

Misspent Money: How Inequities in Athletic Funding in New Jersey Public Schools May Be the Key to Underperformance

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## INTRODUCTION

“If the children of poorer districts went to school today in richer ones, educationally they would be a lot better off,” the Supreme Court of New Jersey opined in its second *Abbott* decision.<sup>1</sup> This disturbingly accepted truth led the Court to the creation of a school-funding scheme that funneled state money into the poorest districts in New Jersey.<sup>2</sup> The scheme is extraordinary in the United States in that it requires education funding parity with the state’s wealthiest districts.<sup>3</sup> Today, many of these 31 “Abbott” districts spend more money per student than many of the much wealthier districts.<sup>4</sup> However, one area of education seems to have been placed low on the funding priority list: athletics. Yet, why should athletics get any priority at all? They are, after all, something extra. Athletics cannot teach the same principles that subjects like English or math can, nor does their primary skill set carry into old age and accompanying crumbling joints. Somehow, however, as this comment will argue, athletics continue to be an integral part of many students’ education. There is something about playing sports that is fundamental to people; they have a unique ability to capture attention and encourage students the way that every high school English and math teacher tries, usually in vain, to do. But still – are athletics *essential* in school?

Bob Hurley, the basketball coach at St. Anthony High School in Jersey City, New Jersey, argues that, for some students, sports are essential.<sup>5</sup> “I think everybody can be better than they think they can be,” said Hurley in an episode

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1. *Abbott by Abbott v. Burke (Abbott II)*, 575 A.2d 359, 364 (N.J.1990).

2. *Id.*

3. Ford Fessenden, *Abbott School Districts Among the Top Spenders*, N.Y. TIMES, June 10, 2007, available at <http://www.nytimes.com/2007/06/10/nyregion/nyregionspecial2/10mainnj.html?fta=y>.

4. *Id.*; In 2008, the New Jersey Legislature passed the School Funding and Reform Act of 2008, which attempted to eliminate funding purely on an *Abbott* or non-*Abbott* basis and instead focuses on funding all at-risk school districts. The Legislature opined, “[t]he decisions in the *Abbott* cases have resulted in frequent litigation and a fragmented system of funding under which limited resources cannot be distributed equally to all districts where at-risk children reside, instead dividing the districts sharply into *Abbott* and non-*Abbott* categories for funding purposes without regard to a district’s particular pupil characteristics . . . .” School Funding and Reform Act of 2008 2007 NJ Sess. Law Serv. 3 (West).

5. 60 Minutes (CBS television broadcast March 27, 2011), available at: <http://www.cbsnews.com/video/watch/?id=7360940n>.

of *60 Minutes*.<sup>6</sup> “Education changes the direction of [a student’s] life.”<sup>7</sup> Coach Hurley, who has attracted national attention for his success coaching inner city students,<sup>8</sup> argues that adolescent males need to be driven by outside influences in order to perform regularly at a high level.<sup>9</sup> “I would sit and listen to these men’s stories for thirty years, and almost always it was the same. Somewhere in the eighth, ninth grade, when they were just starting to make decisions, they got off course.”<sup>10</sup>

St. Anthony High School is a small Catholic school in a rundown neighborhood of Jersey City, New Jersey.<sup>11</sup> Most of its students live below the poverty line.<sup>12</sup> Athletics instill discipline in Hurley’s students. By joining the team, students agree not to use alcohol, cigarettes, narcotics, or get tattoos.<sup>13</sup> Parents say their children’s experiences with Coach Hurley are *the* most demanding of their young lives.<sup>14</sup> To date, Coach Hurley has only had two students in 39 years who did not attend college. He credits this to his students’ experience as athletes on his team.<sup>15</sup>

Stories like that of St. Anthony High School have captured audiences all over the United States. *The Blind Side* received an Academy Award nomination for Best Picture in 2009; the movie is based on the true story of a foster child who went on to attend college on a football scholarship and eventually play in the National Football League.<sup>16</sup> So why, when “more money” has proved unsuccessful in accomplishing the goal of equal education, have we failed to acknowledge the positive effects that athletics can have on education?

This comment argues that, in order to approach equality of education between public schools in New Jersey, we must

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6. *Id.*

7. *Id.*

8. ADRIAN WOJNAROWSKI, *THE MIRACLE OF ST ANTHONY* (2005).

9. *Id.*

10. *Id.* at xiii.

11. Pete Radovich, Jr., Coach Bob Hurley: The Sage of St Anthony, CBSNEWS, March 24, 2011, available at [http://www.cbsnews.com/2100-18560\\_162-20046862.html?tag=contentMain;contentBody](http://www.cbsnews.com/2100-18560_162-20046862.html?tag=contentMain;contentBody).

12. *Id.*

13. *Id.*

14. *60 Minutes*, *supra* note 5 (emphasis added).

15. *Id.*; Radovich, *supra* note 11.

16. *The Blind Side*, IMDB.COM, <http://www.imdb.com/title/tt0878804/> (last visited Jan. 13, 2012); *THE BLIND SIDE* (Warner Bros. 2009).

make athletics a recognized part of the school funding equation. Part I assesses athletic funding in New Jersey public schools and the disparity between money spent on athletics in the wealthy suburban districts and money spent on athletics in poor urban districts. It will also examine the history of New Jersey's highly-litigated funding scheme to bring education in poor districts to the level of wealthy districts, and how inequity continues to exist in the area of athletic funding. Part II will examine the psychological effect that athletics can have on children, especially poor and minority children, and why this matters in low-income communities. It will then argue that adequate athletic programming should be a priority of public education, especially in poor urban school districts. Finally, Part III proposes that the New Jersey Legislature should specifically require an allocation of funding for school-sponsored athletics in its base-level per pupil amount and ensure that this amount is given more weight for low-income districts. Such an allocation would ensure that athletics are taken into account as an important part of education, not just as one option under an umbrella of co-curricular activities. This would further ensure that low-income schools receive the funding to help their students compete with their suburban neighbors.

## I: FUNDING FOR PUBLIC SCHOOLS

### *A: A Primer on Funding in American Public Schools*

While American public schools are funded by a mixture of federal, state, and local money,<sup>17</sup> the state is largely responsible for creating school funding schemes.<sup>18</sup> These funding schemes are comprised of a formula determining how much of a municipality's budget will be borne by state taxpayers and how much will be borne by local taxpayers.<sup>19</sup> This poses a problem. If a school is locally controlled, it can

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17. The distribution of total public elementary school and secondary school funding in the United States is as follows: 46.7% is funded by state sources, 43.8% is funded by local sources, and 9.5% is funded by federal sources. See U.S. CENSUS BUREAU, G09-ASPEF, PUBLIC FINANCES: 2009 (2011), available at [www2.census.gov/govs/school/09f33pub.pdf](http://www2.census.gov/govs/school/09f33pub.pdf).

