 403.
51. *Id.* at 400.
52. *Id.*
53. *Pierce*, 268 U.S. at 534–35.
54. *Id.* at 530. The exceptions included exemptions "for children who are not normal, or who have completed the eighth grade, or whose parents or private teachers reside at considerable distances from any public school, or who hold special permits from the county superintendent." *Id.* Parents whose children did not fall under these exceptions were mandated to send their children to public school. *Id.*
55. *Id.* at 532.
56. *Id.*
57. *Id.* at 532–33.
58. *Id.* at 533.
59. *Id.*
60. *Id.* at 534–35.
61. *Id.* at 535.
62. *Id.*

did not limit the right of parents to determine where to send their children to school to religious reasons alone.[63] The Supreme Court granted an injunction prohibiting the state from preventing parents to send their children to the Military Academy, a private institution that provided nonreligious instruction.[64] Accordingly, this decision stands for the broader proposition that parents have the right to determine the educational needs of their children, whether or not the decision is based on religious beliefs.[65] Religious preferences are merely one factor a parent could consider when choosing a school. Other factors parents could—and do—consider when choosing a school for their children include, for instance, a particular schools' course offerings, the type of environment the school provides or the strength of its extracurricular activities, including its athletic programs.[66] The parents in *Pierce* sent their children to schools that provided the same courses as the public schools but that also provided additional instruction in the form of religious or military training.[67] As much as those parents were given the opportunity to determine the extra type of instruction provided to their children, parents who value interscholastic sports as an integral part of their children's upbringing should also be given the ability to incorporate these sports into their children's training.

Recognizing that it is the parents' responsibility to prepare their children for additional societal obligations, such as entering the workforce, parents may sometimes want to take into consideration athletic motivations in considering where to enroll their children in school. Participation in team sports teaches students skills such as teamwork, cooperation and self-discipline.[68] Since athletics associations also mandate academic eligibility requirements, interscholastic sports may provide additional motivation to attend and perform well in school for students who may not be as motivated by academics alone.[69] Some students may also feel pressure to receive a scholarship in order to attend a college or university. Positioning themselves at a school with a stronger athletic program will allow them to shine and increase their chances of receiving a scholarship. And although it is rare that even a superstar high school athlete will go on to play professionally, many students yearn to achieve that goal, and some have the ability to at least go to

63. *See id.*

64. *Id.* at 536.

65. *See id.* at 535.

66. *See generally* U.S. DEP'T OF EDUC. OFFICE OF INNOVATION AND IMPROVEMENT, CHOOSING A SCHOOL FOR YOUR CHILD (2007), *available at* http://www2.ed.gov/parents/schools/find/choose/choosing.pdf (U.S. Department of Education's recommendations to parents who are choosing a school for their child).

67. *Pierce*, 268 U.S. at 532–33.

68. *See* Beckett A. Broh, *Linking Extracurricular Programming to Academic Achievement: Who Benefits and Why?*, 75 SOC. EDUC. 69, 78 (2002) (suggesting that interscholastic sports improves self-esteem, locus of control, time on homework and social ties between students and parents).

69. *See, e.g.*, CAL. INTERSCHOLASTIC FED'N, 2010-2011 CONSTITUTION AND BYLAWS § 205 (2010), *available at* http://www.cifstate.org/governance/constitution_bylaws/pdf/CIF%20CONST%20BYLAW%20BOOK%201011.pdf; ILL. HIGH SCH. ASS'N, BY-LAWS & ILLUSTRATIONS § 3.020 (2010), *available at* http://www.ihsa.org/org/policy/2009-10/Handbook-Casebook.pdf ; MO. STATE HIGH SCH. ACTIVITIES ASS'N, *supra* note 2, § 213.0.

play at the collegiate level.[70] Prohibiting student athletes from transferring to schools for athletic reasons hinders their ability to improve their skills, to better position themselves for purposes of scouting and, consequently, diminishes their abilities to receive athletic scholarships and their hopes of playing at the professional or collegiate level, however slim those chances might be.

Although it could be argued that allowing students to shop around for schools devalues the importance of academics, the opposite may actually be true. At the grade school level, academics and athletics are intertwined. Athletic associations have academic eligibility requirements, which serve as a check on students' participation in interscholastic sports, ensuring that transferring students will continue to receive a proper academic education and will be penalized if they fail to meet the academic requirements.[71] Because students must achieve a certain level of academic achievement in order to remain eligible for sports, participation in sports may actually have a motivating effect on students.[72] In addition, the National College Athletic Association has certain academic eligibility conditions for incoming freshmen who wish to compete in intercollegiate athletics in Division I or II of the NCAA, including minimum entrance exam scores and minimum grades in core classes in high school.[73] These requirements ensure that academics remain a focus for student athletes, in addition to athletics.

Participation in extracurricular activities also provides a mechanism for students to learn important social values such as teamwork, hard work and self-discipline, values that may not necessarily be taught or learned in the classroom.[74] Students whose transfers were not athletically motivated are unnecessarily deprived of an opportunity to engage in situations where these values may be learned. Students who transfer to seek a better athletic program are deprived of the opportunity to grow as athletes and improve their skills. In a separate opinion in *Indiana High School Athletics Ass'n v. Carlberg*, Justice Dickson recognized that students and

70. *See How Many High School Athletes Get to Play NCAA Sports*, C. SPORTS SCHOLARSHIPS, http://www.collegesportsscholarships.com/percentage-high-school-athletes-ncaa-college.htm (last visited Nov. 16, 2010).

71. *See, e.g.*, MO. STATE HIGH SCH. ACTIVITIES ASS'N, *supra* note 2, § 213.0; ILL. HIGH SCH. ASS'N, *supra* note 69, § 3.020; CAL. INTERSCHOLASTIC FED'N, *supra* note 69, § 205.

72. *See* Danielle Tower, Relationship Between Athletic and Academic Success: A Pilot Study 7–9 (May 1, 2008) (unpublished Honors Scholar Thesis), *available at* http://digitalcommons.uconn.edu/cgi/viewcontent.cgi?article=1048&context=srhonors_theses.

73. Ind. High Sch. Athletics Ass'n v. Carlberg, 694 N.E.2d 222, 244 (Ind. 1997) (Dickson, J., concurring and dissenting). *See also* NAT'L C. ATHLETIC ASS'N, 2010–2011 NCAA DIVISION I MANUAL § 14.3 (2010), *available at* http://www.ncaapublications.com/productdownloads/D111.pdf (providing that "Freshman Academic Requirements" include successful completion of sixteen core courses and a sliding-scale combination of grades in high school core courses and standardized test scores); NAT'L C. ATHLETIC ASS'N, 2010–2011 NCAA DIVISION II MANUAL § 14.3 (2010), *available at* http://www.ncaapublications.com/productdownloads/D211.pdf (stating that "Freshman Academic Requirements" include a minimum GPA of 2.00 based on a 4.00 scale in a core curriculum of at least fourteen academic courses, including those listed in the manual, and a minimum combined score on the SAT verbal/critical reading sections and math sections of 820 or a minimum ACT of 68; requiring student's completion of at least sixteen academic courses, effective Aug. 1, 2013).

