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An Overview of Legal Principles and Issues Affecting Postsecondary Athletics

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AN OVERVIEW OF LEGAL PRINCIPLES AND ISSUES AFFECTING POSTSECONDARY ATHLETICS*

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Athletics, as a subsystem of the postsecondary institution, is governed by the basic principles applicable to higher education generally. These principles, however, must be applied in light of the particular characteristics and problems of curricular, extracurricular, and intercollegiate athletics programs. A student-athlete's eligibility for financial aid, for instance, would be viewed under the general principles governing financial aid, such as contract law and constitutional due process, but aid conditions related to the student's eligibility for or performance in intercollegiate athletics may create a special focus for the problem. In *Taylor* v. *Wake Forest,*[1] for instance, the court held that a student-athlete's refusal to participate in practice was a breach of his contractual obligations under his athletic scholarship. Similarly, procedural due process principles may apply when a student-athlete is disciplined, and First Amendment principles may apply when student-athletes engage in protest activities. But in each case the problem may have a special focus.

Procedural Due Process

In a discipline situation, the penalty may be suspension from the team, thus raising the issue whether the same procedural protections accompanying suspension from school are applicable. For institutions engaging in state action, the constitutional issue is whether the student-athlete has a "property interest" or "liberty interest" in continued intercollegiate competition sufficient to make suspension of that interest a deprivation of "liberty or property" within the meaning of the due process clause. Of three recent lower court cases addressing the question, two have answered affirmatively and one negatively.

In *Behagen* v. *Intercollegiate Conference of Faculty Representatives*[2], a suit brought by University of Minnesota basketball players suspended from the team for participating in an altercation during a game, the court reasoned that participation in intercollegiate athletics has "the potential to bring [student athletes] great economic rewards" and is thus as important as continuing in school. The court therefore held the students' interest in intercollegiate participation to be protected by procedural due process and granted the suspended athletes the protection of notice and a hearing established in *Dixon* v. *Alabama State Board of*

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[1] 191 S.E.2d 379 (N.C. Ct. App. 1972).

[2] 346 F. Supp. 602 (D. Minn. 1972).

Education.[3] In *Regents of University of Minnesota* v. *NCAA,*[4] the same U.S. district court reaffirmed and further explained its analysis of student athletes' due process rights. The court reasoned that the opportunity to participate in intercollegiate competition was a property interest entitled to due process protection not only because of the possible remunerative careers that result but also because such participation was an important part of the student athlete's educational experience. (Although the appellate court reversed this decision,[5] it did so on other grounds and did not question the district court's due process analysis.)

In contrast, the court in *Colorado Seminary* v. *NCAA,*[6] relying on an appellate court opinion involving high school athletes[7], held that college athletes had no property or liberty interests in either participating in intercollegiate sports, participating in postseason competition, or appearing on television. The court did suggest, however, that revocation of an athletic scholarship would infringe property or liberty interests of the student and require due process safeguards.[8] The appellate court affirmed.[9] Given this disagreement among the courts, the extent of student athletes' procedural due process protections remains an open question.

First Amendment Rights

In a protest situation, the First Amendment rights of athletes must be viewed in light of the institution's particular interest in maintaining order and discipline in its athletic programs. An athletes' protest which disrupts an athletics program would no more be protected by the First Amendment than any other student protest which disrupts institutional functions. While the case law regarding athletes' First Amendment rights is as sparse as that regarding their due process rights, *Williams* v. *Eaton*[10] does specifically apply the leading student protest case, *Tinker* v. *Des Moines Independent School District,*[11] to a protest by intercollegiate football players. Black football players had been suspended from the team for insisting on wearing black armbands during a game to protest the alleged racial discrimination of the opposing church-related school. The court held that the athletes' protest was unprotected by the First Amendment because it would interfere with the religious freedom rights of the opposing players and their

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[3] 294 F.2d 150 (5th Cir. 1961) (expulsion of students from state university because of civil rights activity).

[4] 422 F. Supp. 1158 (D. Minn. 1976).

[5] 560 F.2d 352 (8th Cir. 1977).

[6] 417 F. Supp. 885 (D. Colo. 1976).

[7] *Albach* v. *Odle,* 531 F.2d 983 (10th Cir. 1976).