18. DEBORAH YAFFE, OTHER PEOPLE'S CHILDREN 12 (2007).

19. *Id.* at 13.

cater to its own specific interests by heavily relying on the local tax base.<sup>20</sup> However, this also means that the poverty or wealth of the district will greatly affect the size of the budget.<sup>21</sup> Conversely, state taxpayers can fund every district across the entire state equally; the consequence, however, is that school districts will then be centrally controlled by far-away and perhaps out-of-touch politicians.<sup>22</sup>

Traditionally, local control was important because most Americans lived in small, isolated communities; thus, schools were primarily community-serving.<sup>23</sup> Yet Professors Bruce J. Biddler and David C. Berliner argue that this system is flawed.<sup>24</sup> While the local funding system has been retained, most impoverished Americans presently reside in urban cities while the majority of wealthy Americans, privately holding enough resources to adequately fund schools, live in the surrounding suburbs.<sup>25</sup> This, the professors argue, perpetuates inequality because wealthy Americans have an incentive to fund the schools their own children will attend but no incentive to pay additional taxes to fund underserved schools.<sup>26</sup> Consequently, the state must involve itself in distributing funding to public schools if it wants to break the inequality of the local funding cycle.

State-created funding formulas take four different shapes. First, the state can pay the entire cost of each child in public school.<sup>27</sup> Second, the state can give each district a certain amount per student, while the locality, if it so chooses, is free to spend its own money above the state allocation.<sup>28</sup> Third, the state can set a foundation that requires every town to set a minimum taxing and spending level; the state compensates for localities that cannot raise the funds to cover the foundation amount.<sup>29</sup> Lastly, the state can allow the locality

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20. *Id.*

21. *Id.*

22. *Id.*

23. Bruce J. Biddle & David C. Berliner, WestEd, What Research Says About Unequal Funding for Schools in America, 6 (2003) available at <http://www.wested.org/cs/we/view/rs/694>.

24. *Id.*

25. *Id.*

26. *Id.*

27. Yaffe, *supra* note 18 at 16-17.

28. *Id.*

29. *Id.*

to choose its own tax rate and spending level and compensate for the amount that the locality would have raised if it had had a guaranteed tax base level.<sup>30</sup>

Historically, New Jersey funded school districts based on how much each county paid in taxes, ensuring that those counties who earned higher rates of tax received more in state funding.<sup>31</sup> In 1871, the legislature implemented a formula by which state funds were distributed on a per-pupil basis; however, due to political pressure in the early twentieth century, the state reverted back to distribution in proportion with property tax.<sup>32</sup> This led to urban areas taxing significantly more but spending significantly less per student. For example, in 1966-67, Newark spent \$599 per child and taxed \$2.20 per every \$100 of assessed property. Yet Milburn, the wealthy suburb down the road, taxed only \$1.21 per every \$100 of assessed property value while spending \$786 per student.<sup>33</sup>

Advocates for equal education for all students initially regarded the courts as the best place to fight for education reform in areas like equality for all students.<sup>34</sup> In 1954, proponents of education equality for all Americans garnered their first victory in the Supreme Court of the United States (“Supreme Court”) in *Brown v. Board of Education*, in which the Court struck down a system that sent students to separate schools on the basis of their race. Noting the inherent inequalities in such a system, the Court wrote that educational opportunity “is a right which must be made available to all on equal terms.”<sup>35</sup> Additionally, the Court noted the difficulties that separation of equally capable students could have on a child’s psyche:<sup>36</sup> “[t]o separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to be undone.”<sup>37</sup>

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30. *Id.* at 17.

31. *Id.* at 15.

32. Yaffe, *supra* note 18 at 14.

33. *Id.* at 15.

34. Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, (1995).

35. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

36. *Id.*

37. *Id.*

Even though the Court removed deliberate racial segregation in *Brown*, educational inequality still remained on the basis of poverty, or between poor urban blacks and wealthy suburban whites.<sup>38</sup> As a result, the 1960's advocates shifted away from civil rights on the basis of race and towards the "barriers of poverty."<sup>39</sup>

However, in 1973 the Supreme Court foreclosed the possibility of using wealth as a suspect class to reform educational funding in *San Antonio Independent School District v. Rodriguez*.<sup>40</sup> *Rodriguez* was a class action suit brought on behalf of poor children residing in Texas districts with low property tax bases, and alleged that the Texas school funding scheme was unconstitutional because of its heavy reliance on property tax bases to finance public schools.<sup>41</sup> As a result, the poor Edgewood, Texas district had raised only \$26 per student while taxing its base at 1.05%, while state and federal support brought the total amount per pupil to \$356. On the other hand, the wealthy Alamo Heights district had raised \$333 per pupil by taxing its base at 0.85%, while state and federal support brought its total amount of funding per pupil to \$594.<sup>42</sup>

The Supreme Court held that the funding scheme was not unconstitutional, noting that change in this system should come from the "lawmakers and the democratic pressures of those who elect them."<sup>43</sup> The Court reasoned that the poorest families are "not necessarily clustered in the poorest school districts,"<sup>44</sup> and that the Equal Protection Clause does not require "absolute equality or precisely equal advantages."<sup>45</sup> In so holding, the Court shut down, for all practical purposes, federal legal avenues as the means to equality in school funding and shifted the responsibility back to the states.

While the Supreme Court effectively ended educational funding litigation based on federal constitutional rights in *Rodriguez*, the movements of the 1960's left a substantial

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38. Enrich, *supra* note 34.

39. Enrich, *supra* note 34.

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

41. *Id.*; Kathleen M. Sullivan & Gerald Gunther, *CONSTITUTIONAL LAW* 683 (17th ed. 2010).

42. *Rodriguez*, 411 U.S. at 13; Sullivan, *supra* note 41.

43. *Rodriguez*, 411 U.S. at 23.

