

INTERSCHOLASTIC ATHLETICS AND DUE PROCESS PROTECTION: STUDENT- ATHLETES CONTINUE TO KNOCK ON THE DOOR OF DUE PROCESS

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INTRODUCTION

Participation in high school sports has continually increased over the past years, reaching an all-time high of approximately 7.8 million student-athletes in the 2013-2014 school year.¹ Statistically speaking, the increase in the number of participants brings with it a growth in the number of grievances filed by student-athletes on an annual basis. Grievances consist of violations of the governing bodies' academic standards and/or codes of conduct. In dealing with academic violations, state high school associations set forth rules and standards defining academic eligibility (e.g., GPA requirements, progression towards diploma, layout of basic courses that must be taken, etc.) and the associated punishment for those failing to meet a given academic standard (e.g., academic ineligibility).

However, the current structure offered by state high school associations in addressing academic issues is not always consistent with code of conduct expectations and disciplinary proceedings. While high school athletic associations may offer standards of conduct and associated punishments for student-athletes, they often keep the standards vague. For example, the Ohio High School

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¹*High School Participation Increases for 25th Consecutive Year*, NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS, October 30, 2014, <http://www.nfhs.org/articles/high-school-participation-increases-for-25th-consecutive-year/>.

Athletic Association (OHSAA) states in their Regulations/Guidance on alcohol, tobacco, drugs, and steroids the following policy in regards to drug use.² “If you use anabolic steroids or other performance enhancing drugs, you are ineligible for interscholastic competition until medical evidence indicates that your system is free of these drugs.”³ However, OHSAA states nothing in its policies about punishments for student-athletes who use alcohol, tobacco, or other illegal drugs. Rather, the bylaws state specifically in Section 5, Bylaw 4-5-1, “In matters pertaining to personal conduct in which athletic contests and their related activities are not involved, the school itself is to be the sole judge as to whether the student may participate in athletics.”⁴ Likewise, the University Interscholastic League (UIL), the high school athletic association of Texas, has a detailed steroid policy, as well as rules defining eligibility but says nothing in its constitution about the use of other drugs.⁵

The lack of uniform standards for how student-athletes conduct themselves away from academics leaves the creation of policy and disciplinary action to the school districts, schools, athletic departments, and/or coaches. As such, policies, procedures, and punishments may vary widely. Moreover, the lack of uniform standards at a governing level may result in coaches and athletic departments disseminating punishment to student-athletes at their will. While high school athletic association bylaws, like those of OHSAA, may allow for this, they enable situations where an athlete may be punished or dismissed from a team without being granted due process.

For example, in 2013 a Shakopee High football player/wrestler was indefinitely suspended from high school sports after tweeting “Im boutta drill my ‘teammates’ on Monday.”⁶ In response to the

² OHSAA Bylaws, OHIO HIGH SCHOOL ATHLETIC ASSOCIATION (2014), <http://www.ohsaa.org/>.

³ OHSAA Regulations/Guidance on alcohol, tobacco, drugs and steroids, ELIGIBILITY GUIDE FOR PARTICIPATION IN HIGH SCHOOL ATHLETICS (2014), <http://www.ohsaa.org/eligibility/eligibilityguide.pdf>.

⁴ NCAA Manual, Section 5, Bylaw 4-5-1 (2015).

⁵ *Constitution & Contest Rules: Athletics* “Section 1207: Rules, Violations and Penalties” Subsection (f).

⁶ Pat Pheifer, *SUSPENDED OVER TWEET, SHAKOPEE HIGH WRESTLER FILES A LAWSUIT*, STAR TRIBUNE, OCTOBER 24, 2013, <http://www.startribune.com/local/south/228872691.html>.

suspension, the athlete and his family brought suit against the school claiming his constitutional rights were violated.⁷ Also in 2013, a North Andover High School female volleyball player brought suit after she was suspended from her team for responding to a teammate's request to provide a ride home from a party where drinking had occurred.⁸ Despite the fact she "was cleared by police for not drinking or being in the possession of alcohol," the school still suspended her five games.⁹ Though the case was dismissed due to a lack of jurisdiction,¹⁰ the potential remains for a lawsuit claiming the student-athlete was not afforded due process before being suspended.

Despite such recent situations in which procedural due process may be alleged to have been denied to interscholastic student-athletes, courts have seemingly remained steadfast while relying on past legal precedent to rule against the student-athlete. That is, courts that have ruled on such lawsuits often cite *Taylor v. Encumclaw School District*, which reasons there is no right to participate in interscholastic athletics or extracurricular activities, but rather such participation is a privilege.¹¹ Furthermore, courts have also followed *Taylor* and reasoned students possess no property interest in their athletic endeavors. Accordingly, the denial of due process in handling code of conduct violations in regard to interscholastic athletics does not constitute a breach of student-athletes' 14th Amendment rights.

