

**BOARD OF CONTROL
REGULAR MEETING
APRIL 13, 2006
LEXINGTON, KY**

AGENDA MATERIAL



Kentucky High School Athletic Association

2280 Executive Drive ° Lexington, KY 40505 ° www.khsaa.org ° (859)299-5472 (859)293-5999 (fax)

MEMO

TO: KHSAA Board of Control

FROM: Commissioner Brigid L. DeVries 

DATE: April 5, 2006

RE: April 13, 2006 Regular Board of Control Meeting

Hello everyone! Enclosed please find the agenda for the April 13, 2006 Regular Board Meeting. Please note that it will be a very full day.

The Boys' and Girls' Basketball Tournaments were a great success. Thank you for all of your help with the trophies and presentations.

As always, feel free to give me or any of the KHSAA staff a call if you have questions or need information regarding the upcoming Board meeting. Sports specific questions are best directed to the primary staff contact.

I look forward to seeing you on the 13th!

Room reservations have been made for the following individuals at the Hilton Garden Inn as listed below. If you need to change your arrival or departure date, please contact Darlene Koszenski at the KHSAA office as soon as possible.

Board Member	Room, Wednesday night, 4/12	Attend Meeting	Board Member	Room, Wednesday night, 4/12	Attend Meeting
Mike Barren	NO	YES	L.V. McGinty	YES	YES
Chuck Broughton	YES	YES	Steve Parker	NO	YES
Lonnie Burgett	YES	YES	Jeff Perkins	NO	YES
Gary Dearborn	YES	YES	Jeff Schlosser	NO	YES
Paul Dotson	YES	YES	Bob Schneider	NO	YES
Paula Goodin	YES	YES	Jim Sexton	NO	YES
Sally Haeberle	YES	YES	Robert Stewart	NO	YES
Stan Hardin	NO	YES	Jerry Taylor	YES	YES
Ozz Jackson	YES	YES	Donna Wear	YES	YES



BOARD OF CONTROL MEETING
KHSAA Offices, Lexington, KY
April 13, 2006 (All times E.T.)

8:30 a.m. ET, Hall of Fame Screening Committee – Chuck Broughton, Gary Dearborn, Paula Goodin, Stan Hardin, Jeff Schlosser, Butch Cope, Brigid DeVries, Media Rep., Dawahares Rep.
(Material will be sent under separate cover)

9:30 a.m. ET, Officials Committee – L.V. McGinty, Chairperson, Michael Barren, Chuck Broughton, Lonnie Burgett, Gary Dearborn, Paula Goodin, Stan Hardin, Jeff Perkins, Bob Schneider, Robert Stewart, Jerry Taylor, Donna Wear

10:00 a.m. ET, Museum Development Committee – Steve Parker, Chairperson, Lonnie Burgett, Paula Goodin, Sally Haeberle, Stan Hardin, Jeff Perkins, Jeff Schlosser, Bob Schneider, Jim Sexton, Jerry Taylor

10:30 a.m. ET, Football Committee – Bob Schneider, Chairperson, Michael Barren, Chuck Broughton, Gary Dearborn, Paul Dotson, Paula Goodin, Sally Haeberle, Stan Hardin, Ozz Jackson, L.V. McGinty, Jeff Perkins, Jeff Schlosser, Jim Sexton, Robert Stewart

11:00 a.m. – ET, Executive Committee - All Board Members (agenda items listed in Board agenda)

LUNCH

1:30 p.m. ET, - Board of Control Meeting

- 1) Call to Order, President Jerry Taylor
- 2) Reflection – Mike Barren
- 3) Pledge of Allegiance – Ken Tippet
- 4) Possible Executive Session to Review Kentucky Department of Education Hearing Officer Rulings, Current Investigations and Current and Potential Legal Cases
- 5) Consideration of the following appeals in compliance with the KHSAA Due Process Procedure:

Case #	Bylaw	H. O. Recommend	Recuse
#1034	6	ELIGIBLE	
#1036	6	ELIGIBLE	
#1032	6	INELIGIBLE	Dearborn
#1033	6	INELIGIBLE	
#1038	6	INELIGIBLE	
#1037	6	INELIGIBLE (EXCEPTIONS)	
#1039	6	INELIGIBLE (EXCEPTIONS)	
		BOC APPEALS	
#1019	33	OLDHAM COUNTY SCHOOLS	

- 6) Approve bills from January 1, 2006 through March 31, 2006
- 7) Approve minutes from January 1, 2006 through March 31, 2006
 - a) January 11-12, 2006
 - b) February 20, 2006
 - c) March 6, 2006
 - d) March 17, 2006
 - e) March 24, 2006
- 8) 702 KAR 7:065 Commissioner DeVries Contract Renewal and Confirmation of Evaluation
- 9) Committee Report from the **Officials Committee** and Necessary Action (**)
 - a) Review Composite Regular and Post Season Fees for Officials for 2006-2007
- 10) Committee Report from the **Museum Development Committee** and Necessary Action (**)
 - a) Discussion of Fundraising Structure and Plans (O)

- 11) Committee Report from the **Football Committee** and Necessary Action (**)
 - a) Review of Alignment Drafts (to be sent via e-mail at a later date)
- 12) Committee Report from the **Executive Committee** and Necessary Action (**)
 - a) Discussion of Association Bills-January 1, 2006 through March 31, 2006 (W)
 - b) Roof Proposal (W)
 - c) Orkin Report Regarding Termites (W)
 - d) Christian Fellowship Request to Withdraw From Basketball (W)
 - e) Report on KBE Meeting (W)
 - f) Insurance Clarification of Policy
 - g) Telephone Policy (W)
 - h) Transfer Follow Up From Exception Letter (W)

B. Reports and Discussion Items

(W refers to Written Items, O-refers to Oral Action/Discussion)

- 1) Report on Transfers, January 1, 2006 through March 31, 2006 (W)
- 2) Report on School Penalties & Fines, July 1, 2005 through March 31, 2006 (W)
- 3) Review BK Alignment Request from District 52 (W)
- 4) Legislative Update (W)
- 5) New Board of Control member letters (W)
- 6) Confirm date for next Regular Board Meeting (May 22-23, 2006) (O)

C. Miscellaneous Items, Correspondence and Board and Staff items

Items marked (*) have no attachments

Items marked (**) may have additional material distributed prior to the meeting

f:\board\agenda\agendaapril2006.doc

MINUTES OF THE BOARD MEETING

JANUARY 11-12, 2006

President Jerry Taylor convened the regular meeting of the Board of Control on Thursday, January 12, 2006 at 8:30 a.m. All Board members were present except Sally Haeberle. Also present were Commissioner Brigid DeVries, Assistant Commissioners Larry Boucher, Julian Tackett and Roland Williams, Director of Promotions and Media Relations Butch Cope, Fundraising Consultant Ken Tippet and Office Manager Darlene Koszenski. KHSAA legal counsel, Ted Martin, was also present.

Jim Sexton led the Pledge of Allegiance.

President Taylor requested the record show that seventeen out of eighteen Board members were present, and that ten votes were needed to pass any eligibility motions.

Mike Barren made a motion, seconded by Donna Wear, to go into Executive Session to discuss pending legal cases with Ted Martin. The motion passed unanimously. L.V. McGinty made a motion, seconded by Jeff Perkins, to come out of Executive Session. The motion passed unanimously. No action was taken during Executive Session.

The Board of Control then considered the following appeals in compliance with the KHSAA Due Process Procedure:

Case #	Bylaw	H. O. Recommend	Board Motion	Board Second	Vote	Status
#1009	6	Eligible	Accept (Stewart)	Schlosser	15-1-1 (Sexton)	Eligible
#1016	6	Eligible	Accept (Taylor)	Burgett	17-0	Eligible*
#1012	6	Ineligible	Accept (McGinty)	Parker	16-1	Ineligible
#1013	6	Ineligible	Accept (Burgett)	Parker	17-0	Ineligible
#1017	6	Ineligible	Accept (Dotson)	Burgett	16-0	Ineligible
#1018	6	Ineligible	Accept (Dearborn)	Perkins	15-1-1 (Stewart)	Ineligible
Let the record show that Steve Parker left the meeting at 10:20 a.m.						
#1019	9 & 33	South Oldham-Uphold Penalty	Accept (Broughton)	Perkins	12-4	Penalty Upheld
#1011	6	Ineligible (Exceptions)	Accept (Dearborn)	Broughton	14-0-2 (Sexton/ Stewart)	Ineligible**
#980	6	Review Additional Information	Accept (Dotson)	Schlosser	15-0-1 (Jackson)	Remains Eligible
#1015	6	Motion to Reconsider	Accept (Sexton)	Hardin	8-9 (FAILS)	Remains*** Ineligible

*The Board asked the record to show that the eligibility was granted under the Due Process Procedure, not Bylaw 6 – Guardianship.

**The Board asked the Commissioner to investigate comments made about other players in the record, and possible payment of camp fees by school personnel.

***Four guests were present for the review of case #1015: North Hardin Assistant Principal Les Tharp (and father of Chris Tharp); North Hardin Athletic Director Alan Campbell; North Hardin

Basketball Coach Ron Bevars; Hardin County Schools Attorney Jeremy Aldridge. In addition, the Board reviewed the tape of the original eligibility hearing as part of the reconsideration.

Paul Dotson made a motion, seconded by Gary Dearborn, to approve Association bills for the period of November 1, 2005 through December 31, 2005. The motion passed unanimously.

Lonnie Burgett made a motion, seconded by Ozz Jackson, to approve the minutes of the November 16-17, 2005 regular meeting and the December 8, 2005 special meeting. The motion passed unanimously.

Donna Wear, Chairperson, **Individual Sports Committee**, reported that the Track Advisory Committee recommended that students below grade 7 not be eligible to enter post-season play in Track and Cross Country. The Committee wanted to review the desirability of such a prohibition in other sports and to consult Kentucky Medical Association prior to final consideration.

Lonnie Burgett, Chairperson, **Audit & Finance Committee**, asked the Board to approve the following motions:

1. Accept the mid-year budget status report. A motion was made by Donna Wear, seconded by Bob Stewart, and passed unanimously.
2. Accept the office renovation expense report. A motion was made by Jim Sexton, seconded by Jeff Perkins, and passed unanimously.

Paula Goodin, Chairperson, **Title IX Committee**, made a motion, seconded by Mike Barren, to accept the following policy regarding Prime Time/Prime Date Girls' Basketball play, effective with the 2006-2007 season: Each year, beginning in school year 2006-07, girl's basketball teams must schedule at least 40 percent of their regular season home basketball contests on prime dates (Friday night, Saturday or Sunday). This girl's percentage must be accomplished irrespective of the boy's home game "prime date" percentages. If schools schedule boy/girl "prime date" double-headers, then girl's basketball starting game times must be the second scheduled game of the double-header as follows:

One Double-Header	(Optional As To Which Team Plays Second)
Two Double-Headers	(Girls Game Must Be Second At Least Once)
Three Double-Headers	(Girls Game Must Be Second At Least Once)
Four Double-Headers	(Girls Game Must Be Second At Least Twice)
Five Double-Headers	(Girls Game Must Be Second At Least Twice)
Six Double-Headers	(Girls Game Must Be Second At Least Three Times)
Seven Double-Headers	(Girls Game Must Be Second At Least Three Times)
Eight Double-Headers	(Girls Game Must Be Second At Least Four Times)
Nine Double-Headers	(Girls Game Must Be Second At Least Four Times)
Ten Double-Headers	(Girls Game Must Be Second At Least Five Times)

The motion passed 15-1.

President Taylor, **Executive Committee** Chairperson, then asked the Board to approve the following motions:

1. Accept the Corporate Partner Mid-Year Internal and External Sales Reports as presented. A motion was made by Jim Sexton, seconded by Paul Dotson, and passed unanimously.
2. Support the member schools having a vote before any final decision is made on issues agreed to by the member schools Task Force. A motion was made by Jim Sexton, seconded by Gary Dearborn, and passed unanimously.

President Taylor, **Executive Committee** Chairperson, then asked that the record show:

1. L.V. McGinty stated that the reply from Donna A. Lopiano, CEO, Women's Sports Foundation, regarding Fast Pitch Softball Tournament facilities was viewed as a curt response and not very appropriate at addressing the issue.
2. Proceedings from the Public/Non-Public Task Force Meeting were discussed at length.

Commissioner DeVries and Jerry Taylor will send Fay Thornton a congratulations letter from the Board and staff on receiving the Thomas E. Frederick Award from the NIAAA.

Roland Williams gave an update on the recent NIAAA conference held in Orlando.

Ozz Jackson made a motion, seconded by Donna Wear, to approve the date for the Special Board Meeting on February 20th to consider January appeals. The motion passed 14-2.

Paul Dotson made a motion, seconded by Gary Dearborn, to approve the date for the Special Board of Control Meeting, March 24th in conjunction with the Houchens/KHSAA Girls' Sweet 16® Basketball Tournament in Bowling Green, Kentucky. The motion passed unanimously.

Assistant Commissioner Larry Boucher received the post-season basketball officiating assignment requests as follows:

REGION #	DISTRICT PLAY	REGION PLAY
1	IN	OUT
2	IN	OUT
3	IN	OUT
4	IN	OUT
5	IN	OUT
6	IN	IN
7	IN	IN
8	IN	IN
9	IN	OUT
10	IN	IN
11	IN	IN
12	IN	OUT
13	IN	OUT
14	IN	OUT
15	IN	OUT
16	IN	IN

Assistant Commissioner Julian Tackett reviewed the KDE enrollment figures for the Football alignment. The feedback from the Board was to use boys' enrollment only and to explore additional classes. Staff was requested to develop alternative proposals and report back to the Football Committee in February.

President Taylor asked for Commissioner DeVries' evaluation to be placed on the February agenda.

Third year Board members are eligible to attend the NFHS Summer Meeting in Orlando, Florida on June 25-30, 2006. Their attendance should be confirmed at the February meeting.

There being no further business to come before the Board, L.V. McGinty made a motion to adjourn. The motion was seconded by Ozz Jackson, and passed unanimously. The meeting adjourned at 12:15 p.m.

MINUTES OF THE BOARD MEETING

FEBRUARY 20, 2006

President Jerry Taylor convened the special meeting of the Board of Control on Monday, February 21, 2005 at 9:30 a.m. All Board members were present except L.V. McGinty. Also present were Commissioner Brigid DeVries, Assistant Commissioners Larry Boucher, Julian Tackett and Roland Williams, Director of Promotions & Media Relations Butch Cope, Fundraising Consultant Ken Tippet and Office Manager Darlene Koszenski. Ted Martin, KHSAA Legal Counsel, and C. Ray Hall, Courier-Journal reporter, were also present.

Sally Haeberle provided a moment of reflection.

Jeff Perkins led the Pledge of Allegiance.

President Taylor stated for the record that seventeen Board members were present, and that ten votes were needed to pass any eligibility motions.

The Board of Control then considered the following appeals in compliance with the KHSAA Due Process Procedure:

Case #	Bylaw	H. O. Recommend	Board Motion	Board Second	Vote Y/N/R	Status
#1004M	6	ELIGIBLE	Overturn (Perkins)	Dearborn	14-3	Ineligible-A**
#1021	6	ELIGIBLE	Uphold (Jackson)	Dotson	13-4	Eligible
#1000	6	ELIGIBLE-REMAND	Remand (Dearborn)	Dotson	15-0	Eligible
#1004A	6	INELIGIBLE-EXCEPTIONS	Uphold (Burgett)	Perkins	14-3	Ineligible
#1018	6	INELIGIBLE-EXCEPTIONS	Uphold (Dotson)	Haeberle	15-1-1 (Stewart)	Ineligible
#1022	6	INELIGIBLE-EXCEPTIONS	Uphold (Dearborn)	Haeberle	15-1-1 (Sexton)	Ineligible

**The Commissioner was asked to send a letter to the sending school regarding lack of institutional control.

A-Findings of Fact-Case #1004M

1. The Findings of Fact as contained in the Hearing Officer's Recommended Orders dated October 24, 2005 and January 13, 2006 are not disputed by the Board. Instead, based upon those same Findings of Fact, the Board reaches a different conclusion of law. Thus, the Board hereby incorporates by reference the Findings of Fact as contained in the Hearing Officer's Recommended Orders.

Conclusions of Law

Based on the entire record, the Board concludes that the application of Bylaw 6, Section 1 (Bylaw 6") should not be waived for the following reasons:

1. The student's transfer is subject to Bylaw 6 because she participated in varsity sports at the sending school after enrolling in grade nine and then transferred to the receiving school.
2. As concluded by the Hearing Officer, none of the enumerated exceptions to Bylaw 6 apply.
3. The only other potential avenue for eligibility is the waiver provision contained in the Due Process Procedure. It provides that a waiver "may only be granted in cases where strict application of the applicable bylaw is unfair to the student athlete and the circumstances creating the ineligibility are clearly beyond the control of all of the parties involved." This availability of this waiver provision is, however, limited by Bylaw 6. In pertinent part, Bylaw 6 states that a waiver of the period of ineligibility shall not be granted if either:

(1) The change in schools is to nullify or circumvent the action of representatives or rules of the previous school or if the student left the sending school under penalty which would have resulted in their ineligibility at the sending school; or

(2) The change in schools is motivated in whole or part by a desire to participate in athletics at the new school.

The Hearing Officer recommended that the student's sister not be granted a waiver of Bylaw 6 because she fell in category (1). With respect to the student, the Hearing Officer recommended a waiver of Bylaw 6, but stated that the Board "may need to consider the student from a different perspective." The basis for the Hearing Officer's dissimilar treatment was that there were no enumerated "significant" issues with the student except for talking at inappropriate times.

While noting that this was a difficult decision, the Board concludes that the record in this case is clear that the motivation underlying the student's transfer falls squarely within the limitations imposed by Bylaw 6 and that a waiver is inappropriate. The student and her sister were both advised by their softball coach that they were not going to be allowed to participate for the sending school's softball team the following year. This decision was made based on conflicts they, their older sister and their parents had with the sending school's assistant softball coach. While some of the specifics of the incidents culminating in the coach's ultimate decision were disputed, the record shows that there were indeed incidents that caused the conflict and this was not an unsupportable decision. Further, the student was not expelled from the sending school rather, the only action taken was related to softball. As such, the Board will not second-guess the coach's decision as to handle his softball team and which students would be allowed to participate thereon. The sole basis for her transfer was to avoid the inability to play softball at the sending school and participate in softball at the receiving school. Thus, the waiver provision is inapplicable to the student's transfer.

The sending school's indication that it supported the student's eligibility at the receiving school cannot support a waiver of Bylaw 6. First, there is no exception which allows the sending school to create eligibility at the receiving school. The member schools have vested this responsibility in the Commissioner. This Board is charged with the responsibility of protecting the interests of all the KHSAA's member schools and upholding the integrity of the bylaws adopted by those member schools. Because the student's transfer does not satisfy any enumerated exception to Bylaw 6 and a waiver is unavailable, this Board cannot restore eligibility based on the sending school's support.

Finally, a waiver under these circumstances would set a dangerous precedent. While the student may believe that the grounds for the softball coach's decision were erroneous and that she was treated unfairly by the sending school, coaches constantly make decisions which lead to a student's inability to participate for the team. If this Board allowed waivers based on its own judgment of whether the coach made a good or bad decision when there is some evidence to support the decision, then the coach's authority would be undermined and this Board would put itself in the role of the coach. To protect the autonomy of coaches and support Bylaw 6's prohibition against athletically motivated transfers, a waiver is inappropriate under these circumstances.

Bob Schneider, Chairperson of the **Football Committee**, asked the Board to approve the following motion:

1. Instruct staff to prepare three draft football alignments using boys' enrollment figures only. One for 4 classes, one for 5 classes and one for 6 classes, per the recommendations of the Football Advisory Committee. Do not allow playing up. Authorize the change of dates for the 2006 State Football finals at Papa John's Stadium in Louisville, due to a scheduling conflict with the University of Louisville. The 4A game would be played on Thursday, November 30, 2006 at 7:30 p.m.; Class 2A-1A-3A games would be played on Friday,

December 1, 2006 at 11:30 a.m.-3:30 p.m.-7:30 p.m. respectively. The motion was seconded by Paul Dotson, and passed unanimously.

Gary Dearborn made a motion, seconded by Sally Haeberle, to go into Executive Session to discuss Commissioner DeVries' contract renewal. The motion passed unanimously. Gary Dearborn made a motion, seconded by Sally Haeberle, to come out of Executive Session. The motion passed unanimously. No action was taken during Executive Session.

Let the record show that Lonnie Burgett and Sally Haeberle left the meeting.

Gary Dearborn made a motion, seconded by Stan Hardin, to discuss Commissioner DeVries' contract at the April meeting. The motion passed unanimously.

The date for the next Board meeting is Friday, March 24, 2006, at 8:00 a.m. C.T., in conjunction with the Houchens/KHSAA Girls' Sweet 16® Basketball Tournament in Bowling Green, KY.

Since there was no other business to come before the Board, a motion to adjourn was made by Donna Wear, seconded by Chuck Broughton, and passed unanimously. The meeting was adjourned at 2:10 p.m.

MINUTES OF THE BOARD MEETING

MARCH 6, 2006

President Jerry Taylor convened the special called meeting of the Board of Control on Monday, March 6, 2006 at 8:30 a.m. All Board members were present except Paula Goodin. Also present were Commissioner Brigid DeVries, Assistant Commissioners Larry Boucher, Julian Tackett and Roland Williams, Director of Promotions & Media Relations Butch Cope, Fundraising Consultant Ken Tippet and Office Manager Darlene Koszenski. Judge James Keller, Facilitator, Ted Martin, KHSAA Legal Counsel, Pat Conway, St. Marys, Dennis Daugherty, St. Henry, Mike Fields, Lexington Herald Leader reporter, Bill Hill, Sayre, Rob Mullen, Trinity-Louisville, Wilson Sears, Somerset, Jodell Seay, Portland Christian, Leisa Speer, Archdiocese of Louisville, Harold Staples, Owensboro Catholic, were also present.

Jerry Taylor led the Pledge of Allegiance.

President Taylor stated for the record that seventeen Board members were present.

The draft proposals from the Public/Non-Public Task Force were discussed at length.

Sally Haeberle made a motion, seconded by Paul Dotson, to go into Executive Session to review litigation. The motion passed unanimously. L.V. McGinty made a motion, seconded by Sally Haeberle, to come out of Executive Session. The motion passed 14-3. No action was taken during Executive Session.

Commissioner DeVries updated the Board on legislative action which could impact high school athletic programs in Kentucky. She will be speaking with Representative Don Pasley this afternoon about the amendment to House Bill 138, which would amend KRS 156.070 to permit a student to play a sport in a contiguous district if the sport is not offered in his or her district. The Board is opposed to this amendment, and she will convey that sentiment when she speaks with him.

Following additional discussion on the Public/Non-Public Task Force Proposals, Paul Dotson made a motion, seconded by Sally Haeberle, to approve Proposal 1 as written. The motion passed 15-2.

There was considerable discussion on Proposal 2. Mr. Sexton felt that the penalty should not be applied to students unless they had played varsity. Other concerns were expressed about the need to revise KHSAA forms to track participation by students not yet in grade 9. There was also a good deal of discussion on one year versus some form of two year penalty. Following this discussion, Jeff Perkins made a motion, seconded by Paul Dotson, to approve Proposal 2 as written. The motion passed 11-6.

There was then a great deal of discussion on Proposal 3. Staff attempted to clarify the provisions of Proposal 3 as it relates to tuition paying students at public schools (Which would be legal as long as they came through an affiliated school or from a terminal school). Members of the audience and members of the Board expressed opinions regarding the two-year period of ineligibility (one year all levels, one year varsity) compared to the one year transfer ineligibility period. Following this discussion, Jim Sexton made a motion, seconded by Chuck Broughton, to approve Proposal 3 as written. The motion passed 12-5. The passage of this proposal renders Proposals 4 & 5 moot.

The Board discussed the timing of the referendum that was reviewed in KBE Chair Keith Travis' letter. Commissioner DeVries will share the proposals approved by the Board of Control with Commissioner Wilhoit and Keith Travis for their input. Commissioner DeVries will be reporting to the KBE on April 11-12, 2006. It was recommended that once the proposals are approved, they would be part of a three year review process.

Mr. Tackett directed Board members to the Ohio High School Athletic Association's web site, regarding an announcement reminding web site users that only calls from member schools would be taken by staff. The KHSAA may be drafting something similar in the future.

Since there was no other business to come before the Board, a motion to adjourn was made by L.V. McGinty, seconded by Paul Dotson, and passed unanimously. The meeting adjourned at 12:30 p.m.

MINUTES OF THE BOARD MEETING

MARCH 17, 2006

President Jerry Taylor convened the special called meeting of the Board of Control on Friday, March 17, 2006 at 7:30 a.m. All Board members were present except Jeff Schlosser. Also present were Commissioner Brigid DeVries, Assistant Commissioners Larry Boucher, Julian Tackett and Roland Williams, Director of Promotions & Media Relations Butch Cope, Fundraising Consultant Ken Tippet and Office Manager Darlene Koszenski. Ted Martin, KHSAA Legal Counsel, Superintendent Stu Silberman, Fayette County Schools, Superintendent Wilson Sears, Somerset Schools, Superintendent Frank Welch, Pike County Schools, Superintendent Steve Butcher, Wolfe County Schools, Ryan Ernst, Cincinnati Enquirer reporter and C.Ray Hall, Courier-Journal reporter were also present.

Roland Williams led the Pledge of Allegiance.

President Taylor stated for the record that seventeen Board members were present and 9 votes were needed to approve any motions.

Wilson Sears stated that in his opinion, the proposals should not be sent out as a referendum. He asked about the KHSAA's relationship with the State Board, and how the referendum came about being sent, and was referred to the correspondence from Chairman Travis.

Stu Silberman stated that the Kentucky Association of School Superintendents met yesterday and they give unanimous support to the KHSAA for sending the proposals directly to the KDE as is. He also mentioned that Gene Wilhoit was at their meeting, and knew that they were requesting that no referendum be sent. He noted that if the referendum was sent, and the membership voted "NO", the only option would be for the KHSAA Board of Control to overrule the membership again, if the Board desired implementation of the proposals.

Julian Tackett stated for the record that there are only three ways for KHSAA rules and regulations to be changed: 1) Delegate Assembly; 2) Referendum; 3) KBE change 702 KAR 7:065 designating the KHSAA to manage high school sports in Kentucky.

Jim Sexton retracted his comments and motion from an earlier Board of Control meeting regarding the decision to send a referendum to the schools. He then made a motion to refer the Proposals directly to the KBE for their consideration, without a referendum. The motion was seconded by Chuck Broughton, and passed 15-2.

Commissioner DeVries advised Board members that there was no need to approve the DRAFT cover letter and referendum ballots if the Board was not in favor of sending out a referendum at this time. She will also request written confirmation from Gene Wilhoit or Kevin Noland confirming their conversation at the KASS meeting that not sending a referendum was an acceptable procedure.

Gary Dearborn asked if new Board of Control members could be invited to the April and May meeting before officially beginning terms in July, 2006.

Ms. DeVries also mentioned that since there is no need for the special Board of Control meeting on Monday, April 10, 2006, it be cancelled, and the regular April meeting be held on Thursday, the 13th.

Since there was no other business to come before the Board, a motion to adjourn was made by Ozz Jackson, seconded by Sally Haeberle, and passed unanimously. The meeting adjourned at 8:00 a.m.