44. *Id.*

45. *Id.* at 24.

mark on public educational funding across the country.<sup>46</sup> In particular, many states instituted a monetary minimum that must be spent on funding for each pupil.<sup>47</sup> These foundations have sometimes been criticized as a barrier for plaintiffs interested in bringing suits relating to school funding because, in most cases, all of the school districts' funding is significantly above the foundation level.<sup>48</sup> Additionally, the foundation has done little to cure the enormous discrepancy that still remains between wealthy and poor districts.<sup>49</sup>

*B: A "Thorough and Efficient Education"*

New Jersey, a geographically small state with great wealth disparities between neighboring towns,<sup>50</sup> provides a special case in public school funding and equality. Litigation concerning school funding began in New Jersey in 1973 with *Robinson v. Cahill*, in which the New Jersey Supreme Court ultimately ruled in favor of four urban school districts that challenged the constitutionality of the state's public school funding scheme.<sup>51</sup>

The trial court, which issued its decision approximately one year before the federal court's ruling in *Rodriguez*, viewed education as a fundamental right and wealth as a suspect class.<sup>52</sup> As such, it held that a school-funding program where the state distributes unequal amounts of money dependent upon where students live violates both students' and taxpayers' equal protection rights.<sup>53</sup> The trial court reasoned that the program violated taxpayers' rights because it required them to be responsible for different proportions of education funding based on where they lived.<sup>54</sup> The trial

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46. Enrich, *supra* note 34.

47. *Id.*

48. *Id.*

49. *Id.*

50. See Jeanne Sahadi, *Mind the Gap: Income Inequality, State by State*, CNNMONEY, (Jan. 27, 2006), [http://money.cnn.com/2006/01/25/news/economy/income\\_gap/#table](http://money.cnn.com/2006/01/25/news/economy/income_gap/#table). Sahadi notes that the Economic Policy Institute and the Center on Budget and Policy Priorities ranked New Jersey as the state with the fourth greatest income disparity between the average income for the top 5% of families and the bottom 20% of families.

51. Yaffe, *supra* note 18 at 30.

52. *Id.*

53. *Id.*

54. *Id.*

court also held that education is a state and not a local responsibility, and thus taxpayers should share equally in its cost.<sup>55</sup> On appeal, due to its close timing with *Rodriguez* and its consequent local and national spotlight, the case was fast-tracked and was heard on appeal by the New Jersey Supreme Court.<sup>56</sup>

Based on the United States Supreme Court's ruling in *Rodriguez*, the New Jersey Supreme Court rejected the trial court's reasoning.<sup>57</sup> However, the Court opined that the New Jersey Constitution guarantees a "thorough and efficient education," which should be understood as "the educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and competitor in the labor market."<sup>58</sup> Therefore, the Court held that the current scheme contrasted with the New Jersey Constitution and needed to be changed.<sup>59</sup>

However, while legislation in the wake of *Robinson* added to overall school funding, a majority of funding was distributed to middle-class schools as opposed to poor urban schools.<sup>60</sup> Additionally, funding that was not distributed to poor urban schools was used to lower property taxes by replacing local revenue with the new state revenue.<sup>61</sup> As a result, in the case of *Abbott v. Burke*, the Education Law Center (ELC) filed a complaint naming twenty plaintiffs who attended public schools in Camden, East Orange, Irvington, and Jersey City.<sup>62</sup> The plaintiffs claimed that, despite the New Jersey Supreme Court's ruling in *Robinson*, the school-funding scheme in New Jersey continued to "rely on widely disparate local property wealth."<sup>63</sup> The complaint in *Abbott* asserted that the problem had not dissipated under the new system, and it still had the same effects as the old, unconstitutional system.<sup>64</sup> On the State's motion, the case

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55. *Id.*

56. Yaffe, *supra* note 18 at 30.

57. *See generally*, *Robinson v. Cahill* 303 A.2d 273 (N.J. 1976).

58. *Robinson*, 303 A.2d at 295.

59. *Id.*

60. Yaffe, *supra* note 18 at 90.

61. *Id.*

62. *Abbott v. Burke*, 495 A.2d 376, 380 (N.J. 1985). ("Abbott F").

63. Yaffe, *supra* note 18 at 90.

64. *Id.* at 99.

was moved to the administrative court.<sup>65</sup>

The administrative court ultimately found fundamental flaws in the school funding system, ruling that the disparities in efficiency were grounded in wealth; that the that districts, including the plaintiffs “were not providing the constitutionally mandated thorough and efficient education;” that the state’s funding scheme denied students a “thorough and efficient education;” and that this current system was unconstitutional.<sup>66</sup>

However, when the decision was handed down to the Commissioner of Education, the Commissioner failed to adopt the administrative court’s recommendations.<sup>67</sup> While recognizing the disparities pointed out by the court, the New Jersey State Board of Education, nevertheless, adopted the Commissioner’s own recommendations, ultimately deciding that the system was constitutionally substantial.<sup>68</sup>

The plaintiffs appealed the decision, and the New Jersey Supreme Court finally heard the case in 1989.<sup>69</sup> In its decision, the New Jersey Supreme Court held that the system did not live up to the “thorough and efficient” clause of the New Jersey Constitution and held the system unconstitutional.<sup>70</sup> The court recognized that addressing inequities in funding could not cure all educational inequities.<sup>71</sup> Yet, even if money was not the root of the problem, it did not follow that the school districts should be given less funding.<sup>72</sup>

Instead of making a broad statement that the current system was unworkable, as it had done in the *Robinson* decision, the court wanted to provide an implementable

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65. The State responded by filing a motion to dismiss, claiming that the plaintiffs had not taken advantage of administrative remedies. *Abbott I*, 495 A.2d at 380. The trial court held for the State. Yaffe, *supra* note 18 at 99. On appeal, the Appellate Division reversed the decision, and the defendants subsequently petitioned the New Jersey Supreme Court for certification regarding the tribunal where the controversy should be held. *Abbott I*, 495 A.2d at 380. The New Jersey Supreme Court held for the State, and the case was transferred to administrative court. *Id.* at 394.

66. *Abbott II*, 575 A.2d at 364.

67. *Id.* at 364-65.

68. *Id.* at 365.

69. *Id.*

70. *Id.* at 363.

71. *See id.* at 365.

72. *Id.* at 364.

solution in its holding.<sup>73</sup> The New Jersey Supreme Court opined that school funding cannot depend upon the “budgeting and taxing decisions of local school boards” and “must be certain, every year.”<sup>74</sup> Thus, the court decided to focus on the districts that were the worst off, giving the legislature the broad ability to devise a remedy.<sup>75</sup> While this left the ultimate decision with the Legislature, the court distinguished 28 districts that should qualify, based on the Commissioner’s designations. The court noted that there was no evidence of a “thorough and efficient education” violation elsewhere in New Jersey.<sup>76</sup>

### *C: Present Day School Funding in New Jersey*

The *Abbott II* decision has been modified a multitude of times since 1989.<sup>77</sup> Most recently, the New Jersey Legislature passed the School Funding Reform Act of 2008 (“SFRA”).<sup>78</sup> The SFRA provides “the skills and knowledge necessary” for New Jersey’s children to succeed and become productive members of society.<sup>79</sup> In passing the SFRA, the New Jersey Legislature sought to address the deficiencies of past formulas more specifically as well as the realities of each individual school district and its community.<sup>80</sup>

The SFRA creates a base-per-pupil amount for each school year and provides a formula to assign different weight to school districts with different concerns.<sup>81</sup> The purpose of the formula is to provide more funding per student to middle and high schools, vocational schools, districts with large amounts of at-risk pupils, bilingual pupils (including those at-risk), special education pupils, and districts with lower property values and incomes.<sup>82</sup> The base-per-pupil amount includes the cost of the core curriculum, extracurricular activities, and

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73. Yaffe, *supra* note 18 at 191.