74. NAT'L FED'N OF STATE HIGH SCH. ASS'NS, THE CASE FOR HIGH SCHOOL ACTIVITIES 2 (2008), *available at* http://www.nfhs.org/content.aspx?id=3262.

parents face a difficult choice in determining what school and type of education is best for their children, and that for some, athletics is an aspect of education.[75] He pointed out that athletic involvement provides physical benefits such as "lower[ing] mortality rates, promot[ing] cardiovascular and muscular fitness, generat[ing] a general feeling of well-being, and reduc[ing] the symptoms of depression and anxiety."[76] He also recognized that participation in athletics promotes certain developmental and social skills, such as:

> enhanced decision-making skills, self-image, character, morality, independence, and opportunities for youth to experience a sense of achievement . . . learning how to be part of a team, the process of goal setting and working hard, individually and within a team, to achieve goals, and how to deal with successes and overcome the failures provided in sports.[77]

If we believe that one of the purposes of education is to teach students social values in order to prepare them for their entrance into society, athletics serves as a way to teach students a range of practical skills that are critical in the workforce.

In light of the many valuable skills gained from participation in athletics, parents should be free to consider athletics programs in determining where to send their children to school. However, the exploitative recruitment of student athletes remains a problem because it takes the decision to choose the school away from the parents. Accordingly, prevention of recruitment should be the only legitimate reason to promulgate transfer rules. Parents should have the choice to determine which schools to send their children to without the undue influence of coaches or other school authorities, whether through social pressures or monetary incentives such as gifts and payments. Parents have the right to choose an athletic program suitable for their children, but recruiting activities infringe upon that right and cause student athletes to become pawns exploited by school authorities who are furthering their schools' own interests at the expense of the students' interests. Allowing parents to consider athletics in their choice of school is consistent with this anti-recruitment policy because such a policy protects parental choice. On the other hand, when school officials attempt to recruit students and their parents through monetary gifts and other benefits, it can no longer be said that the parents exercised their free choice.[78]

III. THE RATIONAL BASIS TEST AS IT CURRENTLY APPLIES TO TRANSFER RULES

Transfer rules have been challenged by students, parents and even schools on grounds ranging from procedural and substantive due process violations to freedom

75. *Carlberg*, 694 N.E.2d at 243 (Dickson, J. concurring and dissenting).
76. *Id.*
77. *Id.*
78. *See e.g.*, WASH. INTERSCHOLASTIC ACTIVITIES ASS'N, *supra* note 40, § 27.3.1(A).

of religion violations.[79] Courts almost unanimously reject such challenges.[80] However, challenges on the basis of equal protection violations seem to earn more consideration by the courts.[81] Nonetheless, few courts have been willing to overrule athletic associations' uses of transfer rules on equal protection grounds.[82] The Supreme Court of Texas succinctly summarized the equal protection argument in *Sullivan v. University Interscholastic League*:

> The transfer rule creates two classes of students: those who do not transfer from one school to another, as compared to those who transfer. The rule treats these two classes of students differently by permitting members of the first group to compete in interscholastic activities without any delay while imposing a one-year period of ineligibility on the second group.[83]

Although state high school athletics associations are not technically state organizations, courts have unwaveringly held that decisions made by high school athletic associations constitute state action because such associations regulate interscholastic activities of the public educational system in every state.[84]

In deciding how to evaluate state action, courts use a strict level of scrutiny when reviewing state actions that either discriminate against suspect classes or implicate a fundamental right.[85] However, neither of these categories applies here.

79. *See, e.g.*, Barnhorst v. Mo. State High Sch. Activities Ass'n, 504 F. Supp. 449, 450 (W.D. Mo. 1980); *Carlberg*, 694 N.E.2d at 227; Sullivan v. Univ. Interscholastic League, 616 S.W.2d 170, 172 (Tex. 1981).

80. *See, e.g.*, Walsh v. La. High Sch. Athletic Ass'n, 616 F.2d 152, 161 (5th Cir. 1980); *Barnhorst*, 504 F. Supp. at 467; *Carlberg*, 694 N.E.2d at 242; Bruce v. S.C. High Sch. League, 189 S.E.2d 817, 819 (S.C. 1972).

81. *See, e.g.*, *Carlberg*, 694 N.E.2d at 226; *Sullivan*, 616 S.W.2d at 172.

82. *See, e.g.*, *Sullivan*, 616 S.W.2d at 172.

83. *Id.*

84. Although high school athletic associations are voluntary organizations and are not official instrumentalities of the states, courts have held that their actions constitute "state action" subject to the restrictions of the Fourteenth Amendment on the grounds that nearly every public high school is a member of an athletic association, the majority of competitions are held on public property and state departments of education along with other public educational associations rely on such athletic associations to provide a uniform set of regulations to govern extracurricular activities. *See Walsh*, 616 F.2d at 156; Saenz v. Univ. Interscholastic League, 487 F.2d 1026, 1027–28 (5th Cir. 1975); Mitchell v. La. High Sch. Athletic Ass'n, 430 F.2d 1155, 1157 (5th Cir. 1970); La. High Sch. Athletic Ass'n v. St. Augustine High Sch., 396 F.2d 224, 227–28 (5th Cir. 1968); Okla. High Sch. Athletic Ass'n v. Bray, 321 F.2d 269, 272–73 (10th Cir. 1963); *Barnhorst*, 504 F. Supp. at 457; Gilpin v. Kan. State High Sch. Activities Ass'n, 377 F. Supp. 1233, 1237 (D. Kan. 1973); Bucha v. Ill. High Sch. Ass'n, 351 F. Supp. 69, 73 (N.D. Ill. 1972); Reed v. Neb. Sch. Activities Ass'n, 341 F. Supp. 258, 260–61 (D. Neb. 1972).

85. Classes requiring a strict level of scrutiny are limited to race, Loving v. Virginia, 388 US 1, 11 (1967) (striking down a statute prohibiting interracial marriages), national origin, Korematsu v. United States, 323 U.S. 214, 216 (1944) (applying strict scrutiny to a statute which singled out Americans of Japanese origin), and alienage, Graham v. Richardson, 403 U.S. 365, 372–73 (1971) (stating that classifications based on alienage are subject to strict scrutiny). Classes requiring an intermediate level of scrutiny are generally limited to gender, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724–25 (1982), Craig v. Boren, 429 U.S. 190, 198–99 (1976), or illegitimacy, Mathews v. Lucas, 427 U.S. 495, 506 (1976). The Supreme Court has declined to extend heightened intermediate review to classifications based on age, Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313–14 (1976), and

The only classes that have been deemed suspect for purposes of equal protection analysis are those based on race, national origin and alienage.[86] Courts have also declined to find any fundamental right implicated in cases involving transfer rules.[87] If the legislative action in question does not discriminate against a suspect class or impinge on a fundamental right, courts will use a lower level of scrutiny.[88]

Courts typically use a rational basis level of scrutiny in cases involving social or economic legislation that does not discriminate against a suspect class or infringe upon a fundamental right.[89] According to the rational basis test, a state action will be valid only if it is "rationally related to furthering a legitimate state interest."[90] In other words, state conduct that is not rationally related to the achievement of any legitimate goals will not pass muster under the equal protection analysis of the Fourteenth Amendment. After determining whether a legitimate purpose exists, this test requires courts to "reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose."[91] Since the purpose of transfer rules is to prevent the recruitment of student athletes—arguably, a legitimate state interest—in order for the associations' conduct to be in accordance with the equal protection clause, the associations' transfer rules must be rationally related to achieving this particular goal.

