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# THE COSTS OF THE PAY-TO-PLAY MODEL IN HIGH SCHOOL ATHLETICS

Micah Bucy\*

The importance of obtaining a college education has perhaps never been higher, yet the accessibility of college has diminished.<sup>1</sup> Tuition seems to increase every year,<sup>2</sup> interest rates for student loans have increased recently,<sup>3</sup> and application fees have increased.<sup>4</sup> Now even building a quality college application may be costly. There is a growing trend among school districts to charge a fee for a student to participate in extracurricular activities. These fees, commonly referred to as “pay-to-play” fees, can range from \$20 for a school year to upwards of \$1,000 per sport.<sup>5</sup> Some people may not find the idea of paying \$1,000 for their child to play a school sport appalling, but low-income families, and specifically minorities, are forced to forego participation in extracurricular activities because of the expense.

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\* J.D. Candidate, 2014, University of Maryland Francis King Carey School of Law. I would like to thank the journal for their hardwork and dedication, and Professor Taunya Banks for offering her invaluable comments and suggestions during the editing process. I would also like to thank Dr. Joseph Kristobak for providing insight into school administrative matters and helping me to realize the real-world effects of the pay-to-play model. Finally, I would like to thank my family for their never-ending love and support.

<sup>1</sup> Richard Pérez-Peña, *Benefits of College Degree in Recession Are Outlined*, N.Y. TIMES, Jan. 10, 2013, at A15; Steve Odland, *College Costs Out of Control*, FORBES (Mar. 24, 2012, 5:20 PM),

<http://www.forbes.com/sites/steveodland/2012/03/24/college-costs-are-soaring>.

<sup>2</sup> See Kim Clark, *Tuition at Public Colleges Rises 4.8%*, CNN (Oct. 24, 2012), <http://money.cnn.com/2012/10/24/pf/college/public-college-tuition/index.html>.

<sup>3</sup> See Ricardo Lopez, *Student Loan Deal to Get Obama's Signature on Friday*, L.A. TIMES (Aug. 9, 2013, 8:03 AM), <http://www.latimes.com/business/money/la-fi-mo-obama-student-loan-deal-20130809,0,6067318.story>; see also Jeremy W. Peters, *Senate Reaches Deal to End Fight Over Student Loan Interest Rates*, N.Y. TIMES, Jul. 18, 2013, at A14.

<sup>4</sup> See Menachem Wecker, *10 Colleges with the Highest Application Fees*, U.S. NEWS (Sep. 25, 2013), <http://www.usnews.com/education/best-colleges/the-short-list-college/articles/2012/09/25/10-colleges-with-the-highest-application-fees> (noting that application fees have increased slightly but steadily over the past five years to \$37.88, but the top 10 colleges have an average fee of \$76.36).

<sup>5</sup> Bob Cook, *Will Pay-to-Play Become a Permanent Part of School Sports?*, FORBES (Aug. 22, 2012, 4:03 PM), <http://www.forbes.com/sites/bobcook/2012/08/22/will-pay-to-play-become-a-permanent-part-of-school-sports>.

Because top colleges seek to enroll the most diverse and well-rounded freshmen class possible, minority and low-income students who do not participate in these activities are at an unjustifiable disadvantage when it comes to applying for college.<sup>6</sup>

The pay-to-play model is a reactionary tool to combat tightening school budgets. In the midst of this education budget crisis, some districts laid off teachers,<sup>7</sup> shortened the school day,<sup>8</sup> shortened the school week,<sup>9</sup> and/or ended after school study programs.<sup>10</sup> But these are extreme measures. Other districts tried cutting extracurriculars or implementing the pay-to-play model. Those in support of the model assert that since money is tight, schools need to prioritize required programs and cut the rest. The position embedded in this argument is taxpayer unwillingness to increase resources for education by raising taxes.<sup>11</sup>

This comment seeks to critique the pay-to-play model and to argue for its elimination because of its disparate effects on racial minorities and low-income families. I propose, given the importance of a college education, and the fact that extracurricular activities are important to crafting a well-rounded college application, that extracurriculars be considered a part of an “adequate education.” To

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<sup>6</sup> See C.S. MOTT CHILDREN’S HOSPITAL, PAY TO PLAY SPORTS KEEPING LOWER-INCOME KIDS OUT OF THE GAME, 15 NAT’L POLL ON CHILDREN’S HEALTH 3 (May 14, 2011), available at <http://www.mottnpch.org/sites/default/files/documents/051412paytoplayreport.pdf>. [hereinafter MOTT CHILDREN’S HOSPITAL].

<sup>7</sup> Michael A. Rebell, *Safeguarding the Right to a Sound Basic Education in Times of Fiscal Constraint*, 75 ALB. L. REV. 1855, 1882–83 (2011–2012) (discussing the measures schools have adopted in order to stay within their budgetary limits).

<sup>8</sup> *Id.* at 1855.

<sup>9</sup> *Id.* at 1860.

<sup>10</sup> *Id.* at 1938.

<sup>11</sup> Marguerite Roza, *Breaking Down School Budgets*, 9 EDUCATION NEXT, no. 3, Summer 2009, available at [http://educationnext.org/files/breaking\\_budgets.pdf](http://educationnext.org/files/breaking_budgets.pdf). See Ida Liezkovszky, *Ohio’s Public Education is Far From Free*, STALEIMPACT.NPR.ORG (Aug. 18, 2011), <http://stateimpact.npr.org/ohio/2011/08/18/the-rising-cost-of-public-education> (noting the unwillingness of some Ohio taxpayers to increase taxes for the past 30 years). However, Arizona has made an effort to lessen the burden of supporting extracurricular activities by offering a dollar-for-dollar tax credit for taxpayers who contribute money to school’s extracurricular activities. *School Tax Credits for Individuals*, AZDOR.ORG, <http://www.azdor.gov/TaxCredits/SchoolTaxCreditsforIndividuals.aspx> (last visited Aug. 15, 2013).

give a complete picture of the education crisis, Part I examines both the federal and state roles in funding public education. Part II focuses on the importance of an education and examines whether education is a right, and, if so, how far that right extends. Part III examines the pay-to-play model and then explores its consequences and disparate effects based along class and racial lines. In Part IV, I assert that education is so important and the pay-to-play model creates such bright-line divisions based on race and class that states should include extracurriculars as part of an “adequate education.”

## I. FUNDING PUBLIC EDUCATION

The Constitution does not specifically mention education, but rather leaves the task of educating to the states.<sup>12</sup> This limits the role the federal government can play with regards to education. Despite this limited role, Congress has supported public education, at times passing broad—if not always popular—reforms.<sup>13</sup> These education reforms include the Elementary and Secondary Education Act,<sup>14</sup> No Child Left Behind Act of 2002, and President Obama’s Race to the Top initiative.<sup>15</sup> Part A is concerned with the means and methods the states employ to fund education, while Part B is focused on federal funding.

### A. State and Local Sources of Education Funding

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<sup>12</sup> U.S. CONST. amend. X; *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 30 (1973) (finding that education is not a fundamental right).

<sup>13</sup> *See* FEDERAL EDUCATION POLICY AND THE STATES, 1945–2009: A BRIEF SYNOPSIS 5–8 (N.Y. State Archives, Jan. 2006), *available at* [http://www.archives.nysed.gov/edpolicy/altformats/ed\\_background\\_overview\\_essay.pdf](http://www.archives.nysed.gov/edpolicy/altformats/ed_background_overview_essay.pdf) (explaining that the federal government has had a role in public education since 1787 when it passed the Northwest Ordinances which reserved land for the “maintenance of public schools”).

<sup>14</sup> Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 6301–7941.