74. *Abbott II*, 575 A.2d at 408.

75. *Id.*

76. *Id.* at 408.

77. See Designation of Abbott Districts Criteria and Process, STATE OF NEW JERSEY DEPARTMENT OF EDUCATION, <http://www.state.nj.us/education/archive/abbotts/regs/criteria/criteria2.htm> (last accessed on Feb. 10, 2012).

78. See School Funding and Reform Act of 2008, 2007 NJ Sess. Law Serv. 1 (West).

79. *Id.* at 2.

80. *Id.* at 3.

81. *Id.* at 5.

82. *Id.* at 11-15.

the co-curricular activities necessary for a thorough and efficient education.<sup>83</sup>

The SFRA and its predecessors<sup>84</sup> serve to distribute more funds to failing school districts. However, these districts continually fail to rise to the level of their suburban counterparts.<sup>85</sup> The *Abbott* districts and other similarly-situated urban districts consistently rank as some of the lowest schools in the state based on factors including class size, the percentage of students who pass high school proficiency tests, and the number of students who graduate.<sup>86</sup> What is the reason for this disparity? This note argues that in order to begin to bring *Abbott* districts up to par with other districts in the state, the solution is not for New Jersey to solely increase the amount of money allocated to these districts. Instead, the legislature must also carefully craft a new funding formula, expand the definition of “education,” and include athletics as a significant part of the equation.

#### *D: The Current State of Athletic Funding: New Jersey*

Funding for New Jersey’s *Abbott* districts and non-*Abbott* districts paints a murky picture of how athletics are now funded in the state’s most urban areas. In essence, local property taxes fund suburban athletics, while the state provides financial resources for the *Abbott* districts’ athletics.<sup>87</sup> Presently, the state mandated amount that must be spent on high school athletics in New Jersey is fairly

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83. *Id.* at 5.

84. SFRA replaced the 1996 Comprehensive Education Improvement and Financing Act (CEIFA), which outlined the amount of money required for a thorough and efficient education. *See* School Funding and Reform Act of 2008, 2007 NJ Sess. Law Serv. Ch. 260 (ASSEMBLY 500) (West). The New Jersey Supreme Court found CEIFA unconstitutional as it applied to special need districts, and ordered that funding for these districts be increased. *Abbott v. Burke*, 149 N.J. 145 (1997) (“*Abbott IV*”). CEIFA replaced the Quality Education Act (QEA) of 1990, also declared unconstitutional, because it failed to ensure parity for special needs districts. *Abbott v. Burke*, 136 N.J. 444, 643 A.2d 575 (N.J. 1994) (“*Abbott III*”).

85. Fessenden, *supra* note 3.

86. *See* 2010 Top High Schools, N.J. MONTHLY, [http://njmonthly.com/articles/towns\\_and\\_schools/highschoolrankings/top-high-schools-2010.html](http://njmonthly.com/articles/towns_and_schools/highschoolrankings/top-high-schools-2010.html) (last accessed Jan. 13, 2012). *See also* New Jersey School District Rankings, SCHOOLDIGGER.COM, [schooldigger.com/go/NJ/districtrank.aspx](http://schooldigger.com/go/NJ/districtrank.aspx) (last accessed on Jan. 13, 2012).

87. *See* School Funding and Reform Act of 2008, 2007 NJ Sess. Law Serv. Ch. 260 (ASSEMBLY 500) (West).

vague.<sup>88</sup> The per pupil expenditure requirement contains the allocation for school sponsored athletics. In this requirement, funding per pupil must reach a benchmark for core education, transportation, and extracurricular activities.<sup>89</sup> Therefore, while each school must spend a certain amount per pupil on general extracurricular activities, this amount, and thus the amount that must be spent on athletics specifically, is quite discretionary.<sup>90</sup>

The SFRA makes specific legislative findings that “high school athletics often serve an integral role in the development of [the] student” and that “high school athletics foster friendships and camaraderie while promoting sportsmanship and fair play and instill the value of competition.”<sup>91</sup> It is clear that the legislature acknowledges the importance of athletics as a part of this equation, emphasizing that the values and benefits of high school athletics should be “actively promoted and made available to all students.”<sup>92</sup> It is important to note, however, these findings are created through the lens of lawmakers protecting the rights of students who have cognitive and physical limitations.<sup>93</sup> These legislative findings afford no consideration to the student who may not be able to meaningfully participate in adequate athletic programming because of his family’s income level.<sup>94</sup>

Research shows that higher income schools in New Jersey spend a significantly larger amount of money on athletics per student than Abbott districts.<sup>95</sup> Likewise, poor urban Abbott districts spend less money on athletics than poor urban non-

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88. See *id.* SFRA barely mentions athletic funding, but does specify that athletic funding is part of a much larger equation.

89. *Id.* at 11-15.

90. *Id.*

91. N.J. STAT. ANN. § 18A:11-3.2

92. *Id.*

93. *Id.*

94. See *id.*

95. See Stephen Zengel, *An Analysis of Athletic Expenditures in New Jersey Schools* (Oct. 2010) (unpublished Ph.D., dissertation, Rutgers University) (on file with the Rutgers University Library), available at <http://www.worldcat.org/title/analysis-of-athletic-expenditures-in-new-jersey-schools/oclc/693519037?title=&detail=&page=frame&url=http%3A%2F%2Fhdl.rutgers.edu%2F1782.1%2Frucore10001500001.ETD.000055923%26checksum%3D8a82ebfc8d568e4996e7b57c9fef9ed5&linktype=digitalObject>.