MINUTES OF THE BOARD MEETING

MARCH 24, 2006

President Jerry Taylor convened the special meeting of the Board of Control on Friday, March 24, 2006 at 7:30 a.m.(CT). All Board members were present except Sally Haeberle, Bob Schneider and Jim Sexton. Also present were Commissioner Brigid DeVries, Assistant Commissioners Larry Boucher, Julian Tackett and Roland Williams, Director of Promotions & Media Relations Butch Cope, Fundraising Consultant Ken Tippet and Office Manager Darlene Koszenski. Peggy Miller, KHSAA Legal Counsel, Ms. Carol Winders and Norman Meyer, were also present.

Commissioner Brigid DeVries led the Pledge of Allegiance.

Bob Stewart provided a moment of reflection.

President Taylor stated for the record that fifteen Board members were present, and that ten votes were needed to pass any eligibility motions.

Board members then reviewed a follow up letter regarding Case #1011. No action was taken. It was noted for the record that the camp finances were poorly managed and payment records were unavailable, because no receipts were used.

The Board of Control then considered the following appeals in compliance with the KHSAA Due Process Procedure:

Case #	Bylaw	H. O. Recommend	Board Motion	Board Second	Vote Y/N/R	Status
1026	6	INELIGIBLE-EXCEPTIONS	Uphold (Dearborn)	McGinty	10-5	Ineligible
1024	6	ELIGIBLE	Overturn (Dotson)	Broughton	10-5	Ineligible-A
1025	6	ELIGIBLE	Uphold (Jackson)	Schlosser	15-0	Eligible
1027	6	ELIGIBLE	Uphold (McGinty)	Perkins	15-0	Eligible
1028	6	ELIGIBLE	Uphold (McGinty)	Perkins	14-1	Eligible
1030	6	ELIGIBLE	Uphold (Jackson)	McGinty	15-0	Eligible
1023	6	INELIGIBLE	Uphold (Dotson)	Schlosser	15-0	Ineligible
1029	6	INELIGIBLE	Uphold (Dearborn)	Broughton	14-0-1 (Perkins)	Ineligible
1020	6	INELIGIBLE-EXCEPTIONS	Uphold (Jackson)	Burgett	15-0	Ineligible

A-Findings of Fact-Case #1024

1. The Board incorporates by reference the Findings of Fact as contained in the Hearing Officer's Recommended Order. The Board reaches Different Conclusions of Law, however, from those same Findings of Fact.

Conclusions of Law

Based on the whole record, the Board concludes that the application of Bylaw 6, Section 1 (Bylaw 6") should not be waived for the following reasons:

1. The student's transfer is subject to Bylaw 6 because she participated in varsity sports at the sending school after enrolling in grade nine and then transferred to the receiving school.
2. As concluded by the Hearing Officer, the student's transfer does not satisfy any enumerated exception to Bylaw 6.
3. The Due Process Procedure provides for a discretionary waiver if strict application of the applicable Bylaw is unfair and the circumstances creating the ineligibility are clearly beyond the control of all the parties involved. Contrary to the Hearing Officer's conclusion, the student

did not present sufficient evidence to warrant a waiver under this provision. There is no documentation in the administrative record to support the testimony at the administrative hearing, e.g., the notes on the locker, internet posting, etc. Further, although harassment between students is the responsibility of school administrators, there was no testimony that the alleged harassment was communicated to Glasgow's Principal. In this regard, no testimony was presented by any administrator at Glasgow to support the parents' testimony. In addition, there is no indication that harassment charges were filed or that this matter was brought to the attention of law enforcement. Thus, the evidence does not support a conclusion that the strict application of Bylaw 6 is unfair to the student and the circumstances resulting in the student's transfer were clearly beyond the control of all the parties involved.

4. Although the primary purposes of Bylaw 6 are to prevent and deter recruiting and athletically motivated transfers, lack of evidence of these dangers is not a ground to waive the application of Bylaw 6. The KHSAA member schools have adopted and the Kentucky courts have approved an objective standard to govern transfers in Kentucky. See *Kentucky High School Athletic Ass'n v. Hopkins Co. Bd of Educ.*, 552 S.W.2d 685, 687 (Ky. App. 1977) (upholding application of Bylaw 6 to a transfer despite finding that there was no recruiting and the transfer was not athletically motivated). An objective standard is necessary because the inherent administrative and other difficulties make it often impossible to make a subjective determination in the numerous transfers processed each year. Indeed, around 1,000 transfers are processed by the Commissioner each year. If transfers were only precluded when there was evidence of recruiting or athletic-motivation, then Bylaw 6 would be subject to abuse and students would be transferring anytime and anywhere. While the member schools of the KHSAA are not preventing a transfer for subjective personal reasons, they have decided that the student should sit out one year of interscholastic athletics. Thus, although there is no evidence that this student transferred due to recruiting or was otherwise athletically motivated, Bylaw 6 still applies to her transfer.

Gary Dearborn made a motion, seconded by Donna Wear, to go into Executive Session to discuss pending litigation. The motion passed unanimously. Donna Wear made a motion, seconded by Chuck Broughton, to come out of Executive Session. The motion passed unanimously. No action was taken during Executive Session.

L.V. McGinty made a motion, seconded by Steve Parker, to reject a legal settlement offer discussed in closed session. The motion passed 13-1 with one recusal (Schlosser).

The date for the next Board meeting is Thursday, April 13, 2006, at the KHSAA office in Lexington. This will be a full day, regular meeting.

Since there was no other business to come before the Board, a motion to adjourn was made by L.V. McGinty, seconded by Donna Wear, and passed unanimously. The meeting adjourned at 9:00 a.m.

FOOTBALL COMMITTEE

Football – 2007

Current

4 Class System

A) Originally, all districts had 54 teams (216 total)

B) Now have 224 teams listed

C) Some problems

1) Harlan / Evarts Consolidation date

2) Harrodsburg potential closure

D) Playoff System

1) 4 per district advance to playoffs

2) Total of 108 teams in playoffs

3) Brackets are symmetrical with no variance in who plays whom in bracketing

6 Class System

A) Approx 37 schools per class

1) 6A-38 (2 four-team districts, and 6 five-team districts)

2) 5A-38 (2 four-team districts, and 6 five-team districts)

3) 4A-37 (3 four-team districts, and 5 five-team districts)

4) 3A-37 (3 four-team districts, and 5 five-team districts)

5) 2A-37 (3 four-team districts, and 5 five-team districts)

6) 1A-37 (3 four-team districts, and 5 five-team districts)

5 Class System

A) Approximately 44 schools per class

1) 5A-45 teams (3 five-team districts, and 5 six-team districts)

2) 4A-45 teams (3 five-team districts, and 5 six-team districts)

3) 3A-45 teams (3 five-team districts, and 5 six-team districts)

4) 2A-45 teams (3 five-team districts, and 5 six-team districts)

5) 1A-44 teams (4 five-team districts, and 4 six-team districts)

4 Class System

B) Approximately 56 schools per class

1) 4A-56 teams (8 seven-team districts)

2) 3A-56 teams (8 seven-team districts)

3) 2A-56 teams (8 seven-team districts)

4) 1A-56 teams (8 seven-team districts)

KHSAA RULES AND REGULATIONS

Governing the Football Championships

(Adopted by the Board of Control)

(Case situations refer to rulings and interpretations used to interpret and administer these provisions which can be found in the Case Situation section of the Handbook. [When possible, additional cross-referencing information has been included].)

I. Assignment of Schools to Districts, Regions and Classes

a) CLASSES

The Kentucky High School Athletic Association shall sponsor postseason competition in football for boys, provided that fifteen (15) percent of the member schools declare intentions to participate in said competition. Member schools desiring to participate in KHSAA sponsored postseason competition shall notify the Association office prior to September 1. Classification shall be based on enrollment in grades 9-12 including all special education students. The state shall be divided into four classes based on enrollment by the Commissioner, with the approval of the Board of Control. Newly added or deleted programs will be handled on a case by case basis by the Commissioner's office.

As of August 1, 2005 the alignment for football for the 2003 through 2006 playing seasons shall be as follows —

Class A (schools with ranked enrollments 163 through 217, 0 to 531.0 average)

Semi-State 1

Region 1, District 1 - Ballard Memorial, Fulton City, Fulton County, Mayfield, Murray

Region 1, District 2 - Caverna, Crittenden County, Hancock County, McLean County, Metcalfe County, Russellville

Region 2, District 3 - Bardstown, Bethlehem, Campbellsville Kentucky Country Day, Fort Knox, Green County, Holy Cross (Louisville)

Region 2, District 4 - Carroll County, Danville, Frankfort, Harrodsburg, Owen County, Trimble County

Semi-State 2

Region 3, District 5 - Beechwood, Bellevue, Bracken County, Dayton, Holy Cross (Covington), Ludlow, Newport Central Catholic

Region 3, District 6 - Bath County, Berea, Fairview, Lexington Christian, Nicholas County, Paris, Raceland

Region 4, District 7 - Cumberland, Everts, Harlan, Lynn Camp, Pineville, Somerset, Williamsburg

Region 4, District 8 - Allen Central, Hazard, Jenkins, Paintsville, Phelps, Pikeville, South Floyd

Withdrawn from competition - Eminence, Evangel Christian

Class 2A (schools with ranked enrollments 109 through 162, 531.1 average to 752.5 average)

Semi-State 1

Region 1, District 1 - Caldwell County, Fort Campbell, Heath, Lone Oak, Muhlenberg South, Reidland, Trigg County, Webster County

Region 1, District 2 - Butler County, Edmonson County, Glasgow, Hart County, Monroe County, Owensboro Catholic, Todd County Central

Region 2, District 3 - Christian Academy-Louisville, DeSales, Elizabethtown, Larue County, Moore, Shawnee, Washington County, Western

Region 2, District 4 - Casey County, Corbin, Garrard County, Wayne County

Semi-State 2

Region 3, District 5 - Henry County, Lloyd Memorial, Mercer County, Newport, North Oldham

Region 3, District 6 - East Carter, Estill County, Fleming County, Lewis County, Morgan County, Powell County, Russell, West Carter

Region 4, District 7 - Breathitt County, Cawood, Knott County Central, Leslie County, Middlesboro

Region 4, District 8 - Belfry, East Ridge, Magoffin County, Sheldon Clark, Pike County Central, Prestonsburg, Shelby Valley

Withdrawn from competition - Betsy Layne

Class 3A (schools with ranked enrollments 55 through 108, 752.6 average to 1040.5 average)

Semi-State 1

Region 1, District 1 - Calloway County, Hopkins County Central, Hopkinsville, Madisonville North Hopkins, Paducah Tilghman, Union County

Region 1, District 2 - Adair County, Allen County-Scottsville, Bowling Green, Breckinridge County, Franklin Simpson, Logan County, Warren East

Region 2, District 3 - Atherton, Bullitt East, Central, Doss, Fairdale, Jeffersonton, North Bullitt, Valley, Waggener

Region 2, District 4 - Boyle County, Marion County, Pulaski County, Russell County, Southwestern, Taylor County

Semi-State 2

Region 3, District 5 - Covington Catholic, Grant County, Highlands, Pendleton County, South Oldham

Region 3, District 6 - Anderson County, Bourbon County, East Jessamine, Franklin County, Harrison County, Lexington Catholic, West Jessamine, Western Hills

Region 4, District 7 - Bell County, Clay County, Knox Central, Letcher County Central, Madison Southern, Perry County Central, Rockcastle County

Region 4, District 8 - Ashland Blazer, Boyd County, Greenup County, Johnson Central, Lawrence County, Mason County

Withdrawn from competition - McCreary Central, Rowan County

Class 4A (schools with ranked enrollments 1 through 54, top 54 schools, 1040.6 average and up)

Semi-State 1

Region 1, District 1 - Barren County, Christian County, Graves County, Greenwood, Marshall County, Warren Central

Region 1, District 2 - Apollo, Daviess County, Grayson County, Henderson County, Ohio County, Owensboro

Region 2, District 3 - Bullitt Central, Central Hardin, John Hardin, Meade County, Nelson County, North Hardin

Region 2, District 4 - Butler, DuPont Manual, Iroquois, Male, Pleasure Ridge Park, St. Xavier

Semi-State 2

Region 3, District 5 - Ballard, Eastern, Fern Creek, Oldham County, Seneca, Shelby County, Southern, Trinity (Louisville)

Region 3, District 6 - Boone County, Campbell County, Conner, Dixie Heights, Holmes, Ryle, Scott, Simon Kenton

Region 4, District 7 - Bryan Station, Henry Clay, Lafayette, Paul Dunbar, Scott County, Tates Creek, Woodford County

Region 4, District 8 - George Rogers Clark, Lincoln County, Madison Central, Montgomery County, North Laurel, South Laurel, Whitley County

b) ENROLLMENT CRITERIA

The basis for determining the schools to be placed in Class A, AA, AAA, and AAAA will be the average total enrollment in grades 9-12 of a coeducational school including all special education students for the two most recent years available for the entire membership at the time of classification. The Board of Control shall ensure that an upward adjustment is made for the enrollment of a school with less than a full high school course, and for schools enrolling boys only [double].

c) CLASSIFICATION

Initial classification is based on enrollment data verified by the Kentucky Department of Education for the two years through the enrollment of the 2001-2002 school year.

1) Classification Plan

a) The enrollment data used to determine the class boundaries shall be obtained from the Kentucky

Department of Education or other verifiable sources in the case of non-public schools.

- b) The classification shall be for a four-year period.
 - c) The schools shall be placed in enrollment ranked order (after adjustment for single-sex schools)
 - d) The school shall then be placed into equal divisions based on the number of classes approved by the Board of Control. For example, if there are 216 schools, and 4 classes, 54 shall be in each class.
 - e) The highest and lowest enrollment average from each class shall form the bounds of the class for the purpose of making adjustments after two years.
 - f) If there are an odd number of schools or the number of schools is not evenly divisible by the number of classes, the extra teams shall be placed from the lowest class first, up to the highest class. For example, if there were 214 teams and four (4) classes, there would be 53 in AAAA and AAA, and 54 in AA and A.
 - g) If the ranking and division leaves two or more teams with equal enrollments at the dividing point for class division, the Board of Control shall determine which teams go into each class. First preference is to use enrollment data at levels other than the top four (4) grades to determine the class boundaries. If the enrollment data does not yield a clear conclusion, the teams going into each class shall be drawn by random chance by drawing by lot or by coin toss.
- 2) If at any time during the classification period, a school withdraws from playoff competition, it shall not be eligible until the end of the classification period.
 - 3) The Board shall attempt to ensure that districts shall not fall below four (4) teams and that travel distance is considered in making alignment decisions.
 - 4) The average enrollment shall be computed again for the previous two years using the enrollment data from not earlier than the 2001-2002 school year as the first of the average years in order to make adjustments to begin with the 2005 season. Any school whose enrollment average exceeds or is below the class bounds by five (5) percent or more shall automatically be moved after the first two years of the alignment. This movement shall be irrespective of the total number of teams in the class.
- d) District CHAMPION
- 1) Class A, AA, AAA and AAAA will be divided into two semi-states with four regions in each semi-state, and those four regions having two districts in each region.
 - 2) To be eligible to be champion, runner-up, third place or fourth place position of a district, a team must play all other teams assigned to their district.
 - 3) The champion, runner-up, third place or fourth place position in each district shall be determined by the win-loss record based upon the games played against opponents in the district. Only games scheduled by contract prior to the first legal playing date and played before the first weekend of the state playoffs shall be used in determining a district winner or runner-up.
 - a) TIE-BREAKER [two teams]. In the case of a tie for the champion, runner-up, third place or fourth place position between two teams based upon the win-loss record, the team that won the game contested between the two tied teams shall be declared the winner.
 - b) TIE-BREAKER [more than two teams]. Should three or more teams tie for the a district position based upon the win-loss record, the position shall be determined by the following:
 - (i) If one of the teams has defeated each of the other teams tied in games contested between them, that team shall be declared

to hold the highest position, and the winner of the game between the remaining teams (if less than four) shall be declared the second highest position. In the event of more than three teams being tied, where one has defeated each of the tied teams, that team shall be declared the highest position, and the tie-breaking procedure shall be re-applied for the remaining tied teams.

- (ii) If the tie remains, each team tied for the position shall receive one point for each game won by any four of their defeated opponents in all games, except for the games played between any two of the tied teams. All games played shall be counted in applying the tie-breaking procedure, including out of state games, with the exception that a defeated school may be counted only once in the procedure regardless of the number of games played against that particular school. Teams awarded forfeit victories (whether or not a forfeit fee is paid) may count the defeated opponents of the forfeiting team, provided the game was not replaced on the schedule.
- (iii) If the tie remains after application of provision (ii), an additional defeated opponent's wins will be added to the point total for each team until the tie is broken and the winner of the tied position declared, or until all games are exhausted.
- (iv) If the tie for the position involves only three teams, and the application of (ii) and (iii) results in one team being declared the winner of the tied position based on point totals, the highest point total from the application of (ii) and (iii) between the two remaining tied teams shall be declared to hold the next position.
- (v) If the tie for the championship involves more than three teams, and the application of (ii) and (iii) results in one team being declared the winner of the tied position based on point totals, the procedure shall then be re-applied to determine the next position.
- (vi) If the tie for the position involves more than three teams, and the application of (ii) and (iii) results in two teams remaining tied for the position based on points, the head to head game played between them shall break the tie, and head to head competition will break any remaining ties.
- (vii) If a tie results after application of all provisions of the above plan, the tie shall be broken by the Board of Control.

II. Dates and Times for Playoff Games

- 1) Playoff competition will begin on the Friday or Saturday three weeks prior to Thanksgiving Day. All playoff contests shall be held on Friday unless there exists a mutual agreement between the schools to hold the game on another day due to field conditions or availability, or in the mutual best interests of the competing teams.
- a) The top four teams as determined by intra-district records after all tie breakers have been applied will qualify for the championship playoffs. The finishing position within the Region shall hereinafter be referred to as the "seeded position".
- b) In the first three rounds of the championship playoffs in Class A, AA, and AAA, AAAA, teams from District 1 will play against teams from District 2 within the same Region for the Regional championship.
- c) In each Class and Region unless otherwise noted, the first place team from District 1 [1-1] will host the first round game against the fourth place team from District 2 [4-2], the second place team in District 2 [2-2] will host the third place team from District 1 [3-1], the second place team from District 1 [2-1] will host the third place team from District 2 [3-2], and

the first place team from District 2 [1-2] will host the fourth place team from District 1 [4-1]. In the second round, the winner of the game between 1-1 and 4-2 will play the winner of the game between 2-2 and 3-1, while the winner of the game between 2-1 and 3-2 will play the winner of the game between 1-2 and 4-1. In all games in the second round, the team with the highest seeded position [finishing position in district] shall host the game.

- d) For the Regional championship (third round), the highest seed shall host the game. Should teams with the same seeding meet in the third round, the team representing the even numbered District shall host the game in even numbered years, while the team representing the odd numbered District shall host the game in odd numbered years.
- e) For the semi-state round (fourth round), the champion of region I will play the champion of region II, while the champion of region III will play the champion of region IV. The game will be hosted by the odd numbered region in odd numbered years, and by the even numbered region in even numbered years.
- f) Winners of the fourth round games will play for the class championships on the Friday or Saturday following the first weekend after Thanksgiving Day.
- 2) No playoff game shall be scheduled or played on a date or time that requires a loss of school time.
- 3) If the score is tied at the end of any game, it will be broken in accordance with the National Federation tie-breaking procedure enumerated in the Football Rules Manual.
- 4) The visiting team shall have the choice as to the end of the field on which they want to warm up.
- 5) Game officials shall assume jurisdiction over the contest one hour before time for the game.
- 6) The site of all games during the first four rounds in all classes shall be determined by the designated home team.
- 7) The Board of Control shall determine the site of the state finals after receiving the Commissioner's recommendation, and shall be guided by necessary hotel facilities, playing facilities, and community/area support.

III. Game Managers

The Principal of the home school or his/her designee shall serve as the manager for each game of the football playoffs with the exception of the final game in each class, and shall be responsible for ensuring that the game arrangements are complete. The principals of the competing schools, or their representatives shall agree on all matters pertaining to the game, including but not limited to, date and starting time, admission charges, expenses, and allocation of reserved seat tickets for the game. Disagreement on any of these items shall be referred to the Commissioner, whose decision in the matter shall be final. ***It is an explicit duty of each tournament manager to inform the association IMMEDIATELY as to the bracket / pairings / entries / results when requested by KHSAA staff and according to the time deadlines provided including the actual site of the tournament if it is not held at the school. In addition, it shall be the duty of the manager of each contest in soccer, volleyball, football, basketball, baseball and softball to contact the KHSAA Scoreboard with the final results following each contest. This is in addition to fulfilling local media requests. The Board of Control has approved the policy that the receipts of a tournament can be assessed (a fine levied against the manager) for failure to comply with these provisions.*** The Commissioner shall serve as the manager for the state football playoff finals and shall handle all arrangements for the games. The Commissioner may appoint as many assistant managers as deemed necessary to manage the event.

IV. Eligibility to Enter Tournament Play

To be eligible to compete in postseason competition, a member school team shall have competed in games against all teams in a district during the regular season.

V. Contestants

A school may enter a team composed of an unlimited number of players. However, at the state finals, only a squad of fifty-nine (59) persons, including all support personnel shall be included in the expense reimbursement. The roster or eligibility list for the players on the team shall be submitted to the game manager in accordance with the schedule provided prior to the start of the championship game for each playoff class. Cheerleaders from participating schools will be admitted in uniform to each contest.

VI. Officials

For regular season games, football officials are paid \$50 per game per official for a five (5) person crew. The local regional policy board may approve a supplement for incidental expenses such as travel and mileage.

Officials for all KHSAA sponsored state championship competition shall be assigned by the Commission. Only KHSAA Level 2 or Level 3 officials shall be used in all rounds of the state football playoffs. Exceptions must be approved by the Commissioner. Local associations may submit recommendations for postseason assignments to playoff contests. The final selection shall be made by the Commission.

The Board of Control has established fees for postseason play. In all tournament levels, two members of the crew of officials are to be paid a mileage allowance for a maximum of two cars based on the mileage submitted to the manager by the association staff member in charge of the sport or his/her designee. Additional postseason allowances for lodging, etc. shall be at the discretion of the tournament manager and must be approved by the Commissioner.

First round playoff officials shall be paid a fee of \$55.00 per game and shall be assigned to a five-person crew. In the case where an official is required to travel outside of the local assigning area by virtue of the assignments, the fee shall be increased by \$5 per person, per game.

Second round playoff officials shall be paid a fee of \$60.00 per game and shall be assigned to a five-person crew. In the case where an official is required to travel outside of the local assigning area by virtue of the assignments, the fee shall be increased by \$5 per person, per game.

Third round playoff officials shall be paid a fee of \$65.00 per game and shall be assigned to a five-person crew. In the case where an official is required to travel outside of the local assigning area by virtue of the assignments, the fee shall be increased by \$5 per person, per game.

Fourth round (semifinal) officials shall be paid a fee of \$70.00 per game and shall be assigned to a five-person crew. In the case where an official is required to travel outside of the local assigning area by virtue of the assignments, the fee shall be increased by \$5 per person, per game.

State championship officials shall be paid a fee of \$80.00 per game and shall be assigned to a five-person crew.

VII. Champion

The champion of each class shall be the winner of the game played in the final game to be held on the Friday or Saturday following the first weekend after Thanksgiving.

VIII. Trophies and Awards

Trophies will be given to each district and region winner and runner-up. The state champions and runner-up in each class and the eight-man winner and runner-up shall receive a trophy. The cost of the trophies is to be financed by the gate receipts at the playoff site. The state champion and runner-up shall receive fifty-nine (59) individual medals.

IX. Finances

a) FIRST, SECOND, THIRD and FOURTH ROUND

- 1) The proceeds of all playoff games, with the exception of the final game in each class, will be used to defray the expenses of the visiting team, officials, trophies, and other necessary expenses.
- 2) If no agreement can be reached on lodging, meal, and travel expenses, it is recommended that the gross gate be divided evenly between the teams after the payment of officials and trophies. This encourages the visiting team to minimize the travel

expenses and the home team to control game costs and eliminates the perception of inflated costs by either the traveling team or home management.

- 3) There shall be no allowable expense for field or facility rental unless such can be documented by the payment of rental to an outside entity. If such allowable expense is to be paid, the amount shall be the exact amount paid to the outside entity.
 - 4) If no other agreement can be reached, using the state expense allowance is recommended. For the fourth round, schools are encouraged to consider a mileage allowance to be paid to the visitors prior to the gate split due to substantial travel distances involved.
- b) **STATE FINALS**
- 1) The Association will finance the final game in each class. Expenses for lodging and meals and an allowance for team travel will be paid to each participating school. The squad for expense reimbursement purposes shall be limited to fifty-nine (59) persons, including the principal, coaches, team members, cheerleaders, cheer sponsor and other personnel.
 - 2) Schools failing to stay in the motel assigned by the Association shall forfeit the lodging allowance.
 - 3) The rate to be reimbursed for state championship play is \$1 per mile (round trip) for two vehicles, \$5 per meal per person, and a maximum of \$13 per person per night for lodging as approved.
 - 4) After all expenses have been paid, the Kentucky High School Athletic Association shall retain profits from each state tournament.

X. Special Tournament and Regular Season Rules

- 1) **Specifications of Fields and Game Balls**
The specifications for recommended and required standards for fields to be used in tournament play may be developed by Association staff and Advisory Committees and approved by the Board of Control. The Association may enter into a contract to restrict the use of a ball in tournament play to a specific brand or model.
- 2) **Running Clock Provisions**
The Association shall utilize provisions of the National Federation playing rules which allow for the clock to continue running (with the exception of a charged time-out) when the score reaches a 45-point differential at half-time or afterwards in any varsity contest.
 - a) After the first half, any time the score differential reaches 45 points or more, the following changes will be made regarding rules determining when the clock will be stopped and/or started. The clock shall continue to run from the point that the differential occurs (without regard to a later return to less than the differential) with the following clarifications:
 - b) The clock SHALL STOP when an official's time-out is called as in the following specific 3-5-7 occurrences, and shall subsequently start on the READY FOR PLAY signal:
 - i) For measurement of a possible first down (3-5-7a),
 - ii) When captains and coaches are notified of the time remaining (3-5-7d),
 - iii) For a player who appears to be injured (3-5-7e and 3-5-10),
 - iv) For a player in need of equipment repair (3-5-7f and 3-5-6 and 3-5-5b),
 - v) When a coach-referee conference occurs (3-5-7i and 3-5-11),
 - vi) After a foul, to administer a penalty (3-5-7j),
 - vii) For any unusual delay in getting the ball ready to play (3-5-7k),
 - viii) Following the try, successful FG or safety. (3-5-7m),

ix) A score occurs. Following a try, field goal, or safety, the clock shall start on the ready for play. Following a 6-point touchdown, the clock shall remain stopped for the PAT, but shall resume on the ready for play for the ensuing kickoff.

c) The clock SHALL STOP when an official's time-out is called as in the following specific 3-5-7 occurrences, and shall subsequently start on the SNAP:

- i) For unusual heat or humidity which may create a health risk to the players (3-5-7h),
- ii) For an approved TV/radio time-out (3-5-7i),
- iii) A charged time-out is called (3-5-1, 3-5-2, 3-5-3, 3-5-4, 3-5-5),
- iv) At the end of a period
- v) The clock SHALL NOT STOP when an official's time-out is called as in the following specific 3-5-7 occurrences:
- vi) When a first down is declared (3-5-7-b),
- vii) Following a change of team possession (3-5-7c and 3-5-9),
- viii) To dry or change the game ball (3-5-7g)

NOTE: The use of this rule does not preclude the use of NFHS Rule 3-1-3 that reads: "A period or periods may be shortened in any emergency by agreement of the opposing coaches and the referee. By mutual agreement of the opposing coaches and the referee, any remaining periods may be shortened at any time or the game terminated."