While lawsuits such as Shakopee High and North Andover High may be argued from the school's standpoint through use of the *Taylor* ruling, it is necessary to recognize *Taylor* is not a United States Supreme Court case and thus does not bind all courts. Furthermore, in analyzing *Taylor* the court references *Goss v. Lopez*, in respect to the "total educational process"¹²; however, a close examination of *Goss* reveals no indication that sport is either included or not included in said "total educational process". Within

⁷ *Id.*

⁸ *Student punished for going to drive drunk friend*, USA TODAY, OCTOBER 15, 2013, <http://www.usatoday.com/story/news/nation/2013/10/15/sober-driver-drunk-friend/2988991/>.

⁹ *Id.* at para. 4.

¹⁰ *Id.*

¹¹ 132 Wn. App. 688 (2006). [hereinafter *Taylor*].

¹² 419 U.S. 565 (1975). [hereinafter *Goss*].

the *Goss* decision, the Supreme Court established because a person is required to attend school up until a certain age, and therefore has a governmentally created expectation to an education, a property interest does exist in regards to education.¹³ The inclusion of a property interest in one's education requires the individual to have a right to procedural due process, namely, a right to a hearing.¹⁴ In states that allow academic credit for participation in high school sport, such as Texas,¹⁵ an argument may be made then that high school sport is in fact inseparable from the educational process and thus privy to the legal protection established in *Goss*. Furthermore, other states have gone so far as to say interscholastic sport is a part of the mission and purpose of high school education. For example, OHSAA bylaw 4 entitled Student Eligibility states, "This unique form of competition is a carefully constructed system that promotes competitive balance and serves the mission and purpose of education-based sports and activities."¹⁶ According to the New Hampshire Supreme Court ruling entered in *Duffley v. New Hampshire Interscholastic Athletic Assoc., Inc.*, such proclamations within state athletic association bylaws may in fact link interscholastic athletics to the educational process.¹⁷ Lawyers of students claiming constitutional right violations then may look to such statements in the courtroom and argue sport is a part of high school education, and thus again should fall under the legal precedent established in *Goss*.

With the ever growing population of interscholastic athletes, and thus grievances filed on student-athletes' behalves, the time is right to reexamine the legal protections they are afforded. More specifically, the present day intertwining of a high school sport and education results is a much stronger argument that high school sport is a part of the educational process.¹⁸ Though the court findings of *Taylor* demonstrate an incident in which the court ruled

¹³ *Id* at 574.

¹⁴ *Id*.

¹⁵ Tom Benning, *TEXAS HIGH SCHOOL ATHLETES GAIN GROUND IN CLASS*, THE WALL STREET JOURNAL, AUGUST 29, 2009, <https://www.wsj.com/articles/SB125150176952368293>.

¹⁶ OHSAA Manual, Bylaw 4 (2015).

¹⁷ 122 N.H. 484 (1982). [hereinafter *Duffley*].

¹⁸ E.g., the offering academic credit for high school sport participation, the inclusion of education in the mission of high school sport, etc.

specifically against the inclusion of sport in education, it is again important to note such a ruling is not legally binding outside the state of Washington. Thus, the precedent established in the United States Supreme Court's ruling in *Goss* may better fit the context of interscholastic athletics. That is, since students have a governmentally created expectation to an education, and since sport may arguably be considered part of education, interscholastic athletes should have a liberty and property interest in sport and therefore have a constitutional protection.

The goal of this paper is to examine the legal principles of the 14th Amendment in relation to secondary education and interscholastic sport. Past legal precedent dealing with interscholastic sport is scrutinized as a means to provide an in-depth understanding of how courts have ruled on 14th Amendment challenges.

TOTAL EDUCATIONAL PROCESS

Student-athletes are continually facing the reality that they are required to check their Constitutional rights at the door when dealing with athletic participation at the interscholastic level.¹⁹ The very purpose of procedural due process is to prevent arbitrary and inconsistent outcomes by state actors.

For example, the Pennsylvania Supreme Court has held for decades that its interscholastic athletic governing body, the Pennsylvania Interscholastic Athletic Association (PIAA), must provide due process to its athletes. Simply put, Pennsylvania law states, "the elements of due process of law are notice, and an opportunity to be heard and to defend in an orderly proceeding."²⁰ Specifically, the Supreme Court determined that "adjudicatory action cannot be validly taken by any tribunal, whether judicial or administrative, except upon a hearing wherein each party shall have opportunity to know of the claims of his opponent, to hear the evidence introduced against him, to cross-examine witnesses, to

¹⁹ R. Yasser & M Block, 'Upon further review' recognizing procedural due process rights for suspended high school athletes, 26 ENT. AND SPORTS LAW., 22-35 (2008).