[8] 417 F. Supp. at 895. *Cf. Corr* v. *Mattheis,* 407 F. Supp. 847 (D.R.I. 1976) (students have property interest in continued receipt of federal aid funds, as well as a liberty interest in freedom from stigmas foreclosing further educational or employment opportunities.)

[9] 570 F.2d 320 (10th Cir. 1978).

[10] 468 F.2d 1079 (10th Cir. 1972).

[11] 393 U.S. 503 (1969). In *Tinker,* the Court held that the First Amendment prohibited the suspension of several high school students for wearing black armbands to school to protest the United States' Vietnam policy, as their conduct was a non-disruptive exercise of free speech. The Court emphasized, however, that student conduct which, for any reason, "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" is not entitled to constitutional protection. *See also Healy* v. *James,* 408 U.S. 169 (1972) (*Tinker* applied in higher education setting).

church-related institution. The *Williams* opinion is unusual in that it mixes considerations of free speech and freedom of religion. The court's analysis would have little relevance to situations where religious freedom is not involved. Since the court did not find that the athletes' protest was disruptive, it relied solely on the seldom-used "interference with the rights of others" branch of the *Tinker* case.

Tort Law

Tort law is another area where athletics programs present special problems. Because of the physical nature of athletics and because athletics programs often require travel to other locations, the danger of injury to students and the possibilities for institutional liability are greater than those resulting from other institutional functions. These problems are subject to general tort liability principles, applied in light of the special characteristics of athletics programs. In *Scott* v. *State,*[12] for instance, a student collided with a flag pole while chasing a fly ball during an intercollegiate baseball game; the student was awarded $12,000 damages because the school had negligently maintained the playing field in a dangerous condition, and the student had not assumed the risk of such danger. But in *Rubtchinsky* v. *State University of New York at Albany,*[13] a student injured in an extracurricular pushball game did not collect damages; the student was injured when clipped by another player, and the court held the student had assumed the risk of such injury.

When the alleged negligence is that of a public institution (as in the two cases above), the general principles of tort immunity may also apply to athletic injury cases, In *Lowe* v. *Texas Tech University,*[14] for instance, a varsity football player with a knee injury had his damages suit dismissed by the intermediate appellate court because the university had sovereign immunity. But on further appeal the suit was reinstituted because it fell within a specific statutory waiver of immunity.[15]

Sex Discrimination

Sex discrimination has become a major issue in athletics programs. Before the passage of Title IX of the Education Amendments of 1972[16], the legal aspects of this controversy centered on the Fourteenth Amendment's equal protection clause. In recent years courts have held that certain governmental actions violate this clause because they classify and treat persons differently on the basis of their sex.[17] Courts have been searching for an appropriate standard by which to ascertain the validity of sex-based classifications in athletics. Most of the cases have concerned female high school athletes seeking the opportunity to try out for male teams. Although the

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[12] 158 N.Y.S.2d 617 (Ct. Cl. 1956).

[13] 260 N.Y.S.2d 256 (Ct. Cl. 1965). *See* generally the series of Annotations on tort liability in athletic programs at 34 A.L.R. 3d 1210 (1970); 35 A.L.R. 3d 725 (1970); 36 A.L.R. 3d 361 (1970).

[14] 530 S.W.2d 337 (Tex. Civ. App. 1975). *See generally* Annot., *modern status of Doctrine of Sovereign Immunity As Applied to Public Schools and Institutions of Higher Learning," 33 A.L.R.3d 703 (1970).*

[15] 540 S.W.2d 297 (1976).

[16] 20 U.S.C. § 1681 *et seq* (1976). The central provision of Title IX prohibits discrimination on the basis of sex in any education program receiving federal funding.

