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STUDENT AT CHARTER CYBER SCHOOL CAN BE BARRED FROM PARTICIPATION IN INTERSCHOLASTIC SPORTS

***Angstadt v. Midd-West Sch. Dist.*, 377 F.3d 338 (3d Cir. 2004).**

On July 15, 2004, the United States Court of Appeals for the Third Circuit affirmed the district court's dismissal of plaintiff's claim for failure to state a claim for violation of her First Amendment, due process, and equal protection rights.

Plaintiff's daughter was a home schooled student from third through eighth grade, but she was granted a waiver during her seventh and eighth grade years to play basketball at the public school in her school district. In 2001 she enrolled in the Western Pennsylvania Cyber Charter School (WPCCS), an independent public school. WPCCS does not offer a girls' basketball team, so she continued to play at the public school until it barred her from competing because she was not an enrolled student at the public school.

On January 29, 2002, the plaintiffs requested an injunction compelling the public school to permit their daughter to play basketball. The district court conducted a hearing, but plaintiffs voluntarily dismissed their complaint. In November 2002, plaintiffs again requested an injunction alleging that the public school had violated their daughter's First Amendment freedom of association, due process and equal protection rights. The district court granted the school district's motion to dismiss because plaintiffs did not dispute the requirements for participation and had failed to state a claim that illustrated a violation of their daughter's constitutional rights. The plaintiffs appealed.

On appeal, the Third Circuit Court held that a student does not have a constitutionally protected right to play interscholastic sports; therefore, there could be no violation of the daughter's constitutional rights in the district's refusal to allow her to play.

The Third Circuit affirmed the district court's dismissal of the plaintiff's claims.

HOMESCHOOLED STUDENTS DO NOT POSSESS A CONSTITUTIONAL RIGHT IN ATHLETIC PARTICIPATION

***Reid v. Kenowa Hills Pub. Schs.*, 680 N.W.2d 62 (Mich. Ct. App. 2004).**

On March 2, 2004, the Court of Appeals of Michigan affirmed a trial court grant of summary judgment for a school district finding that Michigan statutes do not require public schools to allow home schooled children to participate in extracurricular athletics.

The plaintiffs home schooled their children but wanted them to participate in extracurricular activities as well. The public schools would not allow the children to participate in any sports. The schools are all members of the Michigan High School Athletic Association (MHSAA), which requires that all students be enrolled in, and passing, at least twenty credit hours a public school that is a member of the athletic association to participate in athletics. MHSAA rules also state that any school that allows a student to participate, who does not comply with the requirements, will have to forfeit all of its wins and will be barred from any state championships.

Plaintiffs sued the public school district alleging that their children had a statutory right to participate in extracurricular athletics at the public schools and that by denying their children the right to participate, the schools violated their right to religious freedom and equal protection under the law. The trial court granted the defendant's motion for summary judgment. The parents appealed.

The court of appeals initially held that although in a previous case the Supreme Court of Michigan had granted home schooled children the right to enroll in non-core classes at public schools (such as band, shop, or advanced math), extracurricular athletics are not considered a non-core class. The court found that there was a difference between physical education classes that students are required to take, and physical activities after school that are a privilege but not a right. Therefore, public schools were not required to allow home schooled children to participate in athletic activities. The court also considered plaintiffs' freedom of religion challenge, holding that the MHSAA rules did not deny the plaintiffs their rights to home school their children, nor did the rules force them to violate their religious beliefs. Finally, the court held that the rules did not violate plaintiffs' rights to equal protection because the rules were facially neutral and applied to all children without singling anyone out based on religious or other beliefs.

The court of appeals affirmed the decision of the trial court.

SCHEDULING OF BOYS AND GIRLS SPORTS MUST COMPLY WITH TITLE IX

***McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275 (2d Cir. 2004).**

On June 4, 2004, the United States Court of Appeals for the Second Circuit affirmed the district court's decision that the school district violated Title IX in its scheduling of girls' and boys' soccer.

The New York State Public High School Athletic Association (NYSPHSAA) holds the state championships for girls' soccer at the end of the fall season. The high schools that plaintiffs' daughters attended offered girls' soccer in the spring, preventing them from competing in the state championships. Those same high schools offered boys' soccer in the fall allowing boys' team to compete in the state championships. Plaintiffs sought declaratory and injunctive relief claiming that the school district violated Title IX. The district court awarded the plaintiffs injunctive relief and ordered the school district to submit a plan for compliance with Title IX. The district court then approved a plan moving girls' soccer to the fall. The school district appealed.

On appeal, the Second Circuit Court explained that a disparity in one program component (i.e. scheduling of games) could alone constitute a violation of Title IX "if it is substantial enough in and of itself to deny equality of athletic opportunity to students of one sex at a school." Because the boys' soccer season was scheduled so that they could compete in the state championships and the girls' season was not, the Second Circuit found a clear disparity that produced a negative impact on one sex.