Abbott districts,<sup>96</sup> though the amount they spend in total per student is much greater.<sup>97</sup>

For example, in 2009-2010, the Newark School System spent approximately \$1,000,000 on school-sponsored athletics<sup>98</sup> for approximately 40,000 students,<sup>99</sup> including 10,000 high school students.<sup>100</sup> On the other hand, the Millburn Public School System, a district just east of Newark, New Jersey, boasts a high school that is consistently rated one of the best high schools in the state.<sup>101</sup> This Millburn school system spent approximately \$1,000,000 on school-sponsored athletics in 2009-2010<sup>102</sup> for approximately 5,000 students,<sup>103</sup> including 1,500 high school students.<sup>104</sup> Simple

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96. *Id.*

97. Fessenden, *supra* note 3.

98. The Newark School System spent \$746,699 on school-sponsored athletics in 2008-2009, appropriated \$1,112,543 in 2009-2010, and appropriated \$904,765 for the 2010-2011 school year. NEWARK DISTRICT BUDGET STATEMENT FOR THE SCHOOL YEAR 2010-2011, Page B1, <http://www.nps.k12.nj.us/2286107191130160/lib/2286107191130160/userfriendlybudget.pdf>

99. In the 2009-2010 school year, the student population in the Newark School System totaled 39,443. District Detail for Newark, NATIONAL CENTER FOR EDUCATIONAL STATISTICS, [http://nces.ed.gov/ccd/districtsearch/district\\_detail.asp?Search=1&details=1&InstName=newark&City=newark&State=34&DistrictType=1&DistrictType=2&DistrictType=3&DistrictType=4&DistrictType=5&DistrictType=6&DistrictType=7&NumOfStudentsRange=more&NumOfSchoolsRange=more&ID2=3411340](http://nces.ed.gov/ccd/districtsearch/district_detail.asp?Search=1&details=1&InstName=newark&City=newark&State=34&DistrictType=1&DistrictType=2&DistrictType=3&DistrictType=4&DistrictType=5&DistrictType=6&DistrictType=7&NumOfStudentsRange=more&NumOfSchoolsRange=more&ID2=3411340) (last visited Nov. 1, 2011).

100. The author specifies the number of high school students for comparison purposes, as traditionally high schools are more likely to sponsor athletic programs than grade schools. There were 9,546 high school students in the Newark School System in 2009-2010. District Information, NEWARK PUBLIC SCHOOLS, <http://www.nps.k12.nj.us/22861071412143407/site/default.asp> (last visited Jan. 13, 2012).

101. 2010 Top High Schools, N.J. MONTHLY, [http://njmonthly.com/articles/towns\\_and\\_schools/highschoolrankings/top-high-schools-2010.html](http://njmonthly.com/articles/towns_and_schools/highschoolrankings/top-high-schools-2010.html) (last accessed on Jan. 13, 2012). Millburn High School was rated the number one high school in both 2010 and 2008. New Jersey Monthly notes that it ranks schools on school environment, student performance, and student outcomes.

102. Millburn spent \$915,331 on school-sponsored athletics in 2008-9, appropriated \$977,350 during the 2009-2010 school year, and appropriated \$912,330 during the 2010-2011 school year. District Detail for Millburn Township, User Friendly Budget 2010-2011, Page 2, [http://www.edline.net/files/\\_DTKZS\\_/db5145904a2ffb5b3745a49013852ec4/User\\_Friendly\\_budget.pdf](http://www.edline.net/files/_DTKZS_/db5145904a2ffb5b3745a49013852ec4/User_Friendly_budget.pdf)

103. In the 2009-2010 school year, the Millburn School District had an enrollment of 4,840 students. NATIONAL CENTER FOR EDUCATIONAL STATISTICS, [http://nces.ed.gov/ccd/districtsearch/district\\_detail.asp?Search=2&details=1&ID2=3410200&DistrictID=3410200](http://nces.ed.gov/ccd/districtsearch/district_detail.asp?Search=2&details=1&ID2=3410200&DistrictID=3410200) (last visited Nov. 1, 2011).

104. Millburn High School, which includes grades nine through twelve, had an

mathematics speaks to the inequity between the two districts: while Newark spent approximately \$25 per student in the 2008-2009 school year, Millburn spent approximately \$200 per student in the same span of time – eight times as much.<sup>105</sup> Even if one assumes that each district spent the majority of the money allocated for athletics solely on high school students, the inequity remains – Newark spent approximately \$100 per student and Millburn spent approximately \$700 per student.<sup>106</sup>

There are several theories to explain the disparity. First, schools that receive state aid feel significant pressure to spend those funds on academics because the state reviews and approves their budgets.<sup>107</sup> Evidence demonstrating poor, urban non-Abbott districts spend more money on athletics than poor, urban Abbott districts demonstrates this theory.<sup>108</sup> Second, high-income schools possess the funding and capacity to spend more on athletics.<sup>109</sup> In other words, suburban districts can spend more on athletics because the taxpayers pay more per capita. Unfortunately, because of the 2008 recession, athletics have been given even less attention by school boards.<sup>110</sup>

## II: ATHLETICS IN PUBLIC EDUCATION – WHY SHOULD WE CARE?

### *A: The Importance to Society of an Educated Populace*

The entire public, not just the individual student, benefits from higher graduation rates and an educated population. Society is faced with a high public cost of high school dropouts.<sup>111</sup> A higher graduation rate means an overall

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enrollment of 1,407 students. District Detail for Millburn Sr. High, NATIONAL CENTER FOR EDUCATIONAL STATISTICS, [http://nces.ed.gov/ipeds/data/ipeds\\_datacenter/ipeds\\_datacenter.asp?Search=1&DistrictID=3410200&ID=341020002148](http://nces.ed.gov/ipeds/data/ipeds_datacenter/ipeds_datacenter.asp?Search=1&DistrictID=3410200&ID=341020002148) (last visited Nov. 1, 2011).

105. In order to calculate these figures, the author divided the amount of money allocated to athletics by the number of students in the district that year.

106. In order to calculate these figures, the author divided the amount of money allocated to athletics by the number of high students in the district that year.

107. Zengel, *supra* note 95.

108. *Id.*

109. *Id.*

110. *Id.* at 1.

111. THE PRICE WE PAY: ECONOMIC AND SOCIAL CONSEQUENCE OF INADEQUATE EDUCATION 190 (Clive R. Belfield & Henry M. Levin eds. 2007).

higher income, which in turn creates higher tax revenues.<sup>112</sup> The average lifetime tax benefit from each additional high school graduate is \$139,000.<sup>113</sup> Medicaid and Medicare coverage rates also decrease with a high school diploma. The lifetime public health savings per each high school graduate is approximately \$40,500.<sup>114</sup> Education level also affects government sponsored welfare programs. For example, each high school graduate saves the public \$3,000 over a lifetime in welfare savings.<sup>115</sup>

Furthermore, there is a high economic cost of crime because of inadequate education.<sup>116</sup> School increases the likelihood of finding and landing legitimate work, increases the psychological cost of committing a crime to the potential criminal, and alters crime in indirect ways, such as helping a student understand the consequences of his decisions.<sup>117</sup> Because crime decreases as the education level of the populace increases, society saves money at a rate of \$26,600 per high school graduate in incarceration rates, policing, combating crime, and publicly funding victims.<sup>118</sup> Thus, it follows that the more high school graduates produced the better the economic tax benefits to society will be as well as related savings in public benefits, such as the decrease in crime and teen pregnancy.<sup>119</sup> Additionally, targeting intervention toward at-risk individuals would increase net benefits significantly.<sup>120</sup>

### *B. The Importance of Education outside the Classroom*

Reforming the classroom alone is not the answer. While classroom conditions provide a foundation for learning, reinforcement outside of the classroom is the bigger, and more elusive piece of the education puzzle.<sup>121</sup> Tellingly, only about

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112. *Id.*

113. *Id.*

114. *Id.* at 191.