<sup>15</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111–5, 123 Stat. 115 (2009). It should be noted that these federal programs have been heavily criticized as undercutting local school district’s ability to fashion programs that best fit communities. *See* Dr. Mariana Haynes, *State Strategies for Turning Around Low-Performing Schools and Districts: A Study Guide for Policymakers Based on a Symposium for State Board Chairs and Chief School Officers*, 17 NAT’L ASS’N OF STATE BD. OF EDUC., no. 7, June 2009, *available at* <http://www.wallacefoundation.org/knowledge-center/school-leadership/state-policy/Documents/Strategies-for-Turning-Around-Low-Performing-Schools.pdf>.

The idea of a state educating its citizenry in North America was adopted prior to the founding of America, as the Puritans required every town of fifty or more families to have at least an elementary school.<sup>16</sup> Nearly 150 years later, Pennsylvania ratified a Constitution that guaranteed poor children a free public education.<sup>17</sup> And in 1827, Massachusetts extended the right recognized by Pennsylvania by creating a free public school system that served all of Massachusetts's children.<sup>18</sup> Other states eventually followed the lead of these states. Now all fifty states guarantee a free public education to its citizens.<sup>19</sup>

America's reliance on states to shoulder much of the burden of financing public education has not changed since the early nineteenth century as federal funds account for less than eight percent of the nation's total education expenditure.<sup>20</sup> State generated funds comprise the remaining ninety-plus percent of the primary and secondary education expenditure. Every state constitution, to some degree, provides for a free public education, but the means of funding it is left to the state legislature.<sup>21</sup> State legislatures fund education through a combination of independent local and state revenue streams.<sup>22</sup> Much of the money generated comes from income, sales and property taxes.<sup>23</sup>

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<sup>16</sup> *Historical Timeline of Public Education in the US*, RACE FORWARD (Apr. 13, 2006), <http://www.arc.org/content/view/100/217>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Molly Hunter, *State Constitution Education Clause Language*, EDUC. LAW CTR., available at <http://pabararc.org/pdf/Molly%20Hunter%20Article.pdf>.

<sup>20</sup> See OECD, WHAT SHARE OF NATIONAL WEALTH IS SPENT ON EDUCATION, in EDUCATION AT A GLANCE 2012, Figure 3.5: Trends in Education Expenditure as a Percentage of GDP (2000, 2009) (2012), available at <http://www.oecd-ilibrary.org/docserver/download/9612041ec018.pdf?expires=1384470732&id=id&acname=guest&checksum=5D10C1E70DC319BFA1C4C84379A09011>.

<sup>21</sup> See Scott R. Bauries, *State Constitutional Design and Education Reform: Process Specification in Louisiana*, 40 J. L. & EDUC. 1, 9–10 (2011); Meira Schulman Ferziger, Annotation, *Validity of Public School Funding Systems*, 110 A.L.R. 5th 293 (2003).

<sup>22</sup> MICHAEL IMBER & TYLL VAN GEEL, EDUCATION LAW, 269 (Routledge, 4th ed. 2009).

<sup>23</sup> CTR. ON BUDGET AND POLICY PRIORITIES, POLICY BASICS: WHERE DO OUR STATE TAX DOLLARS GO? 3 (2013), available at <http://www.cbpp.org/files/policybasics-statetaxdollars.pdf>.

The income and sales tax in Maryland generates approximately fifteen billion dollars in revenue.<sup>24</sup> However not all of this money can be funneled into the education system because the state has other responsibilities, like funding healthcare programs, transportation, and public safety.<sup>25</sup> So state legislatures delegate revenue-generating responsibilities to local governments and school districts.<sup>26</sup> This comes nearly exclusively from assessing property taxes on the area within a given school district.<sup>27</sup>

Generally, property taxes account for the majority of the education funding, but the revenue generated by property taxes for a given district depends on the value of the properties being taxed.<sup>28</sup> The reason for this is because property values differ from place to place and school district to school district. Thus, affluent school districts are capable of generating much more in property taxes than are poorer school districts. For instance, the Baltimore City School District operated the 2009–2010 school year on nearly a \$1.35 billion dollar budget<sup>29</sup> and the median property value in Baltimore is approximately \$160,000.<sup>30</sup> In contrast, the Montgomery School District, a district in a commuter county of Washington, D.C., operated on a budget of nearly 2.7 billion dollars<sup>31</sup> because the median property value in Montgomery

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<sup>24</sup> Md. Budget and Tax Policy Inst., *State Revenues: Revenue—All Funds—Billions*, MARYLANDPOLICY.ORG, <http://www.marylandpolicy.org/dnn/Maryland101/Revenues.aspx> (last visited Aug. 19, 2013).

<sup>25</sup> *Id.*

<sup>26</sup> IMBER & VAN GEEL, *supra* note 22 at 271.

<sup>27</sup> William F. Dietz, *State Constitutions, School Finance Litigation, and the Third Wave: From Equity to Adequacy Emerging Issues in State Constitutional Law*, 68 TEMP. L. REV. 1151, 1151 (1995).

<sup>28</sup> *How Do We Fund Our Schools?*, PBS (Sept. 5, 2008), <http://www.pbs.org/wnet/wherewestand/reports/finance/how-do-we-fund-our-schools/197>.

<sup>29</sup> *District Details for Baltimore City Public Schools*, NAT'L CTR. FOR EDUC. STATISTICS, [http://nces.ed.gov/ccd/districtsearch/district\\_detail.asp?ID2=2400090&details=4](http://nces.ed.gov/ccd/districtsearch/district_detail.asp?ID2=2400090&details=4) (last visited Aug. 15, 2013) [hereinafter *District Details for Baltimore City*].

<sup>30</sup> *Baltimore, Maryland*, CITY-DATA.COM, <http://www.city-data.com/city/Baltimore-Maryland.html> (last visited Aug. 15, 2013) [hereinafter *Baltimore City-Data*].

<sup>31</sup> *District Details for Montgomery County School District*, NAT'L CTR. FOR EDUC. STATISTICS, [http://nces.ed.gov/ccd/districtsearch/district\\_detail.asp?ID2=2400480&details=4](http://nces.ed.gov/ccd/districtsearch/district_detail.asp?ID2=2400480&details=4) (last visited Aug. 15, 2013) [hereinafter *District Details for Montgomery County*].

County is \$460,000.<sup>32</sup> In Baltimore City, local revenue accounted for eighteen percent of the school budget for that year,<sup>33</sup> while in Montgomery County the local revenue accounted for seventy-two percent of the schools budget.<sup>34</sup>

Maryland, as well as most states, has a minimum per pupil expenditure that is prepared on an annual basis.<sup>35</sup> The state generated revenues from income and sales tax, as well as state run lotteries and casinos,<sup>36</sup> help to cover the difference between the required minimum and the locally generated revenue. For instance, in the Baltimore City School District, the state contributes sixty-six percent to the education budget,<sup>37</sup> whereas the Montgomery School District supplies just twenty-three percent.<sup>38</sup> The federal government makes up the remaining percentage.

### *B. The Sources of Federal Funding for America's Public Education*

Notwithstanding the Constitution's silence on education, Congress provides partial funding for public education. The power to federally fund education is derived from the general welfare clause of the Constitution,<sup>39</sup> which courts have supported.<sup>40</sup> The total expenditure on primary and secondary education in America has

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<sup>32</sup> *Montgomery, Maryland*, CITY-DATA.COM, [http://www.city-data.com/county/Montgomery\\_County-MD.html](http://www.city-data.com/county/Montgomery_County-MD.html) (last visited Aug. 15, 2013). [hereinafter *Montgomery County City-Data*].

<sup>33</sup> *District Details for Baltimore City*, *supra* note 29.

<sup>34</sup> *District Details for Montgomery County*, *supra* note 31.

<sup>35</sup> MD. CODE ANN., EDUC. § 5-202 (West 2013).