The school district argued that moving girls' soccer to the fall would create a shortage of both field space and officials and would force them to hire another coach. The Second Circuit explained that the fact that money must be spent to comply with Title IX is not a defense. The court also found that the school district failed to demonstrate that the schedules for boys' and girls' soccer afford proportionately similar numbers of boys and girls equivalently advanced competitive opportunities.

The Second Circuit affirmed the district court's holding that there was a violation of Title IX and modified the district court's ruling, noting that although the easiest way for the school district to comply with Title IX would be to move girls' soccer to the fall, the district did have the option of alternating fall seasons between the girls' and boys' teams. The court required girls' soccer to be scheduled for the fall of 2004 so that plaintiffs' daughters would have the opportunity to play in the state championships.

NCAA ATHLETE BARRED FROM RECEIPT OF ENDORSEMENT INCOME IN ONE SPORT WHILE PARTICIPATING IN ANOTHER

***Bloom v. NCAA*, 93 P.3d 621 (Colo. Ct. App. 2004).**

On May 6, 2004, the Court of Appeals of Colorado affirmed the trial court's order denying Jeremy Bloom's request for a preliminary injunction against the NCAA and the University of Colorado allowing him to play college football.

The University of Colorado recruited Bloom to play football. Before college he competed in Olympic and World Cup skiing competitions and received commercial endorsements for ski equipment and a contract to model for Tommy Hilfiger. Because NCAA bylaws permit students to engage in professional sports in which they do not participate in college, Bloom and the University asked the NCAA to waive its rules restricting student-athlete endorsement and media

activities. The NCAA denied the waivers and Bloom discontinued his modeling, endorsement and media activities so that he could participate in the 2002 football season.

Bloom sued for injunctive relief barring the NCAA and the University of Colorado from enforcing the NCAA's endorsement rules. He also alleged that the NCAA rules were arbitrary and capricious and constituted restraints of trade in violation of the antitrust laws. The trial court denied his request for an injunction. Bloom appealed.

The Court of Appeals of Colorado interpreted the NCAA endorsement and media activities bylaws and found that, unlike other bylaws, these rules do not contain any sport-specific qualifiers. The court held that the bylaws presented a clear and unambiguous intent to prohibit student-athletes from engaging in endorsement and media appearances without regard to the source of the opportunities or whether the activities are customary to the participation in a related professional sport. The court also affirmed the trial court decision that the application of these rules in Bloom's case was rationally related to the legitimate purpose of retaining the clear line of demarcation between intercollegiate athletics and professional sports.

The court of appeals affirmed the trial court's denial of Bloom's request for injunctive relief.

WRESTLING COACHES ASSOCIATION LACKS STANDING TO SUE SCHOOLS UNDER TITLE IX FOR ELIMINATION OF WRESTLING TEAMS

***Nat'l Wrestling Coaches Ass'n v. Dept. of Educ.*, 366 F.3d 930 (D.D.C. 2004), motion dismissed, 2004 U.S. App. Lexis 9805 (D.C. Cir. 2004).**

On May 14, 2004, the United States Court of Appeals for the District of Columbia affirmed the district court's grant of the Department of Education's motion to dismiss the National Wrestling Coaches Association's Title IX claims.

In 1979, the Department of Health, Education, and Welfare adopted a policy interpretation (clarified by the Department in 1996) utilizing a three-part test to assess compliance with Title IX. To satisfy the test some universities eliminated mens' sports, particularly mens' wrestling programs.

The National Wrestling Coaches Association sued alleging injury as a result of schools eliminating mens' wrestling. They claimed that the three-part test violates the Equal Protection Clause and that many procedural problems in the Department's policy interpretation rendered the interpretive rules invalid under the Administrative Procedure Act (APA). The district court found that the National Wrestling Coaches Association did not have standing to sue and dismissed the case. The Association appealed.

The court of appeals agreed that the plaintiffs did not have standing because the plaintiffs' injuries were caused by the decisions of particular universities to eliminate male wrestling opportunities, and altering those independent decisions would not redress the plaintiff's injuries. The court also noted that even if plaintiffs had standing, the APA only addresses actions for

which there is no other adequate remedy in a court except judicial review. The court held that a private cause of action directly against a university on the basis of Title IX discrimination would be an adequate remedy for students affected by the decision to eliminate the teams.

The United States Court of Appeals for the District of Columbia affirmed the district court's dismissal of the Association's action.

