The Eligibility Game: Legal Issues Relating To Participation In Intercollegiate Athletics

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The National Collegiate Athletic Association (NCAA) is a voluntary unincorporated association, composed of four-year colleges and universities, whose purpose it is to regulate the nation's intercollegiate athletics. A significant part of the NCAA's regulatory function deals with the establishment and enforcement of rules concerning the eligibility of participants for competition. These rules are established to encourage compliance with satisfactory standards of scholarship, sportsmanship, and amateurship.

Given the widespread popularity of college athletics, its growth, the financial considerations for both the institutions and the individuals participating, and the broad spectrum of participants engaged in intercollegiate competition, it is not surprising that disputes have arisen concerning questions of eligibility, particularly the application and interpretation of rules. It is even less surprising to find that individuals who find themselves dissatisfied with decisions rendered concerning those rules would seek redress in the courts.

This paper will explore some of the issues and particular cases concerning athletic eligibility that have been brought before the courts. It will look at the decisions and reasoning of the courts in those cases and attempt to project the present status of eligibility cases and how those cases may be decided in the future.

A key element in determining the outcome of many cases, not only in athletics, but in Higher Education generally, is the concept of "state action". This is important because an institution involved in state action must adhere to the principles and protections outlined in the Constitution. Although the distinction is generally made between public (tax-supported) and private institutions, there are enough circumstances and complicated situations where that distinction cannot be so neatly drawn.

Because of varying patterns of governmental assistance and involvement, a continuum exists ranging from the obvious public school (such as the tax-supported state university) to the obvious private school (such as the religious seminary). The large gray area between these extremes provides a continuing source of debate about how far the government must be involved before a "private" institution may be considered "public" under the Constitution (Kaplan, p. 21).

The NCAA falls into the "large gray area" because more than half of its member institutions are public. The state is not only involved in financial support of these schools, but also control of their budgets and regulation of their policies. The NCAA also receives state funds in the form of dues paid by those member institutions. Additionally, the NCAA depends on facilities such as fieldhouses and stadiums that are built and are supported by the state.

Numerous courts, including five federal courts of appeals, have held that NCAA activities constitute state action for purposes of constitutional scrutiny. These courts relied primarily on a theory of entanglement: since state instrumentalities form a dominant and pervasive force in the NCAA, governmental actions are sufficiently intertwined with those of the Association to form state action (Springer, pp. 333-34).

The issue of eligibility becomes critical when the student "does not qualify for participation because of an institutional eligibility rule or some external rule which the institution has agreed to apply" (Cross, p. 157). The source for the external rule will either be the conference to which the school belongs or the NCAA, or both. "The external rule may relate to the circumstances of enrollment, such as the transfer rules..., or to the amateur status, academic standards, previous competition, or financial support" (Cross, p. 157). Finding state action in such cases thus affords the students certain constitutional protections, primarily including (but not limited to) due process and equal protection found in the fourteenth amendment. Most of the litigation brought against the NCAA has involved the equal protection clause. In analyzing the way the courts interpret these cases it is important to understand the criterion they use to distinguish between them.

In deciding equal protection claims, the judiciary has developed a two-tier standard of review to ascertain if a classification is constitutionally impermissable. In the upper tier, where suspect classifications or fundamental interests are involved, the court subjects the classification to strict scrutiny. The state must demonstrate a compelling state interest by proving that the state purpose is substantial and that the classification as drawn is necessary to accomplishment of that purpose. If neither a suspect classification nor a fundamental interest is present, the lower tier test is applied. The state must establish that the classification bears a rational relationship to a legitimate state objective (Springer, p. 334).

Suspect classifications, of which the Supreme Court has found only three, are: race, national origin, and alienage—not athletes. Fundamental interests include: abortion, voting, criminal appeals, procreation and interstate travel, but not eligibility to compete in intercollegiate athletics, or at least not yet (Springer, p. 334). Consequently, when finding state action, the courts have consistently applied the lower tier, or rational relationship test.

In what has been described as the leading case in this area *Parish* v. *NCAA*, the question involved the constitutionality of the "1.600 rule" which used a formula created by using test scores and high school grade point averages or class rank to determine if a student could earn a 1.6 average on a 4.0 scale during his freshman year in college. While the court found "state action" on the part of the NCAA, if applied the lower tier test to determine if the classification of being ineligible to participate was appropriate. It ruled that the determination of probable academic success had a "rational relationship" to the "legitimate state objective" of insuring maintenance of certain academic standards.