<sup>36</sup> In Maryland, \$600 million is generated annually from lottery proceeds. Maryland has recently broadened the legality of gambling to include table games and slot machines, which is predicted to generate an additional \$600 million annually in state revenue. MD. BUDGET AND TAX POLICY INST., THE REGULAR PERSON'S GUIDE TO MARYLAND'S TAX SYSTEM, MARYLANDPOLICY.ORG, *available at* <http://www.marylandpolicy.org/dnn/Portals/mbtpi/Documents/RP%20Guide%20to%20MD's%20Tax%20System%202010.pdf>.

<sup>37</sup> *District Details for Baltimore City*, *supra* note 29.

<sup>38</sup> *District Details for Montgomery County*, *supra* note 31.

<sup>39</sup> U.S. CONST. art. 1, §8 reads, "The Congress shall have the power to . . . provide for the . . . general welfare of the United States."

<sup>40</sup> *United States v. Butler*, 297 U.S. 1, 65-66 (1936) (finding "[c]ongress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States").

steadily increased, and as of 2008, 7.3% of the Gross Domestic Product (GDP)<sup>41</sup> in America was spent on public education.<sup>42</sup> Specifically, 4.1% of America's GDP was dedicated for elementary and secondary education, and this percentage roughly amounted to an expenditure of \$10,995 per student.<sup>43</sup> However, the vast majority of this money is not supplied by the federal government; in fact, federal funds make up only about 8% of this country's education expenditure, or about \$880 per student annually.<sup>44</sup>

The percentage of funds allocated from the federal government comes primarily from 'Title I' funding. Title I funding is part of a larger legislative act commonly referred to as the Elementary and Secondary Education Act of 1965 (hereinafter "ESEA")<sup>45</sup>, although today it is known as the No Child Left Behind Act of 2002 (hereinafter "NCLB").<sup>46</sup> The purpose of NCLB is to improve the academic achievement of students who were identified as being disadvantaged.<sup>47</sup> In short, Title I funds are allocated for high-poverty schools in an effort to provide educational services to students (or districts) that are at risk of failing to meet state standards.<sup>48</sup>

Every state receives Title I funding.<sup>49</sup> However, nearly all the money received by the state is distributed to school districts through

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<sup>41</sup> "Gross domestic product is an aggregate measure of production equal to the sum of the gross values added of all resident institutional units engaged in production (plus any taxes, and minus any subsidies, on products not included in the value of their outputs). The sum of the final uses of goods and services (all uses except intermediate consumption) measured in purchasers' prices, less the value of imports of goods and services, or the sum of primary incomes distributed by resident producer units." *Glossary of Statistical Terms: Gross Domestic Product*, ORG. FOR ECON. COOPERATION & DEV., <http://stats.oecd.org/glossary/detail.asp?ID=1163> (last visited Aug. 15, 2013).

<sup>42</sup> *Table 466 Public and private direct expenditures on education institutions: Selected years, 1995 through 2009*, NAT'L CTR. FOR EDUC. STATISTICS, [http://nces.ed.gov/programs/digest/d12/tables/dt12\\_477.asp](http://nces.ed.gov/programs/digest/d12/tables/dt12_477.asp) (last visited Aug. 15, 2013).

<sup>43</sup> *Id.*

<sup>44</sup> INT'L SCHOOL FINANCE, EDUCATION COMMISSION OF THE STATES (April 2010), available at <http://ecs.org/clearinghouse/85/20/8520.pdf>.

<sup>45</sup> Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 6301–7941.

<sup>46</sup> No Child Left Behind Act, 20 U.S.C. §6301–6578, (2002).

<sup>47</sup> *Id.* at §6301.

<sup>48</sup> *Id.*

<sup>49</sup> The text of Title I in the No Child Left Behind Act suggests states have an option whether they want to receive Title I funds, as states have to apply for such funds. No Child Left Behind Act § 6303. However, every state received Title I funding in 2011. U.S. Dep't of Educ., *ESEA Title I Allocations—FY 2011*, U.S. DEPT. OF EDUC.



sub-grants.<sup>50</sup> States are required to issue sub-grants which give priority to districts that 1) are the lowest achieving schools, 2) demonstrate great need, and 3) demonstrate a strong commitment to ensuring such funds are used to enable the lowest achieving schools.<sup>51</sup> Under NCLB, there are two ways Title I funds can be used: the funds can be used in a school-wide program if forty percent or more of the school's students are considered low-income; or, the district must identify individual students who will receive the benefits of the funds if less than forty percent of the school is considered low income.<sup>52</sup>

Congress is able to appropriate money to states by attaching conditions to the disbursement of funds. For instance, in a state's application, a state must demonstrate that it has adopted "challenging academic content . . . [and] academic achievement standards"<sup>53</sup> and that there are measures in place to hold the sub-grantees [school districts] accountable for maintaining "adequate yearly progress."<sup>54</sup> These conditions are set forth in former President George W. Bush's No Child Left Behind Act of 2002.<sup>55</sup> However, President Obama has repeatedly undermined NCLB by granting waivers that release sub-grantees from the requirements of NCLB.<sup>56</sup> While President Obama promised during the 2008 campaign that he would seek to reauthorize

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(last updated June 1, 2012),

<http://www2.ed.gov/about/overview/budget/titlei/fy11/index.html>.

<sup>50</sup> One percent is kept by state for administration costs. No Child Left Behind, § 6304. Schools receiving funds are commonly referred to as Title-1 Schools. *No Child Left Behind*, GREAT SCHOOLS,

<http://www.greatschools.org/definitions/or/nclb.html>.

<sup>51</sup> No Child Left Behind, § 6303(c)(1)-(3).

<sup>52</sup> DANIELLE EWEN & HANNAH MATTHEWS, USING TITLE I TO FINANCE EARLY CHILDHOOD PROGRAMS: LESSONS FROM STATES AND DISTRICTS, SERVE.ORG, 6-9, available at <http://www.serve.org/uploads/docs/CLASP.Presentation.pdf>.

<sup>53</sup> No Child Left Behind § 6311(b)(1)(A).

<sup>54</sup> *Id.* § 6311(b)(2)(A). This state requirement implies that states will hold Title-1 districts accountable; thus receiving Title 1 funds at the local level comes with strings attached.

<sup>55</sup> *Id.* at § 6311 (b)(1)(A)-(b)(2)(A).

<sup>56</sup> States receiving waivers include Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Missouri, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, Wisconsin, and Washington D.C. Joy Resmovits, *No Child Left Behind Waivers Granted to 33 U.S. States, Some With Strings Attached*, HUFFINGTON POST (Aug. 13, 2012, 11:04 AM), [http://www.huffingtonpost.com/2012/07/19/no-child-left-behind-waiver\\_n\\_1684504.html](http://www.huffingtonpost.com/2012/07/19/no-child-left-behind-waiver_n_1684504.html).

the ESEA,<sup>57</sup> reauthorization has not occurred. But Congress passed and the President signed legislation that provides additional funds (to Title I) for education, commonly referred to as the Race to the Top Program (“Program”).<sup>58</sup> The Program was adopted in an effort to encourage state reforms in enhancing standards and assessments, improve the methods in which data is collected, increase teacher effectiveness, and turn around struggling schools.<sup>59</sup> Further, the Program allocates \$4.3 billion<sup>60</sup> to be disbursed among states that demonstrate improvement in these four areas.