COACH UNDER CONTRACT TO ONE UNIVERSITY BARRED FROM BREACHING THAT CONTRACT IN ORDER TO WORK FOR ANOTHER UNIVERSITY

***Northeastern University v. Brown*, 17 Mass. L. Rep. 443 (Mass. 2004).**

Under the contract Brown signed with Northeastern University, the University agreed to hire him as head football coach through the 2007-2008 football season. Article IX of the contract included a liquidated damages clause that required Brown to pay the University $25,000 if he left before the end of his contract. In January 2004, Brown secured a one-year extension to his contract with a raise and raises for his staff, in return for his promise to avoid talking to other colleges. Shortly thereafter, the athletic director from the University of Massachusetts called Northeastern's athletic director asking to speak to Brown about a job, but permission was denied. In February 2004, Brown resigned from Northeastern to take the job of head football coach at the University of Massachusetts.

Northeastern sued to prevent Brown from accepting the position with the University of Massachusetts. Since Brown knew Northeastern's playbook and recruiting practices, the two schools were in the same conference, and the schools played each other every year, Northeastern claimed that the liquidated damages clause was an insufficient remedy. Northeastern requested a preliminary injunction preventing Brown from coaching at the University of Massachusetts and competing against Northeastern.

The court held that Brown intentionally breached his contract with Northeastern. The court noted that although the liquidated damages clause was included in the contract, an injunction could be granted because Northeastern could show that it would suffer irreparable harm if Brown were allowed to work for the University of Massachusetts. In balancing the harms to each party, the court noted that although Brown would not be able to coach and the University of Massachusetts would not be able to employ him, the irreparable harm Northeastern would face in competing with Massachusetts for recruits and television coverage outweighed the harm to Brown and the University of Massachusetts.

The court granted Northeastern University's request for an injunction barring Brown from working for the University of Massachusetts.

PAPER CANNOT COMPEL DISCLOSURE OF COACHES' CONTRACT INFORMATION

***Univ. Sys. of Md. v. Baltimore Sun Co.*, 847 A.2d 427 (Md. 2004).**

On April 15, 2004, the Court of Appeals of Maryland affirmed in part and reversed in part the lower court's holding that employment contracts of state employees are documents that must be disclosed to the public.

The Baltimore Sun made a written request to the University of Maryland, College Park (UMCP) under the Maryland Public Information Act (MPIA) requesting copies of the original and revised versions of the employment contract for UMCP's head football coach. UMCP disclosed the coach's annual salary but denied the remainder of the request. The coach agreed to voluntarily disclose some additional information to the paper. The Baltimore Sun filed another MPIA request, this time for the same type of information on UMCP's head basketball coach. UMCP again refused to disclose information relating to financial income outside of the annual salary. The newspaper sued the school to compel disclosure of the information.

The trial court held that the paper did not have the right to see personnel records stating income derived outside of annual salary. The court granted UMCP's motion for summary judgment instructing the school to produce the documents containing salary information, but indicating that the school should redact all personnel information. The paper moved to alter or amend the judgment. The trial court denied this motion, but a writ of certiorari was issued by the court of appeals.

The court of appeals discussed the NCAA rules that require coaches to report all sources of income from third parties. Without those rules, public universities would not have copies of those contracts or access to that information. Therefore, to determine if the Baltimore Sun had a right to see the documents, the court considered the legislative intent behind the MPIA. The court held that the employment contracts of the coaches did not fall within the exemption from disclosure for personnel records and that all documents reflecting compensation to the coaches must be disclosed. However, contracts made by the coaches with third parties did not need to be disclosed because the MPIA did not require the coaches to report those figures, and therefore, the documents were not public. Still, the third party contracts would have to be disclosed if it was determined that the coaches were receiving payments from those parties solely based on their positions at UMCP. As a result, the court stated that all third party contracts would have to be viewed by the lower court to determine if the financial information must be disclosed.

The court of appeals affirmed in part and reversed in part the decision of the lower court.

COURT UPHOLDS NFL DRAFT ELIGIBILITY RULES

Clarett v. NFL, 369 F.3d 124 (2d Cir. 2004).

On May 24, 2004, the United States Court of Appeals for the Second Circuit reversed the district court's holding that the National Football League's (NFL) eligibility rules violated the antitrust laws, holding that the non-statutory labor exemption bars antitrust challenges to these rules. The Second Circuit also vacated the district court's order that Maurice Clarett be declared eligible for the 2004 NFL draft.

Clarett graduated from high school in December of 2001 and enrolled at The Ohio State University where he became a running back on the football team. The team won the national championship in his freshman year. Clarett was suspended for his sophomore year. He tried to enter the NFL draft, but he was barred because he was not three full seasons removed from his high school graduation.

Since 1990, NFL eligibility rules have permitted a player to enter the draft only three full seasons after that player's high school graduation. Although the eligibility rules do not appear in the text of the collective bargaining agreement, at the time the current agreement went into effect, the rules appeared in the NFL Constitution and Bylaws, which had last been amended in 1992. The rules are also mentioned in three separate provisions within the agreement.