Many jurisdictions have reluctantly refused to overturn the associations' transfer rules.[92] *Barnhorst v. Missouri State High School Activities Ass'n* involved the case of Julie Ann Barnhorst, a student with an outstanding record of academic achievement who transferred from one private high school to another.[93] The

mental retardation, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 443 (1985). Participation in interscholastic sports is not a substantive right protected by the Due Process Clause of the Fourteenth Amendment. Davenport v. Randolph Cnty. Bd. of Educ., 730 F.2d 1395, 1397 (11th Cir. 1984); Niles v. Univ. Interscholastic League, 715 F.2d 1027, 1031 (5th Cir. 1983); Hamilton v. Tenn. Secondary Sch. Athletic Ass'n, 552 F.2d. 681, 682 (6th Cir. 1976); Zehner v. Cent. Berkshire Reg'l Sch. Dist., 921 F. Supp. 850, 863 (D. Mass. 1995); Haas v. South Bend Cmty. Sch. Corp., 289 N.E.2d 495, 497 (Ind. 1972); Menke v. Ohio High Sch. Athletic Ass'n, 441 N.E.2d 620, 623 (Ohio Ct. App. 1981); *Bruce*, 189 S.E.2d at 819.

86. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 371–72 (1971) (stating that classifications based on alienage are subject to strict scrutiny); Loving v. Virginia, 388 U.S. 1, 11 (1967) (stating that the Equal Protection Clause demands that racial classifications be subjected to strict scrutiny); Korematsu v. United States, 323 U.S. 214, 216 (1944) (applying strict scrutiny to a statute which singled out Americans of Japanese origin).

87. *See Niles*, 715 F.2d at 1031 (holding that the transfer rule's burden on the right to travel passed rational basis review because it was "limited in scope and insignificant in magnitude"); *Barnhorst*, 504 F. Supp. at 459 (applying rational basis review because there is no fundamental right to education); *Carlberg*, 694 N.E.2d at 242 (stating that there is no fundamental right to participate in interscholastic sports).

88. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

89. U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 177 n.10 (1980).

90. Clark v. Jeter, 486 U.S. 456, 462 (1988); Vance v. Bradley, 440 U.S. 93, 98 (1979).

91. McLaughlin v. Florida, 379 U.S. 184, 191 (1964).

92. *Niles*, 715 F.2d 1027; Walsh v. La. High Sch. Athletic Ass'n, 616 F.2d 152 (5th Cir. 1980); Ala. High Sch. Athletic Ass'n v. Scaffidi, 564 So. 2d 910 (Ala. 1990); Ky. High Sch. Athletic Ass'n v. Hopkins Cnty. Bd. of Edu., 552 S.W.2d 685 (Ky. Ct. App. 1977).

93. Barnhorst v. Mo. State High Sch. Activities Ass'n, 504 F. Supp. 449, 451–55 (W.D. Mo. 1980).

family believed that the new school offered a superior academic program and would thus enhance Julie Ann's prospects of attending a top-tier university or college.[94] She had participated in volleyball, basketball and track at her former school and sought to continue her athletic participation at the new school.[95] The Missouri State High School Activities Association's transfer rule, however, prohibited "any student, who transfers from one member school of MSHSAA to another member school, [from] participat[ing] in interscholastic athletic competition for a period of 365 days from the date of the transfer," with a few exceptions not applicable here.[96] Even after learning that she would be denied eligibility prior to being admitted to the new private school, Barnhorst enrolled in the new school.[97] Barnhorst sought a determination of eligibility from the executive secretary of Missouri State High School Activities Association.[98] After Barnhorst was denied eligibility, she appealed to the Board of Control of the MSHSAA, invoking the "hardship" exception.[99] Although the parties agreed that Barnhorst was not recruited to transfer, her appeal was subsequently denied.[100]

The district court in *Barnhorst* held that the transfer rule did not violate the equal protection clause.[101] Rather than distinguishing between those who transfer and those who do not, the court's classification distinguished between those who participate in athletics and those who participate in non-athletic activities—such as speech and debate, music and cheerleading—because the MSHSAA's transfer rule only applied to athletic activities.[102] Barnhorst had argued that the regulation was underinclusive because it failed to include students who had participated in recruiting abuses in areas of nonathletic activities.[103] However, the district court found that because there had never been any noticeable recruiting abuses or incidents of school-jumping in areas other than athletics, there was no reason to include them in the regulation.[104] Barnhorst also argued that the transfer rule was overinclusive because it included students, such as herself, who had not been solicited or recruited to transfer schools.[105] Relying on Supreme Court precedent that classifications need not be made free of any mathematical imperfections and

94. *Id.* at 451.
95. *Id.* at 451–52.
96. *Id.* at 450.
97. *Id.* at 452.
98. *Id.*
99. *Id.* at 452–54.
100. *Id.* at 452. The transfer rule did not apply to those who had transferred from one member school to another member school upon completion of the highest grade of a school unit to the lowest grade of the next recognized unit. *Id.* at 453. The transfer rule also exempted students in situations where the student did not exercise a choice to transfer, such as in the case of a change in residence of the student's parents or guardian for reasons other than athletics or the closing of a school to a particular group of students. *Id*. at 453. Since Barnhorst's decision to transfer was a voluntary decision, she could not avail herself of any of these exceptions. *Id*. at 452–53.
101. *Id.* at 458–63.
102. *Id.* at 455. The court stated that the transfer rule had never been applied in these areas, because there had never been a perceived need for such a rule in those areas. *Id.*
103. *Id.* at 459.
104. *Id.*
105. *Id.* at 462.

that administrative difficulties provide a legitimate basis for enacting rules that sweep broadly, the district court also rejected this argument.[106]

Although the court in *Barnhorst* held that the transfer rule was not underinclusive, the court acknowledged that the rule did not apply to those who participated in nonathletic activities.[107] The court also did not consider situations in which students may have been recruited prior to the beginning of their ninth grade year, and therefore would not be subject to any transfer rule. In these situations, the transfer rule would fail to capture some instances where recruiting abuses may have occurred. In addition, the court even acknowledged that this particular rule was overinclusive, but overlooked that fact, reasoning that it would be administratively difficult to make individualized determinations.[108] As discussed later in this Note, the important rights implicated in these cases justify a higher standard for evaluating transfer rules—one that would require a closer fit between the rule and the prevention of recruitment so that overinclusiveness would be minimized, if not eliminated altogether.

Chabert v. Louisiana High School Athletic Ass'n presents a slightly different factual scenario where the court reaches a similar result.[109] A provision in the LHSAA's transfer rules denied immediate eligibility for athletic competition to any student who, upon the completion of the seventh or eighth grade, transferred to any high school outside of his or her home district.[110] Terrebonne Parish was divided into three high school districts by the Terrebonne Parish School Board.[111] Chabert had completed the eighth grade at a public middle school in one of the districts and then subsequently enrolled in Vandebilt Catholic High School, the only Catholic high school in the entire Parish, which was located in a district outside of Chabert's home district.[112] Chabert was denied eligibility in Vandebilt's football program.[113]

The transfer rule in *Chabert* distinguished between students whose parents lived in the district in which Vandebilt was located, and thus immediately were eligible to participate in the sport of their choice, and those who lived outside the district.[114] In upholding the transfer rule, the Supreme Court of Louisiana purported to apply the rational basis test but failed to articulate any explanation of how the particular transfer rule in question rationally related to preventing "the evils of recruiting," even after it acknowledged that the rule "must be scrutinized in light of its avowed purpose."[115] Since Vandebilt was the only Catholic high school in the entire Parish, any student wanting to attend the school for religious or other reasons but

106. *Id.* at 461–62.
107. *Id.* at 455.
108. *Id.* at 461–62.
109. Chabert v. La. High Sch. Athletic Ass'n, 323 So. 2d 774, (La. 1975).
110. *Id.* at 778.
111. *Id.* at 775.
112. *Id.*
113. *Id.* at 776. Vandebilt was the only Catholic high school in Terrebone Parish. *Id.* at 775. Had he chosen to attend the public high school in his home district or lived in the same district in which Vandebilt was located, he would have been immediately eligible. *Id.* at 775–76.
114. *Id.* at 780.
115. *Id.* at 779.

living outside of the school district would be forced to forgo an entire year of interscholastic sports.[116] Automatically penalizing these types of students without examining the reasons underlying the transfer is not rationally related to the goal of deterring recruiting activities because recruitment is only one of a myriad of other reasons that a student might decide to attend a different school.