## II. DEFINITION OF AN ADEQUATE PUBLIC EDUCATION

The states are responsible for providing an education to its citizens.<sup>61</sup> All states embrace that responsibility by providing a free public education.<sup>62</sup> The question still being debated in courts and legislatures is what constitutes an adequate education.<sup>63</sup> This discussion usually occurs in the context of school funding formulas.<sup>64</sup> But these discussions do not directly address whether there is or should be a dividing line between programs/activities that fall within the scope of a free public education guarantee and those that fall outside it. Ideally, a free public education would include any and all

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<sup>57</sup> Amanda Paulson, *Education Reform: Obama Budget Reboots No Child Left Behind*, CSMONITOR.COM (Feb. 10, 2010), <http://www.csmonitor.com/USA/Education/2010/0201/Education-reform-Obama-budget-reboots-No-Child-Left-Behind>.

<sup>58</sup> U.S. DEPT. EDUC., RACE TO THE TOP ASSESSMENT PROGRAM GUIDANCE AND FREQUENTLY ASKED QUESTIONS (2010), *available at* <http://www2.ed.gov/programs/racetothetop-assessment/faqs.pdf>.

<sup>59</sup> *Id.*

<sup>60</sup> JUDITH LOHMAN, OLR RESEARCH REPORT: COMPARING NO CHILD LEFT BEHIND AND RACE TO THE TOP, CONN. GEN. ASSEMB. (June 4, 2010), *available at* <http://www.cga.ct.gov/2010/rpt/2010-R-0235.htm> (Lohman notes that school districts that receive Race to the Top grants also receive federal funding from NCLB, since both laws are currently in effect).

<sup>61</sup> U.S. CONST. amend. X.

<sup>62</sup> Hunter, *supra* note 19.

<sup>63</sup> Randal C. Archibold, *What Kind of Education is Adequate? It Depends*, N.Y. TIMES (Jan. 14, 2001) <http://www.nytimes.com/2001/01/14/nyregion/what-kind-of-education-is-adequate-it-depends.html?pagewanted=all&src=p>.

<sup>64</sup> *Id.*; Jennifer Imazeki & Andrew Reschovsky, *Financing Adequate Education in Rural Settings*, 29 J. EDUC. FIN. 137, 137 (2003), *available at* [www.rohan.sdsu.edu/~jimazeki/papers/JEFSummer2003.pdf](http://www.rohan.sdsu.edu/~jimazeki/papers/JEFSummer2003.pdf).

activities that would help build a well–rounded citizenry.<sup>65</sup> But in reality, governments and schools are limited by budgetary constraints, which play a significant role in the rise of the school fees and the pay–to–play model. This part of the comment discusses the states’ near–exclusive jurisdiction over education matters, as well as various interpretations of what an adequate education entails, with the focus on whether extracurricular activities should be included.

#### A. *Education Is Not a Fundamental Right*

In the United States tripartite form of government, it is the judiciary’s role to interpret and define the scope of the Constitution and the laws Congress may pass.<sup>66</sup> To that end, the United States Supreme Court has aided in shaping what the American public education system looks like today. The most famous case the Court has decided was *Brown v. Board of Education of Topeka, Kansas*, which sparked school desegregation during the Civil Rights Era and acknowledged the importance of education but did not label it as a fundamental right.<sup>67</sup> The failure to extend fundamental right status to education has had a long lasting impact in other decisions made by the Supreme Court.<sup>68</sup> Perhaps most significantly, the Court’s decision in *San Antonio School District v. Rodriguez*<sup>69</sup> reaffirmed *Brown* by not extending fundamental right status and therefore denying federal protection to education, despite its “undisputed importance.”<sup>70</sup> The *Rodriguez* decision, coupled with the Constitution’s silence, grants states nearly exclusive jurisdiction over legal challenges, with few

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<sup>65</sup> Robert S. Brumbaugh & Nathaniel M. Laurence Jr., *Aristotle’s Philosophy of Education*, 9 EDUC. THEORY 1, 1–15 (1959) (noting the legislator of the state must educate the youth for the well–being of the state).

<sup>66</sup> See U.S. CONST. art. III, § 2; *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (establishing judicial review).

<sup>67</sup> 347 U.S. 483, 493 (1954) (noting that education is “perhaps the most important function of state and local governments” and that “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity to an equal education.”).

<sup>68</sup> See *Plyer v. Doe*, 457 U.S. 202, 230 (1982) (invalidating a Texas law that prohibited undocumented alien children from participating in a free education).

<sup>69</sup> 411 U.S. 1, 35–37 (1973) (finding importance of education alone to be insufficient in establishing it as a fundamental right).

<sup>70</sup> *Id.* at 35, 58–59.

exceptions.<sup>71</sup> One exception to this would be if the challenger was bringing a due process or equal protection claim, in which case a federal court could entertain the case, but only by using a rational basis standard.<sup>72</sup>

*B. States Retain Near Exclusive Jurisdiction in Determining  
What an Adequate Education Entails*

Every state has taken up the responsibility of educating its citizenry by including an educational provision in their respective constitutions.<sup>73</sup> But most of these states' educational provisions are vague.<sup>74</sup> For instance, the Maryland provision reads: "The General Assembly, at its First Session after the adoption of this Constitution, shall by Law establish throughout the State, a thorough and efficient System of Free Public Schools; and shall provide by taxation, or otherwise for their maintenance."<sup>75</sup> This provision delegates to the Maryland Legislature the task of defining the scope of a "thorough and efficient System of Free Public Schools" entails.<sup>76</sup> The definition a

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<sup>71</sup> The Court in *Rodriguez* did suggest that if education is denied in its entirety to an individual(s), then there is likely some protection as education is important in exercising the first amendment and the right to vote. *Id.* at 35–37. This right is severely limited by only covering the skills necessary to participate in the electoral system. *Id.*

<sup>72</sup> U.S. CONST. amend. XIV, § 1 ("No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"); *U.S. v. Carolene Products Co.*, 304 U.S. 144, 153–54 (1938) (the Court in introducing rational basis review as the lowest level of scrutiny to apply when engaging in judicial review requires that the enactment in question at least be "rationally related" to a "legitimate" governmental reason offered as its justification).

<sup>73</sup> Hunter, *supra* note 19.

<sup>74</sup> *Id.*

<sup>75</sup> See also COLO. CONST. art. IX, § 2; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; KAN. CONST. art. VI, § 1; MINN. CONST. art. XIII, § 1; N.J. CONST. art. VIII, § 4, para. (1); OHIO CONST. art. VI, § 3; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; TEX. CONST. art. VII, § 1; W. VA. CONST. art. XII, § 1.

<sup>76</sup> See *Hornbeck v. Somerset Cnty. Bd. of Educ.*, 458 A.2d 758, 776–80 (Md. Ct. Spec. App. 1983) (holding that a "thorough and efficient system" does not: 1) "mandate uniformity in per pupil funding and expenditures among the State's school districts" or 2) need "to be 'equal' in the sense of mathematical uniformity, as long as efforts are made to minimize the impact of undeniable and inevitable demographic and environmental disadvantages of any given child").

given legislature arrives upon is more commonly referred to as an “adequate education.”<sup>77</sup>

The term “adequate education” denotes a minimum threshold for school standards. In other words, each state requires that its public education system at least meet certain minimum requirements.<sup>78</sup> The Kentucky Supreme Court was the first state to interpret its educational provision to mandate a qualitatively equal education by imposing certain minimum requirements.<sup>79</sup> In *Rose v. Council for Better Education*, Kentucky’s highest court ruled that the state must monitor the public school system to ensure that each child is afforded an opportunity to a qualitatively equal education.<sup>80</sup> But the *Rose* court and other state supreme courts are hesitant to explicitly state what

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<sup>77</sup> *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 211–12 (Ky. 1989).