Clarett sued the NFL claiming that the eligibility rule was an unreasonable restraint of trade in violation of federal antitrust law. The district court granted summary judgment in favor of Clarett and ordered that he be made eligible for the 2004 draft. The NFL first sought a stay of the district court's order but was denied. The NFL then appealed the district court's decision. Five days before the April 24 draft, the Court of Appeals issued a stay of the lower court's ruling preventing Clarett and others from being a part of the NFL Draft. After the ruling, Clarett filed an emergency appeal with the U.S. Supreme Court, which was denied.

Before the Court of Appeals, Clarett argued that the NFL clubs are competitors for the labor of professional football players and that the eligibility rules violate the antitrust laws. The court first noted that in order to accommodate the collective bargaining process, certain concerted activity among and between labor and employer has been held to be beyond the reach of the antitrust laws due to the non-statutory labor exemption. The exemption is a judicially-created doctrine that defers to the National Labor Relations Board in determining what specific labor practices are exempt from antitrust scrutiny. Typically, mandatory subjects of bargaining such as wages and working conditions, have been protected from antitrust review by the exemption. Therefore, the court noted that NFL teams are permitted to engage in joint conduct with the union with respect to the terms and conditions of players' employment without risking antitrust scrutiny. The court held that the eligibility rules are mandatory bargaining subjects and are protected by the labor exemption. Therefore, Clarett could not contest these rules on antitrust grounds.

The Second Circuit Court reversed the district court and remanded the case with instructions to enter judgment for the NFL.

UNIVERSITY CANNOT RESTRICT EMPLOYEES' COMMUNICATION REGARDING DISPLEASURE WITH MASCOT

***Crue v. Aiken*, 370 F.3d 668 (7th Cir. 2004).**

On June 1, 2004, the United States Court of Appeals for the Seventh Circuit affirmed a district court finding that the plaintiffs' First Amendment free speech rights had been violated. It also affirmed the award of attorney fees to the plaintiffs.

Chief Illiniwek has been the mascot for the University of Illinois since 1926. Since 1975 there has been debate over whether he should remain. In February of 2001, the University became aware of a number of faculty and graduate teaching assistants who contacted prospective student-athletes about the Chief Illiniwek controversy and the implications of competing on behalf of a university that employs racial stereotypes. In March 2001, the chancellor sent an e-mail explaining that the director of athletics must first expressly authorize all contacts with prospective student-athletes. Plaintiffs sued claiming that the directive contained in the email restrained their rights to free speech. The district court entered summary judgment in favor of plaintiffs and ordered nominal damages. The defendant appealed.

The Seventh Circuit Court of Appeals noted that the speech in question was a matter of public concern, and thus, a balancing test must be used to determine if the university's interest outweighed the plaintiff's free speech rights. The university asserted that its threatened interests included adherence to NCAA governing bylaws and protection of prospective students from undue pressure in order to maintain an efficient recruiting program. The court found that the plaintiffs' rights to free expression outweighed any potential impact of the speech on the university's operation of the athletics program.

The Seventh Circuit Court of Appeals affirmed the decision of the district court.

ESPN'S USE OF TRADEMARK DOES NOT INFRINGE ON AGENCY'S TRADEMARK

***Playmakers LLC v. ESPN, Inc.*, 376 F.3d 894 (9th Cir. 2004).**

On June 10, 2004, the United States Court of Appeals for the Ninth Circuit affirmed the decision of the district court denying plaintiff's motion for a preliminary injunction in its trademark infringement action.

In 1997, Playmakers LLC formed, registering two trademarks involving the word "Playmakers" for agency services focused on representing and advising professional athletes. In June 2003, ESPN began advertising a new drama series called "Playmakers" that debuted in August. A number of professional football players and NFL representatives criticized the show for exaggerating negative stereotypes such as the prevalence of illegal drug use and domestic abuse among football players.

In November 2003, Playmakers LLC moved for a preliminary injunction to prevent ESPN from using the title "Playmakers" for its second season. The plaintiff claimed reverse confusion because professional athletes would mistakenly associate the company with the television series or would think that the company was infringing on the rights of the television series' mark. The district court denied the motion and Playmakers LLC appealed.

The Ninth Circuit Court considered the likelihood of confusion, particularly whether a reasonably prudent consumer would be confused as to the origin of the name of the television show bearing one of the marks. The court found that Playmakers LLC failed to show a likelihood of success on the merits because there was no likelihood of confusion and failed to show that the balance of hardships weighed in favor of an injunction.

The Ninth Circuit Court affirmed the decision of the trial court.

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Matthew J. Mitten*, Editor, Professor of Law and Director, National Sports Law Institute*

Paul M. Anderson*, Author/Editor, Designer, Adjunct Associate Professor of Law and Associate Director, National Sports Law Institute*

Melissa Vittone*, Contributor, Managing Editor, Marquette Sports Law Review*