[17] *See, e.g., Reed* v. *Reed,* 404 U.S. 71 (1971); *Craig* v. *Boren,* 429 U.S. 190 (1976); *Kirstein* v. *University of Virginia,* 309 F. Supp. 184 (E.D. Va. 1970) (discrimination in admissions).

decisions are not all in agreement, a consensus appears to be developing on one point. When the sport is a "noncontact sport," that is, a sport involving little bodily contact among participants, the female athlete must be afforded an equal opportunity to compete for the traditionally male team if there is no comparable athletic activity provided for females.[18]

Since the implementation in 1975 of the Title IX regulations,[19] the equal protection aspects of sex discrimination in high school and college athletics have been playing second fiddle to Title IX. Since Title IX applies to both public and private institutions receiving federal aid, it has a broader reach than equal protection, which applies only to public institutions. Moreover, Title IX has several provisions on athletics which establish requirements more extensive than anything yet devised under the banner of equal protection. Thus in most situations the Title IX regulations, rather than the equal protection clause, will provide the primary legal guidance in dealing with sex discrimination in institutional athletic programs.[20]

Section 86.41 of the Title IX regulations is the primary provision on athletics: it establishes various equal opportunity requirements applicable to "interscholastic, intercollegiate, club, or intramural athletics." Section 86.37(c) establishes equal opportunity requirements regarding the availability of athletic scholarships. Physical education classes are covered by section 86.34, and extracurricular activities related to athletics, such as cheerleading and booster clubs, are covered generally under section 86.31. Institutional activities falling within these various categories are subject to Title IX whether or not they directly receive federal funds.[21] In 1975, the U.S. Department of Health, Education, and Welfare issued a memorandum[22] titled "Elimination of Sex Discrimination in Athletic Programs" which provided initial help in understanding these various requirements.[23]

Probably the greatest controversy stirred by Title IX concerns the issue of sex-segregated versus unitary (integrated) athletic teams. The regulations develop a

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[18] The cases are collected in Annot, "Validity, Under Federal Law, of Sex Discrimination in Athletics," 23 A.L.R. Fed 664 (1975).

[19] 45 C.F.R. Part 86 (1977).

[20] In July, 1978, HEW Secretary Joseph Califano announced he had established a special policy unit to help HEW's Office for Civil Rights resolve complaints of sex bias in school athletics programs. The Title IX Policy Work Group was charged with responsibility for drafting policy guidelines on specific issues involving bias in school sports, with particular emphasis on postsecondary institutions.

[21] 45 C.F.R. §§ 86.2(h), 86.11

[22] 40 Fed. Reg. 52655 (1975). *See also* "Directive on the Application of Title IX to Intercollegiate Athletics," 43 Fed. Reg. 18772 (1978) (revenue-producing sports); and HEW's proposed enforcement guidelines, 43 Fed. Reg. 58070 (1978).

[23] Postsecondary institutions must have achieved full compliance with sections 86.41, 86.37(c), and 86.34 by July 21, 1978. 45 C.F.R. §§ 86.41(d), 86.37(c)(2), 86.34(a); HEW Memorandum, 40 Fed. Reg. 52655 (1975). With respect to § 86.31, full compliance was required by July 21, 1976; 45 C.F.R. § 86.3(c).

compromise approach to this issue which roughly parallels the equal protection principles emerging from the court cases noted above.[24] Under section 86.41(b),

> [an institution] may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

This regulation requires institutions to operate unitary teams only for noncontact sports where selection is not competitive. Otherwise the institution may operate either unitary or separate teams and may even operate a team for one sex without having any team in that sport for the opposite sex, so long as the institution's overall athletics program "effectively accommodate[s] the interests and abilities of members of both sexes."[25] In a noncontact sport, however, if an institution operates only one competitively selected team, it must be open to both sexes whenever the "athletic opportunities" of the traditionally excluded sex "have previously been limited."[26]

Institutions similarly retain wide discretion in devising administrative structures for their athletic programs. An institution may have either "separate administrative structures for men's and women's sports (if separate teams exist) or a unitary structure," so long as the structure or coaching assignments do not "have a disproportionately adverse effect on the employment opportunities of employees of one sex."[27]

Regardless of whether its teams are separate or unitary, the institution must "provide equal athletic opportunity for members of both sexes."[28] This requirement "addresses the totality of the athletic program of the institution rather than each sport offered."[29] While equality of opportunity does not require either equality of

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[24] It is still an open question whether Title IX's athletic regulations fully comply with constitutional equal protection and due process requirements. There is some basis for arguing that the Title IX regulations do not fully meet the equal protection requirements that courts have constructed or will construct in this area. *See* W. Kaplin and S. Marmur, "Validity of the 'Separate but Equal' Policy of the Title IX Regulations on Athletics," a memorandum printed in the Congressional Record S777-779 (daily ed., Jan. 23, 1975). One court has ruled on the question, holding Title IX regulation 86.41(b) unconstitutional as applied to exclude physically qualified girls from competing with boys in contact sports; *Yellow Springs Exempted Village School Dist.* v. *Ohio School Athletic Assn., 443 F. Supp. 753 (S.D. Ohio 1978).*

[25] 45 C.F.R. § 86.41(c)(1); HEW Memorandum, *supra* note 22, at 52656.