115. *Id.* at 192.

116. Belfield and Levin, *supra* note 111 at 142.

117. *Id.*

118. *Id.* at 192.

119. *Id.* at 194-95. Though there would be a decrease in market wages as more graduates entered the work force, the economic benefits are still highly positive.

120. *Id.* at 195.

121. Belfield and Levin, *supra* note 111 at 177.

ten percent of a person's waking hours from birth to age 18 are spent in a classroom.<sup>122</sup> Thus, much of what one experiences, is exposed to, and eventually learns comes from outside the classroom.

Moreover, as not all children benefit from exposure to the same learning conditions,<sup>123</sup> longer classroom hours cannot necessarily rectify a learning gap. Experts agree as to the basic conditions human beings need to be able to learn and thrive.<sup>124</sup> These conditions include physical and psychological safety, appropriate structure, supportive relationships, opportunities to belong, positive social norms, support for efficacy and mattering, opportunities for skill building, and integration of family, school, and community efforts.<sup>125</sup> Therefore, it is only in understanding these education-inducing conditions that the state can improve schooling and raise achievement.<sup>126</sup>

### *C. Athletics – An Important Part of Education*

Athletics have been found to have an important impact on high school retention rates, graduation rates, grades, and the probability of enrollment in higher education.<sup>127</sup> Though it might seem that athletics would tire students out and pull their focus from academics, studies actually show that participation adds to energy and commitment to academic pursuits.<sup>128</sup>

First, sports are linked to a lower dropout rate and higher grades.<sup>129</sup> A 1999 study found that students who participate in high school team sports through twelfth grade have a “school-based identity that correlates to positive academic performance.”<sup>130</sup> The study found that these students had an

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122. *Id.* at 177.

123. *Id.*

124. *Id.*

125. *Id.* at 228-29 (2007).

126. *Id.* at 229.

127. WOMEN'S SPORTS FOUNDATION, THE WOMEN'S SPORTS FOUNDATION REPORT: HER LIFE DEPENDS ON IT: SPORT, PHYSICAL ACTIVITY AND THE HEALTH AND WELL-BEING OF AMERICAN GIRLS 30 (2004).

128. *Id.*

129. Jacquelynne S. Eccles & Bonnie L. Barber, *Student Council, Volunteering, Basketball, or Marching Band: What kind of Extracurricular Involvement Matters?*, 14 J. ADOLESCENT RES. 10, 12 (1999).

130. Matthew J. Mitten and Timothy Davis, *Athletic Eligibility Requirements and*

increased twelfth grade GPA and an increased probability of being enrolled in college full-time at age 21.<sup>131</sup> The Women's Sports Foundation also reported in 2004 that females who participate in sports are likely to experience academic success, graduate from high school, and have a greater interest in graduating from college.<sup>132</sup> Male and female athletes were found to have higher grades, higher overall educational aspirations, less school-related disciplinary problems, a higher rate of enrollment in math and science, spend more time on homework, and take more honors classes than students who did not participate in athletics.<sup>133</sup> Moreover, former high school athletes were found more likely to enroll in college and hold higher education aspirations.<sup>134</sup> Athletics also have been found to have a profound impact on the academic performance of minority students and those who live in poverty. Moreover, Black and Hispanic female athletes were found to have better grades in high school,<sup>135</sup> while Hispanic female athletes were also less likely to drop out of school and more likely to improve academic standing, graduate, and attend college.<sup>136</sup>

Second, athletics promote development of social, physical, and intellectual skills, meaningful role and empowerment, positive identity, constructive peer networks, and clear expectations and boundaries.<sup>137</sup> Athletics also have a positive impact on self-concept.<sup>138</sup> Athletics are important for developing "interpersonal competency"—skills that students do not often have an opportunity to fine-tune in the classroom—such as teamwork, teambuilding, flexibility, adaptability, initiative, self-direction, social skills, accountability, leadership, responsibility, strength, stamina,

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*Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 113 (2008).

131. *Id.*

132. Women's Sports Foundation, *supra* note 127 at 30.

133. *Id.*

134. *Id.* at 31.

135. *Id.* However, these effects were short-lived when compared to white student athletes, whose participation was associated with completing college.

136. *Id.*

137. Jacquelynne S. Eccles & Bonnie L. Barber, *Student Council, Volunteering, Basketball, or Marching Band: What kind of Extracurricular Involvement Matters?*, 14 J. ADOLESCENT RES. 10 (1999).

138. Women's Sports Foundation, *supra* note 127 at 30 (2004).

self-discipline, and judgment.<sup>139</sup> Athletics are also important for creating ties to one's community, as they promote school and community pride.<sup>140</sup> In a society that is increasingly technological, athletics provide an opportunity to establish real-life social networks.<sup>141</sup>

Afterschool activities differ from classroom activities and informal social grounds because they have a clear common purpose—in the case of athletics, learning how to play a sport competitively and as a team.<sup>142</sup> Positive adult role models are an integral part of the athletic experience, and students therefore form a different bond with their coaches than they do with their classroom teachers.<sup>143</sup> Students see these adult coaches in a different capacity because they relate them to a “fun,” voluntary activity.<sup>144</sup> The students learn alongside their adult coaches, testing and adapting to different conditions.<sup>145</sup> This teaches students to see authority as a benefit, rather than a hindrance.<sup>146</sup> Additionally, unlike many other afterschool activities like youth groups or social clubs, discipline is an integral part of athletics and is often aimed at improving a student's social, physical, and mental abilities.<sup>147</sup>

Athletics also provide students with a different way to participate in the learning process. They are able to choose the nature and degree of participation, while still being required to put forth effort towards the collective goal.<sup>148</sup> The nature of athletic activities in a school setting also requires students to participate in different capacities each year.<sup>149</sup> In other words, when students are new members, they learn

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139. Jay Matthews, *In Cutting Sports Funding, Everyone Loses*, WASHINGTON POST, Feb. 2, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/01/AR2009020101781.html> (last accessed Nov. 1, 2011); Mitten and Davis, *supra* note 130.