3) Interrupted Games

- a) Refer to NFHS Playing Rule 3-1-4 as KHSAA has authority to determine procedure for game ending.
- b) If game interrupted and cannot be resumed, three choices exist:
 - i) Terminate game with score as it exists;
 - ii) Resume game at point of interruption at a mutually agreed date and time. This decision must be finalized at the site prior to team departure.
 - iii) Resume the game on the following calendar day, unless published Board policies prohibit such play, in which case it shall be played the following day.
 - iv) If game interrupted
 - (aa) Same crew of officials expected to return to complete contest
 - (bb) Substitute officials shall be paid the local policy board mileage add-on only
 - (cc) Local associations shall develop policy on compensation of substitute officials (such as pooling game fees, etc)
 - v) Officials have no say in the postponement decisions, except to moderate discussion.
 - vi) Officials and coaches should involve not solely coaches, but school administrators in the decision.
 - vii) All involved must remember that this situation is caused by elements such as weather that are uncontrollable by anyone, and keep the discussions in that perspective.

4) Overtime

The National Federation 10-yard tie-breaker procedure shall be used in overtime as written in the playing rules.

5) Additional Rules for Contests

Additional rules, governed by State Association adoption provisions in the National Federation Playing Rules or otherwise developed by the Association may be implemented in contests played in Kentucky and will be distributed to the membership when relevant.

XI. School Personnel to Accompany Team

In accordance with Bylaw 20, each school having participants in a KHSAA event shall send a school designee to accompany the team. This person should be designated in writing by the Principal and approved by the local Board of Education.

(See Case Situations on Page 91-92)

EXECUTIVE COMMITTEE

Christian Fellowship School

1343 U.S. Highway 68 East • Benton, Kentucky 42025

Phone: (270) 527-8377 • Fax: (270) 527-2872 • e-mail: cfs@christianfellowship.org

February 16, 2006

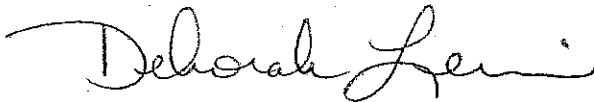
To: Mr. Bill Cowan, Calloway County High School, Mr. Steve Woodward, Marshall County High School, Mr. David Carr, Murray High School

CC: Commissioner Brigid DeVries, Mr. Larry Boucher, Mr. Julian Tackett

This letter is to notify you of our intent regarding the 2006-07 and 2007-08 basketball seasons at Christian Fellowship School. We have decided to withdraw from district play in basketball, both varsity girls and varsity boys, for the next two years. We understand that with this withdrawal from the district that we will not be able to enter post-season play and will not be able to schedule the full 24-game schedule.

We are hopeful that at some point in the future, we will be able to play at the district level once again. We wish each of you continued success with your athletic programs.

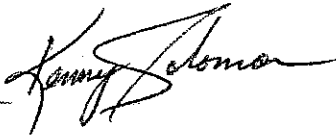
Sincerely,



Deborah Lewis
Interim A.D., designated rep.



Scott Wagner
Boys coach



Kenny Solomon
Girls coach





Kentucky High School Athletic Association

2280 Executive Drive ° Lexington, KY 40505 ° www.khsaa.org ° (859)299-5472 (859)293-5999 (fax)

MEDIA ADVISORY: THURS., MARCH 30, 2006

UPDATE ON KHSAA PUBLIC/NON-PUBLIC REPORT TO BOARD OF EDUCATION

The Board of Control of the Kentucky High School Athletic Association held a special meeting on March 17, 2006 to discuss a course of action with regard to proposals submitted by the Public/Non-Public Task Force. By a vote of 15-2, the Board of Control approved three amendments to KHSAA bylaws. These changes will be reviewed by the Kentucky Board of Education as part of the regulatory process within the structure of 702 KAR 7:065.

The three proposals deal with Financial Aid (Proposal 1), Transfer after representing a member school below grade nine (Proposal 2) and Territory and Feeder Pattern definition (Proposal 3).

The following links on the KHSAA website outline the three proposals:

<http://www.khsaa.org/kde/belowgradenineproposal.pdf>

<http://www.khsaa.org/kde/feederpatternandterritoryproposal.pdf>

<http://www.khsaa.org/kde/financialaidproposal.pdf>

<http://www.khsaa.org/kde/khsaastatus0316revised.pdf>

KHSAA Commissioner Brigid DeVries will appear before the Kentucky Board of Education to provide a status report at the April 11-12 meeting. Until that time, the Association has no further comment on the proposals or related issues.

-- KHSAA --

KENTUCKY DEPARTMENT OF EDUCATION
STAFF NOTE

Review Item:

Kentucky High School Athletic Association Report

Applicable Statute or Regulation

KRS 156.070
702 KAR 7:065

History/Background:

At the direction of the Kentucky Board of Education, KHSAA Commissioner Brigid DeVries empanelled a Task Force of individuals from all types of KHSAA member schools to attempt to resolve issues in the organization. Those issues led in October to a vote of the membership on separate championships for the sports under KHSAA jurisdiction. Upon receipt of this information and due to a desire to find an alternative solution to the perceived symptomatic issues, Commissioner DeVries was directed to assemble this Task Force, which has met on two occasions.

The purpose of the Task Force meetings was to attempt to reach compromise between the public and private member schools regarding four major subject areas:

1. Codifying rules and restrictions on the acceptance of financial aid by student-athletes to attend tuition-charging schools;
2. Studying restrictions on athletes who participate for a member school prior to enrollment in grade nine and who then do not enroll at that school;
3. Defining an athletic territory for KHSAA member schools that do not have rigid boundary defined by the local board of education; and
4. Revising and strengthening of compliance and investigative procedures concerning KHSAA rules.

After its initial review of the report of the first meeting of the Task Force, the Kentucky Board of Education by letter from Chairman Keith Travis to Commissioner DeVries, directed the Association to finalize the meetings of the Task Force, and attempt to agree on proposals to be submitted to the KHSAA Board of Control for review.

The subsequent meeting was held on February 20, 2006 and the Task Force, by general consensus and through the facilitator, Justice James Keller, proposed significant changes in subject areas 1 and 2 above, and such was reported to the KHSAA Board of Control at a special meeting. There was not consensus on item 3 from the Task Force, and two alternative solutions were submitted to the Board of Control for review. Subject area 4, compliance, involves a myriad of undetermined rule changes, and as of yet, final proposals have not been formulated.

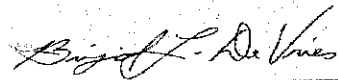
The KHSAA Board of Control met on March 6 at the offices in Lexington and from that meeting, finalized three proposals addressing these subject areas. On subject area 3, the defining of an athletic territory for prospective student-athletes, the Board chose to endorse the proposal put

forth by the representatives of the public schools which correlates ninth grade eligibility and the type of school attended in grades 7 and 8.

In attempting to comply with the aggressive timetable called for by Chairman Travis' correspondence, the Board also met again on March 17, 2006 to discuss the issues. By a vote of 15-2, the Board of Control approved the proposed amendments to KHSAA bylaws and to request that the Kentucky Board of Education approve these changes through the regulatory process within the structure of 702 KAR 7:065. The three proposals, dealing with Financial Aid (Attachment "A"), Transfer after representing a member school below grade nine (Attachment "B") and Territory and Feeder Pattern definition (Attachment "C") are attached.

Contact Person:

Brigid L. Devries, Commissioner
Kentucky High School Athletic Association
859-299-5472



KHSAA Commissioner

Commissioner of Education

Date:

April, 2006

PROPOSAL 1- FINANCIAL AID PROPOSAL - March 17, 2006

Rationale – This proposal would codify previous interpretations and restrictions regarding financial aid in KHSAA member schools to attempt to have all schools on the same level with regards to selection, acceptance and continuance of enrollment by the student body. This proposal codified previous interpretations and attempts to eliminate perceptions about advantages gained by schools awarding financial aid. NOTE: The current Bylaw 7 would become a section under Bylaw 9.

Bylaw 7. Financial Aid [new]

Sec. 1) Definitions for this bylaw

- a) Tuition– means the amount of necessary fees, costs and other charges to attend a member school as determined by that member school's published scale of charges. The tuition at the member school shall be the same for all students in like situation irrespective of participation in athletics and shall not include room and board expenses.
- b) Classification of Schools - means the classification of the member schools as defined by the Kentucky Department of Education. The six current classifications are: [1] A1- District operated general program or multi-program schools; [2] D1- Kentucky Department of Education operated schools [Blind and Deaf]; [3] F1- Federal Dependent Schools; [4] J1- Roman Catholic schools; [5] M1- Other Religious schools and [6] R1-Private non-church related schools.
- c) Public Schools- means the member schools receiving funding from the Kentucky Department of Education or comparable federal sources. Public schools shall include the member schools which are classified as A1, D1 or F1.
- d) Non-Public Schools – means the member schools not receiving funding from the Kentucky Department of Education or comparable federal sources. Those schools shall include the member school which are classified as J1, M1 and R1.
- e) Non-Public School Zone – means the zone to which each non-public school is assigned. The four current non-public school zones are Covington, Lexington, Louisville and Owensboro. These non-public school zones shall be comprised of the counties contained in the geographic alignment related to the archdiocese of the same name.
- f) Non-Public School Governing Board– means the entity having oversight over the member school. For purposes of this bylaw, the "governing board" of a non-public school shall be determined by the school type. For J1 schools, the "governing board" shall be the archdiocese and geographic references shall be the counties included in the non-public school zone of the school. For the R1 and M1 schools, the "governing board" shall be as defined by the governance structure of the institution.
- g) Immediate Family– means the student and the student's father, mother, brother, sister, step-father, step-mother, step-brother, step-sister, husband, wife, aunt, uncle, grandparent.
- h) Financial Aid– means any and all aid given to a student which reduces tuition, including, but not limited to, awards, reductions and waivers.
- i) Need-Based Aid– means the amount of financial aid that an independent financial analysis of the student's financial aid application demonstrates that the student needs to pay tuition to attend a member school, provided such analysis is performed by an agency approved by the Board of Control.
- j) Merit Aid– means financial aid awards given by the member school based solely on academic/test performance which are available to the entire student body through a competitive application process and that the selection of the recipient(s) is based on published objective criteria which may not include athletic achievement or ability.
- k) Merit Aid Test – means the academic assessment or placement test approved by the Board of Control prior to its administration.
- l) Merit Aid Test Date – means be the date submitted by each member school for the administration of the merit aid test.
- m) Financial Records– means the records related to any financial aid analysis of the student including but not limited to, immediate family's records of the method and sources for all tuition payments.

Sec. 2) Non-Permissible Financial Aid

A student shall be ineligible to participate in interscholastic athletics if the student:

- i) Receives financial aid beyond the limits defined in Section 1(i) except for merit aid allowed under this bylaw, and waivers of tuition for non-domestic students ruled eligible under Bylaw 6, Section 2 [Foreign Exchange];

PROPOSAL 1- FINANCIAL AID PROPOSAL - March 17, 2006

- ii) Receives merit aid based on an unapproved merit aid test;
- iii) Receives merit aid based on a merit aid test not administered on an approved merit aid test date;
- iv) Receives merit aid greater than twenty-five percent [25%] of the tuition at the member school;
- v) Receives merit aid from a member school that has already given merit aid to the greater of five [5] percent of its student body or five students;
- vi) Receives financial aid that is not available to the entire student body by published objective criteria;
- vii) Receives financial aid from a funding source that is not under the custody and control of the member school and/or its governing board;
- viii) Receives any financial aid other than the permitted need-based aid or merit aid detailed above from a member school, any other entity governed by that member school's governing board or any representatives of the member school;
- ix) Receives any financial aid that is indirectly or directly related to athletic achievement or ability;
- x) Has any part of the financial obligation to the member school paid directly or indirectly by individuals outside of the student's immediate family;
- xi) Does not agree to complete disclosure of financial records as defined in this bylaw upon request of the KHSAA and its officials, employees and agents.

Sec. 3] Financial Aid Restrictions and Reporting

All member schools shall annually report detailed financial aid information to the KHSAA including, but not limited to:

- i) Tuition schedule and/or other fees applicable to the student body at the member school;
- ii) The merit aid test being utilized by the school and the merit aid test date; and
- iii) A detailed listing of the amount of financial aid awarded by the member school including but not limited to:
 - 1) The need-based aid each student-athlete is eligible to receive based on the report of the approved independent agency;
 - 2) The merit aid given to each student and the qualifying score used to make the determination;
 - 3) The amount of need-based aid awarded to each student; and
 - 4) A specific listing of the sports in which each student participates.

NOTE:

The parenthetical Case Situation would remain which identifies the six approved agencies, which would not be codified into the rules to allow for review by the Board, but would be printed in the interpretations.

CS - Which independent agencies have been approved by the Board of Control to perform the need-based aid analysis?

The Board of Control has approved the following agencies to perform the need-based aid analysis - Financial Aid Independent Review (Rosemount, MN), Family Financial Needs Assessment (Hernando, MS), Private School Aid Service (Lakewood, OH), School and Student Service for Financial Aid (Princeton, NJ) Tuition Aid Data Services (St. Paul, MN), and FACTS Grant in Aid Agency (Lincoln, NE). The use of any unapproved agency renders the student ineligible under Bylaw 7. A member school may petition the Board of Control to approve independent agencies.

CS - What merit aid tests have been approved by the Board of Control to determine the amount of merit aid a student may receive?

The Board of Control has approved the following merit aid tests to determine the amount of merit aid a student may receive - High School Placement Test (Scholastic Testing Service, Inc, Bensenville, IL and Earth City, MO.)

The use of any unapproved merit aid test renders the student ineligible under Bylaw 7. A member school may petition the Board of Control to approve other merit aid tests.

CS - For purposes of Section 2(a)(v), how does the member school determine which students are counted against the limit?

Determinations of which students count against the limit in Section 2(a)(v) are based chronologically on the date of the award of merit aid.

PROPOSAL 1- FINANCIAL AID PROPOSAL - March 17, 2006

CS – *Is there a procedure to be followed by a member school who has submitted a Merit Aid Test Date and is unable to administer the test due to weather or other circumstances beyond the control of school authorities?*

Yes, the school can, in writing, request that the Commissioner approve an additional testing date in the event that such circumstances arise that prevent test administration on the previously scheduled date.

Effective Date and Implementation Issues: Could be effective immediately. Would require sampling of non-public schools to determine all testing instruments. Reporting requirements could be implemented effective with 2006-2007.

PROPOSAL 2- BELOW GRADE NINE PROPOSAL - March 17, 2006

Rationale – This proposal is designed to lessen the "Open Season" on rising 9th graders. In many areas, when students have participated at the high school level while being enrolled below grade nine, there can be a climate for nearly college level "recruiting" of the kids before and upon 8th grade graduation. This change would clarify that if students participate at any level at a KHSAA member school while enrolled below grade nine, they shall enroll in that member school or lose one year of eligibility at all levels in all sports and a second year at the varsity level. This change is basically a return the transfer rule to its pre-1982 form when Bylaw 6 applied any time a student had represented a member school. The proposal rule is more stringent in that it applies to all levels of play and applies longer than a one-year penalty.

Bylaw 6. Transfer Rule

Sec. 1] Domestic Students

Any student who has been enrolled in grades nine [9] through twelve [12] and has participated in any varsity game in any sport at any school following enrollment in grade nine [9] and who then transfers schools shall be ineligible for interscholastic athletics at any level in any sport for one year from the date of enrollment in the new school. Any student who has participated in a contest at any level in any sport representing a member school while being enrolled in grades seven [7] or eight [8] and who then enrolls at a different member school [grade nine or above] shall be ineligible for interscholastic athletics at any level in any sport for the first year of enrollment, and ineligible to participate in interscholastic athletics at the varsity level in any sport during the second year of enrollment at the member school.

The Commissioner has discretion (but is not required) to waive the period of ineligibility set forth above if one of the following exceptions has been met. Determinations of whether a student shall be granted a waiver pursuant to this rule shall be based on the circumstances existing as of the date of enrollment at the new school. The KHSAA shall not recognize as grounds for a waiver of the period of ineligibility an argument that the educational needs of the transferring students would be better served through a transfer.

f] **NON ATHLETIC PARTICIPATION FOR AN ENTIRE SCHOOL YEAR** - In the event that the transferring student did not participate in an interscholastic contest at any level in any sport while enrolled in grades nine through twelve at the sending school during the entire academic school year immediately preceding the change in schools.

THIS PROPOSAL MAKES NO OTHER CHANGES IN THE DOCUMENTED EXCEPTIONS FOR A WAIVER OF THE PERIOD OF INELIGIBILITY (LETTERED a-e and g-h in the 2005-2006 Handbook). The minor change in [f] is necessary due to potential conflict with the newly adopted provision.

Case BL-6-14- What does the word "sport" as used in Bylaw 6 represent with respect to athletic participation?

Sport has been defined as those sports which the KHSAA sanctions AND sponsors a championship. "Sport" includes baseball, basketball, cross country, football, golf, soccer, softball (fast and slow pitch), swimming, tennis, track, volleyball and wrestling. Students whose only participation in interscholastic athletics involves participation in sports or activities other than those listed are not subject to the provisions of Bylaw 6.

Effective Date and Implementation Issues: Could be effective immediately. Would require minor revision to participation list report to ensure compliance monitoring. Would have to address the issue of schools arbitrarily inserting students into contests to "lock them in" to particular schools. In addition, would have to work with all school constituencies to ensure education or parents to this rule as it could impact decisions to allow them to play on a high school team while enrolled below grade nine.

PROPOSAL 3- ATHLETIC TERRITORY/FEEDER PATTERN PROPOSAL - March 17, 2006

Rationale - This proposal would define athletic territories for KHSAA member schools. Students within the athletic territory of the school would be permitted to attend the member school without athletic eligibility restrictions provided the student is otherwise eligible. Students outside the territory would face a loss of eligibility at all levels of play for the first year at the school and at the varsity level for the second year. This proposal would codify an affiliated school / feeder pattern determination as a means of restricting eligibility and attempting to make equivalent the "drawing areas" for non-public schools and the school district boundaries of public schools.

Bylaw 4. Enrollment

Sec. 1) Athletic Territory and Feeder Pattern Requirement

- a) Purpose of this Bylaw - this Bylaw establishes an athletic territory and feeder pattern for each member school of the KHSAA.
- b) Definitions for this Bylaw
 - i) Classification of Schools - means the classification of the member schools as defined by the Kentucky Department of Education. The six current classifications are: [1] A1 - District operated general program or multi-program schools; [2] D1 - Kentucky Department of Education operated schools [Blind and Deaf]; [3] F1 - Federal Dependent Schools; [4] J1 - Roman Catholic schools; [5] M1 - Other Religious schools; and [6] R1 -Private non-church related schools.
 - ii) Public Schools - means the schools receiving funding from the Kentucky Department of Education or comparable federal sources. Public schools shall include the members schools which are classified as A1, D1 or F1.
 - iii) Non-Public Schools - means the schools not receiving funding from the Kentucky Department of Education or comparable federal sources. Non-public schools shall include the member schools which are classified as J1, M1 and R1.
 - iv) Bonafide Residence - means the primary residence of the student and his/her custodial parents.
 - v) Non-Public School Zone - means the zone assigned to each non-public school. The four current non-public school zones are Covington, Lexington, Louisville and Owensboro. These non-public school zones shall include the counties contained in the geographic alignment related to the archdiocese of the same name.
 - vi) Public School Governing Board - means the entity having oversight over the public member school. For purposes of this Bylaw, the "governing board" of a public school shall be the local board of education.
 - vii) Non-Public School Governing Board - means the entity having oversight over the non-public member school. For purposes of this Bylaw, the "governing board" of a non-public school shall be determined by the school type. For J1 schools, the "governing board" shall be the archdiocese and geographic references shall be the counties included in the non-public school zone of the school. For R1 and M1 schools, the "governing board" shall be as defined by the governance structure of the institution.
 - viii) Affiliated School - means the junior high/middle school that is governed by the same governing board as the member school and that enrolls students in any format to include grades seven [7] and/or eight [8].
 - ix) Terminal Public School - means a public school that is located in Kentucky which terminates after grade seven [7] or eight [8] and is neither an affiliated school to any member school nor meets the requirements of a non-resident student agreement per KRS 157.350[4].
 - x) Terminal Non-Public School - means either a non-public school that is located in Kentucky which terminates after grade seven [7] or eight [8] and is not an affiliated school to any member school or a non-public school that is located in Kentucky which terminates after grade seven [7] or eight [8] and is not an affiliated school to any member school within the same county.
 - xi) Public School Feeder Pattern - means all affiliated school(s) for a public member school as defined by the public school governing board. The public school governing board may include any or all of the public affiliated schools under its jurisdiction in the public school feeder pattern and may expand the public school feeder pattern to include any or all of the students that meet the requirements of an

PROPOSAL 3- ATHLETIC TERRITORY/FEEDER PATTERN PROPOSAL - March 17, 2006

approved non-resident student agreement per KRS 157.350(4) or other students attending the public school within the approved policies of the Kentucky Department of Education.

xii) Non-Public School Feeder Pattern – means all affiliated schools for a non-public member school. For non-public schools with an average enrollment of more than 300 students in grades nine (9) through twelve (12) during the previous two years, the non-public school feeder pattern shall be the non-public affiliated schools under the auspices of the non-public school governing board and the students who have attended those affiliated schools in both grades seven (7) and eight (8). For non-public schools with an average enrollment of 300 or less students in grades nine through twelve during the previous two years, the non-public school feeder pattern shall be the residences within a 20-mile radius drawn from main entrance to the non-public school and any affiliated school outside of this radius.

xiii) Public Feeder School – means any affiliated school within the public school feeder pattern for a particular public member school.

xiv) Non-Public Feeder School – means any affiliated school within the non-public school feeder pattern for a particular non-public member school.

xv) Public School Athletic Territory – means any and all residences located within the district boundaries for the public school as defined by the public school governing board and may be expanded to include any or all of the students that meet the requirements of an approved non-resident student agreement per KRS 157.350(4) or other students attending the public school within the approved policies of the Kentucky Department of Education.

xvi) Non-Public School Athletic Territory – means any and all residences located within the boundaries of the non-public school feeder pattern, and the students enrolled in the member school or a defined feeder school within the properly established and reported non-public school feeder pattern.

c) Feeder Pattern Establishment

Each member school shall have a feeder pattern defined by this Bylaw. This feeder pattern, including a list of applicable affiliated feeder schools, shall be reported to the KHSAA on an annual basis in the manner requested by the Commissioner.

d) Eligibility

i) Below Grade Nine (9) Students – a student below grade nine (9) shall be eligible to participate in interscholastic athletics at a member school if:

- 1) the student's bonafide residence is within the member school's athletic territory;
- 2) the student attends the feeder school for the member school; and
- 3) the student's participation is not in conflict with other restrictions.

ii) Students Grades Nine (9) Through Twelve (12) – a student enrolled in any grade nine (9) through twelve (12) at a member school shall be ineligible to participate in interscholastic athletics at any level in any sport for one year from date of enrollment at the member school and ineligible to participate in interscholastic athletics at the varsity level in any sport during the second year of enrollment at the member school if:

- 1) the student's bonafide residence is outside of the member school's athletic territory; or
- 2) the student did not attend grades seven (7) and eight (8) at a feeder school for the member school.

iii) Exceptions

- 1) Terminal Schools – provided the student is eligible under all other Bylaws, a student who attended and is promoted from grade eight (8) by a terminal public school or terminal non-public school shall be eligible to participate in interscholastic athletics at any public school located within the county of the student's bonafide residence or any non-public school located within the non-public school zone of the student's bonafide residence.
- 2) Promotion from Affiliated School- provided the student is eligible under all other Bylaws, a student who attended and is promoted from grade eight (8) by an affiliated feeder school shall be eligible to participate in interscholastic athletics at a member school irrespective of residence location.
- 3) The Commissioner shall have discretion (but is not required) to waive the period of ineligibility contained in this Bylaw under the exceptions contained in Bylaw 6, Section 1 but subject to the limitations contained therein.

PROPOSAL 3- ATHLETIC TERRITORY/FEEDER PATTERN PROPOSAL - March 17, 2006

- 106 4) D1 and F1 schools - this Bylaw shall not apply to students enrolled at D1 or F1 schools.
107 iv) Member School Petition Process - a member school may petition the Board of Control to
108 expand/reduce/define/clarify the member school's feeder pattern and/or athletic territory.
109 v) Compliance Responsibility - each member school shall be responsible for verifying that all student-
110 athletes at the member school are in compliance with this Bylaw and shall maintain supporting
111 documentation subject to disclosure to the KHSAA upon request.
112

113 REMAINDER OF BYLAW 4 REMAINS AS PRINTED WITH SECTIONS RENUMBERED
114

115 NOTE:

116 The parenthetical Case Situation would remain which identifies the six approved agencies, which would not
117 be codified into the rules to allow for review by the Board, but would be printed in the interpretations.

118 **CS - What is the governing Board of a non-public school?**

119 For the purposes of Bylaw 4, the governing board is the Diocesan Superintendent's office for any
120 member schools who are classified as J1 by the Kentucky Department of Education, and the governing
121 board designated by the member school for the schools who are classified as R1 or M1.

122 **CS - Does a student who is enrolled in a public school under a 157.350(4) reciprocal** 123 **agreement or who is enrolled as a tuition paying student at a public school face any loss of** 124 **eligibility on entering in grade nine?**

125 This student would face no loss of eligibility and not be ineligible for one year at all levels and one year at
126 the varsity level provided they are attending a Kentucky public school within the approved regulations
127 and policies of the Kentucky Board of Education and the Kentucky Department of Education, adhering to
128 all local Board of Education regulations, and are eligible according to all other bylaws.
129

130 **Effective Date and Implementation Issues:** Could be effective immediately with exception of currently
131 participating students.
132



MSHSAA News

[Return To News](#)

MSHSAA Policy for Anonymous Calls and Letters

8/5/2005

The MSHSAA staff receives many calls, e-mails and letters each day. On occasions, the callers request to remain anonymous and the authors of the correspondence choose to remain anonymous. This type of communication is difficult, at best, for your MSHSAA staff to handle. These anonymous communications are seeking specific interpretations on By-Laws and matters of eligibility. In many instances a complaint is being filed with no way to confirm any information with member schools. The MSHSAA Board of Directors resolved at the November 1, 1995 meeting to adopt the following policy.

"Anonymous letters sent to the MSHSAA shall be forwarded to the school administrator of the school in question by the MSHSAA executive director with no further action to be taken unless a violation is reported and anonymous callers shall be informed that the MSHSAA staff, has no authority to act upon anonymous calls."