[26] 45 C.F.R. § 86.41(b).

[27] HEW Memorandum, *supra* note 22, at 52655. HEW has taken the same position with respect to the institution's physical education department; CHRONICLE OF HIGHER EDUCATION, p. 10, col. 4 (Nov. 8, 1976).

[28] 45 C.F.R. § 86.41(c).

[29] HEW Memorandum, *supra* note 22, at 52656.

"aggregate expenditures for members of each sex" or equality of "expenditures for male and female teams," an institution's "failure to provide necessary funds to teams for one sex" is a relevant factor in determining compliance.[30] Those grappling with this slippery equal opportunity concept will be helped by section 86.41(c)'s list of ten nonexclusive factors by which to measure overall equality:

1. Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
2. The provision of equipment and supplies;
3. Scheduling of games and practice time;
4. Travel and per diem allowance;
5. Opportunity to receive coaching and academic tutoring;
6. Assignment and compensation of coaches and tutors;
7. Provision of locker rooms, practice and competitive facilities;
8. Provision of medical and training facilities and services;
9. Provision of housing and dining facilities and services;
10. Publicity.

The equal opportunity focus of the regulations also applies to athletic scholarships. Institutions must "provide reasonable opportunities for such awards for members of each sex in proportion to the number of each sex participating in intercollegiate athletics."[31] If the institution operates separate teams for each sex, as permitted in section 86.41, it may allocate athletic scholarships on the basis of sex to implement its separate team philosophy, so long as the overall allocation achieves equal opportunity. If athletic scholarships are not allocated by sex, the institution must assure that its criteria for awarding such scholarships "do not inherently disadvantage members of either sex."[32]

Discrimination on the Basis of Handicap

Under HEW's regulations implementing Section 504 of the Rehabilitation Act of 1973,[33] handicapped students must be given an opportunity to participate in physical education and athletics programs:

> (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors intercollegiate, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

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[30] 45 C.F.R. § 86.41(c).

[31] 45 C.F.R. §§ 86.37(c)(1).

[32] HEW Memorandum, *supra* note 22, at 52656.

[33] 29 U.S.C. § 794, as amended by Section 111(a) of the Rehabilitation Amendments of 1974. The implementing regulations are published in 45 C.F.R. Part 84 (1977).

> (2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different only if separation or differentiation is consistent with the requirements . . . (that the programs and activities be operated in "the most integrated setting appropriate") and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.[34]

Given the newness of these requirements, the difficulty of the concepts and problems they deal with, and the lack of interpretive court decisions, much is yet to be learned about this area of the law. Some concrete content, specifically in the athletic context, must be given to the critical concepts of "qualified handicapped student," "equal opportunity," and "most integrated setting appropriate."

Legal Principles Regarding Athletic Associations and Conferences

Often legal issues regarding athletics will arise from the activity of the various athletics conferences and associations which participate in regulating intercollegiate athletics. Individual institutions have become involved in such legal issues in two ways. Student athletes penalized for violating conference or association rules have sued both the conference or association and the institution over the enforcement of these rules. And institutions themselves have sued conferences or associations over their rules, policies, or decisions. Either situation presents the difficult threshold problem of determining what legal principles apply to the dispute.

The bulk of such disputes have involved the National Collegiate Athletic Association (NCAA), the primary regulator of intercollegiate athletics in the United States. In a series of recent cases courts have held that the NCAA, an institutional membership association for both public and private collegiate institutions, is engaged in "state action"[35] and thus subject to the constraints of the U. S. Constitution such as due process and equal protection. The leading case, *Parish* v. *NCAA*,[36] concerned sanctions applied against Centenary College for granting athletic eligibility to several basketball players who did not meet the NCAA academic requirement. The players, later joined by the college, challenged the constitutionality of the academic requirement (then known as the "1.600 rule"). The court rejected the NCAA's argument that it is a private association not subject to the Consititution:

> We see no reason to enumerate again the contacts and the degree of participation of the various states, through their colleges and universities, with the NCAA. Suffice it to say that state-supported educational institutions and their members and officers play a substan-

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[34]45 C.F.R. § 84.47(a).