Additionally, it ruled that loss of tournament appearances and the chance to appear in games that were televised were not a deprivation of "property" or "liberty" interests. This points out another area of debate, namely whether or not participation in inter-collegiate athletics and all the concomitant trappings, recognition, publicity, and rewards that go with it create a "property interest" for the student deserving Constitutional safeguard.

Not only have courts divided over the claim that a student-athlete's interest in participating in intercollegiate athletics is a property right, but they also have utilized five distinct tests in reaching their conclusions. One test reflects an argument...that an interest in reputation is a liberty right. The four property-oriented tests focus on: Intercollegiate competition as a preprofessional training ground, participation in intercollegiate sports as an integral facet of the educational process, the athletic scholarship as a property right, and the athletic scholarship as contract (Springer, p. 339).

While there is no denying that there is a legitimate interest on the part of the athlete in establishing or maintaining his or her eligibility, the contractual argument appears to provide the strongest base for arguments for establishing the property right (Springer, p. 339-40).

Other cases where state action was found to exist include *Regents of the University of Minnesota* v. *NCAA* where the court ruled that the NCAA could put an institution's athletic teams on probation if it failed to declare its athletes ineligible. In *Associated Students, Inc.* v. NCAA, the court did not apply the "strict scrutiny test" and found that the "1.600 rule" had a "rational relationship" to the creation of the classification.

A slightly different case is *Howard University* v. NCAA. The District Court of the District of Columbia found state action and ruled that the "five year limit on eligibility" and the "1.600" rules were reasonable, but found the "Foreign Student Rule" unconstitutional because it created an unreasonable alienage classification and qualified for the "strict scrutiny" interpretation.

Justice v. NCAA found state action, but ruled that participation in intercollegiate athletics is not a constitutionally protected interest. The District Court of Arizona went on to say that even if it was a protectable property interest, sanctions by the NCAA limiting post-season competition and television appearances did not deprive them of regular season play or their scholarships. The court further stated that even granting all of the above, the NCAA's notice and hearing procedure constituted sufficient due process.

In a related case dealing with due process, *Williams* v. *Hamilton*, the District of New Hampshire found state action and ruled that the "one year residency requirement" for eligibility was rationally related to the legitimate state interest of preventing athletes from transferring from one school to another, year after year. The court also stated that the "privilege" of competing was not protected by due process.

In a more recent case, *Jones* v. *Wichita State University*, the 10th Circuit Court of Appeals again applied the "rationality test" to an academic standard. The "2.0 rule" requires a student to have a cumulate high school grade point average of 2.0 in all subjects in order to be eligible for competition during his or her first year. The student did not have a 2.0 without his grades from his physical education classes included. His high school had originally used those grades, enabling him to attain the minimum 2.0 requirement, but did not use physical education grades when computing averages for regular students. The NCAA has a rule that specifically states that the formula used to compute final grade point averages must be the same as those used for all students. When Wichita State discovered what had happened, they declared the student ineligible and precipitated the resulting litigation. The court held for Wichita State.

The courts found no property interests in *Parish* v. *NCAA, Justice* v. *NCAA* or in *Spath* v. *NCAA*, where a Canadian student lost a year of eligibility because he participated in an organized hockey league after the age of 20. The 1st Circuit Court of Appeals did not find the rule referred to an "alien" class only and asserted that there was no fundamental right to play hockey. It also stated that an athletic scholarship was not a property interest.

However, in *Gulf South Conference* v. *Boyd*, the Alabama Supreme Court did find that the right to participate is a property interest and further stated that the non-interference doctrine in voluntary association by which the courts have traditionally abided, did not apply to an athletic conference in this case.

At this time it should be pointed out, that while in the majority of cases, the NCAA has been found to be engaged in state action, there are two significant exceptions.

In *McDonald* v. NCAA, which was also a case challenging the old "1.600 rule", the Central District Court of California found that there was no "state action" in the other private action of a voluntary association. The court stated that the state must be "inextricably involved" in the private action or be able to control the private action.

Perhaps, even more significant is a most recent case, (decided October 25, 1984) *Arlosoroff* v. *NCAA* where the 4th Circuit Court of Appeals declined to find state action. It mentions several of the cases cited previously and continues in part:

> These earlier cases rested upon the notion that indirect involvement of state governments could convert what otherwise would be considered private conduct into state action. That notion has now been rejected by the Supreme Court, however and its decisions require a different conclusion (*Arlosoroff* v. *NCAA*, p. 1021).

