THE STUDENT-ATHLETE: PROCEDURAL DUE PROCESS AND PROPERTY RIGHT

Cheryl L. Schubert-Madsen, J.D.
Legal Researcher

George W. Schubert, PH.D.
Dean and Faulty Athletic Representative
University of North Dakota
Grand Forks, North Dakota 58202

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At the inception of a collegiate athletic career, the student-athlete has no constitutional right to participate in or receive grant-in-aid for collegiate athletics. However, as factors are introduced into the student-athlete's career, this may change. Questions have arisen concerning the right to participate in athletics, the right to athletic scholarships, the right to public view as an athlete, and numerous other rights. Student-athlete's have consistently maintained, and courts have agreed, that there is a right to procedural due process once the student-athlete has begun participation in collegiate athletics or has received a grant-in-aid.

Procedural due process limitations on federal activity are found in the Fifth Amendment to the United States Constitution. It is stated that, "No person shall . . . be deprived of life, liberty, or property without due process of law . . . ." Procedural due process limitations on state activity are found in the Fourteenth Amendment to the United States Constitution. This amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law. Procedural due process limitations

on state activity are also found in state constitutions. Once must examine, therefore, the individual state law as well as the Fourteenth Amendment.

Procedural safeguards are not present in *all* regulatory activities, and when they are present they are not always of equal intensity. First, one must determine if a procedural right is involved in a case. Second, one must determine the nature and extent of the protection available to the aggrieved party where a procedural right is involved.

The elements necessary in order to establish procedural safeguards are: 1) involvement of state or federal action in withholding the due process; 2) actual personage as the aggrieved party; and 3) threat to or infringemenet upon an interest in life, liberty, or property.

State and Federal Action

The Fifth and Fourteenth Amendments to the United States Constitution, as well as state laws, apply only to governmental action, not to private action. Cases and Materials on Constitutional Law, Gunther, 1980. An action by a student-athlete or a coach against an athletic association would generally be inappropriate. However, conduct that appears to be private may be so interconnected with governmental policy or governmental character as to constitute government action in the eyes of the Court. In the past, this has repeatedly been held so with collegiate athletic assocations. Athletic associations have taken upon themselves the role of coordinator and overseer of collegiate athletics in the interest of its associated institutions, many of which are public institutions and therefore support by state funding. In this way, athletic associations have generally been declared to be performing traditional government functions.

However, in three 1982 cases, Blum v. Yaretsky, Lugar v. Edmondson Oil Co., and Rendell-Baker v. Kohn, the Court indicated its intention to more closely examine assertions of government involvement in a challenged activity. In all three cases conduct of a private party or organization were examined. The court has drawn a picture of the private party or organization as a private contractor who performs government construction contracts, wherein even though the state provides all of the revenue, the contractor's acts cannot be attributed to the government for purposes of finding government involvement. Blum, 457 U.S. 991 (1982); Lugar, 457 U.S. 922 (1982); Rendell-Baker, 457 U.S. 830 (1982). In other words, while the government is the "employer", the athletic association is "private" and its intentional acts cannot be attributed to the government.

In Rendell-Baker the Court examined the issue of whether the private organization performed a public function. If so, it would require a finding

of government action. The main inquiry is whether the function performed has traditionally been the exclusive prerogative of the state. The Court has gone so far as to state that even the education of certain individuals does not fall into a traditional state function. Rendell-Baker. It is therefore doubtful that providing an athletic organization for these individual and others would do so.

With these three decisions in mind, it is probable that a court may find that government action is not present under any circumstances, particularly given the courts' propensity to defer to the decisions of amateur athletic organizations and institutions the area of athletics.

Such was the case in Arlosoroff v. National Collegiate Athletic Association (NCAA), 746 F.2d 1019 (1984), wherein a college tennis player brought action seeking to enjoin enforcement of a NCAA eligiblity rule which precluded him from further competition in intercollegiate tennis. Because the student-athlete had participated in three years of organized tennis before his matriculation at the institution but after his twentieth birthday, the NCAA ruled that his freshman year was his last year of eligibility. The court emphasized, "there is no precise formula to determine whether otherwise private conduct constitutes 'state action.' " Arlosoroff, at 1021. The court referred to Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), in stating that the question in each case is whether the conduct is fairly attributable to the state. The court further pointed out that, since the triad of 1982 cases, mere indirect involvement of state governments no longer converted what otherwise would be considered private conduct into state action.

The court also rejected the idea that the NCAA performs a function "traditionally exclusively reserved to the state." Arlosoroff; Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1975). The fact that the NCAA's regulatory function may be of some public service lends no support to the finding of state action. The courts have stated that, while the education of the student-athlete is traditionally reserved to the state, the function of governing intercolegiate athletics is not.