In *Cooper v. Oregon School Activities Ass'n*, the two plaintiffs attended parochial schools because of their parents' desire to continue their religious education.[117] Following their first years in high school, their parents allowed them to enroll in public school.[118] Although they both participated in athletic programs at their previous schools, the court found that athletic motivations played no part in their decisions to transfer and that neither of them had been recruited to transfer.[119] In fact, the public school and the parochial school from which one of the students had transferred filed and supported a hardship waiver on behalf of one of the students.[120] Nonetheless, the Oregon School Activities Association (OSAA) denied one student's waiver request.[121] The other student was advised by the executive director of the OSAA that a similar waiver request would be futile.[122] The OSAA rule provided, in relevant part, that "[a] student who transfers from any high school to any member high school becomes ineligible until one calendar year after the student first attends the new school."[123] The Court of Appeals of Oregon described the rule's purpose as preserving "harmony among member schools by preventing both actual recruitment of high school athletes and the appearance of recruitment."[124]

Although the court in *Cooper* upheld the transfer rule as constitutional, it conceded that the rule swept broadly and that it was possible for the OSAA to fashion a rule that would avoid penalizing students who had not engaged in recruiting abuses.[125] In fact, the court even suggested that the athletic association create an exception for cases where a student transfers from a parochial or private school to a public school.[126] The court recognized that in those circumstances, students often attend parochial or private schools because of their parents' desires that their children receive a certain type of education, thus establishing a rebuttable presumption that the transfer was for nonathletic reasons.[127] Despite the court's distaste for the overinclusiveness of the current rule, the court reluctantly declined to declare the rule unconstitutional because Oregon law permitted states to enact

116. *Id.* at 776.
117. Cooper v. Or. Sch. Activities Ass'n, 629 P.2d 386, 388 (Or. Ct. App. 1981).
118. *Id.* at 388.
119. *Id.* at 388.
120. *Id.* at 389.
121. *Id.*
122. *Id.*
123. *Id.* at 388. None of the exceptions apply to the plaintiffs. *Id.*
124. *Id.* at 388.
125. *Id.* at 394.
126. *Id.*
127. *Id.*

laws evincing such a "lack of precision."[128]

The facts in *Bruce v. South Carolina High School League* similarly illustrate the unjustness of such an overly broad rule.[129] The transfer rule in *Bruce* provided that a student who "voluntarily transfer[red] from one school to another without a bona fide change of residence will be ineligible to participate in interscholastic athletics for one year."[130] The stated purpose of the rule was "to prevent the encouragement and enticement of athletes to transfer from one school to another."[131] Because the rule provided no exceptions, however, the rule, in effect, automatically denied eligibility to any student who transferred to another school absent a bona fide change of residence regardless of the motivations underlying the transfer.[132]

The plaintiffs in *Bruce* had voluntarily transferred without a change in residence from a private school to the local public school and were denied eligibility to play football at the public school because of the South Carolina High School League's (SCHSL) transfer rule.[133] The parties agreed that the students had not transferred as the result of any recruiting activities.[134] Once again, despite the finding that the students had not engaged in any recruiting violations, the students' efforts to gain eligibility proved futile.[135] The court pointed to the "prohibitive administrative difficulties" associated with conducting individual factual inquiries as a reason to adopt a blanket rule.[136] However, because blanket rules represent the most egregious violation of equal protection rights, administrative convenience alone should not be a sufficient justification for such rules. By encompassing all transfer students within the rule, such a rule sweeps much more broadly than necessary to deter recruitment. These rules fail to punish students that are recruited prior to the beginning of high school and enroll at that time. But more significantly, blanket rules reach innocent students who transfer for any number of legitimate academic, religious or financial reasons. These innocent students are prohibited from participating in interscholastic athletics without any consideration of the reasons underlying their transfer.

In *Indiana High School Athletics Ass'n v. Carlberg*, Jason Carlberg transferred from Brebeuf Preparatory School, where he participated on the varsity swim team, to Carmel High School, for academic reasons.[137] The Indiana High Schol Athletics Association (IHSAA) denied him full eligibility pursuant to its transfer rule, which stated in relevant part:

> a student who changes schools without a corresponding change of residence by the student's parents . . . may not participate in interscholastic athletics as a member of a

128. *Id.* at 395.
129. Bruce v. S.C. High Sch. League, 189 S.E.2d 817 (S.C. 1972).
130. *Id.* at 818.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at 819.
136. *Id.*
137. Ind. High Sch. Athletic Ass'n v. Carlberg, 694 N.E.2d 222, 226 (Ind. 1997).

> *varsity* athletic team during the first 365 days after enrollment unless (i) the student meets one of the special criteria set forth in Rule 19-6.1 or (ii) is declared eligible under the IHSAA "Hardship Rule."[138]

The IHSAA transfer rule was designed "[t]o preserve the integrity of interschool athletics and to prevent or minimize recruiting, proselytizing and school 'jumping' for athletic reasons . . . ."[139] Although the IHSAA admitted that Carlberg's transfer was not due to athletic motivations, the Indiana Supreme Court held that the transfer rule was rationally related to a legitimate interest.[140]

In upholding the transfer rule, the Indiana Supreme Court declined to apply its own reasoning in *Sturrup v. Mahan*, a transfer rule case which measured the goal of deterring recruitment against the means used to achieve it.[141] In *Sturrup*, Warren Sturrup moved from Florida to Indiana to live with his brother in order to escape the "demoralizing and detrimental conditions" of his home and school environment in Florida, which included living in a two-bedroom house with twelve other people and the widespread use of narcotics at his former high school.[142] The IHSAA rule in place at the time of *Sturrup* declared student athletes who transferred to another school without a corresponding move in their parents' addresses ineligible for athletic competition, unless it was necessary for the student to change residences because of "unavoidable circumstances such as the death of the parents or guardian."[143] Despite the finding that the circumstances created by his home and school environment were so severe, the IHSAA refused to grant Sturrup eligibility under the rule's "unavoidable circumstances" exception.[144]

Recognizing that the IHSAA's transfer rule "suffer[ed] from a serious constitutional infirmity," the Supreme Court of Indiana in *Sturrup* found that the transfer eligibility bylaws were unreasonable in achieving their stated objectives because they swept too broadly.[145] The Court of Appeals had held that the transfer rule was unconstitutional on equal protection grounds.[146] The Court of Appeals applied strict scrutiny analysis, finding that Sturrup had a fundamental right to travel.[147] Accordingly, it concluded that the state had failed to articulate a compelling state interest for the rule and that the rule was necessary to further that interest.[148] The Supreme Court of Indiana disagreed with the Court of Appeals' equal protection analysis, finding that all transfer students were treated the same regardless of whether the student transferred from a school outside the state or from

138. *Id.* at 232. None of the rule's exceptions apply in this case. *Id.*
139. *Id.* at 236.
140. *Id.*
141. Sturrup v. Mahan, 305 N.E.2d 877 (Ind. 1974).
142. *Id.* at 881.
143. *Id.* at 879.
144. *Id.* at 881.
145. *Id.*
146. *Id.* at 879.
147. *Id.*
148. *Id.*

a school within the state.[149]