<sup>78</sup> *Id.* Other states have followed Kentucky’s lead in finding its education to be qualitatively inequitable. *See McDuffy v. Sec’y of Exec. Office Educ.*, 615 N.E.2d 516 (Mass. 1996) (holding that Massachusetts is constitutionally required to offer an “adequate” education); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375 (N.H. 1993) (holding that the education clause in the state constitution imposes a duty to provide all students with an adequate education and provide adequate funding to do so); *Leandro v. North Carolina*, 488 S.E.2d 249, 253–54 (N.C. 1997) (concluding that the education clause of the North Carolina Constitution is justiciable as to an adequate education); *DeRolph v. Ohio*, 780 N.E.2d 529 (Oh. 2002) (interpreting “thorough and efficient” in the constitution’s education clause as mandating a minimum qualitative level of education to be offered); *Brigham v. Vermont*, 692 A.2d 384, 397 (Vt. 1997) (finding that there must be statewide educational equality); *Campbell Cnty. Sch. Dist. v. Wyoming*, 907 P.2d 1238, 1279 (Wyo. 1995) (holding that educational services must be nearly identical from district to district).

<sup>79</sup> *Rose*, 790 S.W.2d at 212. The minimum requirements are:

- (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
- (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;
- (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;
- (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness;
- (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
- (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and
- (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

<sup>80</sup> *Id.* at 198 (“Children in 80% of local school districts in this Commonwealth are not as well educated as those in the other 20%.”).

constitutes an adequate education.<sup>81</sup> The likely reason behind this hesitancy is that notions of what constitutes an “adequate” education change over time.

Unfortunately, the reality is that the definition of adequacy in the context of education is inextricably tied to state, district, and school resources. The more resources allocated for education, the higher the minimum threshold. The highest courts in each of the fifty states have ruled that a free public education includes access to basic programs during the regular school year.<sup>82</sup> But often the courts’ language is too vague to define “adequate education.” An adequate or basic education obviously includes a sufficient ability to read, write and do arithmetic (the “three Rs”) because these skills are essential for any person who wants to enter the job market. But a person who is simply able to read words on a page but does not understand their meaning is not going to be a competitive job applicant. There is more to an education just than the “three Rs.”

Schools have continuously demonstrated the belief that there is more to an education than learning to read, write and do arithmetic by funding programs like athletics, music, and the arts. In some states, courts have ruled that fees for programs that are considered non–basic are acceptable,<sup>83</sup> while other states have prohibited them,<sup>84</sup> and still other states have ruled that the fees are permissible only if the activity can be used for credit towards graduation.<sup>85</sup> But with budgetary restraints in full effect and education budgets still being cut, school

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<sup>81</sup> See *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191–93 (Ill. 1996) (disagreeing with jurisdictions that have ventured to define the “contours of a constitutionally guaranteed education” since such questions are “outside the sphere of the judicial function”); *Nebraska Coal. for Educ. Equity & Adequacy Coal. v. Heineman*, 731 N.W.2d 164, 181 (Neb. 2007) (concluding that the “relationship between school funding and educational quality requires a policy determination that is clearly for the legislative branch”); *Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 585 P.2d 71, 128 (Wash. 1978) (Rosellini, J., dissenting) (arguing that courts should not “under the guise of constitutional interpretation, presume to lay down guidelines or ultimatums for legislatures”).

<sup>82</sup> *IMBER & VAN GEEL*, *supra* note 22, at 269–301 (discussing school finance from the federal level down to the local level).

<sup>83</sup> *Id.* at 298 (“Because all state constitutions guarantee a free education or an education free of tuition, no cases permit public schools to charge district residents for access to the basic program during the regular school year.”).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 298 (“Courts are split on the question of fees for nonrequired courses: Some [sic] allow course fees, some forbid them, and some allow them unless the course can be used for credit towards graduation.”).

leaders are forced to make difficult decisions about the allocation of resources.<sup>86</sup> So the question of whether the pay-to-play program is permissible may depend on whether athletics can be used towards graduation.

### III. EXTRACURRICULARS AND THE PAY-TO-PLAY MODEL<sup>87</sup>

Although the definition of a legally adequate education differs from state to state,<sup>88</sup> the traditional definition includes writing, reading, and analytic skills. But a well-rounded education also includes non-traditional classroom-based skills like teamwork, communication, responsibility, perseverance, and time management. Extracurricular activities, specifically athletics, may provide the ideal “classroom” to develop these essential skills. More importantly, the development of these skills plays a role in the college admission process because all colleges seek “well-rounded” individuals that can comprise a diverse freshmen class.<sup>89</sup> Participation in high school athletics is beneficial in a myriad of ways, but beyond building character and honing life skills, it is important in the college admissions process because it gives an adult (coach) the opportunity to

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<sup>86</sup> Interview with Dr. Joseph Kristobak, Superintendent, Cornwall-Lebanon Sch. Dist., in Lebanon, Pa. (May 16, 2013) [hereinafter Kristobak Interview].

<sup>87</sup> For other discussions of the pay-to-play model, see Daniel B. Snow, comment, *Someone to Watch Over Me: A Court Mandated Right to Adequate Extracurricular Activities in California*, 19 GEO. J. ON POVERTY L. & POL’Y 135 (2012) (arguing that California should include extracurricular activities as an “integral” part of the state constitution guarantee for a free public education); Evan D. Fieldman, *A Temporary Band-Aid: Pay-to-Play Fees and the Extracurricular Crisis in Sports and the Arts*, 29 ENT. & SPORTS L. 4 (2011) (arguing that the pay-to-play model is only a band-aid for the problems in education funding); Cassie Merkel, comment, *Misspent Money: How Inequities in Athletic Funding in New Jersey Public Schools May Be the Key to Underperformance*, 23 SETON HALL J. SPORTS & ENT. L. 385 (2013) (arguing that New Jersey should include extracurricular activities as part of the school funding model); Shannon M. Ryan, comment, *Fees for Extracurricular Activities Alienate Students Who Would Otherwise Participate and Should Be Replaced with Alternate Means of Fundraising*, 13 SETON HALL J. SPORTS L. 239 (2003) (arguing that schools should not implement the pay-to-play model but should find alternative methods for funding extracurricular activities).

<sup>88</sup> See *supra* Part II.

<sup>89</sup> Harvard College Office of Admissions, *Applying to Harvard: Frequently Asked Questions—Applications Procedures and Policies: How Important are Extracurricular Activities in Admissions Decisions?*, HARVARD COLL., <http://www.admissions.college.harvard.edu/apply/faq.html> (last visited Aug. 19, 2013).

attest to a student's passion and other non-tangible qualities.<sup>90</sup> But the benefits of athletics are not just about building character and being accepted into college, participation has been found to keep students on the right path.<sup>91</sup> Athletics also play an important role in keeping teenagers active and healthy.<sup>92</sup>

These benefits of participation in high school athletics are threatened by the implementation of the pay-to-play model. Requiring a family to pay in order for a son or daughter to participate can act as a deterrent from participating.<sup>93</sup> This deterrent factor is more prevalent among low-income and racial minority families. Part A first highlights some of the benefits of extracurricular activities, and then Part B seeks to explain why the pay-to-play model severely threatens low-income and racial minority students.

#### A. *The Benefits of Extracurricular Activities*

An education should be about equipping students with the necessary skills and tools to take advantage of future opportunities according to their abilities. One traditional path to attain these skills involves getting a college education, which then opens up more opportunities. And there is a correlation between the prestige of a school and the number of opportunities a graduate receives.<sup>94</sup> But admission into these elite undergraduate institutions is no easy task because not only do they require top-of-the-class academics, but they also expect their students to be well-rounded. Participating in high school athletics therefore can be vital to gaining a college admission.

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<sup>90</sup> Harvard College Office of Admissions, *Applying to Harvard: Frequently Asked Questions—Application Requirements: Should Students Send Supplementary Recommendations?*, HARVARD COLL., <http://www.admissions.college.harvard.edu/apply/faq.html> (last visited Aug. 19, 2013).