Additionally, in Arlosoroff the court reiterated that an institution's being highly regulated and subsidized by a state is not enough to invoke due process protections. If the state in its regulatory or subsidizing function does not order or cause the action complained of, and the specific function challenged is not one traditionally reserved to the state, there is no state action. However, if the state or officers of the state are active participants in creating or enforcing the rules of the organization, state action will likely be found. Chief Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978).

However, in 1983 the court repeated that the actions of the NCAA con-

stitute "state action" for constitional and jurisdictional purposes. Justice v. NCAA, 577 F.Supp. 356 (1983). The court followed the rule set forth in Shelton v. NCAA, 539 F.2d 1197, (1976) and Associated Students, Inc. v. NCAA, 493 F.2d 1251 (1974) and held that the due process clause of the Fourteenth Amendment applied fully to the actions of the NCAA.

Personage

Both the Fifth and Fourteenth Amendments are expressly intended to protect "persons." It has historically been held that corporations are persons for the purpose of the Fourteenth Amendment and in other instances as well. Therefore, it is very unlikely that an academic institution would not be afforded due process protection simply because it is not a "person."

Liberty Interest

The liberty interest has been liberally construed by the courts. However, the stigma which is suffered must be, as a general rule, accompanied by the threat of or actual loss of some property interest before a claim will be successful; similar to the traditional tort rule that emotional distress must be accompanied by physical injury.

Most courts have held that the right to participate in athletics does not constitute a liberty interest. Karmanos v. Baker, 617 F.Supp. 809 (1985). Quoting Mitchell v. Louisiana High School Athletic Association, 430 F.2d 1155 (1970), the court stated "(The privilege of participating in intercollegiate athletics must be deemed to fall in the latter category (protected by the states) and outside the protection of due process (of the Fourteenth Amendment)." Karmanos at 815; Mitchell at 1158. Athletic participation is deemed a privilege to be granted rather than a right to be protected.

However, given the rise in popularity and importance of sporting activities as a form of expression, the increase of financing through athletic scholarships for educational purposes, and the use of collegiate athletics as a means to enter professional athletics, it is not unlikely that courts will begin to recognize the right to participate in athletics as a liberty interest for due process purposes.

Courts are more inclined to find a liberty interest where some tangible interest, such as the opportunity for an education or a better livelihood, exists. Goss v. Lopez, 419 U.S. 565 (1975). Courts have gone only so far as to suggest that intangible interests like stigmatization might suffice to create a liberty interest when there are no tangible losses, such as a loss of education. Cleveland Board of Education v. Loudermill, 105 S.Ct. 1487 (1985).

Property Interest

Clearly, any true property interest will trigger due process protection. Property interests are created by existing rules or understandings stemming from an independent source, such as state law, and their dimensions are defined similarly. Karmanos. Usuaully, property interests are based upon state statutes or regulations which expressly create a property right or entitlement. They also are granted by contract. Until such property interest is specifically granted, it does not exist and due process protections are not invoke. Goss. However, once such interest is granted, it may not be deprived of recipients of that interest without first affording them due process. J. Nowak, R. Rotunda and J. Young, Constititutional Law 497 (2d ed. 1983).

In Justice the Court emphasized that one must have more than a unilateral expectation of a property interest in a benefit. The individual must have a present legitimate claim of entitlement to it. The Court determined that promises made concerning participation are the "mere suggestion of the potential opportunity" and as such do not create a property right.

Scholarships: Courts have found property interests in the rules and regulations of athletic associations. Lower courts have noted that NCAA regulations and documentation regarding student athletic scholarships give rise to a property interest on the part of the student-athlete. Boyd v. Board of Directors of McGehee School District, 612 F.Supp. 86 (1985). While courts do recognize a property interest on the part of the student-athlete, they are limiting the amount of process that is due. This allows courts to recognize that a property interest is involved while simultaneously enabling them to give ample deference to the athletic association, which the courts generally do.

Participation: Generally, courts do not grant a property interest in the right to participate in collegiate athletics. However, if the student-athlete can show a direct link between the participation and a tangible property interest, it is conceivable that a court would find that a property interest is present. Courts have not yet recognized the link between participation, which allows the athlete to be viewed by professional teams, and receiving a professional sports contract.

In Gulf South Conference (GSC) v. Boyd, 369 So. 2d 553 (1979), the court held that the right to be eligible to participate in college athletics is a property right of present economic value. The court stated that, because some college athletes receive scholarships of value to engage in collegiate athletics there is a property right of present economic value even in the situation where the scholarship does not exist. The distinguishing factor in this case, the court noted, is that this situation specifically involved col-

legiate athletics. Participation in high school athletics where scholarships generally do not exist, or any other situation where scholarships are not granted, does not contain a right to participate. GSC.

In McGehee it was held that the privilege of participating in interscholastic athletics does constitute a property interest and invoke protection by the due process clause of the Fourteenth Amendment where such participation is vital and indispensable to a college scholarship and, in essence, a college education.