Nonetheless, the Supreme Court of Indiana found that the decision to deny Sturrup eligibility suffered from another equal protection infirmity.[150] The bylaws had limited eligibility only to students who changed residences with their parents or who, according to the association, fell under the exception of "unavoidable circumstances."[151] Accordingly, the court found that the transfer rule was unreasonable in that it swept too broadly by creating an irrebuttable presumption that all other student athletes had transferred for reasons motivated by athletics and automatically denied eligibility to such students.[152] The court reasoned:

> In short, the purported objective of the transferee eligibility rules is to prevent the use of undue influence and school "jumping," but their practical effect is to severely limit the transferee eligibility in general. The rules as presently constituted penalize a student-athlete who wishes to transfer for academic or religious reasons or for any number of other legitimate reasons. Surely, denying eligibility to such transferees in no way furthers IHSAA objectives.[153]

Accordingly, the Court found that the rule as applied in this case was arbitrary and capricious.[154] *Sturrup* demonstrates that merely providing for a few exceptions to the transfer rule does not solve the rule's deficiency of being overinclusive. First, as the Court in *Sturrup* recognized, this type of rule creates an irrebuttable presumption of athletically motivated transfer for all other students that do not fall within the strict boundaries of the exceptions.[155] Second, this case illustrates that transfer rules often do not include all of the legitimate reasons a student may choose to transfer. A rule creating a limited number of exceptions is likely to exclude students who do not fall under the listed exceptions but who do not deserve to be penalized under the transfer rule.

In *Robbins v. Indiana High School Athletic Ass'n*, the district court reluctantly upheld the athletic association's decision to prevent a transfer student from participating in the varsity volleyball team, even though the transfer was not athletically motivated.[156] The IHSAA's transfer rule prohibited students who transfer without a corresponding change of residence from participating in interscholastic sports, unless the student fell within one of thirteen exceptions permitting full eligibility.[157] The student had transferred from a public school to a parochial school, and had established by convincing evidence her recent conversion to Catholicism, her desire to seek "new challenges" and her desire to take certain

149. *Id.* at 880.
150. *Id.* at 881.
151. *Id.* at 879.
152. *Id.* at 881.
153. *Id.*
154. *Id.* at 882.
155. *Id.* at 881.
156. Robbins v. Ind. High Sch. Athletic Ass'n, 941 F. Supp. 786 (S.D. Ind. 1996).
157. *Id.* at 789.

course offerings not available at the public school.[158] Despite the finding that the transfer was unrelated to athletics, the athletic association had denied her eligibility because her circumstances did not fall within any one of the thirteen enumerated exceptions.[159] The court upheld the decision on due process, religious freedom and equal protection grounds, but noted that the plaintiff's transfer did not violate the spirit of the rule.[160] The court acknowledged that the rule in question was imperfect but noted that the rule should be changed through the athletic association rule promulgation procedure and not through the courts.[161]

Unlike the overwhelming majority of jurisdictions, but like the *Sturrup* court, the Supreme Court of Texas, struck down Texas' transfer rule on equal protection grounds in *Sullivan v. University Interscholastic League* (UIL).[162] The UIL had instituted Section 14, which stated, in pertinent part: "A pupil who has represented a high school (other than his present school) or academy in either football or basketball is ineligible, only in the sport or sports (football or basketball) in which he participated, for one calendar year in a school to which he changes."[163] John Sullivan moved to Texas from Vermont with his family because his father's employment had been transferred.[164] Because John had played basketball in Vermont, he was ineligible to play basketball at his new school, even though he had not been recruited.[165] Here, the transfer rule essentially created two classes of students—those who transferred from one school to another and those who did not—and treated them differently by allowing those who had not transferred to participate in athletics without being subject to a period of ineligibility while imposing the penalty on those students who had transferred.[166] Although the court found that the transfer rule's intention of discouraging the recruitment of high school athletes was a legitimate state purpose, the court held that the rule was not rationally related to the deterrence of recruitment because it was overbroad and overinclusive.[167] The Court reasoned that because the rule broadly affected student athletes who were forced to transfer for reasons unrelated to recruitment, the UIL's rule was not rationally related to the purpose of discouraging recruitment.[168]

IV. A PROPOSAL TO MODIFY THE WAY TRANSFER RULES ARE

158. *Id.* at 790.
159. *Id.*
160. *Id.* at 793.
161. *Id.*
162. Sullivan v. Univ. Interscholastic League, 616 S.W.2d 170 (Tex. 1981).
163. *Id.* at 171 n.2. The rule also provides two narrow exceptions to Section 14. *Id.* The first exception permits students to transfer from their current school to the higher class school nearest to their home or the nearest school in their county, provided that they attended their current school for at least one year and had accumulated less than fifteen accredited units. *Id.* The second exception permitted the transfer of students with one year of eligibility remaining who had a release from their current school stating that the student had not been recruited to participate in interscholastic sports. *Id.*
164. *Id.* at 172.
165. *Id.*
166. *Id.*
167. *Id.* at 172–73.
168. *Id.* at 173.

CURRENTLY EVALUATED

A. RECOGNITION OF THE IMPORTANCE OF EDUCATION AND PARENTAL RIGHTS JUSTIFIES THE USE OF A HEIGHTENED RATIONAL BASIS TEST

The current case law regarding parents' rights to control the education of their children warrants reconsidering the manner in which courts have scrutinized (or, more accurately, failed to scrutinize) transfer rules. Rather than simply deferring to athletics associations, courts ought to employ a heightened form of the rational basis test similar to the level of scrutiny that courts use in situations involving a stronger, but nonfundamental, interest. Although the Supreme Court has refused to recognize the right to education as fundamental, education plays a tremendous role in teaching students the skills and knowledge necessary to provide a foundation upon which they may become productive members of society.[169] In *Brown v. Board of Education*, the Supreme Court recognized the extreme importance of education in the socialization of children:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[170]

Interscholastic athletics may be just as important, if not more so, as a basic education to a child's personal growth and development. In fact, many jurisdictions have found that interscholastic athletics are an integral aspect of a secondary education.[171]

169. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 37 (1973). *See also* HENRY LEVIN ET AL., THE COSTS AND BENEFITS OF AN EXCELLENT EDUCATION FOR ALL OF AMERICA'S CHILDREN (2007), *available at* http://www.cbcse.org/media/download_gallery/Leeds_Report_Final_Jan2007.pdf.

170. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

171. *See* Ind. High Sch. Athletic Ass'n v. Carlberg, 694 N.E.2d 222, 229 (Ind. 1997) ("[A]thletics are an integral part of this constitutionally-mandated process of education."); Yanero v. Davis, 65 S.W.3d 510 (Ky. 2001) (finding that interscholastic athletics are a governmental function because they are an integral part of a secondary education); Thompson v. Bd. of Educ., 79 A.2d 100, 103 (N.J. Cumberland Cnty. Ct. 1951) ("The organization of school athletic teams at public schools generally has been considered to be an integral part of physical education."); Martini v. Olyphant Borough Sch. Dist., 83 Pa. D. & C. 206 (Ct. Com. Pl. 1952) (holding interscholastic contests are within the field of legitimate educational activities); Garza v. Edinburg Consol. Indep. Sch. Dist., 576 S.W.2d 916, 918

Studies have linked participation in interscholastic sports with the development of certain desirable qualities of a productive member of society.[172] One such study, the National Educational Longitudinal Study of 1988, found that interscholastic sports provide greater academic, social and developmental benefits than many other extracurricular activities and sought to explain the reasons underlying the benefits.[173] The study found a positive correlation between participation in interscholastic sports and academic performance, showing a relationship between students who participated in interscholastic sports and improved math and English grades.[174] The study also found that participation in interscholastic sports significantly improves self-esteem, "locus of control" (a term referring to the extent to which a person believes he can control his own behavior) and time spent on homework.[175] In addition, the study found that students who participate in interscholastic sports exhibit stronger ties with other members of the community, including the parents, teachers and school officials.[176]

Compared with other extracurricular activities, such as intramural sports and vocational clubs, and other athletic activities, such as cheerleading, the study found that students who participated in interscholastic sports reaped greater academic, social and developmental benefits.[177] The author of the study suggests that the disparity in benefits is due to the structure of interscholastic sports.[178] The author notes that interscholastic sports are generally more selective, require greater commitment, have more formalized rules and offer competition between schools.[179] The author believes that as a result of this unique system, those who participate in interscholastic sports, as compared to other activities, are exposed to "greater structure and routinization, much larger and more intense social networks, higher social status for student athletes, and a stronger identity with one's school."[180]

When deciding the appropriate level of scrutiny to apply, courts must first determine whether a suspect class is involved or whether a fundamental right is being infringed.[181] If either a suspect class or a fundamental right is implicated, then the court will apply strict scrutiny, the highest level of scrutiny, examining whether there is a compelling state interest for the classification and whether the

(Tex. Civ. App. 1979) ("The primary purpose of the football program is the educational benefit accruing to the students involved in the program.").

172. *See* DR. DOUGLAS HARTMANN, HIGH SCHOOL SPORTS PARTICIPATION AND EDUCATIONAL ATTAINMENT: RECOGNIZING, ASSESSING, AND UTILIZING THE RELATIONSHIP (2008), *available at* http://www.la84foundation.org/3ce/HighSchoolSportsParticipation.pdf; NAT'L FED'N OF STATE HIGH SCH. ASS'NS, *supra* note 74; Tower, *supra* note 72.

173. Broh, *supra* note 68, at 76–88.

174. *Id.* at 76.

175. *Id.* at 78.

176. *Id.*

177. *Id.* at 83–84.

178. *Id.* at 81–82.

179. *Id.* at 81–82.

180. *Id.* at 82.

181. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 US 1, 17 (1973).

legislative action is narrowly tailored to achieve that interest.[182] In determining whether a class is "suspect," the Supreme Court has looked to whether the class possesses the "traditional indicia of suspectness: the class is saddled with disabilities, subjected to a history of purposeful unequal treatment or relegated to such a position of political powerlessness to such an extent as to command extraordinary protection from the majoritarian political process."[183] Thus far, the Court has only applied strict scrutiny to race, national origin and alienage.[184] In cases where the Court finds a "quasi-suspect" classification, the Court will apply intermediate scrutiny, which requires the legislative action to serve an important governmental objective and to be substantially related to the achievement of that objective.[185] The Supreme Court has labeled gender and illegitimacy "quasi-suspect" classes, justifying the use of intermediate scrutiny.[186] In all other cases, courts apply the rational basis test, upholding governmental actions so long as there is a legitimate state interest involved and the action is rationally related to the achievement of that interest.[187] In such cases, the court is most likely to uphold the legislature's actions.[188] However, in some of those cases, the court has applied a heightened rational basis test, striking down legislation that is not rationally related when an important interest is at stake.[189]

The strong value that courts have placed on a parent's right to direct the upbringing of his or her own child, along with the value that interscholastic sports provides in integrating youth into society, justify the use of the higher standard of rational basis articulated by the Supreme Court in transfer rule cases. In *Plyler v. Doe*, the Supreme Court confronted a Texas statute that authorized school districts to deny enrollment to children who were not legally admitted to the country and to withhold state funds from school districts that enrolled such children.[190] The Supreme Court struck down the statute on the grounds that it violated the Equal Protection Clause of the Fourteenth Amendment.[191] In applying equal protection analysis, the Court recognized that education allows children to become self-

182. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986).

183. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

184. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967) (stating that the Equal Protection Clause demands that racial classifications be subjected to strict scrutiny); Korematsu v. United States, 323 U.S. 214, 216 (1944) (applying strict scrutiny to a statute which singled out Americans of Japanese origin); Graham v. Richardson, 403 U.S. 365, 371–72 (1971) (stating that classifications based on alienage are subject to strict scrutiny).

185. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny to gender classification).

186. *See id.*; Reed v. Campbell, 476 U.S. 852, 855 (1986) (applying intermediate scrutiny to state code prohibiting an illegitimate child from inheriting from his father unless his parents had subsequently married).

187. United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).

188. Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & LIBERTY 898, 905 n.37 (2005).

189. *See* Romer v. Evans, 517 U.S. 620 (1996); Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985); Plyler v. Doe, 457 U.S. 202, 205 (1982).

190. Plyler v. Doe, 457 U.S. 202, 205 (1982).

191. *Id.* at 221–22.

sufficient members of society.[192] The Supreme Court recognized that undocumented aliens were not a suspect class and that the right to an education was not a fundamental right; however, it also acknowledged that denying an education to undocumented children—who have no control over their status—would impose a hardship on these children and impair their ability to function in society.[193] Accordingly, rather than simply rubber-stamping the statute, the Supreme Court used a slightly more stringent test, which required the court to weigh the countervailing costs to the government and the injured class to ensure that the classification was reasonably adapted to "*the purposes for which the state desire[d] to use it*."[194] Applying this analysis, the Supreme Court held that Texas had failed to show that denying education to undocumented children furthered some substantial state interest.[195]

In other cases, the Supreme Court has opted to employ a heightened standard even though it has refused to recognize a quasi-suspect class when an important interest was involved. In *Cleburne v. Cleburne Living Center, Inc.*, the Supreme Court struck down a zoning ordinance that required hospitals for the mentally retarded to obtain a special use permit in order to operate.[196] Although the Supreme Court declined to characterize the mentally retarded as a quasi-suspect class, it noted that the "mentally retarded, like others, have and retain their substantive constitutional rights in addition to the right to be treated equally by the law."[197] Since it appeared that the rationales for the special use permit rested on irrational prejudices against the mentally retarded, the Supreme Court held that the ordinance was invalid under the rational basis test.[198]

Reviewing decisions from other courts also provides insight on how a heightened form of the rational basis test should be used. In the seminal case of *Goodridge v. Department of Public Health*, the highest court of Massachusetts used the heightened rational basis standard to hold that Massachusetts may not bar same-sex couples from getting married.[199] In *Goodridge*, several same-sex couples were denied marriage licenses by the Department of Public Health on the ground that Massachusetts did not recognize same-sex marriages.[200] Because this case did not involve a suspect class, the court purported to apply the rational basis test.[201] However, rather than simply deferring to the legislature as it would in cases involving the normal rational basis test, the court performed a more searching review of the marriage statute.[202] This type of examination essentially amounts to a heightened form of the rational basis test. The Supreme Court of Massachusetts

192. *Id.* at 222.
193. *Id.* at 223.
194. *Id.* at 226 (emphasis in original).
195. *Id.* at 230.
196. Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985).
197. *Id.* at 447.
198. *Id.* at 450.
199. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).
200. *Id.* at 949.
201. *Id.* at 960.
202. *Id.* at 953–69.

focused on the importance of civil marriage to individuals and to a well-ordered society and discussed the special benefits conferred upon married persons that are denied to those who are unmarried.[203] In light of the court's discussions that marriage plays an integral role in society, the court concluded that the government had failed to articulate any rational basis for denying the institution of marriage to same-sex couples.[204]

Similarly, transfer rules impose a significant burden on the rights of private individuals to live their lives without the interference of government. The Supreme Court has held that the government may not interfere with an individual's right to privacy in various aspects of the individual's life, including the right to obtain contraception, the right to marry, the right to procreation, the right to obtain an abortion and, of importance here, the right of parents to determine the upbringing of their children.[205] Just as the Massachusetts Supreme Court, in *Goodridge*, placed a high value on marriage in determining the relevant standard of scrutiny, the freedom to raise one's children without interference from the government is an interest that weighs in favor of applying a heightened rational basis standard of review in the case of transfer rules.

