

U.S. Athletic Associations' Rules Challenges by International Prospective Student-Athletes - NCAA DI Amateurism

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This article is part of a broader research stream investigating policy and regulatory frameworks impacting International Prospective Student-Athletes (IPSAs) and their transition to the U.S. combining education and athletics. Elsewhere analyzed are the problems faced by IPSAs in particular relation to the amateurism framework as applied by the National Collegiate Athletic Association Division I (NCAA DI) when contrasted with the international federalized club-based governance model (Kaburakis & Solomon, 2005), as well as the policy recommendations that may attend to policy conflicts and the challenges faced by IPSAs, Athletic Associations, and their member institutions (Kaburakis, 2005). This research examines the legal handling of such cases through the U.S. system of jurisprudence and summarizes the important concepts from legal theory and the major lessons from precedent that may be instrumental in litigation and policy evolution on such matters.

Introduction

U.S. Athletic Associations and their member institutions frequently are called upon to resolve complex problems in regard to eligibility of International Prospective Student-Athletes (IPSAs). In order for the latter to be declared eligible for interscholastic or intercollegiate athletic participation, they need to document their valid status according to the respective Association's regulations. As is elaborated in prior literature (Kaburakis & Solomon, 2005; Kaburakis, 2005), especially in the case of National Collegiate Athletic Association Division I (NCAA DI) member institutions, there are many problems in the determination of amateur status of an international prospect, and NCAA and member institutions' staff members engage in a time-consuming and frequently ambiguous procedure when trying to reach eligibility decisions.

In this process, especially in regard to intercollegiate athletics, there are legal ramifications for the NCAA and member institutions. This study may forecast and prepare for potential legal challenges and litigation initiated by international prospects and their families, after being denied access to NCAA DI institutions and declared ineligible for intercollegiate athletics. Under the prism of U.S. Constitutional Law, there is a need for identifying the legal importance of the outcomes present tactics may have in IPSAs cases, and whether these practices should be amended in order to achieve Equal Protection of the laws for specific classes.

IPSAs are pre-empted from pursuing higher education and athletics in NCAA DI schools, due to the systems of origin and their incompatibility with the NCAA DI structure, *after* they have been offered the chance to do so by means of scholarship offers. Does that create a door through which IPSAs may successfully challenge such NCAA DI amateurism policy and their handling by member institutions and the NCAA staff? Is that considered a legal "Achilles' heel"? Is the very gift of an athletic scholarship offer to an IPSA a "Trojan Horse", use of which in U.S. courts may prove detrimental to NCAA DI member institutions and NCAA staff? Can IPSAs challenge a negative eligibility reinstatement decision by member institutions or the NCAA staff? If so, what are the chances of success in U.S. courts? For that matter, were there any IPSAs that have done so successfully in the past?

This legal analysis ultimately attempts to answer two simple, straightforward, and at the same time difficult questions: Is there something wrong in the handling of IPSAs by NCAA DI amateurism as mentioned above? If so, can they do anything about it?

These questions lead to Athletic Associations' rules' challenges, their constitutional scrutiny, the characterization of their regulations as discriminatory or not, and an analysis of basic legal concepts applicable to the cases examined. It is convenient and helpful, when discussing amateur Athletic Associations rules and their challenges, to include high school regulations and to distinguish the differences

between cases handled at the high school level and at the collegiate level. This way the contribution of this paper is twofold, for research both on interscholastic and intercollegiate athletics, with the hope that more academic research will soon target sport grassroots and youth sport development. Furthermore, International Student-Athletes (ISAs) in U.S. high schools is a fertile ground for legal and policy analysis, and future research projects may find the constitutional analysis presented here forth useful.

As noted by Wong (2002, p150), the validity of High School and Intercollegiate Athletics Associations rules, under the U.S. Constitution, has historically come under frequent scrutiny. In what follows, procedural issues of importance are analyzed, and examples of precedent case law are demonstrated. The theoretical framework and the process by which ISAs can challenge Athletic Association rules are revealed, along with the outcomes of cases that have displayed successful procedures in the past. Especially in terms of NCAA DI policy, the differences between the NCAA DI and the international sport system's legal structure have created many areas of challenges, mainly pertaining to the definition of amateur status. These differences have been particularly evident in sports such as men's and women's basketball, where most sport-specific rules are applied, and in other cases such as tennis, soccer, swimming, diving, and ice-hockey where most ISAs participation is observed (NCAA report on ethnicity 1999-2004). Such structural incompatibility between sport governing systems led to litigation and IPSAs and ISAs challenged regulations adversely affecting them, claiming -among other things- that their Due Process and Equal Protection rights were not upheld (after being offered the chance to join the U.S. system of sport by means of an athletic scholarship offer and enrolling in NCAA member institutions), or that the Association was not serving its purposes (i.e. SA welfare and competitive equity).