The opinion cites *Rendell-Baker* v. *Kohn*, a case heard by the Supreme Court in which the court ruled that the operation of a school is not traditionally an exclusive prerogative of the state. The opinion continues:

> There is no precise formula to determine whether otherwise private conduct constitutes "state action". After "sifting facts and weighing circumstances", *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722, 81 S. Ct. 856, 860, 6 L.Ed.2d 45 (1961), the inquiry in each case is whether the conduct is fairly attributable to the state...
> The fact that NCAA's regulatory function may be of some public service lends no support to the finding of state action, for the function is not one traditionally reserved to the state (*Arlosoroff* v. *NCAA*, p. 1021).

It will be interesting to see the impact of this case of future NCAA litigation, but it clearly attempts to establish a new direction based on the Supreme Court ruling. Whether or not other courts will follow this line of reasoning remains to be seen.

> Any attempts to invoke the protection available under the fourteenth amendment for a college athlete penalized by the NCAA must be qualified with the caveat that such an invocation resides on the borderline of established constitutional doctrine. Aside from a limited number of high school athletic cases, courts generally have not dealt with infringement of athletic interests in constitutional terms (Philpot, Mackall, p. 920).

Another source of law that relates to questions of eligibility are those principles known as "common law". "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 relations with their member institutions" (Kaplan, pp. 291-292).

An example of this type of law can be found in *Weiss* v. *Eastern College Athletic Conference*, where the Eastern District Court of Pennsylvania found that there was no irreparable harm done to a tennis player who was required to sit out one year after transferring schools. Another example is *English* v. *NCAA* where the Louisiana Appellate Court ruled that an NCAA rule whose interpretation was questioned had been applied correctly and that the rule was not arbitrary, capricious, unfair or discriminatory.

It seems almost a certainty that the enactment of Bylaw 5-1-(j) (formerly known as Proposition 48) by the NCAA will result in litigation of some type. This new rule, which goes into effect August 1, 1986 is a requirement for initial eligibility out of high school and replaces the current 2.0 rule. It requires a 2.0 grade point average in a designated core curriculum from 11 identified academic courses and a minimum test score of 700 (combined) on the SAT and a 15 composite score on the ACT.

While the courts in the past have held that such standards satisfy the "lower tier test" for the equal protection clause because they have a rational relationship to the interest of maintaining a certain level of academic standards, there may be a problem with this particular rule. The 2.0 requirement in the core curriculum is not that different from either the 1.600 rule or the cumulative 2.0 rule and would probably be interpreted in the same manner by the courts. However, the minimum test score requirement poses a different problem.

It has been reported and confirmed by various sources that there is a real difference between the performance of blacks and whites on these standardized tests. As a group, blacks achieve lower scores than whites. As mentioned earlier, race qualifies as a "suspect classification" to protect minority groups from the historical and current elements of discrimination. As such, this would qualify any litigation for the "upper tier" or "strict scrutiny test" where the state must demonstrate a "compelling interest" in creating the classification. Obviously, this is much harder to do than merely establishing a "rational relationship".

Also the question of finding "state action" is addressed differently because courts have shown a willingness to act in cases where racial discrimination appears to exist. "Courts appear more likely to find state action in race discrimination cases than in any other kind of case" (Kaplin, p. 25).

With these two factors, the willingness to find state action and the application of the strict scrutiny test, it would appear that once racial differences on the test have been established in court, the minimum test score requirement could be in real trouble.

From its inception the NCAA has attempted to control eligibility by tying it to some academic standards.

The first Association Convention in 1906 includes a discussion of faculty control of athletics. This discussion leads to the adoption of the Association's first policy concerning academic eligibility: 'No student shall represent a college or university in any intercollegiate contest who is not taking a full schedule of work as prescribed in the catalogue of that institution.' (Falla, p. 144).

Obviously, the question of eligibility has become far more complex and complicated since 1906, but the basic issue of maintaining reasonable and legitimate academic standards has remained the same. The courts have consistently demonstrated, time and again, that they will support and

recognize this effort, and not replace the institution's discretion with their own.

College administrators must remember that they have two legal sources with which they must deal: the Constitution and common law. Critical to the application of the Constitutional protections is the finding of "state action" which has been discussed at length. While the NCAA has been bound to be involved in state action, in most instances, a recent court decision has said it is not. Whether this new interpretation is a trend, only time will tell, but the NCAA should be careful to avoid any rules that create a "suspect classification." For the time being, administrators and those who make eligibility rules at the institutional, conference and NCAA level would be well advised to keep court decisions and Constitutional principles in mind when developing policies that have such a profound effect on both students and our institutions.

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