[Advisory
Committees](#)

[Become An
Official](#)

[Championship
Events](#)

[Coaches
Education](#)

[Contact
Information](#)

[District
Assignments](#)

[Eligibility
Information](#)

[MSHSAA
Links](#)

[Calendar
Dates](#)

[MSHSAA
News](#)

[MSHSAA
Open Dates](#)

[Sportsmanship
& Citizenship](#)

Copyright © 2006 Missouri State High School Activities Association. All rights reserved.
Please send comments or questions regarding this Web site to email@mshsaa.org.

Date: Fri, 24 Feb 2006 13:14:34 -0500
From: JTACKETT (Julian Tackett)
To: BCOPE,BDEVRIES,DARLENEK,LBOUCHER,RWILLIAMS
Reply-to: jtackett@khsaa.org
Subject: Etc
Return-Receipt-To: JTACKETT (Julian Tackett)
Disposition-Notification-To: JTACKETT (Julian Tackett)

OHSAA Office Sets New Telephone Policy

As of November 15, 2005, the OHSAA administrative staff will no longer take telephone calls from parents and students about eligibility and other OHSAA regulations.

Reason For the Policy — The OHSAA needs your help in addressing a serious problem. The OHSAA staff receives hundreds of telephone calls and e-mails every week from our member schools. Because the OHSAA exists to serve those schools, responding to their inquiries must be our top priority. The large volume of calls from parents and students is dramatically affecting our ability to serve our member schools.

Solution For Parents and Students — School principals or athletic administrators have always been the first and preferred contact resource for parents and students. This OHSAA policy reinforces school personnel as the source to whom parents and students must direct their questions.

As always, if a school administrator needs assistance in answering a question, they will contact an OHSAA administrator for a "final answer" and then pass it along to the parent or student.

The OHSAA understands that parent and student questions are important. We thank you for your understanding and for supporting our commitment to high quality service directly to our member schools and, through the schools, to parents and students. This approach will ultimately be best for everyone involved.

Could be revised for our Board to say (and I would like this on the March 6 Special Meeting Agenda) - As of March 6, 2006 the KHSAA Executive Staff will no longer take telephone calls from parents and students about eligibility and other KHSAA regulations.

Reason For the Policy — The KHSAA needs your help in addressing a serious problem. The KHSAA staff receives hundreds of telephone calls and e-mails every week from our member schools. Because the KHSAA exists to serve those schools, responding to their inquiries must be our top priority. The large volume of calls from parents and students is dramatically affecting our ability to serve our member schools.

Solution For Parents and Students — School principals or athletic administrators have always been the first and preferred contact resource for parents and students. This KHSAA policy reinforces school personnel as the source to whom parents and students must direct their questions.

As always, if a school administrator needs assistance in answering a question, they will contact an KHSAA administrator for a "final answer" and then pass it along to the parent or student.

The KHSAA understands that parent and student questions are important. We thank you for your understanding and for supporting our commitment to high quality service directly to our member schools and, through the schools, to parents and students. This approach will ultimately be best for everyone involved.

Let me know if I can be of further assistance.

REPORTS



Kentucky High School Athletic Association
2280 Executive Drive ° Lexington, KY 40505 www.khsaa.org ° (859)299-5472 (859)293-5999 (fax)

March 8, 2006

Senator David L. Williams
LRC Room 323
Capitol
Frankfort, KY 40601

Dear Senator Williams:

This letter is in reference to HB 138 and in particular the amendment SCA(2), which would amend KRS.156.070. The amendment, if passed, would permit a student to play a sport in a contiguous district if the sport is not offered in his or her school district. This addition to HB 138 was discussed by the KHSAA Board of Control at the March 6, 2006 meeting and they were unanimous in their opposition to this amendment. There are certainly some unintended consequences of this legislation and I would ask you to give consideration to the significant impact this proposal would have for high school athletic programs statewide.

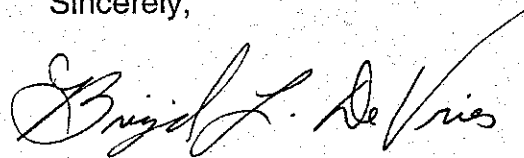
- 1) This legislation would necessitate at least two KHSAA Bylaw changes:
 - ◆ Currently, Bylaw 4, Section Four – (Enrollment Elsewhere) states: *No student who is enrolled or connected with any other school than the one he/she represents shall take part in any contest.* This bylaw would have to be revised by the membership.
 - ◆ Bylaw 6, Transfer Rule, would have to be amended considerably with additional waiver provisions added to the list of exceptions to the rule.
- 2) Conceptually, there appears to be some relief given for students at KHSAA member schools that do not offer certain sports. However, one drawback includes the fact that there is less incentive for school personnel to sponsor or initiate a particular sport if the students can simply go somewhere else and participate.
- 3) One potential ramification also includes the potential for development of some "super powers" in certain sports particularly in metropolitan areas, which obviously alters the balance of fair play we strive to maintain.
- 4) Insurance coverage is a big issue for KHSAA member schools and the responsible parties for coverage would have to be identified. This cannot be left to a simple "blame game" in the event of an injury or illness, etc, as school administrators face potential exposure during the travel times.

- 5) Transportation options and travel costs to and from practices and contests could be problematic due to state restrictions already in place. Costs would have to be borne by, and likely allocated between schools, if cooperative agreements were in place, and again, this could create disharmony among our members.
- 6) The intended relief this amendment seeks to allow would instead have a detrimental effect by reducing the incentive school districts have for developing middle or high school athletic programs. This could also have additional Title IX complications for girls' programs that are already struggling to have increased participation opportunities.

In closing, I would recommend that this amendment be withdrawn and allow school personnel across the state the opportunity to propose a change of this nature through the Rules Review Process contained in the KHSAA Constitution. On an annual basis all 282 KHSAA member school have an opportunity to propose changes similar to the amendment in this bill through the Annual Meeting Process. This process appears to be the most appropriate way for school personnel to research and debate the merits or drawbacks of a proposed rule change with other member school personnel. While conceptually this proposal may have some merit for a single student or small group of students, other aspects are problematic. Please allow the KHSAA membership the opportunity to govern their Association.

Thank you for your consideration.

Sincerely,



Brigid L. DeVries
Commissioner

BD:dk

xc: KHSAA Board of Control Members
Senator Dan Kelly, Majority Floor Leader
Senator Richie Sanders, Majority Caucus Chairman
Senator Dan Seum, Majority Whip
Senator Katie Stine, President Pro Tempore
Senator Joey Pendleton, Minority Whip
Senator Johnny Ray Turner, Minority Caucus Chairman
Senator Ed Worley, Minority Floor Leader



MAR 30 '06

MAR 30 '06

March 29, 2006

Keith Travis, Chair
Kentucky Board of Education
Capital Plaza Tower, 1st Floor
500 Mero Street
Frankfort, KY 40601

MAR 30 '06

MAR 30 '06

Re: KHSAA Feeder System Proposals

Dear Mr. Travis:

As president of historic Presentation Academy, I am greatly troubled by the proposals on athletic eligibility and competition recently approved by the Kentucky High School Athletic Association ("KHSAA") Board of Control and sent on to the Kentucky Board of Education ("KBE") for consideration. While many voices have offered passionate opinions during this year's Public-Private championship debate, those of vital educational institutions like Presentation Academy ("Pres") and similar non-public schools have not been heard, and we believe that these proposals raise serious questions regarding the viability and survival of these unique schools.

Located in Louisville, Presentation Academy is the Catholic downtown leadership academy for young women. Founded in 1831, Pres is the oldest continually operating school in Louisville. We fear that the proposals recently forwarded to your board by the KHSAA Board of Control could have an impact that goes far beyond athletic competition at Pres and other similar institutions. These proposals, we believe, pose a clear threat to the financial viability and the very existence of our historic school. Our major concerns lie with the proposed establishment of *feeder school patterns*. We question the legal foundation of this proposal and also realize its moral implications. A basic principle that underlies our concerns is that parents have a constitutional right to choose a school for their children that is consistent with their beliefs. This proposal would significantly alter that right – and would strip it outright from some parents and children.

We suggest that Pres, which now has an enrollment of 350 young women at its downtown Louisville campus located just one mile from the Ohio River, presents a special case that should not and cannot be ignored. We are affiliated with the Archdiocese of Louisville, but our diverse student population is drawn from Kentucky and Southern Indiana. Members of that student body hail from nine counties and 62 zip codes, so Presentation Academy's "feeder schools" are, quite literally, everywhere. As a result, twenty percent (20%) of our current student body falls outside the proposed feeder

system. But schools in our unique situation – and there are others located near our Commonwealth's borders – are given no consideration, much less remedy, in these proposals.

Our proximity to the state border at the Ohio River means approximately one-half of what would be recognized as Pres' attendance area is located in Southern Indiana, none of which is within the boundaries of the Archdiocese. Schools located in that area would not be recognized as "feeder" territory for Pres. Given its location and current status of Catholic/private schools in Indiana, Presentation Academy provides an attractive option – in fact, the only option – for Indiana parents who seek the significant advantages of single-gender education for their daughters. It will be extremely difficult to tell the parents of a prospective student from Southern Indiana – a vital part of the economy of Pres – that their daughter would benefit from the educational advantages of attending Pres, but in doing so she would be barred from any opportunity to participate in athletics for one year plus an additional year in varsity athletics.

Six percent of our current student body at Pres consists of students who live in Southern Indiana. Exactly two of those students participate in athletics. Clearly, out-of-state enrollment is not an athletic issue for Pres, but the denial of an opportunity for those students to participate in athletics presents a basic issue of fairness for these students and the parents that have sacrificed so that their daughters can attend Presentation.

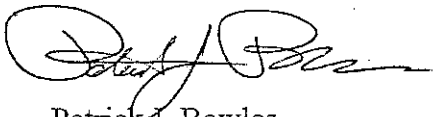
Establishment of the feeder school pattern is questionable on its face. No other state has adopted a feeder school system in response to questions about championship inequities, yet the KHSAA Board of Control has forwarded to you a plan that takes our state into these untested waters. To expect an 11-year-old adolescent (6th grader) or their parents to choose a high school based on future, possible athletic participation runs counter to the fundamental purpose of education. The adoption of this policy will clearly place early and undue pressure on both students and parents. We also believe that it will ultimately benefit the large schools and athletic programs that proponents of these proposals seek to curb.

Many observers and participants in this debate believe that the real issue lies with football championships. If this debate is truly an attempt to fix football inequities, the solutions proposed clearly come at the expense of non-football schools like Pres. The ripple effect of this move has the potential to become a tidal wave that could ultimately wipe away our school and others like it.

The attempt to "level the playing field" under the current proposals would, we believe, further diminish the chance for Presentation to compete in athletics. While the Pres family wants our teams and individual student-athletes to compete at a high level, the fact remains our school has never won a KHSAA team championship. The solutions offered to your board by the KHSAA Board of Control may have been designed with large school athletic powers in mind, but the schools that will feel the most significant impact of these measures are mid-size schools like Pres, or smaller institutions.

In closing, Presentation Academy strongly urges the KBE to seriously consider the root cause, if any, to the current debate and the impact of its actions on all member schools. It is not an exaggeration that the proposals that have been delivered to your members pose a significant threat to Pres, one of Kentucky's most enduring educational institutions, and others like it. We urge you to take the needs of all of our Commonwealth's schools into consideration as you evaluate those questionable proposals. But, most of all, we urge you to consider the impact of these proposals and your actions on each student and all of Kentucky's schools, and the potential for a significant and negative impact on some schools that could extend well beyond championships and athletic competition.

Respectfully yours,



Patrick J. Bowles
President

cc. KBE Members

Brigid DeVries, KHSAA Executive Director

Jerry Taylor, KHSAA President

Leisa Speer, Superintendent of Education, Archdiocese of Louisville



Kentucky High School Athletic Association
2280 Executive Drive ° Lexington, KY 40505 www.khsaa.org ° (859)299-5472 (859)293-5999 (fax)

March 30, 2006

Robert B. Bressler, M.D.
The Harned Building, Suite 2
212 West 18th Street
Hopkinsville, KY 42240

Dear Mr. Bressler:

This letter is in reference to your correspondence regarding the 2005 Annual Meeting Proposal #20, which stipulated that public and non-public schools be placed in two divisions for post-season tournament play. Thank you for taking the time to express your opinion on this very complicated issue.

I will be happy to share some of your suggestions with our Board of Control for their review at our April 13, 2006 Board meeting.

Again, thank you for your input and letter.

Sincerely,

A handwritten signature in cursive script, reading "Brigid L. DeVries", is positioned above the printed name and title.

Brigid L. DeVries
Commissioner

BD:dk

xc: KHSAA Board of Control Members

Robert B. Bressler, M.D.

Fellow, American College of Physicians
American Academy of Allergy,
Asthma & Immunology

Diplomate, American Board of
Allergy and Immunology

FEB 8 2006

2/4/06

Dear Commissioner DeVries,

As a concerned parent, I would like to share with you some thoughts I have had toward solving the Proposal 20 dilemma. I currently have three children enrolled at University Heights Academy but I am not an official representative of the school. I am sure there have been many creative and thoughtful suggestions. However, I believe that in my proposal there may be some novel ideas worth considering. Below are highlights of my proposal. Although this was devised with basketball in mind, it could also be applied to any of the other sports not currently broken down into size classifications.

1. Have two separate tournaments.

- Class I tournament would consist of all public schools that fit into the Class AAA or Class AAAA under guidelines used for football as well as ALL private schools.

- Class II tournament would consist of all public schools that fit into the Class A or Class AA guidelines used for football.

2. Any public school eligible for the Class II tournament would have the OPTION to declare for the Class I tournament for the FOLLOWING year. This declaration would be irrevocable.

3. Private school geographic boundaries for enrollment (regarding athletic eligibility) would be determined by the greatest distance (mileage) from a public school address to the most distant point on any bus route for that same public school among all of the public schools in that athletic region.

In my opinion, this format would address some of the most contentious concerns, noted below, that have plagued these discussions.

Concern: Small schools have no chance to win a state tournament.

Response: With the small school tournament this is solved GUARANTEEING a small PUBLIC school champion.

Concern: We would not have a true state champion.

Response: It would be extraordinarily unlikely that the best team in the state would not be in the Class I tournament. Furthermore, any small public school that expects to have a highly competitive team or simply wants to compete in the Class I tournament can declare for it the year before.

Robert B. Bressler, M.D.

Fellow, American College of Physicians
American Academy of Allergy,
Asthma & Immunology

Diplomate, American Board of
Allergy and Immunology

Page 2

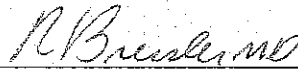
Concern: There is an uneven playing field between private and public schools.

Response: 1. The private schools are all going to have to compete in the same tournament as the larger public schools.

2. Geographic limitations for enrollment with respect to athletic eligibility are the same for public and private schools.

I know that the issues involved are extremely complex but I hope that these ideas may at least provide some "food for thought". If I can be of any assistance, please give me a call.

Sincerely,



Robert B. Bressler, M.D.



Kentucky High School Athletic Association
2280 Executive Drive ° Lexington, KY 40505 www.khsaa.org ° (859)299-5472 (859)293-5999 (fax)

March 30, 2006

Mr. Peter L. Schuler
Chief Juvenile Defender
Louisville Metro Public Defender
719 West Jefferson Street
Louisville, KY 40202-2732

Dear Peter:

This is in response to your recent correspondence regarding the proposed Bylaw Proposals for Bylaw changes currently being discussed by the KHSAA Board that establishes athletic territories or boundaries for all KHSAA member schools. Thank you for taking the time to express your opinion on the KHSAA not increasing additional barriers to high school sports participation.

I will be happy to share your letter with the KHSAA Board of Control at their April 13, 2006 meeting. Thank you for your letter.

Sincerely,

A handwritten signature in cursive script, which appears to read "Brigid L. DeVries", is positioned above the printed name.

Brigid L. DeVries
Commissioner

BD:dk

xc: KHSAA Board of Control Members

Louisville - Jefferson County Public Defender Corporation

LOUISVILLE METRO PUBLIC DEFENDER

ADVOCACY PLAZA
719 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202-2732

MAR 24 2006

502-574-3800
Fax: 502-574-4052
e-mail: defender@thepoint.net
Web site: www.louisvillemetropublicdefender.com

DANIEL T. GOYETTE
EXECUTIVE DIRECTOR
CHIEF PUBLIC DEFENDER

March 22, 2006

Brigid DeVries, Commissioner
KHSAA
2280 Executive Drive
Lexington, KY 40505

Dear Commissioner:

Thank you for taking the time to speak with me about KHSAA's proposals concerning middle school attendance and high school sports eligibility. As I expressed to you, the proposals in their present form would pose significant barriers to high school sports participation for many of our clients.

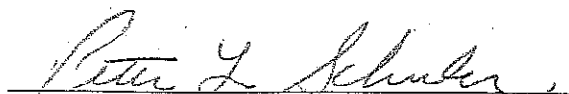
My office represents many children who have multiple home and school displacements that remove them from their designated feeder school pattern. Sports is often one of the few paths available to help these kids escape a troubled life. I have concerns for the children who are often overlooked in this controversy: the average or below-average kid who will greatly benefit from the discipline, camaraderie, and realization that improvement comes with hard work. I also have concerns about putting up barriers to sports participation at a time when some health experts are concerned about what is being referred to as an epidemic of childhood obesity.

I appreciate your offer to send me a copy of those proposals. As an attorney, I would like to know exactly what we are dealing with.

Yours truly,

JEFFERSON DISTRICT PUBLIC DEFENDER

BY:



PETER L. SCHULER
CHIEF JUVENILE DEFENDER



Kentucky High School Athletic Association
2280 Executive Drive ° Lexington, KY 40505. www.khsaa.org ° (859)299-5472 (859)293-5999 (fax)

April 4, 2006

Athletic Director Alan Donhoff
St. Xavier High School
1609 Poplar Level Road
Louisville, KY 40217

Dear Alan:

Congratulations on your upcoming term as KHSAA Board of Control member. Your first official Board meeting is in July (tentative dates July 10-11, 2006), and to better prepare you for this experience, you are cordially invited to sit in and observe the May 22-23, 2006 Board of Control meeting at the KHSAA office in Lexington.

Also, if you are available, feel free to attend the April 13, 2006 meeting at the KHSAA office in Lexington as well. Contact Darlene Koszenski, my Assistant, if you are planning to attend either meeting.

On behalf of the KHSAA Staff and Board of Control, I look forward to working with you as a Board of Control member.

Sincerely,

A handwritten signature in black ink, which appears to read "Brigid L. DeVries", is positioned above the printed name.

Brigid L. DeVries
Commissioner

BD:dk

xc: KHSAA Board of Control members



Kentucky High School Athletic Association
2280 Executive Drive ° Lexington, KY 40505 www.khsaa.org ° (859)299-5472 (859)293-5999 (fax)

April 4, 2006

Principal Jerry Keepers
Southern High School
8620 Preston Highway
Louisville, KY 40219

Dear Jerry:

Congratulations on your upcoming term as KHSAA Board of Control member. Your first official Board meeting is in July (tentative dates July 10-11, 2006), and to better prepare you for this experience, you are cordially invited to sit in and observe the May 22-23, 2006 Board of Control meeting at the KHSAA office in Lexington.

Also, if you are available, feel free to attend the April 13, 2006 meeting at the KHSAA office in Lexington as well. Contact Darlene Koszenski, my Assistant, if you are planning to attend either meeting.

On behalf of the KHSAA Staff and Board of Control, I look forward to working with you as a Board of Control member.

Sincerely,

A handwritten signature in cursive script, reading "Brigid L. DeVries", is positioned above the printed name.

Brigid L. DeVries
Commissioner

BD:dk

xc: KHSAA Board of Control members



Kentucky High School Athletic Association
2280 Executive Drive ° Lexington, KY 40505 www.khsaa.org ° (859)299-5472 (859)293-5999 (fax)

April 4, 2006

Principal Dave Weedman
Oldham County High School
PO Box 187
1150 North Highway 393
Buckner, KY 40010

Dear Dave:

Congratulations on your upcoming term as KHSAA Board of Control member. Your first official Board meeting is in July (tentative dates July 10-11, 2006), and to better prepare you for this experience, you are cordially invited to sit in and observe the May 22-23, 2006 Board of Control meeting at the KHSAA office in Lexington.

Also, if you are available, feel free to attend the April 13, 2006 meeting at the KHSAA office in Lexington as well. Contact Darlene Koszenski, my Assistant, if you are planning to attend either meeting.

On behalf of the KHSAA Staff and Board of Control, I look forward to working with you as a Board of Control member.

Sincerely,

A handwritten signature in cursive script, reading "Brigid L. DeVries", is written over a horizontal line.

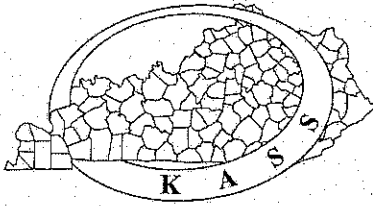
Brigid L. DeVries
Commissioner

BD:dk

xc: KHSAA Board of Control members

Kentucky Association of School Superintendents

Blake Haselton, PH.D.,
Executive Director
H: 502•222•0645
C: 502•396•5707



2644 Sheffield Court
LaGrange, KY 40031
Fax: 502•222•2427
Blakehaselton@aol.com

April 6, 2006

Commissioner Brigid DeVries
Kentucky High School Athletic Association (KHSAA)
2280 Executive Drive
Lexington, KY 40505

APR 10 2006

Dear Commissioner DeVries:

At the March 16, 2006 regular meeting of the Board of Directors of the Kentucky Association of School Superintendents (KASS), the Board voted that a resolution be sent to you supporting that the recommendations of the "Task Force on Public and Non-Public School Issues Related to 702 KAR 7:065" be sent with a recommendation from the KHSAA Board directly to the Kentucky Board of Education (KBE). Subsequently, I learned the KHSAA Board voted 15-2 to take that action on March 17th at a special called meeting to consider this issue. For the record, KASS supports that action by the KHSAA Board of Control.

After reviewing the KBE agenda for their meeting on April 11-12, 2006, I noted the KBE is scheduled to consider (as item XII. G.) "Kentucky High School Athletics Association (KHSAA) Report on the Work of the Task Force and By-Law Amendments from the Board of Control – Brigid DeVries and Julian Tackett. . ." as part of their (KBE) Business Session on Tuesday afternoon.

As you know from our prior discussions, KASS did not choose to take a position on this matter instead expressing confidence in (and supporting) the KHSAA process in determining how best to resolve the issues remaining from the recent delegate assembly and KHSAA Board actions. At your request I served as a member of the Task Force and believe, based on my participation in that process, the recommendations were fair and will, if implemented, address public school concerns that resulted in majority votes in favor of Proposals 3 and 20 by member schools.

I trust this correspondence reflects the position of the KASS and encourage you to contact me in the event we can be of assistance in the future.

Sincerely,

Blake Haselton

Perry, Teresa - Commissioner's Office

From: Wilhoit, Gene - Commissioner of Education
Sent: Thursday, March 30, 2006 2:54 PM
To: Butcher, Stephen; Silberman, Stu (FCPS); Moore, Tim Supt; Sears, Wilson; Gold, Joe Dan
Cc: Noland, Kevin - Deputy Commissioner; Travis, Keith - Kentucky Bd. of Education; Miller, Mary Ann - Commissioner's Office; 'b.devries@khsaa.org'; 'j.tackett@khsaa.org'
Subject: KHSAA Proposals 3 and 20

A number of concerns were raised at KEDC, KASS and in conversations with KBE Chairman Keith Travis about the process to be used by the KHSAA to resolve the issues surrounding Proposals 3 and 20 relating to public and non-public schools.

Specifically, superintendents voiced concern that the March 10th letter from Chairman Travis to Brigid DeVries represented a specific procedural mandate to KHSAA about how the organization is to resolve the issue and was a departure from a previous KBE position.

Regarding these issues, we believe all feedback from Commissioner Wilhoit and Chairman Travis indicated that the KBE has no intent or desire to intervene in the decision-making processes of KHSAA. Moreover, the KBE has consistently stated that it is the responsibility of KHSAA to find resolution within its membership in a reasonable timeframe. The purpose of the March 10th letter was to reemphasize that the KBE expected resolution by April, given this issue has been before us for over six months. Chairman Travis and the Board has not or will not insert themselves into KHSAA procedures. On this issue, KBE will not determine how the organization will come to consensus on issues.

However, resolution of the issue must be done according to KHSAA Constitution and ByLaws. Mr. Travis' reference to procedure (both in the February 12 letter and the March 10 letter) was simply reference to current KHSAA Constitution, Article IX, Sections 2 and 3. The Constitution and/or Bylaws can be amended in only two ways, by vote of delegates at the annual meeting or by mail. Clearly, the membership must act on the proposed bylaw amendments.

Assuming that approval by referendum has not occurred prior to the April 11 KBE meeting, the lack of compliance with the required procedure in the KHSAA Constitution (which is adopted as part of the regulation in 702 KAR 7:065), likely will result in delayed action.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRENTWOOD ACADEMY,

*Plaintiff-Appellee/
Cross-Appellant,*

Nos. 03-5245/5278

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC
ASSOCIATION; RONNIE CARTER, Executive Director
and in his individual capacity,

*Defendants-Appellants/
Cross-Appellees.*

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 97-01249—Todd J. Campbell, District Judge.

Argued: December 7, 2004

Decided and Filed: March 17, 2006

Before: GIBBONS and ROGERS, Circuit Judges; BELL, Chief District Judge.*

COUNSEL

ARGUED: Richard L. Colbert, COLBERT & WINSTEAD, Nashville, Tennessee, for Appellants. James F. Blumstein, VANDERBILT LAW SCHOOL, Nashville, Tennessee, for Appellee. **ON BRIEF:** Richard L. Colbert, W. Gregory Miller, J. Christopher Anderson, COLBERT & WINSTEAD, Nashville, Tennessee, for Appellants. James F. Blumstein, VANDERBILT LAW SCHOOL, Nashville, Tennessee, H. Lee Barfield II, W. Brantley Phillips, Jr., BASS, BARRY & SIMS, Nashville, Tennessee, for Appellee. Daniel Casse, WHITE HOUSE WRITERS GROUP, Washington, D.C., Chester E. Finn, Jr., THOMAS B. FORDHAM FOUNDATION, Washington, D.C., John F. Daly, FEDERAL TRADE COMMISSION, Washington, D.C., William E. Quirk, James M. Humphrey, SHUGHART, THOMSON & KILROY, Kansas City, Missouri, for Amici Curiae.

GIBBONS, J., delivered the opinion of the court, in which BELL, Chief D. J., joined. ROGERS, J. (pp. 27-37), delivered a separate dissenting opinion.

* The Honorable Robert Holmes Bell, Chief United States District Judge for the Western District of Michigan, sitting by designation.

OPINION

JULIA SMITH GIBBONS, Circuit Judge. This appeal represents the third trip to this court for the parties to this litigation. The case has also been before the United States Supreme Court, which made a notable ruling that defendant-appellant Tennessee Secondary School Athletic Association ("TSSAA") was a state actor.