<sup>91</sup> Ralph B. McNeal Jr., *Extracurricular Activities and High School Dropouts*, 68 SOC. OF EDUC. 62 (1995) (finding that participating in extracurricular activities decreases the likelihood of dropping out of high school).

<sup>92</sup> Centers for Disease Control and Prevention, *Adolescent and School Health: Physical Activity and the Health of Young People*, CDC.GOV, <http://www.cdc.gov/healthyyouth/physicalactivity/facts.htm> (last updated Feb. 19, 2013).

<sup>93</sup> MOTT CHILDREN'S HOSPITAL, *supra* note 6.

<sup>94</sup> Paul Sullivan, *Measuring College Prestige vs. Cost of Enrollment*, N.Y. TIMES, Apr. 20, 2013, at B5, available at [http://www.nytimes.com/2013/04/20/your-money/measuring-college-prestige-vs-price.html?pagewanted=2&\\_r=0](http://www.nytimes.com/2013/04/20/your-money/measuring-college-prestige-vs-price.html?pagewanted=2&_r=0).



Nearly every (top) university in America places an emphasis on admitting a “diverse and well–rounded” freshman class. For instance, at Harvard the admissions team “seeks to enroll well–rounded students as well as a well–rounded first year class” because “[l]ike all colleges, we seek to admit the most interesting, able, and diverse class possible.”<sup>95</sup> At top universities like Harvard, extracurricular activities can tip the scales for admission. Yale University, for example, states, “[o]ur goal is to assemble a diverse, well rounded freshmen class” and so it does not rely solely on grades and test scores. Rather, the university states, “[a]cademic criteria are important to Yale’s selective admissions process, but we look at far more than test scores and grades.”<sup>96</sup> Similarly, Stanford University finds that “learning about [an applicant’s] extracurricular activities and non–academic interests helps us to discover your potential contributions to the Stanford community,”<sup>97</sup> and Princeton notes that “[i]n addition to academic qualifications we are interested in the talents and interests [an applicant] would bring to Princeton outside the classroom.”<sup>98</sup> Participation in extracurricular activities can be the difference between being admitted or rejected because roughly three–quarters of the applicant pool possess the talent to succeed academically.<sup>99</sup>

These top schools are not necessarily interested in seeing a two–page list of different activities. Stanford University, for example, candidly states on its website: “an exceptional depth of experience in

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<sup>95</sup> Harvard College Office of Admissions, *Applying to Harvard: Frequently Asked Questions—Applications Procedures and Policies: How Important are Extracurricular Activities in Admissions Decisions?*, HARVARD COLL., <http://www.admissions.college.harvard.edu/apply/faq.html> (last visited Aug. 19, 2013).

<sup>96</sup> Yale College Undergraduate Admissions, *Advice on Putting Together Your Application*, YALE COLL., <http://admissions.yale.edu/advice-putting-together-your-application#extracurriculars> (last visited Aug. 19, 2013).

<sup>97</sup> Stanford University Undergraduate Admission, *Our Selection Process—Extracurricular Activities*, STANFORD UNIV., <http://www.stanford.edu/dept/uga/basics/selection/evaluate.html> (last visited Aug. 19, 2013).

<sup>98</sup> Princeton University Undergraduate Admission, *Admission FAQ: Reviewing the Applications—To What Extent Are Extracurricular Activities Considered in the Application Process?*, PRINCETON UNIV., [http://www.princeton.edu/admission/applyingforadmission/faq/reviewing\\_the\\_application](http://www.princeton.edu/admission/applyingforadmission/faq/reviewing_the_application) (last visited Aug. 19, 2013).

<sup>99</sup> Yale College Undergraduate Admissions, *What Yale Looks For*, YALE COLL., <http://admissions.yale.edu/what-yale-looks-for> (last visited Aug. 19, 2013).

one or two activities may demonstrate [an applicant's] passion more than minimal participation in five or six clubs. We want to see the impact you have had on that club, in your school, or in the larger community, and we want to learn of the impact that experience has had on you."<sup>100</sup> Given that there are many more qualified applicants than there are available seats, the admissions staff must make distinctions somewhere, and extracurricular activities provide a bright-line of demarcation in the applicant pool.

Participation in extracurricular activities not only fills up a line on a college application, it can do so much more. A student-athlete experiences success and failure, develops a work ethic, and is able to be passionate about something. These are characteristics of a student that teacher recommendations probably cannot speak to, but coaches get first-hand knowledge of an athlete's work ethic, is with the athlete after a big win or a bad loss—thus they are the ideal person to attest to a student's character and what he or she can contribute outside of the classroom. This is the type of information that elite schools desire in their admissions process because only then does a full picture of an applicant emerge.<sup>101</sup>

The benefits of participating in high school athletics are clear, but participation has two other significant benefits: these activities help to keep students in school and on a path for success, and they keep teenagers active and healthy. Studies show a correlation between participating in extracurricular activities and high school graduation rates.<sup>102</sup> Further, the importance of a high school diploma cannot be overstated because of the strong correlation between a high school diploma and future earning capacity.<sup>103</sup> In addition, participation in athletics keeps teenagers from being sedentary in front of a screen after school<sup>104</sup> and from avoiding non-nutritious eating habits.<sup>105</sup>

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<sup>100</sup> See *supra* note 97.

<sup>101</sup> See *supra* note 90.

<sup>102</sup> McNeal Jr., *supra* note 91, at 62 (Participating in extracurricular activities decreases the likelihood of dropping out of high school).

<sup>103</sup> Richard K. Caputo, *The GED as a Predictor of Mid-Life Health and Economic Well-Being*, 9 J. OF POVERTY 73–97 (2005) (finding that high school dropouts who eventually obtain their GED still tend to have decreased earning capacities as compared to high school graduates).

<sup>104</sup> Joe Flint, *Teens are Watching More TV, Not Less, Report Says*, L.A. TIMES (Mar. 9, 2013), <http://articles.latimes.com/2012/mar/09/business/la-fi-ct-teen-tv-study-20120309>.

### *B. The Pay-to-Play Model*

The pay-to-play model is one tool that school districts have utilized to combat tightening school budgets. As the name suggests, this model requires student-athletes to pay fees.<sup>106</sup> By definition, extracurricular activities include any and all activities that go beyond the traditional education curriculum. But the pay-to-play model specifically refers to participation fees in athletics.<sup>107</sup> The model is simple: first, a prospective student-athlete makes a school athletic team, and second, that student-athlete is handed a bill that shifts the costs of sports from the school to the student.<sup>108</sup>

There are two variations of this model. The first is a flat fee that covers an entire academic year. However, in many cases this fee actually covers two sports and not the whole school year.<sup>109</sup> If the student wants to play three sports or more, this model requires the student to pay another fee.<sup>110</sup> The second model, is one in which a district assigns a fee to a particular sport—presumably based on the cost to the district—and each team member is required to pay that fee. For example, a school district may determine that the participation fee for football is \$250, the fee for basketball is \$200, and is \$150 for

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<sup>105</sup> *TV Watching Teens Tend to Have Poorer Eating Habits*, NYDAILYNEWS.COM, <http://www.nydailynews.com/life-style/health/foster-healthier-eating-habits-teens-tv-article-1.1081824> (last updated May 21, 2012).

<sup>106</sup> For a discussion on how schools have used the pay-to-play fee to replace budget shortfalls, see Cook, *supra* note 5.