²⁰ *Pennsylvania State Athletic Com. v. Bratton*, 112 A.2d 422, 425 (Pa. Super. 1955); See also *School Dist. v. PIAA*, 309 A.2d 353, 356-57 (Pa. 1973) (holding that PIAA actions constitute state action).

introduce evidence in his own behalf, and to make argument.”²¹ Furthermore, when an administrative decision is based upon information secretly collected and not disclosed, due process concerns are clearly raised.²² This means that courts should protect athletes’ rights to participate in interscholastic competitions, particularly when an eligibility determination is made by an administrative body in an arbitrary or capricious manner, which occurs when “there is a willful and deliberate disregard of competent testimony and relevant evidence which one of ordinary intelligence could not possibly have avoided in reaching a result.”²³ The reason for implementing such weighty protections for high school athletes is because, at least in some jurisdictions, participating interscholastic athletics is a unique right. Deprivation of that right in violation of due process protections can lead to serious irreparable harm.²⁴

As illustrated by decades of Pennsylvania law, interscholastic athletics play a vital role in education and hold an ever-growing importance in our society. Accordingly, interscholastic athletic participation outside of Pennsylvania should join and be more closely and fairly governed consistent with the due process protections of the United States Constitution. *Goss* may establish a basis for such a viewpoint as the United States Supreme Court reasoned students possess a property interest in their education.²⁵ Therefore, at least minimum due process protections are required when suspending a student from the educational process to ensure the school’s decision is not arbitrary.

However, the educational process’s relation to extracurricular activities, in particularly to athletics, has been a point of contention over the years. A majority of courts hearing this legal issue have held participation in athletics is a privilege and not a right.²⁶

²¹ *Bratton*, 112 A.2d at 425

²² *Soja v. Pa. State Police*, 455 A.2d 613, 617 (Pa. 1982).

²³ *Dziewar v. PIAA*, 2009 U.S. Dist. LEXIS 3062, 16-17 (E.D. Pa. 2009).

²⁴ *Hosack v. PIAA*, 2009 Pa. Dist & Cnty. Dec. LEXIS 33 (Beaver CCP 2009) (concluding that suspending a high school basketball player without due process is an irreparable harm without monetary remedy).

²⁵ *Goss*, 419 U.S. at 565.

²⁶ See *Brentwood Academy v. Tenn. Secondary School Athl Assn*, 2001; *Bruce v. S.C. High School League*, 1972; *Hamilton v. Tenn. Secondary School Athl Assn*, 1970; *Morrison, et al., v. Roberts*, 1938; *Niles v. University Interscholastic League*, 1983;

Brentwood: State Action

In addition to conflicting jurisprudence as to whether athletic participation is a privilege or a constitutionally protected right, the United States Supreme Court further muddied the waters as to whether interscholastic athletic governing bodies are state actors when it reexamined the *Brentwood Academy* debacle in 2007. At its core, the *Brentwood Academy* case concerned whether a rule prohibiting high school coaches from recruiting middle school athletes violated the First Amendment.²⁷ Although far removed from due process violations for individual athletes, the case raised the vital question as to whether the state's interscholastic governing body was a state actor.²⁸ Much like the NCAA, the Tennessee Secondary School Athletic Association (TSSAA) is a non-profit organization comprised of both public and private high schools in which the member schools create, adopt, and enforce its own rules.²⁹

Arising out of sanctions by the TSSAA for alleged impermissible recruiting tactics, Brentwood Academy, a private school, challenged its punishment on the basis of First and Fourteenth Amendment violations.³⁰ The ensuing legal challenge resulted in nearly a decade of appeals and reversals trying to decipher whether the TSSAA was a state actor. In its first trip to the Supreme Court, *Brentwood Academy* led to a resounding victory for high school athletes as the Court concluded that the TSSAA was a state actor based on the government's "entwinement" with its activities.³¹ Due to the TSSAA's regulation of interscholastic sports with the oversight of the state education board, the Court determined that it was properly a state actor for civil rights purposes.³² Justice David Souter explained, "The nominally private character of the Association is overborne by the pervasive entwining of public institutions and public officials in its composition and workings, and there is no substantial reason to

Whipple v. Oregon Sch Activities Assn, 1981; *Wooten v. Pleasant Hope R-VI School District and Stout*, 2000; *Zehner v. Central Berkshire Regional School District*, 1996).

²⁷ *Brentwood Academy v. TSSAA*, 531 U.S. 288 (2001). [hereinafter *Brentwood I*].

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 295.

claim unfairness in applying constitutional standards to it.”³³ The Court also reiterated the basic test of the entanglement exception is that “state action may be found . . . only if, there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’”³⁴ The Court supported its conclusions by pointing to the facts that the TSSAA consisted primarily of public schools, received most of its funds from public schools, held meetings on government property, and in a sense, received the state’s blessing to regulate interscholastic sports.³⁵ This, the Court reasoned, was enough “entwinement” to place Constitutional burdens on the TSSAA.³⁶

Of course, the Court had to engage in intellectual gymnastics to avoid undoing its prior decision in *NCAA v. Tarkanian* that absolved the NCAA of all due process requirements by finding that the NCAA was not a state actor.³⁷ In one of the most debated conclusions in Supreme Court jurisprudence, the *Brentwood* Court differentiated its conflicting rulings by claiming that since the NCAA did not act within a single state, that it was less of a “state actor” for constitutional purposes than an interscholastic athletics body operating within only one state.³⁸ Although the precise meanings and applications of “entwinement” and “entanglement” continue to plague practitioners,³⁹ the main takeaway was that interscholastic athletic governing bodies were state actors and had to provide full due process to its member institutions, coaches, and athletes.