The parties' dispute began when the TSSAA imposed a number of penalties on plaintiff-appellee Brentwood Academy ("Brentwood") as a result of asserted violations by Brentwood of the TSSAA's rule governing recruiting of student athletes. Brentwood sued the TSSAA and its executive director, defendant-appellant Ronnie Carter, alleging violations of the First and Fourteenth Amendments, federal antitrust laws, and Tennessee law. After the United States Supreme Court determined that the TSSAA is a state actor, this court on remand held that the recruiting rule was content-neutral and subject to intermediate scrutiny. We remanded to the district court with instructions about the proper analysis in the case on the First Amendment issue. The district court conducted a ten-day nonjury trial. The district court found for Brentwood on the First Amendment issue, holding that the application of the rule to Brentwood was not narrowly tailored to further the TSSAA's legitimate, substantial interests. The district court also found for Brentwood on its substantive and procedural due process claims against the TSSAA, as well as on its procedural due process claim against Carter in his individual capacity. The district court enjoined the TSSAA's penalties against Brentwood. The district court also held that the TSSAA was entitled to immunity from Brentwood's antitrust claims. The parties cross-appealed to this court on these issues.

For the reasons set forth below, we affirm in part, reverse in part, and remand for further proceedings.

I.**A. Factual Overview**

We begin with a description of the most pertinent facts and supply additional facts as necessary in our discussion of the various issues.

The TSSAA is a voluntary association of 290 public schools and 55 independent and parochial schools from across the state of Tennessee. The TSSAA is organized as a non-profit corporation under Tennessee law, with the purpose of stimulating and regulating interscholastic athletic competition among its member schools. Its governing entity is the Board of Control. As noted in the Supreme Court's decision in this case, the Tennessee State Board of Education, beginning in 1925, explicitly acknowledged the TSSAA's functions "in providing standards, rules and regulations for interscholastic competition in the public schools of Tennessee." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 292 (2001). In 1972, the Board designated the TSSAA as "the organization to supervise and regulate" interscholastic athletics and specifically approved the TSSAA's rules and regulations, including the recruiting rule. *Id.* In 1996, the Board dropped the rule expressly designating the TSSAA as regulator but did not change its relationship with the organization. *Id.* at 292-93. At all times relevant to the present case, Ronnie Carter served as executive director of the TSSAA.

Brentwood Academy is an independent school in Brentwood, Tennessee, and a member of the TSSAA. In 1998, the school had about 520 students in grades six through twelve. Brentwood's athletic teams, especially its football team, have been very successful in interscholastic competitions,

even though its enrollment is smaller than many of its competitors. At the time of the events in question, Brentwood's Headmaster was Bill Brown; the Athletic Director and Head Football Coach was Carlton Flatt; and the Director of Admissions was Nancy Brasher. Brentwood paid a fee to the TSSAA to renew its membership on an annual basis.

The TSSAA has promulgated a "recruiting rule" in order to regulate the attempts of secondary schools to recruit middle school student athletes for athletic programs. The rule, found in the TSSAA's Bylaws, reads:

The use of undue influence on a student (with or without an athletic record), his or her parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes shall be a violation of the recruiting rule.

The bylaws also include a number of questions and answers and other guidelines that are known as interpretive commentary. While these are meant to aid in the interpretation of the recruiting rule, they are not binding on the TSSAA Board of Control. Carter agreed that the recruiting rule itself is "all that really counts, everything else underneath it, the interpretative commentary is discretionary and it depends on the totality of the circumstances."

Excerpts from the interpretive commentary include the following:

1.

Q. How is undue influence interpreted in the recruiting rule?

A. A person or persons exceeding what is appropriate or normal and offering an incentive or inducement to a student with or without an athletic record.

...

3.

Q. Is it permissible for a coach to contact a student or his or her parents prior to his enrollment in the school?

A. No, a coach may not contact a student or his or her parents prior to his enrollment in the school. This shall apply to all students whether or not they have an athletic record.

4.

Q. What are some of the guides [sic] used in determining whether there has been undue influence used which would result in a violation of the recruiting rule?

A. Some examples are, but not limited to:

3. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school except where there is a definite feeder pattern.

4. Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete in the seventh grade and above at any non-member school except where there is a definite feeder pattern involving the schools.

...

Private...schools may not contact students enrolled at the public schools. Public schools may not contact students enrolled at the private schools.

...

7. Admitting students to athletic contests free of charge when there is an admission being charged at the contest except where there is a definite feeder pattern involved with the school.

The "definite feeder pattern" exception does not apply to Brentwood, except with regard to those students who are enrolled at Brentwood Academy itself in the sixth grade or higher.

In some form, the recruiting rule has been in effect at least since the early 1950s and probably earlier. It has undergone various changes; the auxiliary questions and answers and guidelines were added during the 1980s and 90s.

In 1997, a number of coaches at public high schools that were TSSAA members reported various alleged recruiting violations by Brentwood to the TSSAA. On behalf of the TSSAA, Carter and other TSSAA officials began an investigation into the allegations. During the investigation, Brentwood supplied Carter with a copy of a letter Flatt sent to various eighth grade boys in April 1997 as well as information regarding phone calls Flatt made to the families of the boys to whom the letter was sent. The letter read, in part:

Having officially enrolled at Brentwood Academy, the TSSAA allows you to participate in spring football practice. If you are not currently involved in a sport at your school, we would like to invite you to practice with your new team.... Due to the inconvenience to your parents, please do not feel that you must attend every practice. However, I do feel that getting involved as soon as possible would definitely be to your advantage.... We are certainly glad that you decided to become an *Eagle*.

The letter was signed, "Your Coach, Carlton Flatt." This letter was sent to all incoming ninth grade male students who had applied, been tested and admitted, and signed enrollment contracts with Brentwood.¹ Flatt testified that after the letter was mailed, he received "a couple of phone calls" from parents of boys who received the letter with questions about the letter and the necessity of the boys attending practice. As a result of these calls, Flatt decided to call each of the families of the boys who received the letter to clarify that the spring practice was not mandatory and should not trump any other academic or athletic responsibility the boys might have. All twelve boys who received the letter ended up attending spring practice.

¹ Headmaster Brown later testified that those students who sign such contracts (and paid the accompanying \$300 deposit), in his mind, were officially enrolled at Brentwood and committed to come. The TSSAA, however, contends that the term "enrolled" (as used in the recruiting rule) is defined in the TSSAA Bylaws, under Article II (Eligibility Rules), Section I (Academic Rules):

To be eligible to participate in athletic contests during any semester....

(b) Students shall be regularly enrolled, in regular attendance, and carrying at least five full courses. A student shall be considered as regularly enrolled after the student has attended for three days, has engaged in three or more days of football, girls volleyball, cross country, golf or girls soccer practice during the period on or after August 1, or has participated in an athletic contest in any sport.

There was some testimony at trial indicating that a few students every year do not end up attending Brentwood even after signing the enrollment contracts.

The TSSAA also investigated allegations that tickets for a Brentwood football game provided by Flatt to a middle school coach were used by some of the coach's student athletes to attend the game for free. As the TSSAA put it, these tickets were "made available to uncontrolled individuals" in a way that facilitated "the possibility for abuse." Flatt later testified that he had told the coach that the tickets were not to be used to provide free admission to middle school students. The middle school coach nonetheless allowed two of the free tickets to be used by two of his students.

Carter notified Brentwood by letter dated July 29, 1997, that the TSSAA had found Brentwood guilty of multiple violations of TSSAA rules. The letter informed Brentwood of various penalties that would be assessed as a result of the rules violations. Brentwood requested a hearing with Carter and members of the TSSAA Board of Control; a hearing was held on August 13, 1997, at which Headmaster Brown and representatives of Brentwood made a presentation regarding the allegations and determinations in the July 29 letter. Following the hearing, Carter again sent a letter to Brown providing more specific information about the violations and penalties to be assessed against Brentwood. Pursuant to the TSSAA Bylaws, Brentwood appealed the penalties to the full Board of Control, which is charged with enforcing the TSSAA Bylaws. Another hearing was held on August 23, 1997. In an August 23, 1997, letter that represented the final TSSAA decision on the matter, the Board notified Brentwood that it had found that Brentwood, and specifically Flatt, violated the recruiting rule in two ways: (1) by granting free admission to a Brentwood football game to two eighth grade athletes from another school; and (2) by sending letters and making phone calls to eighth grade boys at other schools regarding spring football practice at Brentwood.² The Board also cited Brentwood for conducting impermissible off-season practice with certain Brentwood student-athletes, but this alleged rule violation is not an issue in this appeal. As a result of these violations, the Board imposed numerous penalties, including a four-year probation for Brentwood's entire athletic program, suspension of playoff eligibility for the Brentwood football and boys' basketball teams, and a \$3,000 fine.

B. Procedural History

Brentwood sued the TSSAA and Carter (in his official and individual capacities) on December 12, 1997, alleging that the TSSAA violated the First and Fourteenth Amendments; the Sherman Act, 15 U.S.C. §§ 1-2; and Tennessee law. On July 29, 1998, the district court found that the TSSAA and Carter were state actors and granted summary judgment to Brentwood on its First Amendment claim brought under 42 U.S.C. § 1983. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 13 F. Supp. 2d 670 (M.D. Tenn. 1998). The TSSAA appealed that decision, and the Sixth Circuit reversed, on the basis that the TSSAA is not a state actor and thus not subject to suit under § 1983. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 180 F.3d 758 (6th Cir. 1999). The United States Supreme Court granted certiorari and reversed the Sixth Circuit, holding that "the association's regulatory activity may and should be treated as state action owing to the pervasive entwinement of state school officials in the structure of the association." *Brentwood Acad.*, 531 U.S. at 291.

On remand from the Supreme Court, this court considered the merits of the TSSAA's appeal. This court reversed the decision of the district court granting summary judgment to Brentwood and remanded the case to the district court, holding that: (1) Brentwood did not waive its right to challenge the recruiting rule by voluntarily joining the TSSAA; (2) the recruiting rule is not facially overbroad; and (3) the district court erred by subjecting the recruiting rule to strict scrutiny, because

²To be clear, the alleged violation of the recruiting rule was the *invitation* to attend football practice, not the practice itself. It is undisputed that in 1997, participation by incoming Brentwood students in spring football practice was permissible under TSSAA rules. The rule was subsequently changed to prohibit such participation.

it is content-neutral. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 262 F.3d 543 (6th Cir. 2001). This court remanded to the district court with instructions to: (1) determine whether the TSSAA's asserted substantial state interests for the recruiting rule were legitimate; (2) determine whether the application of the rule to Brentwood was narrowly tailored to further the TSSAA's legitimate state interests; and (3) address Brentwood's claims against Carter in his official and individual capacities. *Id.* at 558.

After remand and prior to trial, on October 25, 2002, the district court granted partial summary judgment to defendants on Brentwood's antitrust claims, reasoning that since TSSAA is an organization "pervasively entwined" with the state, it is entitled to antitrust immunity under *Parker v. Brown*, 317 U.S. 341 (1943).

In December 2002, the district court held a bench trial and considered the issues addressed by this court in its 2001 opinion, as well as Brentwood's substantive due process, procedural due process, equal protection, and Tennessee state law claims. The court issued a memorandum opinion and order on January 13, 2003, finding: (1) for Brentwood on its First Amendment, substantive due process, and procedural due process claims against the TSSAA; (2) for Brentwood on its procedural due process claim against Carter in his individual capacity; and (3) for Carter with regard to Brentwood's First Amendment and substantive due process claims against Carter in his individual capacity. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 304 F. Supp. 2d 981 (M.D. Tenn. 2003). The court held that Carter was not entitled to qualified immunity on Brentwood's procedural due process claim but that he would be entitled to qualified immunity on Brentwood's First Amendment claim. The court declined to reach the equal protection or state law claims, and it refused to award damages to Brentwood. As relief for Brentwood, the court enjoined the penalties imposed by the TSSAA against Brentwood in 1997.

On February 10, 2003, the TSSAA and Carter appealed the January 13, 2003, order to this court. On February 24, 2003, Brentwood cross-appealed, taking issue with: (1) the district court's October 2002 order granting partial summary judgment to defendants on the antitrust claims; and (2) the relief provisions of the January 13, 2003, order.³

II. Analysis of the Issues

This court reviews a district court's findings of fact for clear error. *See Waxman v. Luna*, 881 F.2d 237, 240 (6th Cir. 1989). However, conclusions of law, questions of mixed law and fact, and "findings of ultimate facts which result from the application of legal principles to subsidiary factual determinations" are all subject to *de novo* review. *Id.* (citation and quotation marks omitted); *see Cordrey v. Euckert*, 917 F.2d 1460, 1465 (6th Cir. 1990).

A. The TSSAA's Reliance on Its Contractual Relationship with Its Members

Permeating the TSSAA's arguments⁴ on both the First Amendment and due process issues is its contention that rulings by the district court "ignored the constitutionally critical fact that the relationship between TSSAA and [Brentwood] arose entirely from a membership contract that [Brentwood] renewed each year." In other words, according to the TSSAA, "[e]very argument of

³ Brentwood did not appeal the district court's conclusions regarding Brentwood's equal protection or state law claims. Nor did it appeal the district court's dismissal of Brentwood's First Amendment and substantive due process claims against Carter in his individual capacity.

⁴ For the sake of convenience and clarity, we refer to the defendants collectively as "TSSAA" throughout this section of the opinion.

[Brentwood] and every ruling by the District Court relies [sic] on the false premise that TSSAA is the sovereign State exercising police power rather than a state actor that asks its members to honor its voluntary contractual obligations." Prior to undertaking analysis of the First Amendment claim, we must address this argument as it relates to that claim.

There is a short answer to the TSSAA's argument with regard to the First Amendment claim. The answer is that it is inconsistent with the law of the case and this court's 2001 opinion. In the 2001 opinion this court outlined the First Amendment analysis to be employed by the district court on remand. See *Brentwood Acad.*, 262 F.3d at 557-58. The underpinning of that analysis is that the TSSAA's role in this case is that of a governmental entity exercising regulatory authority and that the recruiting rule must be considered a content-neutral rule subject to intermediate scrutiny. The court noted with particularity that the recruiting rule was analogous to zoning ordinances and limitations on noise, posting of signs, and distribution of religious literature that have been upheld as reasonable time, place, and manner restrictions. *Id.* at 553-54. The panel in the 2001 decision instructed the district court on remand to determine whether the recruiting rule is narrowly tailored to meet TSSAA's substantial interests. *Id.* at 558. It noted that this question could not be decided in the abstract as a matter of law and contemplated that TSSAA would present evidence to justify the need for its regulations. *Id.* The panel was quite clear in outlining the district court's task on remand.

The TSSAA's reasoning invites us to stray from the 2001 panel's road map and follow another analytical route it deems more favorable to its position. In making its argument, it suggests that two lines of First Amendment cases – unconstitutional conditions cases represented by cases such as *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996), and government employee speech cases such as *Pickering v. Board of Education*, 391 U.S. 563 (1968) – provide the correct analytical framework. Both lines of cases were mentioned by the panel in its 2001 opinion but in a context different from that in which the TSSAA now urges that they apply.

One argument made by the TSSAA in 2001, bearing substantial resemblance to its present position, was that Brentwood "waived its right to question the constitutionality of the recruiting rule because, by voluntarily choosing to be a member of TSSAA, it has agreed to abide by the rules of the organization." *Brentwood Acad.*, 262 F.3d at 549. This court rejected that argument, reasoning that "the Supreme Court's rulings that parties do not give up First Amendment rights by contracting with, or being employed by, a public agency forecloses [sic] TSSAA's argument that Brentwood gave up its right to challenge the constitutionality of the recruiting rule because it voluntarily joined TSSAA." *Id.* at 550-51 (citing *Umbehr* and *Pickering*). While *Umbehr* and *Pickering* may have given guidance in disposing of the waiver argument, the 2001 opinion in no way indicates that they govern the analysis on remand as to whether the TSSAA's application of the recruiting rule to Brentwood violated its First Amendment rights.

Our agreement or disagreement with the 2001 panel decision is not at issue here. We have no authority to overturn a prior published decision of this court, see *Darrah v. City of Oak Park*, 255 F.3d 301, 309 (6th Cir. 2001), and, moreover, that decision is the law of the case, see *Scott v. Churchill*, 377 F.3d 565, 569-70 (6th Cir. 2004). While courts have some discretion in following the law of the case doctrine, see *id.* at 570, this protracted and contentious litigation presents a compelling situation for its application. In order to maintain the integrity of the judicial process, an appellate court cannot change its mind as to the proper analysis after it has remanded a case for trial and the district court has tried it, giving its best effort to adhere faithfully to the appellate court instructions. We should properly review the district court's decision, but we cannot change the rules after the fact. See *United States v. Campbell*, 168 F.3d 263, 265 (6th Cir. 1999) ("Determinations of the court of appeals of issues of law are binding on both the district court on remand and the court of appeals upon subsequent appeal."). This stance properly defers to the precedent set by the prior

panel and recognizes that the parties and the district court must be able to rely on this court's prior rulings in trying the case.⁵

While this court's 2001 ruling provides the definitive answer to the First Amendment argument based on the TSSAA's contractual relationship with its members, we note also that clear problems exist with the manner in which the TSSAA seeks to apply the "unconstitutional conditions" doctrine. The TSSAA relies on *Umbehr* to argue that the "unconstitutional conditions" doctrine specifically allows a state agency to impose conditions, even on fundamental rights like free speech, when those conditions are reasonably necessary to accomplish the objectives of the contract. This is not an accurate reading of *Umbehr*, which held that the First Amendment limits the government's ability to terminate relationships with independent contractors because of their speech. See 518 U.S. at 673-74. Moreover, *Umbehr*, in which the Court addressed only the narrow issue of "whether, and to what extent, independent contractors [with the government] are protected by the First Amendment," *id.* at 673, is not a precisely apposite precedent anyway. See also *id.* at 685 (emphasizing the "limited nature of our decision today"). The present case does not involve the government as a party in a contractual relationship with an independent contractor, *cf. id.* at 678-79.

Similarly, there are obvious differences between the TSSAA's role in this case and the government's role as employer, *cf. Pickering*, 391 U.S. at 574. The TSSAA's reliance on the argument that Brentwood's speech is not a matter of public concern is thus misplaced. The requirement that speech relate to a matter of public concern in order to be protected emanates from the government employee cases in which employee speech is limited in many respects by virtue of the employer-employee relationship. See *id.* at 568 ("The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."). The public concern requirement is not a part of the intermediate scrutiny given to a content-neutral restriction on speech. The 2001 decision of this court, in discussing the waiver issue, described the way in which public interests were to be taken into account on remand. In that decision, this court observed that substantial government interests, which the TSSAA would have to establish, were of necessity matters of public concern. *Brentwood Acad.*, 262 F.3d at 551. In making this observation, it placed the public interests concept in its proper place in the framework adopted later in the opinion – on the governmental interest in promulgating the rule, not on the question of whether Brentwood's speech related to a matter of public concern. See *id.* at 557-58.

A couple of nuances in the TSSAA's argument deserve mention. The TSSAA urges the applicability of its preferred analysis by differentiating between the government's "sovereign power" and its "contractual power." In doing so, it makes much of the dicta in *Umbehr* discussing the difference between the government's "sovereign power" and its "contractual power." See 518 U.S. at 678. Reading *Umbehr* too broadly, it asserts that *Umbehr* extended the *Pickering* "public concern" framework to "any case where the government is exercising contractual power as opposed to sovereign power." Again, the applicability of the First Amendment to the TSSAA's regulatory conduct does not hinge on whether there was a contract or not. Even if such a distinction between contractual and sovereign power were applicable in any meaningful way to the present case, the Court's conclusion in *Umbehr* – that some scrutiny more deferential than strict scrutiny should apply

⁵ It is interesting to note that the TSSAA, in its first appeal to this court, challenged the "analytical framework that the district court used" in its initial decision. *Brentwood Acad.*, 262 F.3d at 551. We agreed with the TSSAA the last time around, holding that "the district court erred in concluding that the recruiting rule is a content-based regulation that fails strict scrutiny review" and that, rather, the recruiting rule is content-neutral and subject to intermediate scrutiny. *Id.* at 551-53. In this appeal, however, we cannot agree with the TSSAA's challenge to the analytical framework governing the case and set out by this court previously.

when the government exercises contractual power – does not suggest that the First Amendment does not apply to the TSSAA's enforcement of its recruiting rule. *See id.* In fact, *Umbehr* suggests that the approach this court took in its previous opinion was the right one: that the First Amendment does apply to the rule, and intermediate scrutiny is the standard to which the rule should be subjected. *See Brentwood Acad.*, 262 F.3d at 551-54; *see also Umbehr*, 518 U.S. at 678 (“The tests that we have established in our government employment cases must be judicially administered with sensitivity to governmental needs, but First Amendment rights must not be neglected.”).

A second nuance relates to the TSSAA's efforts to cast the present case as a “subsidy” case, where the government has considerable autonomy over how a government program is administered. This characterization is similarly futile. The defendants state in their brief that “TSSAA membership is a subsidy” and that under *Rust v. Sullivan*, 500 U.S. 173 (1991), the government acting as a contractor in a subsidy context “must be able to require the contracting party to limit its speech when reasonably necessary to effectuate the purposes of the contract.” Tellingly, the defendants cite to no page in the *Rust* opinion that supports this reading of the case; there is none. *Rust* involved a government funding program involving disbursements to doctors to advise patients on family planning topics. One condition of the program was that no funds could be used in programs where abortion was presented as a method of family planning. The Court upheld the program, reasoning that Congress had “merely chosen to fund one activity to the exclusion of the other.” *Id.* at 193. In later First Amendment jurisprudence, the Court “explained *Rust* on th[e] understanding” that the government in that case was itself engaging in speech and could thus make viewpoint-based funding decisions. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001); *see also United States v. Am. Library Ass'n*, 539 U.S. 194, 211-12 (2003) (plurality opinion) (citing *Rust* in upholding the government's requirement that libraries receiving federal subsidies utilize filtering software). Clearly, the TSSAA's enforcement of the recruiting rule is not a funding program. Nor does it represent government speech. Cases like *Rust* do not govern the present case.

Thus, as the 2001 panel determined, the appropriate characterization of the TSSAA's role is as a government regulator, a context to which the First Amendment surely applies. *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834-35 (1995); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130-31 (1992); *see also Brentwood Acad.*, 531 U.S. at 291 (holding that the association's “regulatory activity” is state action, even though “[n]o school is forced to join” the TSSAA) (emphasis added); *id.* at 292-93 (noting that the Tennessee State Board of Education designated the TSSAA as “the organization to supervise and regulate [interscholastic] athletic activities” in Tennessee, and that the present case was triggered by a “regulatory enforcement proceeding”) (emphasis added). The applicability of the First Amendment to regulation of speech by the government in this context does not vary depending on whether the speech relates to a matter of public concern or whether the relationship between the government and the speaker is voluntary or contractual. For example, when the government regulates how and when citizens can enter into voluntary contractual relationships with the government that regulate certain speech by those citizens, the government's licensing or regulatory scheme must meet constitutional standards, regardless of whether the speech at issue involves a matter of public concern. *See Forsyth County*, 505 U.S. at 129-31; *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 552-53 (1975). The same goes for the TSSAA's application of its recruiting rule.

We thus reject the defendants' attempt to reshape the framework through which we view this case – a framework set out by this court previously and utilized by the district court in trying the case. The TSSAA, in administering its rules and regulations and imposing penalties against member schools, acts as a regulator, not as an employer, contractor, or disbursing of funds. Therefore, as this court has previously concluded, *Brentwood's* First Amendment rights are at issue in this case, and intermediate scrutiny applies to the TSSAA's application and enforcement of the recruiting rule.

The dissenting opinion accepts the TSSAA's invitation to revisit previously rejected arguments and to recharacterize them as new ones. In fact, it even goes beyond the TSSAA's arguments and suggests that no First Amendment rights are implicated here.

The opening sentences of the dissenting opinion are conceptually attractive when first read. They are: "High school football is a game. Games have rules." Of course, games have rules. And so do cases. Here, the rule is called "law of the case." The dissent correctly notes that this dispute hardly evokes our notions of the core values of the First Amendment; the same could doubtless be said of other examples of First Amendment jurisprudence. But, in this case, the time for appellate court observation of any lack of a First Amendment issue was long ago.

In recycling the TSSAA's waiver argument, the dissent characterizes the 2001 panel decision as dealing with a broad issue of whether Brentwood had waived its right to sue entirely. The problem with this interpretation is that in 2001 Brentwood *had* sued and *had* challenged the same rule at issue in this appeal. The panel was discussing waiver in this context, and the clear import of its decision is that Brentwood had not waived or given up its right to challenge the rule at issue here by entering into a contract with the TSSAA.

Another difficulty with the dissent's waiver theory is that it is implicitly based on the content of the contract. Yet the contract here contains no provision that assists in the analysis. Brentwood does agree to be bound by the rules. If the TSSAA were not a state actor, that would be the end of the story. Since the TSSAA *is* a state actor, the contract gives no guidance as to whether Brentwood waived a right to challenge a rule it considered unconstitutional. The contract's silence thus becomes evidence of an absence of waiver of constitutional rights. The silence provides no basis for differentiating between a waiver of some rights and not others.

B. Application of the Recruiting Rule to Brentwood

Turning to the analysis of the First Amendment issue, we consider whether the TSSAA's application of the recruiting rule to Brentwood violates the First Amendment. In the 2001 opinion, the court laid out the intermediate scrutiny analysis that applies to content-neutral regulations:

[A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but . . . it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation The validity of time, place, or manner regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted.

Brentwood Acad., 262 F.3d at 557 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 798-800 (1989) (internal quotations, citations, footnotes, and alterations omitted)). The TSSAA has asserted three interests as justification for the recruiting rule: (1) to keep high school athletics in their proper place subordinate to academics; (2) to protect student athletes from exploitation; and (3) to foster a level playing field among the various member schools. *See id.* In its previous opinion, this court recognized the first interest as legitimate and substantial. *See id.* at 557-58 (citing *Crocker v. Tenn. Secondary Sch. Athletic Ass'n*, 980 F.2d 382, 386-87 (6th Cir. 1992)). This court remanded to the district court to determine whether the TSSAA's other two asserted substantial state interests for the recruiting rule were legitimate. *Id.* at 558.

The district court held that the TSSAA has a substantial governmental interest in protecting student athletes from exploitation. While it also held that the TSSAA's interest in fostering a "level playing field" was a legitimate governmental interest, it found that this interest was not substantial, especially considering that "[t]he substantial governmental interest in informed school choice trumps any governmental interest in controlling which schools or teams win athletic contests." Unlike rational basis review, intermediate scrutiny does not allow a court to supplant the particular interests put forward by the state with other suppositions. *See Edenfield v. Fane*, 507 U.S. 761, 768 (1993). In determining whether an interest is substantial, a court must look beyond "hypothesized justifications," *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373-74 (2002), and focus instead on the "actual interests served by the restriction." *Edenfield*, 507 U.S. at 768.⁶

The district court's conclusions regarding the TSSAA's interests, which we review *de novo*, were not erroneous. With regard to the asserted interest of protecting student athletes against exploitation, the TSSAA presented voluminous evidence at trial, primarily via expert witness testimony, in support of its argument that this interest is a substantial one. Carter testified that the "fundamental" reason for the recruiting rule was preventing exploitation. One of Brentwood's expert witnesses even testified that preventing the exploitation of student athletes, defined as the "selfish, unjust utilization of students for a school's benefit rather than for the benefit of the individual student," was a compelling state interest. At one point in its brief, Brentwood seems to suggest that evidence such as written legislative history or testimony from the initial drafters of the recruiting rule is necessary to prove that preventing exploitation of students was one of TSSAA's "actual" interests in applying the rule to Brentwood.⁷ For the purposes of the first prong of the intermediate scrutiny test, it is only necessary to establish that the actual interest exists and is substantial, and this can be done without resort to such primary sources. While there is no known written legislative history for the recruiting rule and all of the initial drafters of the rule are dead, the evidence, especially Carter's testimony under oath, suggests that preventing the exploitation of middle school student athletes is a substantial state interest and was one of the TSSAA's "actual" interests in applying the rule to Brentwood. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 312 (2000) (Souter, J., concurring in part and dissenting in part) (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994) (plurality opinion)) (noting that the state can regulate speech to further an interest in preventing reasonably "anticipated harm," as long as the harm is real); *see also* Knight Foundation Commission on Intercollegiate Athletics, *A Call to Action: Reconnecting College Sports and Higher Education* 20-21 (2001) (noting that "[h]igh school sports today can reflect the worst of their collegiate counterparts" in terms of exploitative commercial influences, pervasive recruiting efforts, and academic compromises for student athletes focused only on a professional athletic career); *cf. Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462 (1978) (holding that the state has an important interest in preventing solicitation by lawyers that involves undue influence, intimidation, overreaching, and other forms of "vexatious conduct").