<sup>107</sup> The section will only address the model as it pertains to athletics since the majority of data addresses only that, but fees are charged for other activities such as National Honor Society and Student Government. See Erik Brady and Ray Giler, *To Play Sports, Many U.S. Students Must Pay*, USATODAY (Jul. 29, 2004, 11:06 PM), [http://usatoday30.usatoday.com/sports/preps/2004-07-29-pay-to-play\\_x.htm#](http://usatoday30.usatoday.com/sports/preps/2004-07-29-pay-to-play_x.htm#); see also *Public Schools' 'Pay to Play' Fees: By the Numbers*, THEWEEK (May 31, 2011, 12:32 PM), <http://www.theweek.com/article/index/215789/public-schools-pay-to-play-fees-by-the-numbers>; Stephanie Simon, *Public Schools Charge Kids for Basics, Frills*, THE WALL STREET JOURNAL (May 25, 2011), <http://www.onlinenews.com/article/SB10001424052748703864204576313572363698678.html> (budget shortfalls have caused Medina City Schools to impose fees on students to enroll in many basic courses such as Spanish and Earth Sciences, graded electives such as band, and extracurricular activities like cross-country and track).

<sup>108</sup> Kristobak Interview, *supra* note 86.

<sup>109</sup> High school athletics traditionally have three seasons: fall, winter, and spring.

<sup>110</sup> See Cook, *supra* note 5.

baseball. If a student wished to participate in all three sports, he may face a fee upwards of \$600.<sup>111</sup>

In many states where these models have been implemented, there are fee waiver provisions for participants from low-income families.<sup>112</sup> However, only six percent of those who apply for a waiver actually obtain one.<sup>113</sup> This may be due to the non-uniform methods of applying for waivers, which range from a teacher referral and parent application to a student's eligibility for free or reduced lunches.<sup>114</sup>

The pay-to-play model is in vogue as administrators try to trim budgets, but the idea is not new; rather this model began in the 1980s.<sup>115</sup> About thirty years after the idea was first introduced, sixty-one percent of all middle and high school student-athletes reported that they were required to pay participation fees.<sup>116</sup> Of that percentage, the average required fee is \$93, but twenty-one percent reported fees exceeding \$150 per year.<sup>117</sup> Furthermore, the report suggests that participation fees are in addition to the cost of equipment not provided by the schools.<sup>118</sup> In all, the report found the average cost for a

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<sup>111</sup> This fee does not include the costs that have always existed, such as equipment and transportation costs. This fee also does not account for injuries that a student-athlete may suffer while playing. If there is an injury, most schools shift the burden of the costs to the family by requiring student-athletes to sign releases before pre-season activities begin, thus causing the potential price tag to participate to skyrocket. However, Illinois has shifted the burden from the families onto the school by requiring the school to carry three million dollars in benefits or coverage for five years related to medical injuries that occur on the field or court. Mark Guarino, *Rocky's Law: Illinois Schools to Carry Catastrophic Insurance for Athletes*, CSMONITOR.COM (Aug. 5, 2013, 7:49 PM), <http://www.csmonitor.com/USA/Education/2013/0805/Rocky-s-law-Illinois-schools-to-carry-catastrophic-insurance-for-athletes-video>.

<sup>112</sup> See Cook, *supra* note 5; see also John Raffel, *Schools Mull the Future of Participation Fees for Athletic*, HIGHSCHOOLSPORTSCENE.COM (Oct. 18, 2012), <http://www.highschoolsportscene.com/articles/2012-10-18-schools-mull-the-future-of-participation-fees-for-athletic>.

<sup>113</sup> MOTT CHILDREN'S HOSPITAL, *supra* note 6, at 2.

<sup>114</sup> Raffel, *supra* note 113.

<sup>115</sup> See Attorney Gen. v. E. Jackson Pub. Sch., 372 N.W.2d 638, 639-40 (Mich. Ct. App. 1985) (holding that interscholastic sports were not an integral part to an education and thus allowed for the imposition of participation fees); Raffel, *supra* note 113.

<sup>116</sup> MOTT CHILDREN'S HOSPITAL, *supra* note 6, at 1.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* These costs include equipment that schools typically do not supply such as cleats, baseball gloves, hockey sticks, etc.

student–athlete to participate in school athletics per year was \$381,<sup>119</sup> but it is not uncommon for the fee to approach the \$1,000 mark.<sup>120</sup>

For instance, in one large suburban Ohio school district, the fees range from \$521 to \$933.<sup>121</sup> Nevertheless, some of the parents of the student–athletes in that district support the pay–to–play model, or at least prefer it to raising taxes to increase school revenue.<sup>122</sup> Distressingly, it is not improbable that participation fees will continue to increase as long as school budget crises persist. One is left to wonder whether there is a price when families will finally decide that the costs of the pay–to–play model are too exorbitant.

### *C. The Pay–to–Play Model Disparately Affects Low Income Families and Minorities*

America has struggled with education equality since states began providing free public education. Much of the struggle regarding equal education has centered on disparities based on socio–economic class and race.<sup>123</sup> The issues with pay–to–play are no different as many of the benefits discussed earlier are also restricted to white, middle class and affluent Americans. The next section will first examine how low–income families are negatively affected by the pay–to–play model<sup>124</sup> and then show that the pay–to–play model does in fact disproportionately affect racial minority families.<sup>125</sup>

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<sup>119</sup> *Id.*

<sup>120</sup> Cook, *supra* note 5.

<sup>121</sup> *Id.* The figure \$521 refers to the cost of cross country and \$933 to tennis.

<sup>122</sup> *Id.* Recently, the school budget was forced to make \$10 million in budget cuts after voters rejected the third proposed tax hike in the past two years, suggesting voters continue to prefer participation fees to a tax increase. Michael D. Clark, *Lakota Schools' Budget Ax Falls*, CINCINNATI.COM (May 12, 2012), <http://news.cincinnati.com/article/20120312/NEWS0102/303120161/Lakota-schools-budget-ax-falls>.

<sup>123</sup> See David R. Williams, *Race, Socioeconomic Status, and Health: The Added Effects of Racism and Discrimination*, 896 ANNALS OF THE N.Y. ACAD. OF SCI. 173, 173–88 (2006), available at <http://deepblue.lib.umich.edu/bitstream/handle/2027.42/71908/j.1749-6632.1999.tb08114.x.pdf?sequence=1>.

<sup>124</sup> See *infra* Part III.C.1.

<sup>125</sup> See *infra* Part III.C.2.

*1. Inequities, the Pay-to-Play Model, and Low Income Families*

The pay-to-play model creates inequities based on income level because it constructs barriers to opportunities. The Mott Report found a correlation between participation in school athletics and household income.<sup>126</sup> Only one-third of lower-income families have a child participating sports, whereas more than half of higher income families have a child participating.<sup>127</sup> This suggests that participation fees can be the barrier between a student participating and not. And the Mott Report found that nineteen percent of families earning less than \$60,000 curtailed their child from participating compared to just five percent for families making more than \$60,000.<sup>128</sup> This means that students from low-income families are nearly four times more likely than students from affluent families to be prohibited from the benefits of school athletics as discussed in Part III.A.

The inequity that exists for individual families can be extrapolated so as to see the inequities on a district-wide scale. Every family is different; some prioritize one thing over another. As the Mott Report implies, some lower-income families must place a higher emphasis on participation in school sports than others because not every family is stopping their child from participating.<sup>129</sup> But if enough students in a given district are unable to participate in a particular sport because of the associated fees, or for any other reason, this may then prompt the district to eliminate the sport altogether.<sup>130</sup> For instance, school districts may not want to continue to budget for a basketball team that consistently has only six players. In this sense, the model has the effect of threatening those students who can afford to pay the participation fee from participating and thus restrict their access to the benefits and opportunities that accompany high school athletics.