This initial *Brentwood I* decision paved the way for athletes to successfully argue that their participation in interscholastic athletes was a constitutionally protected right. To deprive them of that right required full compliance with the due process protections of the Constitution. That is, however, until *Brentwood I* went back to the Supreme Court. In reviewing the specific violations, the Court concluded that the TSSAA’s rule did not violate the First

³³ *Id.* at 289.

³⁴ *Id.* at 298. (internal citation omitted).

³⁵ *Id.*

³⁶ *Id.* at 303.

³⁷ 488 U.S. 179 (1998). [hereinafter *Tarkanian*].

³⁸ *Brentwood I*, 531 U.S. at 297-298.

³⁹ See Chemerinsky Erwin, *Constitutional Law Principles and Policies* (3d Ed.) at pp. 524-527. (analyzing the *Brentwood* and *Tarkanian* decisions).

Amendment and that its sanctions process fully complied with due process requirements.⁴⁰ Justice Souter then remarked that “Brentwood made a voluntary decision to join TSSAA and to abide by its anti-recruiting rule.”⁴¹ In a sense, if it did not like the rules, it could leave the organization. This was the same rationale presented in *Tarkanian* to UNLV – if you do not like the rules, then go play somewhere else.

Athletes, however, do not enjoy that luxury. This is why Justice Thomas’ concurring opinion in *Brentwood II* is so problematic. Thomas wrote that he would overrule the initial *Brentwood I* decision in saying that TSSAA is not a state actor would be more appropriate.⁴² This then left open the possibility that an athletic association less entwined with the state could be a non-state actor and avoid providing full Constitutional protections. Of course, the practical effect is that most interscholastic athletic governing bodies accept their role as a state actor, but they simply claim that with respect to individual athletes’ claims, playing a sport is a privilege, not a right. Thus, privileges do not necessitate Constitutional protections, and the governing organizations can escape due process claims.

Taylor v. Enumclaw Overview

One of the cases with such an outcome, *Taylor v. Enumclaw School District*, came from the Court of Appeals of Washington in 2006.⁴³ In this case, the school received an anonymous phone call accusing certain student-athletes of underage drinking.⁴⁴ The athletes were suspended from their sport without further investigation, but not suspended from school.⁴⁵ One of the student-athletes filed suit against the school claiming he was not given the due process he was entitled to by the Constitution based on his property interest in his sport.⁴⁶ The student-athlete attempted to use the Supreme Court ruling in *Goss*, which established a public

⁴⁰ *TSSAA v. Brentwood*, 551 U.S. 291 (2007). [hereinafter *Brentwood II*].

⁴¹ *Id.*

⁴² *Id.* at 306.

⁴³ *Taylor*, 132 Wn. App. 688 (Wash. Ct. App. 2006). [hereinafter *Taylor*].

⁴⁴ *Id.* at 691.

⁴⁵ *Id.*

⁴⁶ *Id.* at 693.

school must provide minimal due process protections to students facing suspension from the total educational process based on their protected property interest in their education, as basis for their legal argument.⁴⁷ More specifically, the student-athlete argued athletics were a vital part of the “total educational process” and therefore gave rise to a property interest.⁴⁸ The school district however, contended participation in athletics was a privilege and not a part of the “total educational process” as described by the United States Supreme Court in *Goss*.⁴⁹ The Court of Appeals of Washington ruled in favor of the school district reasoning athletics were not a part of the educational process in terms of required curriculum; therefore it was not a violation of their due process rights to suspend a student-athlete from a sport without notice and a hearing.⁵⁰

Although the argument of athletics as a part of the educational process failed in the state of Washington in 2006, and in other courts throughout our nation’s history, the argument holds potential merit and has succeeded in select cases. Therefore, to delve into the potential future application of *Goss* in regards to claims of athletics’ inclusion in the educational process, first, it requires the establishment of constitutive definitions of the process itself and a more thorough exploration of the purpose of secondary education. A review of literature reveals the purpose behind educating youth is to help them develop a skill set and an intellect that cultivates their futures and allows them to be successful.⁵¹ Furthermore, within American culture education serves as an essential means to build well rounded, balanced individuals.⁵² This is made evident through the fact colleges and universities seek high school students who are involved with extracurricular activities.⁵³ College applications and job resumes go as far as having specific

⁴⁷ *Id.* at 695-696.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 698-699.

⁵¹ C B Swanson, *SPENDING TIME OR INVESTING TIME? INVOLVEMENT IN HIGH SCHOOL CURRICULAR AND EXTRACURRICULAR ACTIVITIES AS STRATEGIC ACTION RATIONALITY AND SOCIETY* (2002), <http://rss.sagepub.com/>.

⁵² *Id.*

⁵³ *Id.*

sections reserved solely for a person to demonstrate involvement with out-of-the-classroom activities, including athletics.