It must be noted at this point that the above cases are contradictory to the historical line of cases. Most courts do not grant that mere participation in athletics is enough to trigger a property interest. Colorado Seminary v. NCAA, 570 F.2d 320 (1978).

At present, courts have viewed the liberty interest and the property interest separately. However, it is conceivable that, if a student-athlete can demonstrate that both interests are involved, the court would base a finding of due process protection based upon the sum of the two interests.

Amount of Due Process

When a person is deprived of life, liberty, or property by state or federal action, some amount of due process must be extended. The extent of process due in a given case varies substantially. Normally, due process requires notice of the proceedings and a fair hearing. The nature, extent, and timing of the notice and hearing, are dependent on the court's determination of how much process is due in a given case.

Courts determine the requisite process due by applying a balancing test. Application of this test necessitates that the court weigh three factors in determining the amount of process due. First, the court weighs the nature and amount of private interest that will be affected by the official action. Second, the court determines the amount of risk of an erroneous deprivation of such interest through the procedures used and the probable value of additional or substitute procedural safeguards. Third, the court examines the government's interest, including the function involved and the fiscal and adminisrative burdens that the additional or substitute procedural requisites would entail. Mathews v. Eldridge, 424 U.S. 319 (1976).

McGehee the court applied the balancing test and determined that where there was no clear urgency for acting prior to taking the challenged action the amount of due process required would be increased.

Historically, courts have given broad deference to the governing agencies of collegiate athletics. However, in 1979 the court emphasized that the athlete himself is not a member of the athletic association. The athlete has no choice as to whether he will participate on a team which is a member since nearly all collegiate institutions are members of one association or another. The institutions themselves have little choice as to whether they will be a member of an association since membership in a practical sense is an economic necessity. Additionally, the athlete has no voice or bargaining power concerning the rules and regulations adopted by the athletic associations. Therefore, the basic freedom of association principle behind the non-interference rule is not present. GSC, at 557.

GSC is, however, the exception. Again in 1985 the court reiterated its hesitancy to involve itself in conflicts which develop in the day-to-day operation of a school system, including the governing athletics. McGehee.

As the courts have increased their review of these cases, precedents have been established. However, while the courts are analogizing the specific cases being reviewed with prior decisions, there are very few actual precedents in the speciifc area of collegiate athletics already existing. Therefore, courts necessarily must balance the three factors set forth above to determine how the factors apply in a particular case. Only after a true line of precedent is established in any area will a student-athlete or an administrator know with any certainty what amount of process is due.

In balancing the above factors the courts have deferred to the expertise of school administrators and rule-making bodies of athletic associations. These two entities, in order to safeguard their own interests, are likely to restrict the nature and extent of the due process accorded a student-athlete. Therefore, it is logical to assume that the notice and hearing due to an athlete will be limited.

Notice: A balancing test must be used to determine the type of notice that must be given in an individual instance. The court must balance the student-athlete's interests and the extent to which additional notice would reduce the possibility of an error by the decision-maker against the added administrative and fiscal burden on the school or athletic association of giving such notice. Often, a mere oral recitation informing an athlete of the action being taken and a basic enumeration of the reasons for or charges supporting the action may suffice as proper notice.

Hearing: The same factors considered in determining the notice requirement of procedural due process must also be balanced to ascertain the kind or form of hearing that must be afforded. When a party is being subjected to extreme privation or hardship similar to a criminal penalty, formal hearing procedures much like those used in a criminal trial may be required. In other less severe cases where the administrative burden is significant and

the interest involved is limited, the required hearing procedure may be quite informal and still meet due process standards.

Some form of hearing is almost always required. In McGehee the court stated that since there were no urgent circumstances confronting the coach, the educational process or the other students, the student-athlete must be given a hearing to determine the action to be taken.

In Goss, which involved only a minimal penalty, the Court noted that a hearing in which the student could present his side of the story constituted the minimum hearing requirement. In other cases the courts have required much more, such as formal testimony and discovery.

In order to invoke protection based upon lack of due process in the hearing, it must be the actual hearing itself which is unfair or in violation of the athlete's rights. In Karmanos the court stressed that the actual hearing or investigation involved in the action must be unfair. It is not enough that the eligibility rule be unfair. Neither is it enough that a legislative or executive hearing or investigation is unfair. Karmanos.

Conclusion

Athletes have been afford due process rights when a liberty or property interest is implicated in a termination or related decision by a coach, department, institution, or association. To establish the right to due process, however, the athlete or employee must establish each of the elements of due process. There must be goverment action; the party challenging the action must be a "person"; and the there must be a presence of a life, liberty or property interest. Yet even when each of these elements is present, courts are inclined to defer to the educational and athletic decision-makers and limit the type of notice and hearing that must be afforded.