The TSSAA also introduced evidence that supports its contention that fostering a level playing field among member schools is a legitimate state interest. Specifically, its experts and

⁶ *Edenfield* and *Thompson* are commercial speech cases, but the test they apply, just like the test applicable here, asks the court to determine whether the asserted state interests are substantial. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980).

⁷ Mostly, however, Brentwood conflates the "substantial interest" prong of the intermediate scrutiny test with the "narrowly tailored" prong, conceding later in its brief that the "TSSAA has a substantial interest in preventing exploitation of students," defined as "a student...being threatened, coerced, or harassed." Brentwood's argument that there are "problems with this theory...as a justification for TSSAA's disciplinary action" against Brentwood is evaluated in the next section of this opinion, since this is an argument that the application of the rule was not "narrowly tailored" to further Brentwood's legitimate and substantial interests.

Brentwood's own Headmaster Brown testified that the recruiting prohibition helps level the playing field among schools, especially as between private schools with significant resources and public schools with more limited resources and access to potential students. Carter testified at length about *how* the recruiting rule preserves competitive equity among schools, explaining that without the rule, "the rich would get rich real quick, and the poor would get poor real quick." There is very little, if any, evidence, however, explaining *why* competitive equity is an important value in the first place. It may be true, as defendants claim in their brief, that "maintenance of fair competition among [the TSSAA's] members lies at the core of [the TSSAA's] reason for being," but simply saying this is so does nothing to demonstrate why such a "reason for being" is a substantial state interest. State actors may act out of a variety of interests, but only some are substantial. The defendants can cite to no evidence to support the notion that ensuring that high schools compete in interscholastic sports in an equitable manner is a substantial state interest, especially when coupled with the admittedly substantial interest of ensuring that athletics do not become more important than academics at the high school level. The district court was right that this interest, while legitimate, is not substantial.⁸

Having established that the TSSAA has substantial state interests in keeping athletics subordinate to academics and preventing the exploitation of student athletes, the next question in the analysis, as set out in this court's previous opinion on the matter, is whether the recruiting rule, "as applied to Brentwood," is narrowly tailored to further those interests. *See Brentwood Acad.*, 262 F.3d at 557; *see also Turner Broad. Sys.*, 512 U.S. at 664 (plurality opinion) ("That the Government's asserted interests are important in the abstract does not mean...that the [speech regulation] will in fact advance those interests."). Specifically, the district court's task was

to decide if the punishment exacted for these alleged violations relating to the free game tickets, spring football-practice letters, and the followup telephone calls was appropriate regulatory action narrowly tailored to further TSSAA's legitimate interests as a state actor....In proceeding with this case on remand, we caution both the parties and the district court to stay focused on the two alleged recruiting rule violations in question, rather than engage in a wide-ranging attack or defense of the recruiting rule as a whole.⁹

Brentwood Acad., 262 F.3d at 558. This court also noted in its previous opinion that the application of the recruiting rule must not "unreasonably limit alternative avenues of communication." *Id.* at 554 (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986)). On remand, the

⁸Despite our conclusion that the district court correctly found that the TSSAA had established substantial state interests in keeping athletics subordinate to academics and preventing the exploitation of student athletes, the dissent devotes considerable attention to a discussion of the type of proof a defendant might have to present to support such interests. The two opinions do not differ on the ultimate point, that is, the TSSAA did have substantial state interests at stake. The true point of departure is whether the rule "as applied to Brentwood" is narrowly tailored to further those interests. *See Brentwood Academy*, 262 F.3d at 557.

⁹The "two alleged recruiting rule violations" referred to here are: (1) the free game tickets and (2) the spring practice letters and followup calls. *See Brentwood Acad.*, 262 F.3d at 548. While this court's previous opinion considered both of these rule violations as bases for Brentwood's First Amendment claim, neither the initial district court opinion nor the opinion being appealed here applied First Amendment scrutiny to the application of the recruiting rule to the free game tickets episode. In both opinions, the district court considered only whether the application of the rule to the letters and phone calls was constitutional. Defendants state in their brief that "[o]nly the spring practice letters and phone calls formed the basis of [Brentwood's] First Amendment claim."

The disconnect between this court's previous opinion and the district court's opinions on this point is likely due to the fact that, judging from its brief, Brentwood has focused its First Amendment claim on the punishment for the letters and calls, recognizing, perhaps, that it is unclear whether the First Amendment is implicated by the provision of free game tickets. Regardless, we confine our "narrowly tailored" inquiry to the letters and calls, leaving the free tickets episode to be considered under substantive due process analysis.

district court held that the recruiting rule "is not narrowly tailored to further any of the three governmental interests of the TSSAA as applied to Brentwood Academy."¹⁰

Reviewing *de novo*, we affirm this conclusion. The defendants import a definition of "enrolled" from a separate provision in the TSSAA Bylaws to support their argument that the students contacted by the letters and calls were not truly enrolled at Brentwood and that Brentwood therefore violated the recruiting rule by contacting them. Putting aside the fact that the Bylaw provision upon which defendants rely seems to apply not to practices or recruiting but rather only to eligibility to participate in athletic contests, the defendants' contention that the students at issue were not enrolled misses the point. Considering that the interpretive commentary to the recruiting rule is not binding and serves only as a guideline, the TSSAA's use of its discretion to punish Brentwood for the letters and calls was not a narrowly tailored way to keep athletics subordinate to academics at Brentwood or ensure that the student athletes being contacted were not being exploited.¹¹

First, surely, however one defines "exploitation," this interest was not furthered by punishing Brentwood. As the district court pointed out, the students contacted by the letter and calls had already signed enrollment contracts with Brentwood Academy, and the letter and calls were directed to all male students who had done so. In fact, Brentwood did not send the letter to one male student who had been accepted by Brentwood but had not yet signed an enrollment contract. Indeed, the students contacted had all agreed, and by all accounts were excited, to attend Brentwood the following year. Additionally, it is clear that the followup phone calls were made to clarify for the students involved that the practice was optional and should not preclude any other commitments they might have. The district court was right that "[n]either students nor parents were exploited in theory or in fact."

With regard to the former interest (keeping athletics subordinate to academics), it is a closer call, but the TSSAA's use of the regulation to punish Brentwood seems to "burden substantially more speech than is necessary to further the government's legitimate interest[]" in keeping athletics subordinate to academics. See *Ward*, 491 U.S. at 799; see also *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (holding that content-neutral regulations will be sustained only "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest"). The TSSAA must demonstrate that in this situation "the recited harms [were] real, not merely conjectural, and that the regulation [would have] in fact alleviate[d] these harms in a direct and material way." *Turner Broad. Sys.*, 512 U.S. at 664. They did not demonstrate this at trial. The district court obviously found the testimony of the parents of the boys in question to be more significant and persuasive than evidence from experts indicating that the letters and calls might -- in theory -- signal an emphasis on athletics over academics. The parents indicated they were glad to get the letter, and they did not at all think the implication of the letter was that Brentwood subordinated athletics to academics.

If the letters and calls were the first or only pieces of information the students or their families had ever received about Brentwood or would receive before arriving at the school, then an argument could be made that the school was unduly emphasizing athletics over academics. This was

¹⁰ Even though the district court found that fostering a level playing field was not a substantial state interest, it nonetheless included the interest in its "narrowly tailored" analysis.

¹¹ It is worth noting again that the district court's task was to consider the application of the recruiting rule specifically to Brentwood on these facts. The district court's opinion does not mean that application of the recruiting rule to other schools communicating in similar ways to students would be unconstitutional. For example, it is possible that letters and calls similar to the ones at issue here would be exploitative in a different context.

not the case. Each of the families of the children in question had already signed enrollment contracts with Brentwood. The information about spring football practice was simply information being provided to incoming students about an extracurricular activity available to them – an activity in which incoming students were allowed to participate under TSSAA rules.¹² Incoming students at Brentwood received a variety of information about a multitude of topics and activities, including academics at the school, and the letters and calls should be seen in this context.¹³

Even if the students could (and sometimes did) “wiggle out” of their contracts with Brentwood, this did not mean that Brentwood should be punished for disseminating information about an optional activity for incoming Brentwood students. In fact, defendants’ argument that the students in question were not technically enrolled and could have still decided to attend another school might even weigh in Brentwood’s favor, in that the letters and calls could be seen as part of an ongoing attempt to make sure the incoming students were informed about what Brentwood had to offer. That these particular communications emphasized athletics does not mean that punishing Brentwood for the communications served the TSSAA’s interest in keeping athletics subordinate to academics. In this context, the harm the TSSAA sought to prevent was “conjectural,” not “real,” or at least not based on the evidence in the record. *See id.* Put another way, it is not clear that the TSSAA’s substantial interest in subordinating athletics to academics was achieved any more effectively by punishing Brentwood for Platt’s letters and calls than it would have been had no punishment been handed down. *Cf. Ward*, 491 U.S. at 798-801, 800 n.7 (holding that a sound-amplification guideline that eliminated the evils the city sought to eradicate without restricting a substantial quantity of speech represented “the essence of narrow tailoring,” because it was not “substantially broader than necessary to achieve the interests justifying it”); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984) (upholding a time/place/manner regulation because it “respond[ed] precisely to the substantive problem which legitimately concerns the City”).

¹² That the rule was subsequently changed to prevent such participation in spring practice bolsters the conclusion that the TSSAA’s punishment of Brentwood in this case was not narrowly tailored. Banning spring practice participation, rather than applying the recruiting rule punitively to Brentwood’s invitation to participate in the approved activity, would have been a more narrowly tailored way to promote the TSSAA’s substantial interests. *See Thompson*, 535 U.S. at 373 (“[R]egulating speech must be a last – not first – resort. Yet here it seems to have been the first strategy the Government thought to try.”).

¹³ Headmaster Brown testified:

[A]s far as enrollment, we had to deal with our kids to get them acclimated to the school before they came. It would be – there’s no way that they could start with no contact from the school before. I mean that’s part of what all schools do. I mean they have got to get reading lists, got to know about the picnics, got to know about the options in the summer retreat, work options, and all of that so we have to communicate with them.

Admissions Director Brasher noted that admission is generally granted in November or February of the previous school year, and after a student is admitted and signs the enrollment contract, the student receives a packet of information, including a letter from the admission director, the student-parent agreement, and the handbook for Brentwood Academy with policies and procedures. Also, once an enrollment contract is signed, that student’s family is put on the school’s general mailing list, and they receive all the information that is sent to current students. Brasher provided more details:

We have a mailing that goes out usually about the end of May that will include reading list, letters from the English teachers, information about our summer session which includes summer school, computer camps, drama camps, athletic camp, driver’s ed. We have arts in April, it’s a big fine arts venue in April and we send them information on that.

Brasher also noted that there are some mailings that are targeted to particular groups of students, such as a letter about cheerleading tryouts that is sent only to girls.

To justify its regulation on Brentwood's speech, the TSSAA cannot rely on "shoddy data or reasoning"; rather, its evidence must "fairly support [its] rationale" for the application of the recruiting rule to the letters and calls. See *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002). Carter himself seemed to doubt that one could actually measure whether such letters and calls would emphasize athletics over academics or exploit the children:

Well, I think, first of all, you can't measure – you can't measure it on the effect that it had on those kids or any other circumstance that would occur. If [exploitation] occurs, then it's very difficult to imagine what impact it has on or to figure out what impact – I very seldom have seen kids in those situations that think it's had any impact on them. But it's very hard to turn around and determine that.

Carter's instinct was accurate, since despite evidence by numerous parents, school officials, and experts at trial, there was no evidence to show that the punishment of Brentwood was justified due to the effect of Brentwood's actions on the children or the relative standing of academics and athletics at the school. In sum, the TSSAA did not show that the application of the recruiting rule to Brentwood was narrowly tailored to serve the TSSAA's substantial interests.¹⁴ Reviewing *de novo*, we affirm the holding by the district court on this issue.¹⁵

¹⁴This court's previous opinion supports this conclusion. In determining that the recruiting rule is content-neutral, rather than content-based, this court pointed out that the recruiting rule does not impose a "total ban...on communications between secondary schools and middle school athletes regarding high school athletics." *Brentwood Acad.*, 262 F.3d at 551-52. According to the court's opinion, the greatest restriction imposed by the rule is the "prohibition on coaches...from initiating contact with middle school students for the purpose of recruiting student athletes." *Id.* at 552 (emphasis added). The rule allows "numerous ways in which Brentwood can get its message about athletics out to prospective students," as evidenced by the letter written by Brentwood's lawyer to the TSSAA in 1993 detailing Brentwood's understanding of various acceptable modes of communication. *Id.* On remand, the district court determined that applying the rule to the letters and calls was unconstitutional, since the application of the rule to the letters and calls was not narrowly tailored to further the TSSAA's substantial interests. Under the terms of this court's previous opinion, one could also read the district court opinion as a suggestion that the communications either were not made for the purpose of recruiting student athletes, or fell under the category of acceptable modes of communication under the recruiting rule, or both.

¹⁵The dissenting opinion's approach to this aspect of the case departs from a record-based analysis of whether the application of the recruiting rule to Brentwood was narrowly tailored to serve the TSSAA's substantial interests. In doing so, it neglects consideration of the evidentiary record, a process that an as-applied challenge necessarily entails, and substitutes theoretical analogies between recruiting rules and restrictions on adult-oriented businesses. While the dissent's approach might be appropriate in cases involving facial challenges to a regulation, such as *Renton* and *Ward*, on which the dissent heavily relies, it is inconsistent with the proper analysis for an as-applied challenge. See *Taxpayers for Vincent*, 466 U.S. at 796, 803 (distinguishing between a facial challenge and an as-applied challenge and concluding, after determining that the appellee could not establish that the law is "unconstitutional in every conceivable application, or...seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad,'" that the challenge was "basically a challenge to the ordinance as applied to [the appellee's] activities," and therefore "limit[ed] [the Court's] analysis of the constitutionality of the ordinance to the concrete case before [it]"); cf. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (noting that litigants bring a facial challenge where they attack "a statute not because their own rights of free expression are violated, but because...the statute's very existence may cause others not before the court to refrain from constitutionally protected speech").

The dissenting opinion's only arguable reference to the trial court record on the issue of whether application of the rule to Brentwood was narrowly tailored to serve the TSSAA's substantial interests is its suggestion that the rule permitted Brentwood to distribute its letters to private athletic leagues and other schools and permitted Brentwood coaching staff to refer potential students who contacted them to other Brentwood officials. The dissent deems these options alternative channels for communication. While these options are presumably permissible (but not mentioned in the evidence), they are hardly viable alternatives for achieving Brentwood's purpose and communicating the information contained in the letters to incoming students. The dissent's noting of these options is another way of saying that the recruiting rule did not prohibit Brentwood from advertising its sports and other offerings to the world at large through any available public medium, but that fact has little if anything to do with whether the recruiting rule as applied to Brentwood was narrowly tailored to serve the TSSAA's substantial interests.

C. Free Tickets as a Substantive Due Process Violation

The district court also held that the application of the recruiting rule to Brentwood violated the school's substantive due process rights with regard to the free tickets used by two students to attend a Brentwood football game. After citing authority indicating that the doctrine of substantive due process means that "governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed," *see Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1216 (6th Cir. 1992) (internal quotation marks and citation omitted), the district court centered its substantive due process analysis on the notion that

[a]s applied, the Recruiting Rule did not give Brentwood Academy constitutionally adequate notice that providing tickets to another coach, who secretly disregards express instructions to use the tickets only for adults, will constitute a violation. The Recruiting Rule is unconstitutionally vague as applied to Brentwood Academy on the facts of this case.

The court went on to explain that "the Recruiting Rule did not give...Brentwood Academy[] a reasonable opportunity to know what was prohibited with regard to complimentary tickets so that it could act accordingly."

When the vagueness argument was formulated as a First Amendment challenge, this court repudiated it. *See Brentwood Acad.*, 262 F.3d at 557 ("As a whole, the [recruiting] rule gives reasonable notice of what is prohibited, especially as applied to Brentwood."). Essentially, the district court has now recast its previous holding striking down the recruiting rule as overbroad and vague (a holding that was reversed) as a determination that Brentwood's substantive due process rights were violated. *See Brentwood Acad.*, 13 F. Supp. 2d at 693. Yet, if the substantive due process claim is characterized as a vagueness challenge,¹⁶ then for the reasons set out in this court's previous opinion, the claim fails. *See Brentwood Acad.*, 262 F.3d at 555-57; *see also Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972) (upholding an anti-noise ordinance against a vagueness challenge because it clearly "delineates its reach in words of common understanding") (internal quotation marks and citation omitted). If the substantive due process claim instead rests on an argument that the TSSAA's application of the recruiting rule infringed some fundamental constitutional right, the claim fails because no such right is implicated here,¹⁷ and the TSSAA's action was thus subject only to rational basis scrutiny. *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955). Lastly, if the substantive due process claim rests, as the district court seems to intimate at one point, on an allegation that the TSSAA acted arbitrarily or capriciously to deprive Brentwood of a property or liberty interest, it still fails, at least as a *substantive* due process claim. Brentwood could not reasonably allege that the defendants perpetrated an "egregious abuse of governmental power" sufficient to give rise to a substantive due process claim, because there is no evidence to suggest that the defendants "maliciously and intentionally abused [their] state authority in order to injure" Brentwood. *See Vinson v. Campbell County Fiscal Court*, 820 F.2d 194, 201 (6th Cir. 1987). Indeed, such a claim of a deprivation of a property or liberty interest, at

¹⁶ Brentwood's initial complaint lumps together a number of justifications for its claim that TSSAA violated its substantive due process rights. For instance, Brentwood claims that the recruiting rule infringed on liberty interests of students and parents to choose their schools, the recruiting rule is too vague, and the rule is fundamentally unfair in that Brentwood was punished for actions of a person beyond its control. The third argument is better analyzed as a procedural due process claim and is considered *infra*. *Cf. County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (holding that substantive due process precludes certain government actions "regardless of the fairness of the procedures used to implement them") (citation omitted).

¹⁷ The fundamental right to educate one's own children, *see Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925), is not at issue, especially since the regulation and penalties were applied only against Brentwood, not against the parents of the children involved.

least outside of the zoning context, *see Pearson*, 961 F.2d at 1217, is more appropriately characterized as a procedural due process claim, which is considered *infra*. For all of these reasons, the district court erred in concluding that the application of the recruiting rule to penalize Brentwood for the free game tickets episode violated Brentwood's substantive due process rights. We reverse the district court on this issue.

D. Procedural Due Process Claim

The district court also found that Brentwood's procedural due process rights were violated. The Fourteenth Amendment provides, in part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Procedural due process generally requires that the state provide a person with notice and an opportunity to be heard before depriving that person of a property or liberty interest. *See, e.g., Thompson v. Ashe*, 250 F.3d 399, 407 (6th Cir. 2001) ("Courts have long recognized that the Fourteenth Amendment requires that an individual who is deprived of an interest in liberty or property be given notice and a hearing."). Only after a plaintiff has met the burden of demonstrating that he possessed a protected property or liberty interest and was deprived of that interest will the court consider whether the process provided the plaintiff in conjunction with the deprivation, or lack thereof, violated his rights to due process. *Hamilton v. Myers*, 281 F.3d 520, 529 (6th Cir. 2002).

The first issue is whether Brentwood was deprived of a property interest. Clearly, at a minimum, fining Brentwood \$3,000 deprived Brentwood of a property interest. *See Herrada v. City of Detroit*, 275 F.3d 553, 556 (6th Cir. 2001). The panel need not decide whether potential lost revenues due to the ban from playoff participation also qualify as a property interest.

The second step in the procedural due process analysis is determining whether the TSSAA's deprivation of Brentwood's property interest contravened notions of due process. Under circuit precedent, a § 1983 plaintiff can prevail on a procedural due process claim by demonstrating that the property deprivation resulted from either: (1) an "established state procedure that itself violates due process rights," or (2) a "random and unauthorized act" causing a loss for which available state remedies would not adequately compensate the plaintiff. *Macene v. MJW, Inc.*, 951 F.2d 700, 706 (6th Cir. 1991). A plaintiff alleging the first element of this test would not need to demonstrate the inadequacy of state remedies. *Moore v. Bd. of Educ. of Johnson City Sch.*, 134 F.3d 781, 785 (6th Cir. 1998). If the plaintiff pursues the second line of argument, he must navigate the rule of *Parratt v. Taylor*, 451 U.S. 527, 539 (1981), which holds that a state may satisfy procedural due process with only an adequate postdeprivation procedure when the state action was "random and unauthorized." *See Macene*, 951 F.2d at 706. In *Zinerman v. Burch*, 494 U.S. 113, 128-29 (1990), the Supreme Court narrowed the *Parratt* rule to apply only to those situations where predeprivation process would have been impossible or impractical. In this context, an "unauthorized" state action means that the official in question did not have the power or authority to effect the deprivation, not that the act was contrary to law. *See id.* at 138.

Whether seen as an attack on an established state procedure or as an attack on a "random and unauthorized" act, Brentwood's claim is not subject to the *Parratt* rule, as it clearly was not "impossible" for the TSSAA to grant a predeprivation hearing¹⁸ to Brentwood on these facts. *See*

¹⁸ The district court stated that Brentwood was deprived of its property interests immediately upon issuance of the July 29, 1997, letter, simply because the letter itself said the penalties were effective immediately. *See Brentwood Acad.*, 304 F. Supp. 2d at 1005. The hearings held after this date, the court reasoned, were therefore postdeprivation hearings, which under certain Supreme Court precedent, must be more extensive and thorough than predeprivation hearings. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545 (1985). This conclusion by the district court seems wrong, as Brentwood did not pay the \$3,000 fine, and it appealed the July 29, 1997, decision precisely so it would not have to pay the fine or be subject to any other penalty. Brentwood had thus not been "deprived" of its property by

id. at 128. It seems clear that Carter and the Board had the authority to impose the penalties against Brentwood; their acts were not “random and unauthorized.” If, as is more likely, the TSSAA’s action was the result of an “established state procedure,” then the question becomes whether that procedure violated Brentwood’s due process rights.¹⁹

Brentwood first argues that it was deprived of the right to a “neutral, impartial decisionmaker.” Brentwood points out that Carter acted as investigator, trial judge, initial appellate judge, and participant in the final appeal. This court, however, has rejected arguments that due process is violated when the same official plays multiple roles in the process, such as when he acts as investigator, witness, presiding officer at hearing, and final decisionmaker. *See Moore*, 134 F.3d at 786; *Duchesne v. Williams*, 849 F.2d 1004, 1005 (6th Cir. 1988) (en banc); *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 926-27 (6th Cir. 1988). This line of argument thus fails.

In finding a violation of Brentwood’s procedural due process rights, the district court focused on Brentwood’s alternative procedural due process argument: that during the TSSAA Board of Control’s private deliberations after the August 23, 1997, hearing, the Board heard *ex parte* evidence regarding contacts with middle school students allegedly made on behalf of Brentwood, and that this evidence affected the Board’s final decision and penalty. Brentwood claims that it should have had the chance to rebut this evidence by cross-examining the TSSAA investigators who discussed these contacts with the Board during the private deliberations. *See Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (“In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”); *see also Loudermill*, 470 U.S. at 546 (“The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.”).

In evaluating Brentwood’s argument, it is necessary to recount in some detail the evidence about the subject of the *ex parte* discussion. There had been reports made to the TSSAA alleging that an Amateur Athletic Union (AAU) basketball coach named Bart King urged particular middle school student athletes to attend Brentwood, had provided transportation to Brentwood for those students, and promised scholarships to those students. Brentwood alleged in its initial complaint that King was in no way affiliated with the school and that Brentwood never represented to King or others that King had authority to act on its behalf. After the TSSAA received reports containing the allegations involving King, two TSSAA officials, Gene Meness and Bernard Childress, investigated the matter. Meness and Childress met with Brentwood Headmaster Brown in early June 1997 and asked Brown about King. Brown suggested that they put questions regarding King and other issues in writing and send them to him. Through an exchange of letters during July 1997, the TSSAA informed Brentwood that it was investigating the allegations relating to King, and Brentwood stressed to the TSSAA that King was in no way associated with Brentwood Academy. Meness and Childress did not speak to King during the investigation.

August 23, when the final hearing was held. *Cf. id.* at 545-46 (drawing the deprivation line at the moment of termination of employment). In any event, it is immaterial to the analysis in this case whether the hearing process occurred predeprivation or postdeprivation.

¹⁹ Even if the acts were “random and unauthorized,” and the *Parratt* rule did apply, the ultimate issue would be this same question: whether the procedure provided (the hearings in front of the Board of Control) was adequate. *See Macene*, 951 F.2d at 706.

As the district court found, there was no indication from the TSSAA before the final hearing that it was still considering the Bart King allegation.²⁰ In fact, the district court determined that "the TSSAA and Carter misled Brentwood Academy about a person and allegation which ultimately mattered to the decision." See *Brentwood Acad.*, 304 F. Supp. 2d at 1004 n.29. Despite this lack of indication that King's conduct was at issue, at the final hearing on August 23, Brentwood's counsel Tom Nebel offered to call King as a witness, saying, "We have Bart King here to answer any questions. And it was our intention to put him on, but I don't know if you all are interested in extending for five minutes to hear Bart King or not. He's here if you want him." Carter answered, "No." Evidently this was the only discussion of King at the hearing. Carter later testified that "if Brentwood Academy wanted [to call King], they could have easily done it.... The school can put on anything they want to." Nebel later testified that he was not cut off from presenting any information he wanted to present at the hearing.

Meness and Childress were present during the Board of Control's private deliberations following the August 23 hearing. While Childress recalled answering some questions posed by Board members, neither Meness nor Carter recalled answering any questions about Bart King. Board of Control President Mike Reed and Board member Michael Hammond testified that during the Board's private session, the Board discussed the allegations surrounding King's actions. In Reed's initial deposition in this case, Reed was asked whether the King allegations were one of the reasons behind the Board's ultimate finding (upon which the penalties were based, in part) that there was "[c]ontact with student-athletes, initiated by Brentwood Academy, while those students were enrolled at other schools." Reed answered affirmatively. However, at trial, Reed first testified that although the King allegations were a "factor" in the discussion of the final penalty, the "final penalty did not involve Bart King": "[W]e discussed Bart King and the situation that took place, we did, we discussed it, but the final penalty really dealt with the letter from Mr. Flatt." When asked about his deposition testimony at trial, Reed also referred to a lack of memory in his deposition testimony and further indicated that the situation with King "was a factor in the overall penalty." The assertion that the final penalty was not based on the King allegations was reiterated by Carter and Hammond in their testimony at trial.