Sport as a Part of the Educational Process

Historically, not all courts have reasoned in the same manner as *Taylor*. Rather, some have agreed interscholastic sport is a part of education. For example, in *Florida High School Activities Association v. Bryant*, the court said:

It is an important and vital part of (Bryant's) life providing impetus to his general scholastic and social development and rehabilitation from his prior problems as a juvenile delinquent. (Interscholastic basketball) has resulted in the improvement of his grades, attitude, self-confidence, discipline and maturity.⁵⁴

Furthermore, in *Albach v. Odle*, although the court ultimately dismissed the student-athlete's argument for violation of due process when he was required to sit out a year from athletics after transferring within the same school district, the court did acknowledge:

The educational process is a broad and comprehensive concept with a variable and indefinite meaning. It is not limited to classroom attendance but includes innumerable separate components, such as participation in athletic activity and membership in school clubs and social groups, which combine to provide an atmosphere of intellectual and moral advancement.⁵⁵

Within such an address, this court defined the components of education to be inclusive of athletics. Though they did not go so far as to claim the student held a property interest in each separate component, their statements of the inclusion of various aspects in the educational process is significant and in contrast to the reasoning set forth in *Taylor*.

Finally, in *Duffley*, the Supreme Court of New Hampshire ruled in favor of a 19-year-old member of the basketball team who

⁵⁴ 313 So. 2d 57 (Fla. 3d DCA 1975).

⁵⁵ 531 F.2d 983 (10th Cir. 1976)

was declared ineligible due to an eight consecutive semester rule.⁵⁶ In the ruling the court stated:

It is apparent that interscholastic athletics are considered an integral and important element of the educational process in New Hampshire. It follows that the right to participate in them at least rises above that of a mere privilege. Recognizing this, and the stark fact that a student's ability to attend college and further his education may, in many instances, hinge upon his athletic ability and athletic scholarships, we hold that the right of a student to participate in interscholastic athletics is one that is entitled to the protections of procedural due process.⁵⁷

The court reasoned this instance is based on the regulations set forth by the State Department of Education.⁵⁸ More specifically, the regulations stated, "Pupil activities, including athletics, should be considered a part of the curriculum"⁵⁹). Furthermore, the assertion by the state athletic association of New Hampshire (NHIAA), of their goal "to establish the state athletic program as an integral part of the entire school program" extended the court's justification that interscholastic sport was a part of the educational process.⁶⁰ Thus, in instances where the high school athletic association's regulations are disseminated by the State Department of Education and proclaim such a clear purpose as to promote athletics as a part of education, the argument for athletics' inclusion in the total educational process is greatly strengthened. However, it is important to note the regulations and descriptions of state athletic associations and state departments of education vary from state to state. Therefore, the application of the total educational process as interpreted from the Supreme Court ruling in *Goss* may vary as well.

Following the rulings of *Florida High School Activities Association*, *Albach*, and *Duffley*, academic and social development can be found to be a primary focus of athletic participation. As such, a legal argument for the inclusion of athletics in the total education process can be made. More specifically, interscholastic athletics can

⁵⁶ *Duffley*, 122 N.H. at 492.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

be said to provide necessary value and lessons to a student's overall education and maturation. Educational institutions should be aware of such rulings, re-examine the department of education and athletic association regulations, and note the time may be approaching where courts in their state or at the national level recognize such an argument and require procedural due process for athletic team participants.

FUTURE LIBERTY AND FINANCIAL IMPACT

An additional argument for applying constitutionally guaranteed due process to interscholastic student-athletes could be made through reviewing the potential financial outcomes of sport participation. Interscholastic athletics educate students with valuable lessons and provide opportunities for students to have their higher-level education paid for, in part, or in full. A common criticism of this notion is that a mere 2% of high school athletes receive college athletic scholarships.⁶¹ However, as previously mentioned, involvement with athletics is a considered factor for a student's acceptance into a college or university based on the depth of their application, regardless of their intention to play collegiately. Therefore, an opportunity to receive higher education can be directly impacted by a high school student's involvement in athletics. While it should be acknowledged only a small percentage of interscholastic athletes go on to play collegiate sports, and furthermore, that even a smaller number are provided an athletic scholarship and go on to earn money in a professional capacity, an act that is likely to affect a small portion of the population is not reason enough to deny fair treatment to those who may be impacted.⁶²

Therefore, high school sports' influence on the potential to earn a college scholarship is an important issue the courts may consider. This notion has been directly addressed and ruled favorably upon by the United States District Court in Arkansas.⁶³ Here the court held a student could not be suspended from the high school football

⁶¹ *How do athletic scholarships work?*, NCAA.ORG (2014), www.ncaa.org.

⁶² U.S. Const. amend. XIV, §1; R. Yasser & M Block, *supra* note 20.