In addition, courts have recognized the important value of education and the benefits of interscholastic athletics for students.[206] The positive effects that education and interscholastic sports have on students also justify the use of a heightened rational basis standard to evaluate transfer rules. Although participation in interscholastic athletics has not been declared a fundamental right for purposes of the due process clause, in certain instances regarding equal protection rights, courts have recognized that participation in interscholastic sports is still a substantial and cognizable individual interest.[207]

Interscholastic athletics also play a pivotal role in the area of education. They help build self-confidence, encourage teamwork and healthy competition and help develop a myriad of other leadership skills.[208] For students who are not academically inclined, interscholastic sports may provide a much needed boost of

203. *Id.* at 954–57.

204. *Id.* at 968.

205. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972) (holding statute allowing married persons, but not single persons, to obtain contraception violates equal protection clause); Griswold v. Connecticut, 381 U.S. 479 (1965) (concerning right to obtain contraception); Loving v. Virginia, 388 U.S. 1 (1967) (recognizing right to marry); Skinner v. Okla. *ex rel.* Williamson, 316 U.S. 535 (1942) (affirming right to procreation); Roe v. Wade, 410 U.S. 113 (1973) (protecting right to obtain abortion); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (supporting right of parents to determine the upbringing of their children).

206. Plyler v. Doe, 457 U.S. 202, 221 (1982); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954); Meyer v. Nebraska, 262 U.S. 390, 400 (1923); Ind. High Sch. Athletic Ass'n, Inc. v. Carlberg, 694 N.E.2d 222, 236 (Ind. 1997); Haas v. South Bend Cmty. Sch. Corp., 289 N.E.2d 495 (Ind. 1972) (DeBruler, J., concurring).

207. Brenden v. Indep. Sch. Dist. 742, 477 F.2d 1292, 1299 (8th Cir. 1973) (holding that females have a substantial and cognizable interest in participating in interscholastic sports).

208. *Benefits of High School Activities*, IOWA HIGH SCH. ATHLETIC ASS'N, http://www.iahsaa.org/resource_center/Character_Sportsmanship_Safety/Benefit_of_Activities_Handout.pdf (last visited Dec. 2, 2010).

motivation to excel in academics—due to academic eligibility requirements—and they may help establish a social network for students who are academically-oriented.[209] Participation in interscholastic athletics also offers opportunities for students to receive athletic scholarships or, at the very least, to include the activities in their applications. Denying transfer students the ability to compete in interscholastic sports, even for one year, could jeopardize their chances of receiving either reward.[210] Because of the great benefits of allowing students to compete in interscholastic sports and the potential ramifications of denying the opportunity to innocent students who have not engaged in recruiting activities (or even to students who had no control over their transfers), actions by athletic associations should be held to the same standard as that articulated in *Plyler v. Doe*.[211]

When the *Plyler* standard is applied, it is clear that transfer rules violate the equal protection clause of the Fourteenth Amendment. *Plyler* requires the court to perform an inquiry into whether the classification was *reasonably adapted* to the purposes for which the state intended to use it, by weighing the costs to the state and to the injured parties.[212] Transfer rules, as applied in these cases, are not reasonably adapted to address the issue of recruitment because they oftentimes include within their realms students that the rules did not intend to affect.[213] Moreover, the interests of the students and parents involved in these situations do not justify the use of such rules. Students benefit from having a well rounded education, which may often include participation in interscholastic sports.[214] By developing values such as teamwork, healthy competition and discipline, students will be better prepared to live and function as productive citizens in society.

Two aspects of the transfer rule that would not pass muster under the higher *Plyler* standard are the breadth of the transfer rule and the broad administrative discretion of the rule. When measuring whether the rule is *reasonably* adapted to deterring recruitment, any rule that either includes significantly more students than the rule intended to affect or fails to include students that the rule intended to encompass is not reasonable in application. In addition, under the higher standard, administrative convenience alone probably would not be sufficient to allow athletics boards to have nearly unfettered discretion in determining eligibility, though it would have been under the traditional rational basis test.[215]

209. *See* Broh, *supra* note 68, at 78; *supra* Part III.

210. *Improve Your Chances for an Athletic Scholarship*, C. SCHOLARSHIPS.ORG, http://www.collegescholarships.org/athletic.htm (last visited Dec. 2, 2010).

211. Plyler v. Doe, 457 U.S. 202, 223–24 (1982).

212. *Id.*

213. *See* Genusa v. Holy Cross Coll., Inc., 389 So. 2d 908, 909 (La. Ct. App. 1980); Bruce v. S.C. High School League, 189 S.E.2d 817, 818 (S.C. 1972); Sullivan v. Univ. Interscholastic League, 616 S.W.2d 170, 172 (Tex. 1981); IND. HIGH SCH. ATHLETIC ASS'N, *supra* note 2, §19(a)(8); THORNTON, *supra* note 1, at 619.

214. Judy Kroeger, *Sports Provide Students with a Well-Rounded Education*, TRIBLIVE NEWS (Apr. 4, 2008), http://www.pittsburghlive.com/x/leadertimes/news/s_560688.html.

215. *See* Leslie W. Abramson, *Equal Protection and Administrative Convenience*, 52 TENN. L. REV. 1, 6 (1984) ("Although most equal protection challenges fail when the rational basis test is applied, that standard is not toothless. Even administrative convenience cannot save laws that contain classifications unsupported by permissible state interests or bearing no rational relationship to an

The problem of the transfer rule's breadth is best demonstrated in *Barnhorst v. Missouri State High School Ass'n* and in *Indiana High School Athletics Ass'n v. Carlberg*, two cases discussed above where the court refused to overturn the associations' decisions to deny eligibility to innocent transfer students.[216] In *Barnhorst*, the only exceptions were for students who had been promoted to high school or whose parents did not exercise a choice in the decision to transfer.[217] Because the receiving school in *Barnhorst*, Sunset Hill School, was recognized as an exemplary school with a superior academic program, it is conceivable that many students, like Barnhorst, might have chosen to attend Sunset for academic reasons.[218] In fact, the court even acknowledged that there was "no reason to suspect that Sunset ever ha[d] or ever would engage in 'recruiting' actions, since its athletic program [was] distinctly subordinate, in priority, to its academic program."[219] Under such circumstances, the transfer rule is more likely to penalize innocent students like Barnhorst rather than students who had actually been recruited or solicited to transfer.