Beyond the consequences the model creates for lower income college applicants, the other benefits that accompany participation in school athletics are diminished as well. Families, regardless of income level, that pay these participation fees likely do so with some

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<sup>126</sup> MOTT CHILDREN'S HOSPITAL, *supra* note 6, at 1.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> Kristobak Interview, *supra* note 86.

expectations. For instance, parents who pay the fee probably expect that their student–athlete will get playing time and not be confined to the bench for the whole season. These expectations produce pressure for the coach to monitor playing time and ensure that every athlete receives the same playing time. This simultaneously creates the impression in a student–athlete that he or she can simply buy his or her way onto a team. This unintended consequence of creating an entitlement mentality undermines some of the most valuable lessons of athletics—determination, hard work, and perseverance are necessary for success.

2. *The Inequities of the Model Simultaneously Affect Racial Minorities Because Low–Income Families are Primarily Comprised of Racial Minorities*

The pay–to–play model creates inequities based on race because there is a strong correlation between low–income and racial minorities.<sup>131</sup> The correlation between low–income and racial minorities can be seen through the population make up of cities as opposed to suburbs. For example in Baltimore, Maryland, the median income is \$39,000,<sup>132</sup> and the population is comprised of about seventy percent of racial minorities.<sup>133</sup> While in Montgomery County, a suburb of Washington, D.C., the median income is more than \$94,000<sup>134</sup> and has a much more homogenous racial makeup with minorities making up about fifty percent.<sup>135</sup>

The school populations reflect a comparable population demographic. For instance in the Baltimore City School District, minority students outnumber white students at a rate of almost four–to–one.<sup>136</sup> In the Montgomery County School District, the racial makeup is vastly different as white students outnumber minority students at a rate of nearly two–to–one.<sup>137</sup> The difference is significant because an intensely segregated African American or Latino School is

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<sup>131</sup> Williams, *supra* note 124, at 173–88.

<sup>132</sup> *Baltimore City–Data*, *supra* note 30.

<sup>133</sup> U.S. Census Bureau, *State and County Quick Facts: Baltimore City, Maryland*, CENSUS.GOV, <http://quickfacts.census.gov/qfd/states/24/24510.html> (last updated June 27, 2013, 3:11 PM).

<sup>134</sup> *Montgomery County City–Data*, *supra* note 32.

<sup>135</sup> *Id.*

<sup>136</sup> *District Details for Baltimore City*, *supra* note 29.

<sup>137</sup> *District Details for Montgomery County*, *supra* note 31.

fourteen times more likely to be a high poverty district than other schools.<sup>138</sup> And urban (minority) children, like those enrolled in the Baltimore City School District, are four times more likely to attend a poor school than are suburban children.<sup>139</sup> So when schools implement the pay-to-play model, it is not only four times more likely to deter low-income families but also racial minorities at a similar rate.

#### IV. INCLUDING EXTRACURRICULARS AS PART OF AN ADEQUATE EDUCATION

If states are serious about offering a public education system that provides the opportunity for an equal education, then states need to include extracurricular activities as part of an adequate education. One way to combat the effects of the pay-to-play model is to include athletics as part of an adequate education. This would mandate districts to provide funding for athletics, thereby putting all students on an equal playing field. Accomplishing this would be no small task as almost no state has a prohibition against charging fees to participate.

But including this as part of an adequate education does nothing to solve the problem of funding those activities. Notwithstanding the importance of extracurricular activities, one would likely be hard pressed to find someone advocating for funds to be directed away from the classroom and into athletics. But this should not impede a district's ability to find alternative methods of funding; it just means that school districts need to get creative.

A possible alternative, albeit likely unpopular one, would be to raise property taxes to account for an athletics budget, which on the whole is a relatively small part of a school's budget. Another method could be seeking local business sponsors, which would grant a business naming rights to the stadium or arena and give the business the right to market itself at the various sporting events. By using local businesses as the sponsors as opposed to national sponsors, districts would retain control over the operation of its athletics and facilities, but it would be sharing that cost with the community. In some places, this is likely a tough sell to business owners, but in others,

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<sup>138</sup> Williams, *supra* note 124, at 173–88.

<sup>139</sup> Nat'l Ctr. for Educ. Statistics, *supra* note 42.



communities are inextricably tied to and invested in the success of its local high school teams.

One of the greatest parts of high school sports is the enthusiasm and the camaraderie that permeates through a given school. School districts ought to harness that enthusiasm, and use it to find methods to fund extracurricular activities so that schools can offer a more adequate education to all American students.

### CONCLUSION

Extracurricular activities offer students life lessons beyond reading, writing, and arithmetic—they offer the opportunity to improve and refine inter and intra-personal skills that are important for success. But the benefits do not simply stop at building character; studies have shown that participation in extracurricular activities, such as athletics, increase the likelihood that students stay on the path towards graduating high school.<sup>140</sup> And in today's globalized market, the advantages of obtaining a high school diploma are still profound as the average income for a high school graduate is nearly \$10,000 more than a high school dropout.<sup>141</sup> The potential benefits of extracurriculars may have a further impact as high school student-athletes are more than one and a half times more likely to obtain a college education than non-student-athletes.<sup>142</sup> The significance of a college education versus a high school education or less is profound as those who earn post-secondary degrees earn more than double high school dropouts and nearly \$10,000 more than high school graduates.<sup>143</sup>

For a select few extracurriculars will pave one's path to college with an athletic scholarship, but for most participation will not yield a scholarship; however that does not lessen the potential importance of

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<sup>140</sup> See *supra* Part III.A.

<sup>141</sup> ALLIANCE FOR EXCELLENT EDUC., THE HIGH COST OF HIGH SCHOOL DROPOUTS: WHAT THE NATION PAYS FOR INADEQUATE HIGH SCHOOLS, ALL4ED.ORG (Nov. 2011), <http://www.all4ed.org/files/archive/publications/HighCost.pdf>. [hereinafter ALLIANCE FOR EXCELLENT EDUC.].

<sup>142</sup> DEVEN CARLSON & LESLIE SCOTT, STATISTICS IN BRIEF: WHAT IS THE STATUS OF HIGH SCHOOL ATHLETES 8 YEARS AFTER THEIR SENIOR YEAR, NAT'L CTR FOR EDUC. STATISTICS (2005), available at <http://nces.ed.gov/pubs2005/2005303.pdf>.

<sup>143</sup> In 2009, the average annual income for a graduate with a Bachelor's Degree was \$46,930 compared to \$36,190 for a graduate with an Associate's Degree. Similarly, a high school graduate earned \$27,380 compared to \$19,540 for high school dropouts. ALLIANCE FOR EXCELLENT EDUC., *supra* note 142.

participation.<sup>144</sup> It may simply be that participation compels someone to attend school regularly or motivates a student to try harder in the classroom in order to remain eligible to compete. Participation also demonstrates to colleges that there is more to an applicant than just grades; it helps demonstrate that a student–athlete is able to add value to a school’s community and incoming freshmen class, which makes for a more attractive applicant.

There are tangible and intangible benefits of high school athletics, but those benefits are being stripped away by districts that employ the pay–to–play model. Further, the model is not being implemented uniformly; the model is being implemented in school districts on an as–needed basis. This creates inequities from school district to school district because schools that are able to provide extracurricular activities at no extra cost are offering a higher qualitatively minimum education than those that impose the fees. In reality, the deterrence effect that is created by the model is found more predominantly in low–income families. And because low–income families are more often than not synonymous with racial minorities, the pay–to–play model simultaneously creates inequities among low–income families and racial minorities. The elimination of the pay–to–play model from a district’s method of funding extracurricular activities is an important step towards ensuring that every American student is offered a qualitatively equal education.

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<sup>144</sup> For a list by sport of the percentages of high school athletes that go on to play college athletics, see Lynn O’Shaughnessy, *The Odds of Playing College Sports*, CBS (Apr. 4, 2011, 12:49 pm), [http://www.cbsnews.com/8301-505145\\_162-37244966/the-odds-of-playing-college-sports](http://www.cbsnews.com/8301-505145_162-37244966/the-odds-of-playing-college-sports).