⁶³ *Boyd v. Board of Directors of the McGehee School District No. 17*, 612 F. Supp. 86 (E.D. Ark. 1985). [hereinafter *Boyd*].

team without procedural due process protections because he was an outstanding athlete.⁶⁴ More specifically, the court reasoned that the season was his last opportunity to participate in football at the high school level, which was “vital and indispensable to a college scholarship and, in essence, a college education”.⁶⁵ The court found the plaintiff’s continued status on the team was not only important in regards to his future educational development, but also in regard to his future financially.⁶⁶ Referencing the United States Supreme Court landmark case of *Goss*, the court claims this sort of stake is “indeed embraced in this fundamental aspects of life, liberty and property which the Federal Constitution is designed to protect and secure.”⁶⁷ Accordingly, in this case, the District Court in Arkansas reasoned:

[The student-athlete’s] continued status as a member of the McGehee High School football team during his last year was very important to [his] development educationally and economically in the future. Thus, [his] privilege of participating in interscholastic athletics must be deemed a property interest protected by the due process clause of the Fourteenth Amendment.”⁶⁸

The due process clause aims to protect against such instances where an evident danger of arbitrarily damaging a person’s development educationally and economically exists.⁶⁹ Thus, when a student-athlete has potential to obtain a college scholarship or even merely college acceptance based on their athletic ability, life, liberty and property interests are implicated. The Supreme Court directly warns of the impact on future education and future employment in their analysis in *Goss* in regard to suspension from education:

Since misconduct charges, if sustained and recorded, could seriously damage the student’s reputation, as well as interfere with later educational and employment opportunities, the State’s claimed right to determine unilaterally and without

⁶⁴ *Id.*

⁶⁵ *Id.* at 90.

⁶⁶ *Id.* at 88.

⁶⁷ *Id.* at 90.

⁶⁸ *Id.* at 93.

⁶⁹ *Board of Regents of State Colleges et al. v. Roth*, 408 U.S. 564 (1972). [hereinafter *Roth*]

process whether that misconduct has occurred immediately collides with the due process clause's prohibition against arbitrary deprivation of liberty. In *Boyd*, the court interprets this to be the same for suspension from athletics. The potential repercussions of suspension from athletics are in line with those of suspension from education; thus, the same cautiousness and surety of fairness should be applied.⁷⁰

In *Goss*, the Supreme Court discussed the seriousness of the event in a student's life when educational benefits are denied even temporarily.⁷¹ The Supreme Court further addressed the substantiality of one's "liberty interest in reputation, which is also implicated" through a suspension from the educational process.⁷² The Supreme Court states in *Roth*, "Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, the minimal requirements of due process must be met."⁷³ The impact a suspension may have on a young student-athlete's future could be major, especially if resultant of behavioral misconduct. It is only fair to ensure the matter is handled with methodology and uniformity.

Restitution Rule

Unfortunately, the only uniformity in this area of the law is the way in which interscholastic athletic associations have attempted to impede athletes' abilities to mount due process challenges. That is, the associations, following the NCAA's lead, have almost unanimously adopted a rule, known as the Restitution Rule, designed to bar athletes and coaches from ever initiating litigation against them.

Prior to the *Tarkanian* ruling that granted the NCAA a shield from providing due process to its athletes,⁷⁴ the NCAA faced legal decisions in multiple jurisdictions concluding that it was a state actor. Therefore, the NCAA, much like their high school equivalents, had to adopt fully constitutional disciplinary measures

⁷⁰ *Goss*, 419 U.S. at 565.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Roth*, 408 U.S. at 573.

⁷⁴ *Tarkanian*, 488 U.S. 179.

before depriving an athlete of the right to play a given sport. The obvious solution, which was the one proposed by its own general counsel, was to reform its disciplinary proceedings to provide full due process rights to athletes. Remarkably, on July 10, 1973, outside General Counsel, George H. Gangwere, Esq., authored a memorandum to NCAA Executive Director Walter Byers advocating for due process rights for athletes.⁷⁵ Attorney Gangwere advised:

“This memo will show you: (1) that even though there may be no constitutional right to participate in intercollegiate athletics there may be a sufficient interest in such participation to require the observance of due process before one can be deprived of it and (2) that the courts have not been consistent in deciding whether or not participation in intercollegiate athletics is such a substantial interest that it requires due process protection. Certainly where the eligibility of potential professional athletes or “super stars,” or the continuation of a grant in aid are involved it would not be difficult for a court to find such a substantial interest. . . It is our recommendation, therefore, that the member institutions be urged to give notice and an opportunity for a hearing to student athletes in any infractions action wherein it is proposed to suspend eligibility or aid.”⁷⁶

Rather than provide due process to its athletes, however, the NCAA created a rule that penalized any person or entity that sued it. Soon thereafter, interscholastic athletic organizations began copying it nearly word for word. The troubling bylaw, currently codified as NCAA Bylaw 19.7, provides that

If a student-athlete who is ineligible under the terms of the constitution, bylaws or other legislation of the Association is permitted to participate in intercollegiate competition contrary to such NCAA legislation but in accordance with the terms of a court restraining order or injunction operative against the institution attended by such student-athlete or against the Association, or both, and said injunction is voluntarily vacated,

⁷⁵ Restitution Rule article, page 471 citing Memorandum from Walter Byers, Exec. Dir., NCAA to the Members of the NCAA Council (July 30, 1973) (on file with the NCAA Library's Walter Byers Archives).