140. Matthews, *supra* note 139.

141. Mitten and Davis, *supra* note 130.

142. Bullock, Muschamp, Ridge & Wikeley, *Educational Relationships in Out-of-School Time Activities: Are Children in Poverty Missing Out Again?*, EDUCATION, CITIZENSHIP, AND SOCIAL JUSTICE 5 (2) (2010), available at <http://opus.bath.ac.uk/20507/>.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. Bullock, Muschamp, Ridge, and Wikeley, *supra* note 142.

148. *Id.*

149. *Id.*

from older students, and when they become older members, they participate in the teaching process themselves.<sup>150</sup>

Unfortunately, studies in the United Kingdom established that children living in poverty are less likely to experience education outside of the classroom.<sup>151</sup> Low-income families are shown to spend more of their resources on the basic necessities and have less income for outside learning experiences or resources.<sup>152</sup> Additionally, as these families have fewer resources than middle class families to put towards “adequate social and academic participation,” children within these families face a greater chance of exclusion from such activities. Success in life is based heavily around knowing how to develop and sustain relationships with others.<sup>153</sup> As after-school activities are centered on constructing social behavior, including forming these multi-group membership bonds, a cycle of deprivation could be created if children who live in poverty are not given these opportunities to learn how to form professional bonds with others.<sup>154</sup>

Because learning is often a lower priority within low-income families who are forced to focus on providing the basics for their children, children need incentives and aid from outside sources for education.<sup>155</sup> Scholars argue that the opportunity for college scholarships is highlights the importance of athletics in low-income neighborhoods. Whether or not a student will actually have the skill to earn a college scholarship is irrelevant; an athlete who cannot develop his skills and participate in competition at the high school varsity level will normally not have the opportunity to obtain a college athletic scholarship or gain entry into a lucrative professional athletic career.<sup>156</sup> The lack of incentive leaves schools with different levels of athletic programming and, in return, grave disparities for these types of opportunities.

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150. *Id.*

151. *Id.*

152. *Id.*

153. Bullock, Muschamp, Ridge, and Wikeley, *supra* note 142.

154. *Id.*

155. *Id.*

156. STEVEN C. WADE & ROBERT D. HAY, *SPORTS LAW FOR EDUCATIONAL INSTITUTIONS* 1 (1988).

### III: EQUAL EDUCATION: ATHLETICS SHOULD BE INCLUDED IN THE RIGHT TO EDUCATION, AND HOW WE ACHIEVE IT

#### A: *Title IX and the Equal Protection Route*

Inequalities in athletics have been the focus of much attention when the disparity lies between genders. Title IX of the Education Amendments of 1972 provides that no person may “be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity” that receives federal funding.<sup>157</sup>

While some argue that Title IX has been vital in the expansion of female athletics, the implications of Title IX decisions have been widely criticized.<sup>158</sup> First, critics argue that the interpretation has encouraged the elimination of sports teams altogether because of the unavailability of funds to create equality between the sexes.<sup>159</sup> Additionally, as women began to outnumber men on college campuses, many colleges had to eliminate or scale back men’s sports in order to satisfy Title IX’s “proportionality” requirement for institutional sports.<sup>160</sup> This was not always because of funding issues; in fact, at least one university’s program that had been funded entirely by outside supporters was cut in order to create proportionality.<sup>161</sup>

Similarly, cutting high school sports in order to comply with equality has also recently gained limelight. In November 2010, the National Women’s Law Center filed federal complaints against twelve school districts alleging that the districts discriminated against women as their gender balance in athletics did not mirror the gender balance

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157. 20 U.S.C. § 1681 (2012).

158. John Irving, *Wrestling with Title IX*, N.Y. TIMES, Jan. 28, 2003, <http://www.nytimes.com/2003/01/28/opinion/wrestling-with-title-ix.html?src=pm>.

159. *Id.*; See also H. Clay McEldowney, *Title IX Gender Quotas May Hurt High School Sports Next*, STAR-LEDGER (Newark, N.J.), Sept. 25, 2011, [http://blog.nj.com/njv\\_guest\\_blog/2011/09/title\\_ix\\_gender\\_quotas\\_may\\_hur.html](http://blog.nj.com/njv_guest_blog/2011/09/title_ix_gender_quotas_may_hur.html). MacEldowney notes that many suggest Title IX is a scapegoat for athletic departments that can no longer afford to fund the same breadth of athletics.

160. *Id.* While Title IX does not require proportionality between men’s and women’s athletics, many universities found that this was the easiest way for them to comply with the law.

161. *Id.* Marquette University’s wrestling team, which was completely funded by alumni supporters, was cut in 2001 to “comply with gender equality.”

of their overall student body.<sup>162</sup> However, critics point out that if women's interest in athletics does not equal that of men's, there will be few options other than cutting male teams and/or rosters to create equality with women's teams.<sup>163</sup>

Examining Title IX litigation may create the impression that equal protection is the best route towards arguing that athletics should be awarded constitutional protections. However, courts have held that the right to athletics is not protected by due process.<sup>164</sup>

*B: A Constitutional Right to Athletics in New Jersey: Pay-to-Play and its History in Free Education States*

There is no federal constitutional right to participate in extracurricular activities, including sports.<sup>165</sup> Specifically, in *Palmer v. Meluzzi*, the Third Circuit held that a student suspended from school and, in turn, from participation in interscholastic football, did not have a property interest in playing interscholastic sports.<sup>166</sup> However, in applying New Jersey law, the Third Circuit noted that the New Jersey Constitution provides for a free education, that New Jersey law requires public schools to offer programs designed to develop individual talents of its students, and that the notion of athletics as a "privilege" as opposed to a "right" is widely criticized.<sup>167</sup> Marrying these concepts with the New Jersey legislature's finding of importance of athletics in education, the court held that a New Jersey court would likely recognize a protected interest to participate in athletics.<sup>168</sup>

The New Jersey courts have yet to address whether there is a right to participate in athletics, but courts in jurisdictions where "free education" is addressed in their constitutions have held that there is a legal right to free athletics.<sup>169</sup> California, for example, held in *Hartzell v. Connell* that "pay-to-play" programs, where schools charge students fees to participate in extracurricular activities, were unconstitutional

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162. H. Clay McEldownney, *supra* note 159.

163. *Id.*

164. *Palmer by Palmer v. Merluzzi*, 868 F.2d 90 (3rd Cir.1989).

165. *Id.* at 96.

166. *Id.*

167. *Id.* at 97-98.

168. *Id.* at 99.