[35]Generally, courts have used three different approaches in analyzing whether an ostensibly private entity is engaged in state action. *See, e.g., Powe* v. *Miles*, 407 F.2d 73 (2nd Cir. 1968) (delegated power theory); *Greenya* v. *George Washington Univ.*, 512 F.2d 556 (D.C. Cir. 1975) (public function theory); *Rackin* v. *University of Pa.*, 386 F. Supp. 992 (E.D. Pa. 1974) (government contracts theory).

[36]506 F.2d 1028 (5th Cir. 1975).

> tial, although admittedly not pervasive, role in the NCAA's program. State participation in or support of nominally private activity is a well-recognized basis for a finding of state action. . . . Moreover, we cannot ignore the states'—as well as the federal government's—traditional interest in all aspects of this country's educational system. Organized athletics play a large role in higher education, and improved means of transportation have made it possible for any college, no matter what its location, to compete athletically with other colleges throughout the country. Hence, meaningful regulation of this aspect of education is now beyond the effective reach of any one state. In a real sense, then, the NCAA by taking upon itself the role of coordinator and overseer of college athletics—in the interest both of the individual student and of the institution he attends—is performing a traditional governmental function.[37]

The court here is using first the "government contacts" theory and second the "public function" theory of state action. (Most other cases holding the NCAA engaged in state action, such as *Howard Univ.* v. *NCAA,*[38] rely only on the government contacts theory.) Having found the NCAA to be engaged in state action, the court proceeded to examine the NCAA's rule under due process and equal protection principles, finding the rule valid in both respects.

Besides the Constitution, relevant legal principles can be found in the common law of "voluntary, private associations."[39] Primarily these principles would require the NCAA and other conferences and associations to adhere to their own rules and procedures, fairly and in good faith, in their relations with their member institutions. *Trustees of the State Colleges and Universities* v. *NCAA,*[40] for instance, arose after the NCAA had declared a California state university's athletic teams indefinitely ineligible for postseason play. The university argued that the NCAA's decision was contrary to the NCAA's own constitution and bylaws. The lower court issued a permanent injunction against the NCAA. The court of appeals affirmed, reasoning that the relationship between the NCAA, as a voluntary association, and the university, as a member, was one of contract, evidenced by the constitution and bylaws of the NCAA. To enforce this relationship, courts will intervene in a private association's internal affairs to nullify substantial disciplinary action taken against a member in violation of the association's constitution and bylaws.

Thus, two legal avenues exist which a postsecondary institution may use in disputes with the NCAA: the United States Constitution and the common law. These approaches are two-edged, however: student-athletes may also claim these constitutional and common law protections when the NCAA and the institution are jointly engaged in enforcing NCAA rules against them. In these circumstances

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[37] *Id.* at 1032-33.

[38] 510 F.2d 213 (D.C. Cir. 1975).

[39] Regarding the application of voluntary private association law to the NCAA, see Note, "Judicial Review of Disputes Between Athletes and the National Collegiate Athletic Association," 24 STANFORD L. REV. 903, 909-916 (1972).

[40] 82 Cal. App. 3d 461, 147 Cal. Rptr. 187 (1978); *see also California State University, Hayward* v. *NCAA,* 47 Cal. App. 3d 533, 121 Cal. Rptr. 85 (1975).

even private institutions may be so involved with the NCAA's state action that they are themselves engaged in state action. Institutions may also be acting on the NCAA's behalf sufficiently to be subject to the common law principles binding that association. The same legal principles would be relevant to other athletic associations and conferences in which postsecondary institutions hold membership, although the existence of state action will depend on whether the particular association meets the requirements of *Parish* and other similar cases.

Conclusion

As this survey indicates, postsecondary athletics programs are subject to a wide range of legal principles. For the most part, legal problems which arise in other areas of a postsecondary institution's activities will have legal counterparts in postsecondary athletics. Many of the principles and problems mentioned here, as well as other special issues of postsecondary athletics, are treated in greater depth in the articles in this symposium.