The district court found that the TSSAA and Carter violated Brentwood's procedural due process rights by considering *ex parte* evidence during their private deliberations on August 23, 1997. In reaching this conclusion, the district court recounted the testimony of Board of Control President Reed as well as Board members Hammond, Mickey Dunn, and Morris Rogers, all of whom indicated in their testimony that TSSAA investigators Childress and Meneses provided some information to the Board regarding their findings during the private session. Additionally, the court noted that Carter testified that Carter, Meness, and Childress were all present to answer questions from the Board during the private session. The court below also pointed out that "Bart King, according to Reed, was discussed and...was a factor in the penalties imposed." *Id.* at 1004. The court credited all of this evidence "based on the demeanor of the witnesses, the consistency of the testimony, and because the testimony is adverse to the witnesses' interests as TSSAA Board of Control members." *Id.*

²⁰ Carter's July 29, 1997, letter to Brown details six "concerns" and violations on which the penalties are based. Only the sixth concern, which obliquely refers to contacts "by persons not connected with Brentwood Academy," arguably has anything to do with King. The violation listed under concern six, however, gives no indication that the TSSAA seeks to assign any responsibility to Brentwood for any actions by King. At the first hearing on August 13, 1997, Brentwood submitted an affidavit from King denying the allegations detailed in the earlier exchange of correspondence between the TSSAA and Brentwood. Then, after the first hearing, Carter sent Brown a letter dated August 14, 1997, listing the violations found at the first hearing. None of these violations implicates King in any way.

The district court's factual finding that there was discussion during the Board of Control's deliberations about the King allegations was not clearly erroneous and, in fact, was well-supported by the evidence. The district court was also correct in its conclusion that Brentwood Academy did not have notice that the King matter was a possible basis for final TSSAA action against Brentwood. Whether the King issue was actually a factor in the penalties ultimately imposed is far less certain. Yet the district court was entitled to credit Reed's deposition and trial testimony that the King issue influenced the Board's findings and penalties over his contrary trial testimony and other evidence that the King issue was not a basis for the penalties.²¹ See Fed. R. Civ. P. 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."). Thus, the finding that the King issue influenced the penalties is also not clearly erroneous.

There is no applicable precedent that describes the precise process a school such as Brentwood should receive from a state athletic association such as the TSSAA before the association imposes penalties such as the ones assessed here. Cf. *Loudermill*, 470 U.S. at 545-46 (setting out the due process requirements for termination of tenured public employees); *Goss v. Lopez*, 419 U.S. 565, 581 (1975) (setting out the due process requirements for short-term school suspensions); *Morrissey v. Brewer*, 408 U.S. 471, 488-89 (1972) (setting out the due process requirements for parole revocations). The district court therefore correctly looked to the general balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) to determine what process is due in this situation. The *Mathews* balancing test states:

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

The district court correctly concluded that in a situation such as the one presented by this case, due process requires that a school be informed of all of the issues relied on by an athletic association levying penalties against the school and be given a chance to respond to those issues before the penalties are imposed.²² Such a requirement imposes only a minimal burden on the state actor and would be of great value in ensuring that a school is not wrongfully penalized. Moreover, as the district court noted, such a requirement is clearly consistent with the notification requirements set out by this court and others in analogous situations. See, e.g., *Loudermill*, 470 U.S. at 546 ("The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."); *Moore*, 134 F.3d at 786 ("[T]he process offered Moore was constitutionally sufficient. She received written notice of the charges against her, as well as an explanation of the Board [of Education]'s evidence, and was offered an opportunity to present her side of the story."); *Swank v. Smart*, 898

²¹ Reed's deposition testimony is a prior inconsistent statement given under oath and also amounts to an admission against interest on the part of the TSSAA. Fed. R. Evid. 801(d)(1) & (2).

²² The TSSAA complains that the district court "once again" ignored the contractual relationship between it and Brentwood in evaluating the procedural due process claim, but fails to articulate exactly how the contractual relationship lessens the TSSAA's obligation as a state actor to provide procedural due process.

F.2d 1247, 1253 (7th Cir. 1990) (“[The police officer] was entitled to challenge the chief’s assessment of the damage caused by the [incident in which the officer was seen giving a girl a ride on his motorcycle]. Ex parte presentation of evidence denies due process....”); *id.* at 1256 (“[A] tenured public employee has a constitutional entitlement to a fair hearing before being fired and that with immaterial exceptions a fair hearing includes the right to be shown the evidence on which the tribunal has relied, including evidence pertaining to the gravity of the sanction to be imposed when liability is conceded.”) (citations omitted); *Newsome*, 842 F.2d at 927 (holding that student was “denied procedural due process when the superintendent disclosed to the school board, during their closed deliberations, new evidence which had not been presented during the open hearing at which Newsome and his attorney were present”); *see also Greene v. McElroy*, 360 U.S. 474, 496 (1959) (“[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue.”).

In sum, we affirm the district court’s conclusion that the TSSAA and Carter violated Brentwood’s procedural due process rights. The district court correctly determined what process was due to Brentwood: notice of the evidence relied upon in penalizing Brentwood and an opportunity to respond to that evidence before penalties were imposed. Here, the TSSAA failed to give that notice as it related to King. Brentwood therefore had no notice that it should respond to the King evidence at the hearings. Yet, the King evidence was used by the TSSAA in its deliberations and, under the district court’s findings, influenced the penalties imposed on Brentwood. The failure to afford the requisite process violated Brentwood’s Fourteenth Amendment rights to procedural due process.

E. Availability of Qualified Immunity for Carter

The district court also held that Carter was not entitled to qualified immunity. Whether a defendant is entitled to qualified immunity is a question of law reviewed *de novo*. *Thacker v. City of Columbus*, 328 F.3d 244, 259 (6th Cir. 2003). Qualified immunity protects government officials from civil liability for actions taken within their official discretion insofar as these actions do not violate clearly established statutory or constitutional rights of which a reasonable official would have been aware. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). It is not merely a defense to liability; rather, when applicable, qualified immunity protects government officials from lawsuits and, hence, the burdens of litigation. *See Saucier v. Katz*, 533 U.S. 194, 200-01 (2001).

The initial question here is whether the qualified immunity defense is even available to Carter, an employee of a non-profit corporation that has been found to be a state actor when engaging in regulatory activity. “In assessing whether the qualified immunity afforded state officials extends to private actors who are considered state actors under § 1983, [the court] must consider both the purposes of qualified immunity protection and the nature of the relationship between the state and the putative private party.” *Bartell v. Lohiser*, 215 F.3d 550, 556 (6th Cir. 2000). This court held in *Bartell* that workers for a non-profit foster-care corporation that had contracted with the government and was closely supervised by a state agency were entitled to qualified immunity. *Id.* at 557. The *Bartell* court distinguished *Richardson v. McKnight*, 521 U.S. 399, 412 (1997), in which the Supreme Court held that private prison guards were not entitled to qualified immunity, as involving a for-profit corporation that operated with limited direct supervision by the government. *See Bartell*, 215 F.3d at 556-57 (citing *Richardson*, 521 U.S. at 413). Here, one of these factors weighs in favor of Carter (because the TSSAA is a non-profit corporation) and one weighs in favor of Brentwood (because the TSSAA operates with limited direct governmental supervision).

Nevertheless, a closer examination of *Bartell* and *Richardson* indicates that the balance is tipped towards Carter’s argument that qualified immunity is available to him. Specifically, one of the key reasons qualified immunity was unavailable in *Richardson* was because the purposes of

qualified immunity were already served by “marketplace pressures” that themselves “provide[d] the private firm with strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful, or ‘nonarduous’ employee job performance.” 521 U.S. at 410. Here, there are no such marketplace pressures; the TSSAA, unlike the prison firm in *Richardson*, does not have to compete with other firms for the job it does on behalf of the state. Also, the *Richardson* court relied heavily on the fact that “[h]istory does not reveal a ‘firmly rooted’ tradition of immunity applicable to privately employed prison guards.” *Id.* at 404 (citing *Wyatt v. Cole*, 504 U.S. 158, 164 (1992)). The district court in this case picked up on this rationale, noting that “[j]udicial history does not reveal a firmly rooted tradition of immunity applicable to employees of private athletic associations.” The notion that there would be such a “firmly rooted” history, though, is unreasonable in the first place, considering that athletic associations like the TSSAA have only recently grown in importance and stature, and litigation involving such associations has been relatively rare. See *Brentwood Acad.*, 531 U.S. at 304 (“No one...has pointed to any explosion of § 1983 cases against interscholastic athletic associations....”); see also *Richardson*, 521 U.S. at 414-15 (Scalia, J., dissenting) (chiding the *Richardson* majority for relying on the historical absence of any cases in which immunity was successfully asserted by a private prison guard). We find that qualified immunity is available to officials such as Carter.

Having found that qualified immunity is available to Carter, the next question is whether it applies in this case. If an official acts within his discretionary authority and asserts qualified immunity, the burden shifts to the plaintiff to prove that the officer violated a right so clearly established that any reasonable official in his position would have understood it was unlawful to engage in the conduct that violated the right. See *Gardenhire v. Schubert*, 205 F.3d 303, 311 (6th Cir. 2000). This court evaluates this burden according to a three-prong standard. See *Williams v. Mehra*, 186 F.3d 685, 691 (6th Cir. 1999). First, the court considers whether a constitutional or statutory violation occurred. *Id.* If so, the court then considers whether the right that was violated was clearly established in the sense that a reasonable person would have known of the right. *Id.* The right must have been “clearly established at the time of the actions in question.” *Dickerson v. McClellan*, 101 F.3d 1151, 1158 (6th Cir. 1996). If the right was clearly established, the court’s third step is to “determine whether the plaintiff has alleged sufficient facts, and supported the allegations by sufficient evidence, to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.” *Williams*, 186 F.3d at 691.

Having found that a violation of Brentwood’s procedural due process rights occurred, the next question is whether Brentwood’s rights were clearly established such that “it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Saucier*, 533 U.S. at 202. On this point, there is simply no support for the district court’s conclusion that “the contours of procedural due process were sufficiently clear and apparent that Carter had fair warning, and reasonably should have understood, that what he did violated the procedural due process rights of Brentwood Academy.” As described above, there is no applicable authority describing what process state secondary athletic associations must provide when enforcing their regulations. It asks too much of Carter to expect him to have applied the *Mathews* factors and concluded that failing to give notice that the King issue would be considered and then considering it during the Board’s private deliberations would violate Brentwood’s due process rights. Regardless of Carter’s extensive involvement in the investigation and decision making with regard to the TSSAA’s penalties against Brentwood, there is no evidence that his conduct was objectively unreasonable, or that Brentwood’s due process rights (or First Amendment rights, for that matter) in this context were clearly established. For these reasons, we reverse the district court on this issue and find that Carter is entitled to qualified immunity.

F. Antitrust Immunity

The district court ruled in an October 2002 order that the TSSAA was entitled to antitrust immunity under the doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). Brentwood appeals from this order, arguing that the doctrine does not apply and that its antitrust claim should be permitted to proceed.²³

In addition to the facts noted earlier about the TSSAA as an organization, the following facts are pertinent to the antitrust immunity inquiry. The bulk of the TSSAA's revenues come from gate receipts at member teams' tournaments, but member schools do pay annual dues. TSSAA employees are not paid by the state but are eligible to join the state employee retirement system. The voting membership of the Board of Control and Legislative Council (the rulemaking body of the TSSAA) are composed of school administrators, and the public school administrators who typically serve in these positions carry out their TSSAA duties during regular school hours.

The district court issued only a cursory explanation of its decision on this issue. The court explained, without analysis, that the Supreme Court's decision on "pervasive entwinement" meant that the TSSAA was a state actor "for purposes of antitrust immunity." However, while there are similarities between the two tests, the *Parker* antitrust immunity inquiry is different from the inquiry into whether state action exists for the purposes of § 1983 and the Fourteenth Amendment. See *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 194 n.14 (1988) (noting that the two inquiries are "somewhat similar" but "by no means identical"); *Tarabishi v. McAlester Reg'l Hosp.*, 951 F.2d 1558, 1565 n.6 (10th Cir. 1991). Indeed, the extensive case law on the issue of *Parker* antitrust immunity reveals that the doctrine does not apply to the TSSAA.

In *Parker*, the Supreme Court held that when a "state in adopting and enforcing [a regulatory] program..., as sovereign, imposed the restraint as an act of government," the program could not violate the Sherman Act, because the Act was directed against "individual and not state action." 317 U.S. at 352; see also *City of N. Olmstead v. Greater Cleveland Reg'l Transit Auth.*, 722 F.2d 1284, 1287 (6th Cir. 1983) ("[The] doctrine enunciated in *Parker*...exempt[s] 'anticompetitive conduct engaged in as an act of government by the state as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service' from Sherman Act control.") (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 413 (1978) (opinion of Brennan, J.)) (emphasis removed). The Court has clarified that while *Parker* immunity clearly applies to a state legislature or a state supreme court acting in its legislative capacity, when the regulatory activity is carried out by others pursuant to state authorization, the program must meet the two-part standard set out in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980). See *Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984). "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *Midcal Aluminum*, 445 U.S. at 105 (quoting *City of Lafayette*, 435 U.S. at 410 (opinion of Brennan, J.)).²⁴ Like other judicially imposed exemptions from the antitrust laws, the *Parker* doctrine must be narrowly construed. See *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992).

²³In its brief the TSSAA argues a number of issues relating to the antitrust claim. Before the district court, however, it raised only the antitrust immunity issue, and we will therefore not consider the other issues on appeal. See *Barner v. Pilkington N. Am., Inc.*, 399 F.3d 745, 749 (6th Cir. 2005).

²⁴In *Midcal Aluminum*, the Court held that a California price-setting system for wine met the first but not the second prong of the test, because the state simply authorized the price setting and enforced the prices established by private parties. 445 U.S. at 105. The State did not monitor market conditions or otherwise actively supervise the program. *Id.* at 105-06. Therefore, California's involvement was not sufficient to establish *Parker* immunity. *Id.*

The first question under the *Midcal Aluminum* test is whether the TSSAA acts pursuant to a “clearly articulated and affirmatively expressed” state policy to displace competition. 445 U.S. at 105. This policy must be one clearly articulated in the first instance not by a state agency, see *Goldfarb v. Va. State Bar*, 421 U.S. 773, 790 (1975), but by “the State itself, such as a policy approved by a state legislature...or a State Supreme Court,” see *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 63 (1985) (citations omitted). The “clearly articulated” state policy requirement is not satisfied “when the State’s position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive.” *Cnty. Communications Co. v. City of Boulder*, 455 U.S. 40, 55 (1982). In *City of Boulder*, the Court held that the *Parker* doctrine did not protect a municipality’s regulation of the cable television market, even if the city’s activities were authorized by a home rule statute, because the “general grant of power to enact ordinances” did not imply “state authorization to enact specific anticompetitive ordinances.” *Id.* at 56. On the basis of this rationale, the TSSAA should not receive antitrust immunity. The Tennessee General Assembly has done nothing more than delegate to the State Board of Education the general authority to develop policies for the operation of public schools. Tenn. Code Ann. § 49-1-302. The state statute says nothing about interscholastic athletics or the TSSAA itself, which acts under the auspices of the Board. See *Brentwood Acad.*, 531 U.S. at 292-93. The Tennessee statute represents a vague, neutral authorization by the sovereign; this is not enough to establish a “clearly articulated and affirmatively expressed” state anticompetitive policy. *Midcal Aluminum*, 445 U.S. at 105; see also *Mich. Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 534 (6th Cir. 2002) (“Grants of general or neutral authority to govern local affairs will not satisfy the ‘clear articulation’ component of the state action exemption from antitrust liability.”).

Other Supreme Court precedent, however, suggests that “‘explicit authorization’ by state legislatures to displace competition [is] not necessary to pass the clear articulation test. The *Parker* exemption applies as long as the suppression of competition is the foreseeable or logical result of what the state authorizes.” *Id.* at 535 (citing *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42-44 (1985)). In *Town of Hallie*, a city refused to supply sewage treatment facilities to those outside the city’s borders. 471 U.S. at 37. The state statute did not refer to competition, but it authorized the city to refuse to provide sewage treatment to adjacent unincorporated areas unless they agreed to annexation. *Id.* at 41. The Court held that “anticompetitive effects logically would result from this broad authority to regulate” and thus the first prong of the *Midcal Aluminum* test was met. *Id.* at 42. *Town of Hallie* is distinguishable, however, since although the state statute in that case did not explicitly authorize anticompetitive state behavior, it specifically described and authorized the policy in question. Here, not only does the Tennessee statute fail to authorize anything like the recruiting rule or any other regulation, but it also fails to mention interscholastic athletics at all. The state as sovereign has not made clear its intent to establish an anticompetitive regulatory program. Cf. *S. Motor Carriers Rate Conference*, 471 U.S. at 63-64 (“The legislature thus made clear its intent that intrastate rates would be determined by a regulatory agency, rather than by the market.”); *Mich. Paytel*, 287 F.3d at 536 (holding that anticompetitive effects are “the logical and foreseeable result of the City’s broad authority under state law and the Michigan Constitution to bid out public contracts for the maintenance of City prisons”).

Assuming, *arguendo*, that the TSSAA acts pursuant to a “clearly articulated and affirmatively expressed” anticompetitive state policy, the next question is whether its regulatory program is actively supervised by the state. See *Midcal Aluminum*, 445 U.S. at 105.²⁵ This court

²⁵ A threshold question before reaching this second prong of the test is whether the second prong applies to the TSSAA. *Town of Hallie* stands for the proposition that the active state supervision requirement is not applicable in cases where the actor is a municipality, and the Court suggested in dicta in that case that the same should go for cases in which the actor is a “state agency.” See 471 U.S. at 46, 46 n.10. In their brief, defendants cite a number of cases to support their argument that the TSSAA qualifies as a political subdivision of the state for antitrust purposes and therefore need

has held that the active supervision requirement must be met by state supervision; "municipal oversight" of the program is insufficient. See *Riverview Invs., Inc. v. Ottawa Cmty. Improvement Corp.*, 774 F.2d 162, 163 (6th Cir. 1985). Significantly, this court has also held that antitrust immunity does not apply to a private actor to whom authority is delegated such that the private actor becomes the "effective decision maker." See *Mich. Paytel*, 287 F.3d at 537-38. In these situations, when a private actor (such as a non-profit corporation) acts on behalf of the state but makes "independent decisions without the input, advice, involvement, or oversight of...any...governmental body," antitrust immunity does not apply. *Id.* at 538 (quoting *Riverview Invs., Inc. v. Ottawa Cmty. Improvement Corp.*, 899 F.2d 474, 481-82 (6th Cir. 1990)); see also *Town of Hallie*, 471 U.S. at 47 ("Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State."). Here, authority was clearly delegated from the state to the State Board of Education and then, in turn, to the TSSAA. There is nothing at all in the record to indicate that the state is actively involved in supervising the TSSAA. In fact, the evidence suggests that the opposite is the case. See also *Midcal Aluminum*, 445 U.S. at 106 ("The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.").²⁶

Defendants therefore cannot establish either prong of the *Midcal Aluminum* test. For these reasons, we reverse the district court's October 2002 decision finding that the TSSAA is entitled to *Parker* antitrust immunity and remand for further proceedings with respect to Brentwood's antitrust claim.

G. Relief Issues

Brentwood also appeals the district court's denial of damages. "[W]hen § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 (1986). "[P]roximate causation is an essential element of a § 1983 claim for damages. That is, a violation of a federally secured right is remediable in damages only upon proof that the violation proximately caused injury." *Horn v. Madison County Fiscal Court*, 22 F.3d 653, 659 (6th Cir. 1994) (internal citation omitted). The district court found that the damages claimed by Brentwood (reputational harms and time spent by employees on the case) were not proximately caused by the defendants. On appeal, Brentwood argues that the district court should have considered whether the damages were "foreseeable" and that the harms suffered by Brentwood were foreseeable consequences of the defendants' conduct.

not meet the second prong of the *Midcal Aluminum* test. However, none of these cases concern an athletic association such as the TSSAA, and defendants cite no case from this circuit to support their argument. In fact, circuit precedent suggests that it is only municipalities that are exempt from the second prong of the test. See *Mich. Paytel*, 287 F.3d at 536 (holding that "private parties must establish both" elements of the *Midcal Aluminum* test).

²⁶The dissent rests its differing result on our decision in *Consolidated Television Cable Service, Inc. v. City of Frankfort*, 857 F.2d 354 (6th Cir. 1988). Based on the ruling in that case, it concludes that the TSSAA is the agent of the Tennessee Board of Education, itself a state agency, and that the TSSAA need only meet the state antitrust immunity test for state political subdivisions. The relationship between the municipality and its agent cable television company in *Consolidated*, however, is not analogous to the relationship between the Board and the TSSAA. Frankfort provided cable television service to its citizens and owned the system for providing the service, created the cable company to operate the system, and exercised continued supervisory control over the cable company – described by the court as "ultimate control." *Id.* at 358. In fact, *Consolidated* itself had previously described the cable company as an agent of the municipality, a fact which the court mentioned as *dicta* but which nevertheless appears important to the resolution. The TSSAA, with its mix of public and private membership and revenue, its elaborate internal governance and appeal structure, and its lack of state supervision does not fit within the cable company model described in *Consolidated*.

The district court rightly pointed out that any costs incurred by Brentwood as a result of the litigation were costs it chose to incur when it filed the case. As to Brentwood's reputational damage, foreseeability is an element of the proximate cause analysis, but it is distinct from the requirement that a plaintiff show the injury was directly caused by the defendant. *See Perry v. Am. Tobacco Co.*, 324 F.3d 845, 850-51 (6th Cir. 2003). It is a fundamental tort law principle that while an injury to a plaintiff might be foreseeable, the damages incurred could still be "too remote to permit recovery." *See, e.g., Laborers Local 17 Heath & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 236 (2d Cir. 1999). Here, the district court sensibly concluded that even if Brentwood's reputational harms were foreseeable, they could be traced much more directly to the media and other third-party actors than to the TSSAA or Carter.

Brentwood also argues that the district court, which enjoined the penalties assessed against Brentwood, should have also enjoined the enforcement of the recruiting rule "as applied to speech more generally." Brentwood asserts in its brief that "[o]nly a decision-forcing injunction against applying the [recruiting rule] to speech can assure TSSAA's First-Amendment-mandated 'careful calculation of the speech interests involved.'" These arguments are not well-taken. In its previous opinion, this court clearly rejected a facial challenge to the recruiting rule based on an argument that the regulation was invalid in all of its applications. *Brentwood Acad.*, 262 F.3d at 554-57. The court suggested that the recruiting rule could in fact be applied constitutionally in some cases, and the district court's task on remand was to consider only whether the rule was constitutional as applied to Brentwood. *Id.* at 554-58. The district court correctly limited its remedy accordingly and enjoined only the application of the rule to Brentwood in this case.²⁷ We affirm the remedy granted by the district court.

III.

For the foregoing reasons, we: (1) affirm those parts of the district court's decision finding for Brentwood on its First Amendment and procedural due process claims and granting injunctive relief on these claims; (2) reverse the district court's decision finding for Brentwood on its substantive due process claim; (3) reverse the district court's decision finding that Carter is not entitled to qualified immunity; (4) reverse the district court's order finding that the TSSAA is entitled to antitrust immunity; and (5) remand for further proceedings on Brentwood's antitrust claim.

²⁷ In its brief, Brentwood argues that the district court's injunction should also be directed at Carter in his official capacity. It is unclear why Brentwood makes this argument or why this should be the case, as the injunction enjoins all of the penalties imposed by the TSSAA against Brentwood. The injunctive relief was thus complete.

DISSENT

ROGERS, Circuit Judge, dissenting.

High school football is a game. Games have rules.

To have federal courts, under the guise of applying the enduring principles of the First Amendment, reverse the ordinary application of high school football recruiting rules—where the core values of the Amendment are not even remotely involved—unduly trivializes these constitutional principles. This is no more a case involving our nation's ideal of freedom of expression than a case involving a coach who is thrown out of a game for talking back to a referee. This is instead a case involving game participants who challenge the discretionary administration of participation rules. Of course, good lawyers can characterize almost any perceived injustice as a constitutional case (and maybe even an antitrust case to boot), but courts should be hesitant to go along.

The Supreme Court has properly instructed us in this case that the defendant is a state actor for constitutional purposes, and this court in its 2003 decision properly determined that Brentwood Academy did not contract away all of its constitutional rights by joining TSSAA. If, for instance, TSSAA discriminated on the basis of race or religion or the expression of political views, the earlier court holdings in this case would insure the availability of federal court relief. But here TSSAA is clearly doing nothing more than administering its game rules—the game being interschool high school football. Dissatisfaction with application of game rules does not become a First Amendment violation merely because the rule involves speech.

Recruiting and eligibility rules are of course a very real part of the game itself, protecting the student-athlete and the brand of competition agreed to. The game of football, like any game, has rules which the competitors accept as an inherent part of participation. In addition to the basics of the game, such as how many players may participate at one time and how many points are awarded for a touchdown, competitors agree on further rules governing competition more broadly, agreeing on rules that govern how teams are grouped into leagues, how the champion of the league is determined and who is eligible to participate in a game. Fierce competition among high schools for talented student athletes, and the demand for success from fans and alumni, bring the potential for excess. As a result, athletic leagues comprised of educational institutions, such as TSSAA, have rules governing both the recruitment of student-athletes and the eligibility of student-athletes to participate in athletic contests. Anti-recruiting rules may inhibit “speech,” but so do the ordinary rules of a football game that allow players and coaches to be removed for disputing the propriety of a referee's call.

Accordingly, I dissent from those portions of the majority's decision upholding plaintiff's First Amendment claims. I also dissent from the finding of a due process violation and from the decision to reverse the district court's determination that there is no basis for antitrust liability in this case.

¹ I concur in Part II.C. of the majority opinion rejecting Brentwood's substantive due process claim.

I.

While the insubstantiality of plaintiff's First Amendment claim is clear, the complexities of modern First Amendment jurisprudence make it less clear precisely why the claim is not substantial. There are two parts to the answer. First, ordinary enforcement of game rules does not amount to an unconstitutional limit of free expression in part because participants agree to play in the games. Second, ordinary enforcement of game rules does not amount to an unconstitutional limit on free expression because rules (including rules limiting speech) are inherently necessary to ordered competition. Of course these two ideas substantially overlap, but they find expression in different strands of First Amendment law. Both strands reflect the underlying idea that rules have value for the sake of being rules, and only trench on First Amendment concerns when their relationship to the game is too attenuated. Enforcement of the recruitment rule in this case is clearly warranted because Brentwood agreed to general applicability of the rules (although not to rules that draw distinctions unrelated to the purpose for the rules, such as interpretations of the rules that discriminate, for example, on the basis of political party affiliation). Enforcement of the recruitment rule in this case is also clearly warranted because, in the context of athletic competition, the rule is sufficiently related to legitimate public interests and narrowly tailored. Under each of these arguments, and certainly under at least one of the two, there is no First Amendment violation in this case.