169. *Hartzell v. Connell*, 679 P.2d 35 (1984).

under its free education clause.<sup>170</sup> The *Hartzell* Court found that the Santa Barbara High School District, after cutting its budget by \$1.1 million in the spring of 1980, adopted a plan that would raise money for extracurricular activities by charging students a fee to participate in dramatic productions, musical performances, and athletic competition.<sup>171</sup> The fee activities were supervised by compensated school personnel and sponsored by the schools and their student bodies.<sup>172</sup> Additionally, students could obtain a fee-waiver in a similar manner to the free lunch program.<sup>173</sup> Nevertheless, the California Supreme Court held that “the imposition of fees as a precondition for participation in educational programs offered by public high schools on a noncredit basis violates the free school guarantee of the California Constitution . . . .”<sup>174</sup> In so holding, the court stated that extracurricular activities are an integral part of public education.<sup>175</sup> Such activities, the court held, are “a fundamental ingredient of the educational process”<sup>176</sup> and are just as important in a school’s ultimate purpose of making overall good citizens as “the study of algebra and Latin.”<sup>177</sup>

By contrast, many states have held pay-to-play programs to be constitutional and many public schools continue to implement such programs.<sup>178</sup> In Michigan, for example, 126

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170. *Id.*

171. *Id.* at 37.

172. *Id.* at 38.

173. *Id.* at 38.

174. *Hartzell*, 679 P.2d at 47 (1984).

175. *Id.* at 42.

176. *Id.*

177. *Id.* (quoting *Moran v. School District #7, Yellow Stone County*, 350 F.Supp. 1180, 1184; *Kelly v. Metropolitan County Bd. of Ed. of Nashville, etc.*, 293 F. Supp. 485, 493 (M.D. Tenn. 1968); *Alexander v. Phillips*, 31 254 P. 1056, 1059 (Ariz. 1927)). The court’s holding in *Hartzell* did not seem to have a bearing on actual policy and on September 10, 2010, the American Civil Liberties Union filed a class action suit alleging that the state of California had “violated their constitutional duty to provide free and equal education by failing to ensure that California public schools do not charge fees for educational activities.” The State of California settled with the ACLU in December 2010, promising to create a watchdog system to ensure that public schools did not continue to violate the court’s holding in *Hartzell*, and in turn, the California Constitution. See *Doe v. California Settlement Implementation Agreement*, available at <http://www.ibabuzz.com/education/files/2010/12/Doe-v-California-Settlement-Implementation-Agreement.pdf>.

178. Eric Brady and Ray Giler, *To Play Sports, Many U.S. Students Must Pay*, USA Today, July 29, 2004, available at [http://www.usatoday.com/sports/preps/2004-07-29-pay-to-play\\_x.htm](http://www.usatoday.com/sports/preps/2004-07-29-pay-to-play_x.htm)

out of 760 high schools reported charging user fees in 2004.<sup>179</sup> Fees average \$75 to \$100, and are typically waived for students that participate in free or reduced lunch programs.<sup>180</sup> However, given the Third Circuit's analysis in *Palmer* regarding the requirement of free education and importance of athletics in New Jersey, it is likely that New Jersey would follow the California decision if given the chance to evaluate the constitutionality of pay-to-play programs, or otherwise decide whether students have a legally protected right to play sports.

### C. "Appropriate" Funding Defined

Both the Supreme Court and the New Jersey Supreme Court have said many times that "appropriate" funding is not, nor can it ever mean, equal funding.<sup>181</sup> Additionally, we have seen the equal funding problem in Title IX: if equal funding is implicated by the law, well-funded New Jersey schools run the risk of having to cancel their programming in order to comply with equality regulations. Furthermore, the Supreme Court has held that equal protection does not apply to wealth, and therefore "equality" can be a tricky word to use in discussing school funding.<sup>182</sup>

Yet funding does not necessarily need to be equal in order to be fair. Public opportunities for children vary greatly depending on where they grow up. However, these children are almost always uninvolved in the factors that ultimately decide what school district they will attend; factors such as household income, housing markets, and job opportunity.<sup>183</sup> As the New Jersey Supreme Court stated in *Abbott II*, "the only reason [the children] do not get that advantage is that they were born in a poor district. . . They face, through no fault of their own, a life of poverty and isolation that most of us cannot begin to understand or appreciate."<sup>184</sup>

Therefore, I propose that we create a benchmark of funding for school-sponsored athletics. Instead of including

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179. *Id.*

180. *Id.*

181. *Abbott II*, 575 A.2d at 363; *Rodriguez*, 411 U.S. at 24.

182. *Rodriguez*, 411 U.S. at 24.

183. See generally Part II, *supra*.

184. *Abbott II*, 575 A.2d at 412.

athletics under a discretionary umbrella of funds, as is done presently, the New Jersey school funding scheme needs to provide a provision specifically allocating state money to student athletic programs.

As the Supreme Court noted in *Brown v. Board of Education*, education is the key to good citizenship.<sup>185</sup> Education, the *Brown* majority opinion wrote, “is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment.”<sup>186</sup> However, effective education cannot be defined in the same way for every student. While certainly some students exceed and absorb citizenship values through classes like math, science, and English, such a curriculum will not prove successful for every student. Many are programmed to learn logical thinking by planning a batting order, performing under pressure by playing in an important game, or teaching a freshman recruit a different running technique which will likely build an inherent social bond between the two.

Additionally, student athletics are a representation of the school to the broader community and one of the only opportunities for students to travel to other schools and compare themselves and their district’s programs with another district’s students and programs. Districts should take advantage of these opportunities. As the Supreme Court noted in *Brown v. Board of Education*, separating students based on certain characteristics over which they have no control can have a lasting impression on a student’s “mind and heart.”<sup>187</sup>

## CONCLUSION

As the United States Supreme Court and New Jersey Supreme Court both have discussed in relation to school funding itself,<sup>188</sup> it is not, at least at first, the actual amount of money that is spent on athletics that is important. Instead, it is the fact that money needs to be specifically allocated to provide athletic programming. This would force schools and

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185. *Brown v. Board of Ed.*, 347 U.S. 483, 493 (1954).

186. *Id.*

187. *Id.*

188. *Abbott II*, 575 A.2d at 363; *Rodriguez*, 411 U.S. at 24.

school boards to recognize the importance of athletics and to address how money should be spent in the athletic realm. While most schools—perhaps, arguably, all schools—do presently spend money on athletics, it is the state’s failure to recognize how athletics can have an impact on improving all areas of education directly in its funding scheme that should be brought to educators’ attention.

As this comment has shown, athletic participation can have a significant impact on students, particularly on minority students who make up a substantial proportion of New Jersey’s underperforming school districts. By recognizing the importance of athletics, and by including it in the original funding formula, New Jersey could become a leader in alternative measures to increase academic performance, academic interest, and graduation rates.