⁷⁶ *Id.*

stayed or reversed or it is finally determined by the courts that injunctive relief is not or was not justified, the Board of Directors may take any one or more of the following actions against such institution in the interest of restitution and fairness to competing institutions.⁷⁷

The potential penalties include vacating individual and team records, awards, and victories; enacting postseason bans on the entire team, forfeiting television revenue for games in which the targeted athlete participated; or any other monetary fines the organization deems appropriate.

This means that if an athlete who believes he or she has been wrongfully suspended due to an alleged violation of an organization rule seeks a court order via an injunction or restraining order to return to the playing field, it could cost his or her team massive penalties if that ruling is later vacated or reversed. In effect, the Restitution Rule penalizes the athlete for going to court and punishes that athlete's school for following the court's Order. Of course, that was the point. At the 1975 NCAA Convention's General Round Table prior to voting to adopt the Rule, Edgar Sherman, the Director of Athletics at Muskingum College, bragged that the Restitution Rule "would help to discourage legal actions against the NCAA in several ways."⁷⁸

Interscholastic athletic associations have now sought the same protections from legal action. Since the inception of the NCAA's Restitution Rule in 1975, at least 32 state high school athletic associations have enacted the Restitution Rule, with most organizations copying the NCAA's rule word for word.⁷⁹ Only the Kentucky High School Athletic Association specifically exempts a school from punishment for complying with a court order that is later vacated or overturned.⁸⁰

The mere existence of the Restitution Rule suggests that there is a valuable right to competing in interscholastic athletics. This

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Steve Silver, *How a little known ncaa rule shuts athletes out of the legal system*, VICE SPORTS (December 20, 2016) https://sports.vice.com/en_us/article/how-a-little-known-ncaa-rule-shuts-athletes-out-of-the-legal-system.

⁸⁰ *Id.*

intrinsic value is why courts are likely to grant injunctions so that an athlete does not suffer irreparable harm from missing athletic competition. At the high school level there may not be financial value, but there is arguably an element to the value of that individual's education. If there was no right to compete in interscholastic athletics, and no value to doing so, then no athlete could ever successfully obtain an injunction from a state court. Accordingly, if there was no risk of being subject to a court's Order demanding an athlete's reinstatement, then the Restitution Rule would not be necessary in the first place. By threatening to punish coaches, teammates, and entire schools for an athlete exercising his or her rights in court, the interscholastic athletic associations that have adopted the Restitution Rule have implicitly admitted that they must provide constitutional protections to the right to compete. Yet, these associations have adopted a rule designed to shield them from that obligation.

INSUFFICIENCY OF CURRENT LEGAL PRECEDENT

While the vast majority of courts in the past have been reluctant to accept claims of a property interest in athletics, courts are relying on *stare decisis* principles to say it has already been addressed. However, due to the current stature sports holds in our society, this may prove to be insufficient in regard to the essence of what the Supreme Court deems to be a liberty or a property interest. The Supreme Court has said, "liberty and property are broad and majestic terms... purposely left to gather meaning from experience... they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged."⁸¹ Moreover, the Supreme Court says protected property interests "are created and their dimensions are defined by an independent source such as state statutes or rules..."⁸² As such, the evolution of sport's inclusion in the educational process through State Departments of Education and state athletic associations, and the degree of importance placed on sport by society, calls for a reexamination of past legal theory.

⁸¹ *Roth*, 408 U.S. at 573 ; R. Yasser & M Block, *supra* note 20.

⁸² *Id.* at 577.

HEEDING THE WARNING

As is often true in law, each situation needs to be addressed on a case-by-case basis, in particularly here, state by state. The court in *Tiffany v. Arizona Interscholastic Association, Inc.* decided a case in which a senior in high school brought suit when he was unable to participate in athletics at 19 years old, based on a statewide age regulation.⁸³ The court denied the student's constitutional claim but stated, "In the realm of constitutional law, there are very few absolutes"⁸⁴ Meaning, in some instances, student-athletes have established they have a legitimate liberty or property interest in athletics. This same court went further stating:

We are persuaded that under certain circumstances a high school student can properly establish an entitlement to due process protection in connection with a suspension or exclusion from high school athletics. We believe that an appropriate extension of the holding in *Goss v. Lopez* was expressed by the court in *Pegram v. Nelson*, 469 F.Supp. 1134 (1979).⁸⁵

The case of *Pegram* involved a student being suspended from school for ten days and from athletics for four months.⁸⁶ The court in *Pegram* eloquently reasoned:

The opportunity to participate in extracurricular activities is not, by and in itself, a property interest...[however] total exclusion from participation in that part of the educational process... depending upon the particular circumstances, be a sufficient deprivation to implicate due process.⁸⁷

The rationale by the courts in *Tiffany* and *Pegram* are that of which public schools, and thus state actors, should consider adopting. While not every instance of exclusion or deprivation from interscholastic athletics may arise to the level of a liberty or property interest, there are those that do. Thus, schools should

⁸³ *Tiffany v. Arizona Interscholastic Ass'n*, 726 P.2d 231 (App. 1986). [hereinafter *Tiffany*].