In *Carlberg*, the court reasoned that the rule acts as a deterrent to athletically motivated transfers.[220] However, the rule does so at the expense of innocent transfer students. The means chosen to achieve the goal of deterring recruitment are hardly *rationally related* to the purported ends. Although the rule may deter some students from transferring for athletic reasons, in so doing the rule also penalizes other students, such as Carlberg, who transfer without a corresponding change in residence and who do not fall under one of the exceptions that the association deems legitimate.[221] A harsh rule that fails to consider the underlying reasons for the transfer penalizes students who did not have the foresight to enroll in a particular school from the outset. Consequently, those students who—for any legitimate reason—decide that their original school was not a good fit for them are deprived of the valuable opportunity to participate meaningfully in interscholastic athletics at their new school.

B. AN ALTERNATIVE TO THE TRANSFER RULE THAT SATISFIES THE HEIGHTENED STANDARD

Thus far, the transfer rule "solutions" that high school athletics associations have created with regards to recruitment have failed to specifically address the problem. Transfer rules are beginning to be scrutinized and challenged not only in the judiciary but also in the legislature, in the executive branch and in the public forum. The Minnesota legislature has recognized that the Minnesota High School League's

otherwise legitimate governmental objective.").

216. *See supra* Part III.

217. Barnhorst v. Mo. State High Sch. Activities Ass'n, 504 F. Supp. 449, 453 (W.D. Mo. 1980).

218. *Id.* at 451.

219. *Id.* at 461.

220. Ind. High Sch. Athletic Ass'n, Inc. v. Carlberg, 694 N.E.2d 222, 236 (Ind. 1997).

221. *See, e.g., id.* at 225 (where student transferred for academic reasons); Sturrup v. Mahan, 305 N.E.2d 877, 878 (Ind. 1974) (where student transferred due to detrimental home and school conditions).

transfer rule infringes on the right of school choice.[222] Consequently, the Minnesota legislature, with the support of Minnesota governor Tim Pawlenty, has made several efforts to overrule the league's transfer rule.[223] New Jersey Assemblyman Reed Gusciora has urged the New Jersey Interscholastic Athletic Association to modify its transfer rule, citing the fact that the rule is unfairly broad and consequently affects numerous students who transfer for financial, academic or social reasons.[224] Gusciora is considering the possibility of legislation to tackle the issue.[225] Howard Stephenson, a senator in the Utah Legislature, recently proposed a bill that would allow students to transfer between schools for athletic reasons.[226]

Along with the transfer rule, many athletics associations also have rules against recruitment and respective punishments for those that are found in violation of those rules.[227] If the transfer rule is simply another mechanism to prevent recruitment, then it should be applied to do just that. Currently, the rule is simply too broad to achieve that goal, bringing into its scope students that have transferred for reasons wholly or partially unrelated to athletics. Students who have not been subject to any sort of recruitment activities should not be prohibited from participating in interscholastic sports simply because the school's rule does not provide an explicit exception for their specific circumstances.

Rather than burdening students and parents with trying to determine what constitutes a "legitimate" transfer—based on vague descriptions of words such as "hardship" and "bona fide," for example—athletics associations should require the school board to prove that a student has transferred because he or she has been recruited.[228] This solution frees the student from the presumption that he or she has already been subject to some kind of athletic recruitment and ensures that the rule will actually serve the purpose for which it was created.

Requiring schools to establish that a transfer student has been the target of recruiting activities is necessary if the transfer rule is meant to deter the recruiting of student athletes without being overinclusive or underinclusive. By shifting the burden to schools to establish recruitment, such a rule would eradicate the overbearing presumption that all transfer students have already engaged in prohibited activities. A rule without this presumption is more closely tailored to the stated purpose of the transfer rules, a purpose commonly cited by high school

222. Brian Bakst, *Pawlenty Questions Limits on High School Transfer Rule*, MINN. PUB. RADIO (Mar. 20, 2007), http://minnesota.publicradio.org/display/web/2007/03/20/pawlentytransfer.

223. *Id.*

224. Michael DeLoreto, *Gusciora Wants to Change Rules Regarding High School Athletic Eligibility*, POLITICKERNJ.COM (Dec. 23, 2009), http://vip.politickernj.com/mdeloreto/35635/gusciora-wants-change-rules-regarding-high-school-athletic-eligibility.

225. *Id.*

226. Amy Donaldson, *High School Sports: Transfer Rule Up for Debate on Kids' Best Interests*, DESERET NEWS (June 24, 2010), http://www.deseretnews.com/article/700042808/High-school-sports-Transfer-rule-up-for-debate-on-kids-best-interests.html.

227. *See, e.g.*, FLA. HIGH SCH. ATHLETIC ASS'N, BYLAWS § 6.3 (2010), *available at* http://www.fhsaa.org/rules/handbook/1011_handbook2.pdf; IND. HIGH SCH. ATHLETIC ASS'N, *supra* note 2, § 20; MO. STATE HIGH SCH. ACTIVITIES ASS'N, *supra* note 2, § 216.0; WASH. INTERSCHOLASTIC ACTIVITIES ASS'N, *supra* note 40, § 27.3.0.

228. *See supra* Part I.

athletics associations as a justification for their overly broad rules—to protect students from exploitation by school authorities.[229] More importantly, this type of rule allows legitimate transfer students who want to participate in interscholastic sports to do so without being deemed ineligible for a period of time for offenses they did not commit. Such a rule also gives these students the opportunity to reap the many benefits of participating and competing in organized athletic activities.

Proponents of the current rules suggest that performing intensive factual inquiries into each case is infeasible because such inquiries are prohibitively expensive, could not be staffed by current personnel and would have limited success in identifying athletic transfers.[230] However, these administrative difficulties are justified by students' rights to be treated equally, the importance of instilling the critical skills that students learn by participating in interscholastic sports and the rights of parents to determine how to educate their children.

The Supreme Court recognizes that students do not discard their rights when they enter the schoolhouse building.[231] Administrative convenience should not be a sufficient justification for these rules when a higher standard of scrutiny is applied.[232] Although the right to participate in interscholastic athletics is not recognized as a fundamental right warranting strict scrutiny, the benefits gained from participating in interscholastic sports and the right of students and parents to school choice are sufficiently important that administrative convenience should not be sufficient for high school athletics associations to escape a heightened standard.

V. CONCLUSION

High school athletics associations should strive to better protect the rights of student athletes by ensuring that transfer rules are applied only to prevent the recruitment of high school athletes. Protecting these rights is in fact consistent with an antirecruiting agenda: recruiting practices cloud students' and parents' transfer decisions, exerting undue influence and depriving families of the right to make meaningful and voluntary decisions. Meanwhile, current transfer rules are overinclusive, sweeping within their reach many students who transfer for legitimate reasons. Preventing legitimate transfer students from participating in interscholastic sports does nothing to discourage the practice of recruitment, but rather deprives students who have done no wrong of the opportunity to participate. Consequently, the rule should be altered so that a school board must prove a given transfer was motivated due to recruitment practices; only then may the board penalize a student accordingly. Such a rule will ensure that other students do not have to suffer the harsh consequences intended for a small number of students.

229. *See* Genusa v. Holy Cross Coll., Inc., 389 So. 2d 908, 909 (La. Ct. App. 1980); Bruce v. S.C. High School League, 189 S.E.2d 817, 818 (S.C. 1972); Sullivan v. Univ. Interscholastic League, 616 S.W.2d 170, 172 (Tex. 1981); IND. HIGH SCH. ATHLETIC ASS'N, *supra* note 2, §19(a)(8); THORNTON, *supra* note 1, at 619.

230. Ind. High Sch. Athletic Ass'n, Inc. v. Carlberg, 694 N.E.2d 222, 233 (Ind. 1997).

231. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

232. *See* Vlandis v. Klein, 412 U.S. 441, 458–59 (1973) (White, J., concurring).