I recognize that the first argument is subject to the criticism that it ignores our earlier 2001 decision and renders the extensive district court proceedings on remand an exercise in futility. In addition, the second argument is subject to the criticism that it does not adequately defer to the factual findings of the district court. While I am sympathetic with the inclinations undergirding these arguments, I cannot in the end accept that they compel us to affirm the finding that enforcement of an unexceptional athletic anti-recruiting rule violates the First Amendment.

A.

First of all, Brentwood agreed to comply with TSSAA anti-recruiting rules, and thus gave up its right to engage in some expressive activity otherwise protected by the First Amendment. That is not to say that it gave up all of its rights to engage in expressive activity vis-à-vis TSSAA. But it obviously gave up some. By comparison, a person by accepting employment by the government gives up some rights protected by the First Amendment (e.g., the right to read the newspaper all day long), but does not give up all First Amendment rights (e.g., the right to talk politics during a break).

Brentwood in this case gave up its right to engage in certain types of speech, and may not assert such a right now. *See Leonard v. Clark*, 12 F.3d 885, 889-90 (9th Cir. 1993) (affirming the district court's decision not to reach the issue of whether a labor union's free speech rights had been violated where the district court had first determined that the union waived its First Amendment protections in a collective bargaining agreement). Brentwood in short gave up its right to speak in violation of TSSAA's game rules (including its anti-recruiting rules) as consideration for access to TSSAA leagues and tournaments, and to benefit from TSSAA's enforcement of its rules against competitors.

1. *Free Speech Rights May Be Given Up*

Most individually held constitutional rights may be waived, if done knowingly, intelligently, and with sufficient awareness of relevant circumstances and likely consequences. *See Brady v. United States*, 397 U.S. 742, 748 (1970) (recognizing waiver of the constitutional right to a trial in a criminal case); *Leonard*, 12 F.3d at 889-90 (upholding a contractual waiver of First Amendment rights where it was knowing, voluntary, and intelligent); *Erie Telecomms. v. Erie*, 853 F.2d 1084, 1096 (3d Cir. 1988) ("constitutional rights, like rights and privileges of lesser importance, may be contractually waived where the facts and circumstances surrounding the waiver make it clear that

the party foregoing its rights has done so of its own volition, with full understanding of the consequences of its waiver").

The power to waive individually held constitutional rights extends to First Amendment speech-related protections. The Supreme Court has repeatedly held that contractual waivers of free speech protections may be judicially enforced. In *Snepp v. United States*, the Supreme Court held that the Central Intelligence Agency (CIA) was not barred by the First Amendment from enforcing an employment agreement that required CIA employees to get its permission before publishing writings about agency activities. 444 U.S. 507, 507-511 (1980). The Court upheld this prior restraint on speech in part because the CIA employee in that case had voluntarily signed the employment agreement. See *id.* at 510-11. Similarly, in *Rust v. Sullivan*, the Court upheld the federal government's restriction on the abortion-related speech of staff members working for doctors receiving Title X funds. 500 U.S. 173 (1991). The Court upheld this restriction because it was "a consequence of [the staff members'] decision to accept employment." *Id.* at 199.

The Third, Fourth, and Ninth circuits have also honored contractual waivers of First Amendment rights contained in contracts with state actors. *Erie Telecomms.*, 853 F.2d at 1094-98 (upholding a cable company's waiver of First Amendment rights in a franchise agreement with a city); *Lake James Cmty. Volunteer Fire Dep't., Inc. v. Burke County*, 149 F.3d 277, 280-82 (4th Cir. 1998) (holding enforceable a Fire Department's "limited waiver" of some First Amendment rights in a contract with a county government); *Leonard*, 12 F.3d at 889-92 (upholding a labor union's waiver of some First Amendment rights to a city as provided in a collective bargaining agreement).

While these cases demonstrate that constitutional rights can be bargained away, they do not begin to cover all the possibilities. Some constitutional rights are so obviously alienable that no one would challenge the idea. To become a prison guard, a person may give up the right to be out of the prison premises for eight hours a day. To become a judge, a person may give up the right to solicit charitable contributions. To become a flight attendant, a person may give up the right to refrain from speaking before the plane takes off. And so on. Again, this is not to say that such persons give up all free expression rights, but they certainly give up some.

2. *Brentwood Gave Up its Right to Certain Speech*

In this case Brentwood gave up some of its free speech rights when it signed a one-year contract agreeing to abide by TSSAA's game rules, including its anti-recruiting rules. Brentwood's promise is not materially different from the CIA's employment agreement or the speech restrictions on the *Rust* staff employees. In each of these situations, the promisors agreed not to speak in certain ways in return for something they desired.

Brentwood's waiver was doubtless knowing, voluntary, and intelligent. The anti-recruiting rule and supplemental materials explicitly forbade Coach Flatt from "contact[ing] a student or his or her parents prior to his enrollment in the school." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 262 F.3d 543, 549 (6th Cir. 2001). Nothing could be clearer, and Coach Flatt did exactly this. His waiver—and his violation of this crystal clear rule—were voluntary, knowing, and intelligent. Moreover, there is no evidence on the record that would suggest that Brentwood had agreed to TSSAA's rules involuntarily or without knowledge. That Brentwood, a sophisticated and tenacious party, never contested in this appeal that it understood the anti-recruiting rules tells volumes about the intelligence of its waiver.

3. *Brentwood's Waiver Has No Unconstitutional Conditions Doctrine Defect*

Brentwood's waiver does not run afoul of the "unconstitutional conditions" doctrine because the anti-recruiting rules relate to participation in TSSAA athletics and Coach Flatt's recruiting letter and follow-up phone calls do not bear on matters of public concern.

"Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the" right surrendered. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (citing *Perry v. Sindermann*, 408 U.S. 593 (1972); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)). When the free speech rights of government employees are at issue, this doctrine prevents the surrender of speech rights only if the speech bears on some matter of public concern. *Connick v. Myers*, 461 U.S. 138, 146 (1983).

In this case the unconstitutional conditions doctrine will invalidate Brentwood's waiver only if Brentwood's membership in TSSAA has "little or no relationship" to the free speech rights surrendered (i.e., to the anti-recruiting rules); or if, applying the *Connick* standard, Coach Flatt's recruiting speech bore on a matter of public concern.

The anti-recruiting rules relate to participation in TSSAA and limit no speech on any matter of public concern. By limiting Coach Flatt's right to recruit unenrolled middle-school students for the football team, the anti-recruiting rules regulate the formation of teams that compete in TSSAA. It is an off-the-field regulation thought to enhance the quality of on-the-field competition by promoting equity in the relative strength of teams. The anti-recruiting rules, therefore, have a clear relationship, not "little or no relationship," to participation in TSSAA. Obviously, there is no reason to think that Coach Flatt's recruiting letter or follow-up phone calls touch upon any matter of public concern under *Connick*. Consequently, there is no unconstitutional conditions doctrine defect in Brentwood's agreement to comply with recruitment rules.

There is no reason to limit the *Connick* no-public-concern analysis strictly to government employee cases. *Connick* is analogous because the restriction on Brentwood's recruiting speech emanates from the necessity of limiting game participants' speech as part of the competitor-referee relationship. Cf. Maj. Op. at 8 (observing that lawful restrictions on government employees' speech emanate from the necessity of limiting their speech as part of the employer-employee relationship). The operation of a sports league demands speech limits that are germane to the agreed-upon venture no less than does employment. To extend an earlier analogy, a government employee harms the employer-employee relationship when he exercises his First Amendment right to read the newspaper for his entire workday. Likewise, Coach Flatt harmed the competitor-referee relationship between Brentwood and TSSAA when he disobeyed anti-recruiting rules that others were presumably following.

Brentwood's promise to follow the anti-recruiting rules has no unconstitutional conditions doctrine defect because it has a relationship to Brentwood's participation in TSSAA and limits no speech of public concern. Brentwood's First Amendment claims should be dismissed.

4. *Our 2001 Opinion Leaves Open the Possibility That Brentwood Gave Up Those Free Speech Rights That Might Interfere With TSSAA Game Rules*

In my view, this court's 2001 opinion does not at all foreclose the foregoing argument. Compare Maj. Op. at 7; *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 262 F.3d 543, 550 (6th Cir. 2001). The 2001 opinion on the contrary rejected a different and overly broad theory of waiver: that Brentwood had given up its right to sue entirely. See *id.* The 2001 opinion noted that

the cases cited by TSSAA in support of this overly broad waiver theory involved parties that had explicitly “waived their right to *sue*,” and concluded that “[t]here is no comparable TSSAA provision prohibiting members from *challenging the constitutionality* of the recruiting rule.” *Id.* (emphasis added). In other words, the 2001 opinion says only that Brentwood did not waive its right to sue *generally*. That is true. While retaining its right to sue generally, Brentwood waived a more limited group of rights—including any free speech-related theories that would invalidate the normal administration of rules that Brentwood agreed to, including the anti-recruiting rules. Brentwood could for instance sue on the basis of the unconstitutional conditions doctrine and indeed this court relied upon such cases in our rejection of the blanket waiver argument. *See id.*

By analogy, the staff personnel in *Rust* did not waive their right to sue about their employment conditions or free speech rights generally. Surely a court could have heard a political discrimination claim brought against the government funding authority by any such staff members. Yet the Court still held that the staff members, by accepting employment, waived First Amendment objections to Title X’s abortion-speech restrictions. *See Rust*, 500 U.S. at 199 (“employees’ freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority”). In this case, Brentwood waived only speech rights that would interfere with its agreement to abide by TSSAA’s game rules and that did not violate the unconstitutional conditions doctrine.

The 2001 opinion never addressed this narrower theory of waiver and thus does not foreclose any and all arguments based on waiver. Brentwood waived its right to have Coach Flatt contact as yet unenrolled students. Its First Amendment claim should be dismissed on that ground.

B.

While our previous decision did not foreclose the above argument, it did direct the lower court to apply the test for content-neutral speech restrictions, and I certainly respect the majority’s reluctance to disregard the district court’s extensive factual inquiry. In my view, however, none of the district court’s factual findings are sufficient to warrant the legal conclusion that Brentwood’s First Amendment rights were violated by TSSAA’s enforcement of the anti-recruiting rules. The very nature of game rules requires that they be somewhat arbitrary. If upon remand the district court had found a restriction on speech of a public concern, or a restriction on speech unrelated to the game of football, our review of the district court’s conclusion might support affirmance. Nothing like that was found in this case.

In this case, TSSAA’s game-related legitimate interests in subordinating athletics to academics, preventing the exploitation of middle school student-athletes, and furthering competitive equality of teams, together fully justify the enforcement of the anti-recruiting rules against Brentwood. The anti-recruiting rules are reasonable time, place or manner restrictions on speech that are narrowly tailored to serve a significant government interest and leave open alternative channels of communication. *See Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989); *Tucker v. City of Fairfield*, 398 F.3d 457, 463-64 (6th Cir. 2005). The anti-recruiting rules, as applied to Coach Flatt for the spring practice letter and the follow-up phone calls, are narrowly tailored. The rule by its terms is limited to contacts “to secure or to retain a student for athletic purposes” The rule also leaves open alternative channels of communication. Coach Flatt could have distributed recruiting letters to private athletic leagues not affiliated with any school system near Brentwood’s geographic area, or he could have distributed such materials to the administration of any public or private school with a request that those schools give them to students. The rule expressly endorses another alternative channel: potential students who on their own initiative contact the coaching staff seeking enrollment or financial aid information may be referred to Brentwood’s principal, admissions department, guidance department, or the person in charge of financial aid.

The majority relies extensively on the required “roadmap” of our previous opinion in this case, but following that roadmap leads directly to the conclusion that there is no First Amendment violation. We held, in approximately one page of analysis, that the anti-recruiting rules amount to a content-neutral regulation subject to intermediate scrutiny. 262 F.3d at 553-54 (Part D). We also held, in another page of analysis, that the district court on remand should determine if the anti-recruiting rules are narrowly tailored to meet TSSAA’s substantial interests. *Id.* at 557-58 (Part F).

Repeatedly cited in those two pages are the adult entertainment ordinance case of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and the New York rock concert case of *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). Under the indisputably applicable analysis of those cases, it is not possible to find a First Amendment violation on the primary factual findings of the district court in this case.

The zoning ordinance at issue in *Renton* prohibited the location of adult theatres within 1000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. 475 U.S. at 43. The Court held that the ordinance was to be evaluated under the test for content-neutral time, place, and manner restrictions on speech. *Id.* at 46-50. This is the test that we previously held to be applicable to the particular anti-recruiting rules in this case. The test is whether the ordinance “is designed to serve a substantial governmental interest and allows for reasonable alternative means of communication.” *Id.* at 50. The Court upheld the ordinance, ruling that the City could rely on the experiences of other cities “so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.” *Id.* at 51-52. The Court rejected arguments that the ordinance was underinclusive or that it did not allow reasonable alternative means of communication.

Similar analysis compels a rejection of Brentwood’s First Amendment claim. In First Amendment jargon, TSSAA is attempting to regulate the negative secondary effects of Brentwood’s speech: the exploitation of middle school athletes, the subordination of academics to athletics, and unevenly matched teams. The district court recognized the validity of these interests. 304 F. Supp. 2d at 994. TSSAA has furthered these interests by restricting communication between the coach and a student prior to enrollment, just as many cities have restricted the erotic message of dancers by keeping it away from residential areas and churches. In both cases, the negative secondary effects are controlled by restricting the time and the nature of the messages a speaker may convey. In the context of a content neutral, time, place, or manner ordinance regulating adult oriented businesses, “[t]he First Amendment does not require a city, before enacting . . . an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.” *Renton*, 475 U.S. at 51-52. “*Renton* . . . does not require a ‘city to demonstrate[,] . . . with empirical data, that its ordinance will successfully lower crime’, at least ‘not without actual and convincing evidence from plaintiffs to the contrary.’” *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471, 481 (5th Cir. 2002) (quoting *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002) (plurality opinion)). Under *Renton*, an ordinance regulating adult oriented businesses is valid so long as a city reasonably concludes that the time, place or manner restriction will be effective in curtailing the negative secondary effects of the businesses; empirical proof that the regulation is effective in lowering prostitution or crime in the case of every establishment affected by the ordinance is not required. *See Alameda Books*, 535 U.S. at 438-39.

It is not right to say that because the parents in this case were happy to receive the letter and that there was no exploitation of students or subordination of academics in this particular case, TSSAA has relied on “shoddy data or reasoning” that does not “fairly support [its] rationale” for the enforcement of the anti-recruiting rules against Brentwood. *Compare* Maj. Op. at 15 (quoting *Alameda Books*, 535 U.S. at 438). Applied to an adult oriented business, such reasoning would

allow the owner of an adult business to mount an as-applied First Amendment challenge to a zoning ordinance if she could show that there were no negative secondary effects, such as prostitution or crime, at *her* establishment. Such is not the state of the law. The anti-recruiting rules, like restrictions on an adult oriented business, operate in the aggregate and are judged based on the overall effect on speech; a city is not required to show that every cabaret affected by an ordinance causes an increase in crime and prostitution before the ordinance can be applied to that business. The aggregate overall increase in crime from an adult oriented business is sufficient to force the operators of those businesses to disperse or congregate. Similarly, TSSAA is not required to demonstrate that each time it enforces the anti-recruiting rules it is stamping out the exploitation of student athletes or the bending of academics to the will of athletics for the anti-recruiting rules to be valid. It is sufficient that, in the aggregate, contact between an authority figure such as a coach and a potential student-athlete may lead to the exploitation of student athletes or the subordination of academics to athletics to justify restricting contact between coach and potential student. All TSSAA must show is that it had a reasonable belief that contact between a coach and a prospective student had the potential for abuse in order to restrict such contact, so long as alternative avenues to communicate the message are left intact. The record here shows such a reasonable belief.²

Moreover, the anti-recruiting rule as applied to Brentwood is narrowly tailored and leaves Brentwood alternative channels to communicate its message. Communications not for athletic purposes are of course permitted. Moreover, had the spring practice letter been distributed to representatives of private sports leagues near Brentwood, school administrators of other schools with a request for distribution, or students who on their own had contacted appropriate Brentwood officials, there would be no violation of the anti-recruiting rules.

The as-applied nature of the district court's inquiry does not require a different conclusion. A rule that precludes coach contact with not-yet-enrolled incoming students cannot be constitutional on its face if the underlying purposes of the rule have to be demonstrated every time the rule is applied in order to survive an as-applied challenge. Otherwise there would be no basis for having the rule. Just as the City of Renton does not have to show ill-effects from each proposed adult theatre placement in order to enforce its rule, and just as New York in the *Ward* case does not have to show ill effects each time it requires a band to use city provided sound technicians, TSSAA does not have to show ill effects each time it punishes coach contact with not-yet-enrolled students.

This conclusion is further supported by the traditional deference given to educators in carrying out policies that affect First Amendment rights. This dispute arises in the context of high school education, and the courts have consistently given great deference to educators' decisions that

²The majority makes the remarkable observation that TSSAA provided no "evidence to support the notion that ensuring that high schools compete in interscholastic sports in an equitable manner is a substantial state interest," and no evidence "explaining why competitive equity is an important value." Maj. Op. at 12. Presumably the City of Renton need not provide evidence for the obvious proposition that crime increases are against the public interest, and New York in the *Ward* case need not provide evidence that appropriate modulation of band concerts is in the public interest. Similarly, it can hardly be argued that TSSAA needs to provide evidence for the obvious proposition that more evenly balanced high school football matches are in the public interest.

³The majority opinion also discounts the interpretive commentary accompanying the anti-recruiting rules as non-binding to find that the anti-recruiting rules are not narrowly tailored and burden substantially more speech than necessary. Maj. Op. at 13. Thus, the majority avoids the fact that Brentwood was punished for behavior specifically cited as examples of conduct that would violate the anti-recruiting rules. The commentary to the anti-recruiting rules is non-binding only to the extent that TSSAA has a certain amount of discretion in enforcing the rule, and the examples cited in the interpretive commentary are a non-exclusive list. The discretion vested in TSSAA under the anti-recruiting rules is not so broad that the anti-recruiting rules, despite content neutrality, become a de facto prior restraint on speech. See *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988) (no standards for denial or grant of permit for newsrack on public property); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

have an impact on First Amendment rights. The Supreme Court has recognized the “important, delicate, and highly discretionary functions” that the educational system undertakes, and emphasized a consistent concern for “the need [to] affirm[] the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969). As this court has stated, “In the First Amendment arena . . . the Supreme Court . . . has frequently emphasized that public schools have considerable latitude in fashioning rules that further their educational mission and in developing a reasonable fit between the ends and means of their policies.” *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 393 (6th Cir. 2005). While not a public school, TSSAA is a part of the educational system that regulates what both parties concede is an important part of the high school experience. TSSAA should enjoy greater latitude in fashioning and applying recruiting rules that prescribe and control the conduct of overzealous coaches to further its educational mission, consistent with fundamental constitutional safeguards.

The Supreme Court and our court have both recognized that the federal courts are ill-equipped to regulate high school education. “It long has been the case that constitutional claims generally receive less rigorous review in the secondary and middle school setting than they do in other settings.” *Id.* Federal courts are even less well-equipped to regulate high school athletics.

Finally, I note the “Catch-22” implication of the argument that the particular application of the anti-recruiting rules violated the First Amendment in this case. By prohibiting all communication between coaches and unenrolled students, the regulation is more rigorously content neutral. The more the prohibition is “tailored,” for instance by permitting some types of communication but not others, the less content neutral it becomes. An attack on the particular application of the no-communication rule thus gives TSSAA the Hobson’s choice of (1) making the prohibition more content specific, thereby coming closer to treading on First Amendment values, or (2) discarding the rule—not required if the rule is facially valid.

II.

Brentwood’s procedural due process rights were not violated because the presentation of ex parte evidence, if any, did not affect TSSAA’s final decision.

Based on TSSAA’s written decision and the testimony at trial, the district court clearly erred in determining that the TSSAA Board of Control heard ex parte evidence related to Bart King during its deliberations following Brentwood’s final hearing, and that the allegations regarding Mr. King were a basis for the penalty imposed. The only support for the district court’s finding that the King allegations were a basis for Brentwood’s punishment are two statements by TSSAA Board of Control President Mike Reed. In his deposition, Mr. Reed stated that the King allegation was one of the reasons Brentwood was found to have violated the anti-recruiting rules. At trial, Mr. Reed disclaimed his deposition testimony, stating that Brentwood’s final penalty was due to Coach Flatt’s letter rather than Mr. King’s activities. He went on to state that the Bart King allegations were a “factor” in “what was going on and so forth,” interrupting Brentwood’s counsel before the follow up question was finished.

With all due respect to the district court’s better position to judge the credibility and demeanor of witnesses, the district court clearly erred in determining that Mr. Reed’s single statement at deposition was sufficient to show that ex parte evidence was presented to the Board of Control and formed a basis for the penalty imposed on Brentwood. Michael Hammond and Ronnie Carter, in addition to Mr. Reed, testified that the King allegations were not a basis for the final penalty. Mr. Hammond further indicated that the discussion of the King allegations during the Board of Control’s private deliberations was superficial. Gene Meness and Bernard Childress, the TSSAA investigators who looked into the King allegations, could not recall answering any question

from the Board of Control related to Mr. King. Indeed, it is unclear what evidence they could have presented given that they did not interview Mr. King and the investigation consisted of a series of letters between Brentwood's headmaster and TSSAA. In short, other than a single statement in a lengthy deposition, there is no evidence that TSSAA based its final penalty on ex parte evidence related to Bart King and the district court clearly erred in resting the entire weight of its finding that Brentwood's procedural due process rights were violated on so slender an evidentiary reed.

III.

Finally, the fact that TSSAA has been granted state authority to regulate athletic competition requires us to affirm the district court's conclusion that state antitrust immunity applies in this case. TSSAA is entitled to state antitrust immunity because, as an agent of the Tennessee Board of Education (the Board), TSSAA partakes of the Board's state authorization to displace competition. TSSAA has done so using foreseeable means pursuant to clearly articulated Tennessee policy. As a result, TSSAA satisfies the applicable test for state antitrust immunity designed for municipalities and state political subdivisions. I would therefore affirm the decision of the district court granting summary judgment in favor of the TSSAA on Brentwood's antitrust claims based on state antitrust immunity.

A. *TSSAA is the Tennessee State Board of Education's Agent*

TSSAA is an agent of the Board and, as such, receives state antitrust immunity if it satisfies the test for municipalities or state political subdivisions. Our ruling in *Consolidated Television Cable Service, Inc. v. City of Frankfort* indicates that TSSAA is an agent of the Board. 857 F.2d 354 (6th Cir. 1988). In that antitrust suit, we held that a municipal cable television corporation (that obviously was not itself a city) was an agent of the City of Frankfort and thus should receive state antitrust immunity if it satisfied the test for municipalities. *Id.* at 358-60. We classified the corporation as the City's agent because the City exercised "ultimate control" over the corporation. *Id.* at 359.

More specifically, the City had "ultimate control" over the corporation because (1) it was a municipal corporation; (2) the corporation's form and method had been dictated by the City; (3) the corporation existed at the City's pleasure; (4) and the City appointed one half of the corporation's board of directors. *See Consolidated*, 857 F.2d at 358-59.

Analogously, the Board exercises "ultimate control" over TSSAA. The Board enjoys ultimate control over TSSAA because the Board delegated to TSSAA all of TSSAA's regulatory powers and therefore can revoke its authority at any time. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 13 F. Supp. 2d 670, 679-81 (M.D. Tenn. 1998). The Board wields a general power to review, approve, or reaffirm the content of TSSAA's regulations. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 292-93, 299-301 (2001). At its whim, the Board can revoke any TSSAA rule it dislikes. *See id.* The Board's review power implicitly disciplines TSSAA. *See id.* Moreover, the Board's chairman has power to designate a person or persons to serve in an ex-officio capacity on TSSAA's governing bodies. *Id.* at 292. The Board may thus directly influence TSSAA's most minute decisions by populating its decision-making bodies with people of its selection. The Board's complete dominion over TSSAA is "ultimate control" under *Consolidated*, making TSSAA the Board's agent.

*B. The State Antitrust Immunity Test for Municipalities and State Political Subdivisions
Applies to TSSAA's Allegedly Anticompetitive Conduct*

Because TSSAA is the Board's agent, and the Board is a state agency, TSSAA need only satisfy the state antitrust immunity test for municipalities or state political subdivisions, not the more stringent test for private actors. *See Consolidated*, 857 F.2d at 359-62 (applying the test for municipalities to an agent of a municipality). In *Consolidated* we read *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), clearly to hold that the requirement of "active supervision" applied "only when the actor is a private party rather than a municipality." *Consolidated*, 857 F.2d at 360. The test for municipalities and state political subdivisions allows TSSAA to act anticompetitively pursuant to "clear articulation of a state policy to authorize anticompetitive conduct." *See Town of Hallie*, 471 U.S. at 40-42 (internal quotation omitted). Tennessee law need not *explicitly* demand or permit displacement of competition. *See id.* at 41-42. The anticompetitive conduct need only be the "foreseeable result" of state authorization. *Id.* at 42.

*C. Tennessee's Policy to Displace Competition in Interscholastic Athletics is Evident
in Its Broad Grant of Authority to Regulate Interscholastic Athletics*

Tennessee's policy to displace competition in interscholastic sports may be inferred from its grant of authority to the Board. As the Supreme Court has noted, Tennessee law vests in the Board wide-ranging authority to regulate primary and secondary education. *See Brentwood Acad.*, 531 U.S. at 292 (citing TENN. CODE ANN. § 49-1-302). Section 49-1-302 grants broad powers that include the authority to regulate athletics programs; this section further serves as the basis for TSSAA's status as the agency responsible for regulating interscholastic school sports in Tennessee. *See id.* Under the Supreme Court's decision in *City of Columbia v. Omni Outdoor Advertising*, such broad authority to set restrictions on competitive endeavors makes evident the state's policy to displace competition. *See* 499 U.S. 365 (1991).

In *Omni*, the Supreme Court held that state antitrust immunity applied to a city that had used its state-granted zoning authority to restrict billboard construction. *See id.* at 368-79. In holding that state delegation of zoning authority to a city evinces a state policy to displace competition, the Court said: "The very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants. A municipal ordinance restricting the size, location, and spacing of billboards (surely a common form of zoning) necessarily protects existing billboards against some competition from newcomers." *Id.* at 373. Consequently, the mere delegation of zoning authority to the city adequately evinced a state policy to displace competition.

In this case, the delegation to TSSAA of comprehensive power to regulate interscholastic athletics is the equivalent of the city's grant of zoning authority in *Omni*. Just as the exercise of zoning authority in *Omni* stopped a company from competing in the billboard construction market, TSSAA's anti-recruiting rules restrict schools' efforts to build their best teams by wooing talented players with scholarships or perquisites. In a broader sense, also, TSSAA's potential efforts to determine the venues of games, what teams will face each other, the grouping of schools into divisions, the dates of the athletic seasons or pre-seasons, and any number of other restrictions run the risk of "preventing normal acts of competition" in a manner analogous to the zoning authority in *Omni*. Such regulations are a "foreseeable result" of Tennessee's decision to authorize the statewide regulation of interscholastic sports.

The Supreme Court has impliedly acknowledged the inherent need for rules that "prevent[] normal acts of competition" in the football context. The Court has written regarding the National Collegiate Athletic Association (NCAA):

What the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete. Moreover, the NCAA seeks to market a particular brand of football—college football.

NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 101-102 (1984). These sorts of restrictions, and their anticompetitive effects, are no less foreseeable here.