⁸⁴ *Id.* at 235.

⁸⁵ *Id.*

⁸⁶ *Pegram v. Nelson*, 469 F.Supp. 1134 (M.D.N.C. 1979). [hereinafter *Pegram*].

⁸⁷ *Id.* at 1139, 1140.

attempt to be fair, thorough and methodical in their application of their interscholastic policies and bylaws.

CONCLUSION

Cotton and Wolohan note a continual growth over the past decades in the dependence on the legal system to resolve disputes between individuals.⁸⁸ In regards to claims of violations of due process, secondary schools should be prepared to see lawsuits fighting eligibility, suspension and expulsion issues in sport. Though the Supreme Court has yet to directly rule on the issue of due process in interscholastic athletics, the continual growth in prominence of sport in our society suggests they may be called upon to address the issue in the near future. Within such a ruling, the Supreme Court could explain the spirit of the law suggests that society strives to provide a fair and opportunistic environment for all.⁸⁹ Furthermore, they may note the law attempts to avoid arbitrary and capricious judgments that student-athletes are currently at risk of facing.⁹⁰

Accordingly, it would behoove educational systems and state high school athletic associations to have a method for fair and balanced procedures for handling eligibility issues in sport regarding not only academics, but also codes of conduct violations. If nothing more, such regulatory bodies should review current bylaws and mission statements and seek to limit or remove altogether the mention of athletics as a means of academic and social growth. In doing so, they will potentially avoid the legal strife found in cases such as *Florida High School Activities Association, Albach*, and *Duffley*, and thus avoid the expenditure of large amounts of money, resources, and the unwanted press in defending their actions after the fact.

The satisfaction of procedural due process in the instance of a property interest is simple. All that is required of procedural due process is a hearing, and notice of said hearing.⁹¹ Student conduct boards are already in place in our educational institutions because

⁸⁸ D J Cotten & J T Wolohan, *LAW FOR RECREATION AND SPORT MANAGERS* (6th ed. 2013).

⁸⁹ *Armstrong v. Manzo*, 380 U.S. 545 (1965). [hereinafter *Armstrong*].

⁹⁰ *Id.*

⁹¹ *Armstrong*, 380 U.S. at 552.

of the established property interest in education. Many schools already have policies and procedures in place for athletic eligibility, just as they do for academics. However, some of these athletic policies follow a zero tolerance standard. These zero tolerance policies should be carefully considered before implementation without a method for due process as the nature of zero tolerance policies is absolute and strict, and therefore risks backlash. The Supreme Court in *Goss* addresses the risk of the assertion of behavioral misconduct through the following analysis:

Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.⁹²

Realizing this quote from the Supreme Court is in regards to suspension from an academic setting, the parallels in the rationale can be drawn to the risk involved with zero tolerance policies in athletics. Thus, not only should educational institutions include the right to due process in their interscholastic athletic bylaws, but they should also ensure their disciplinary actions and methods for investigating alleged behavior are methodical.

A protected interest may certainly still be infringed upon or taken away; however, it cannot be taken away “on ground of misconduct absent fundamentally fair procedures to determine whether the misconduct ha[d] occurred.”⁹³ Establishing a standard process prior to suspension or expulsion from athletics would more fairly govern each instance on a case-by-case basis and would help avoid lawsuits because consistent punishments would be handed out. Providing due process promotes an environment of fairness that would therefore weaken the merits of a lawsuit.

A consequence of establishing a property interest in athletics would potentially be that parallels could be drawn to all extracurricular activities, including student councils, music programs, and gifted programs. Nevertheless, as previously

⁹² *Goss*, 419 U.S. at 581

⁹³ *Id.* at 574.

mentioned, meeting the minimum requirements of due process is already in place to handle student conduct issues inside the classroom. Accommodating the same standards for athletics and extracurricular activities would not create a need for entirely new resources, just a potential increase in the already existing procedures and application of policies. While more incidents may be heard on the forefront, the elimination of lawsuits based on denial of due process or arbitrary decisions may result.

In closing, based on the mixed judicial review of this age-old decision, coupled with its reliance on decisions made decades ago when sport was a different entity, as well as the number of lawsuits making headlines, it would be prudent for interscholastic athletics to provide proper due process to their athletes prior to suspensions. Additionally, it would be wise for schools to have uniform policies and procedures across all sports, and potentially even in line with the rest of their district, region and state. This would help ensure that their decisions on each particular case could not be seen as arbitrary, and thus help avoid timely and costly public legal battles.

The value placed on athletics in today's society is no longer in line with the value afforded to student-athletes in the justice system. As the Supreme Court stated in *Roth*, the range of interests protected by procedural due process are not infinite however, the mixed judicial review and legitimacy of certain arguments supporting a liberty and/or property interest in sport, coupled with the acknowledgement by multiple courts over the years that athletes may have a constitutional right to due process in certain instances, suggests student-athletes will continue to knock on the door of due process.