Fundamental legal concepts

Three important concepts regarding Constitutional Law and Athletic Associations' rules challenges should be put forth here, for a complete and proper understanding of the applicable regulations: *Judicial Review, Standing, and Injunctive Relief.*

Judicial Review

As a general rule, courts have declined to intervene in the internal affairs of Athletic Associations when membership is voluntary (Masteralexis, 2003, p.426). However, especially on the issues of amateurism and eligibility, there has been an increasing number of cases

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that were granted judicial review (Wong, 2002, p.170). In order for the latter to take place, one of the following conditions has to be met:

- The rule(s) under question violate(s) an individual's constitutional rights.
- The rule(s) violate(s) public policy and deemed fraudulent or unreasonable.
- The rule(s) exceed(s) the scope of the Athletic Association's authority.
- The rule(s) is/are applied unreasonably or arbitrarily.
- The Athletic Association is violating its own rules.

Even if the court decides to grant judicial review, it does not amend a specific regulation itself, but instead remands it to the respective Athletic Association (Wong, 2002, p.170). Violations of constitutional rights that have been identified with successful challenges of Athletic Associations' regulations were dealing with either Due Process or Equal Protection considerations (Masteralexis, 2003; Schoonmaker, 2003; Wong, 2002). Due Process refers to infringements of life, liberty, and most importantly – for Athletic Associations rules' challenges – property, which is examined further; Equal Protection involves fair application of the law, irrespective of one's national origin, among other protected classes. Both Due Process and Equal Protection considerations require the additional element of State Action to be present, in order for judicial review to be granted. The analysis that follows examines how State Action affected the outcome of various cases of Student-Athletes challenging Athletic Associations' regulations.

Standing

Equally important is the notion of proper standing (Masteralexis, 2003; Wong, 2002). For a court to decide on a case challenging associations' regulations, the SA has to show proper standing. For a plaintiff to be able to bring a case in court, he/she must meet three criteria:

- The plaintiff sustained an injury.
- The interest which the plaintiff seeks to be protected is one that falls at least arguably within the zone of interests protected by the Constitution, legislative enactments, or judicial principles. In other words, "substantiality of federal question" is explored, in a way that is investigated in the subsequent portions of this discussion.
- The plaintiff has an interest in the outcome of the case, which would entail being either directly or otherwise indirectly involved.

The aforementioned elements are of utmost importance to potential plaintiffs, who challenge the validity of Associations' regulations. If an individual Student-Athlete (SA) is not directly involved, or is not indirectly affected by a certain regulation, the crucial elements are missing, and the courts do not proceed further (Masteralexis, 2003; Wong, 2002).

Injunctive Relief

Provided that a plaintiff has established the elements of judicial review and standing, the crucial step is seeking injunctive relief against a rule that adversely affected him/her, e.g. by rendering a SA ineligible and not allowing him/her to compete (Masteralexis, 2003; Wong, 2002). Practically, an injunction of some form allows a SA to compete and not suffer irreparable harm from not participating in competition as a result of the challenged regulation. Injunctive relief prevents from future wrongdoings, as opposed to punishment of past actions. Bearing in mind modern systems of jurisprudence and the administration of justice, injunctive relief becomes the single most important element a plaintiff pursues, as it allows for competition, while a trial or appeal is still pending. Instead of filing for monetary damages, injunctions are oftentimes preferred in regard to legal strategy. Forms of injunctions are:

- Temporary Restraining Order.
- Preliminary Injunction.
- Permanent Injunction.
- Specific Performance.

A temporary restraining order is issued in emergency situations and is usually effective for 10 days. The plaintiff should establish that he/she is facing irreparable harm, and that monetary damages would be an inadequate remedy. A preliminary injunction is granted to a plaintiff prior to a full trial on the merits of a legal action and lasts throughout the trial process of the case. Temporary restraining orders and preliminary injunctions aim at preserving the status quo, i.e. in cases where initial eligibility was granted by the Athletic Association, until the rights of the litigants can be determined. To be awarded a preliminary injunction the plaintiff must prove four elements:

- A substantial threat of irreparable harm without the preliminary injunction.
- The balance of the hardships favors the plaintiff.
- The plaintiff possesses a likelihood of success on the merits of the pending case.
- Granting the injunction serves the public interest.

A permanent injunction involves the same four elements, but is awarded after the full hearing of the case and it remains enforced until the completion of the lawsuit. The injunction of specific performance refers to specific contractual issues (especially pro-sport contracts and involuntary servitude prevention) and will not be analyzed here.

The entity deciding on injunctive relief matters takes into consideration three important factors before issuing judgment: nature of the controversy, objective of the injunction, and the comparative hardship to both parties (Masteralexis, 2003; Wong, 2002). As will be explored further, the problematic nature of injunctive relief has discouraged many potential plaintiffs from pursuing their cases and seeking injunctions; however it becomes evident that the means of federal cases and using the legal weapons provided by the Constitution have proved useful in long series of litigations.

Basic Constitutional Principles

The first important step in a case involving an IPSA and a challenged Athletic Association rule involves the element of *State Action*. If the Athletic Association is recognized as a State Actor, then it has to uphold a plaintiff's constitutional rights (Altman, 2003; Wong, 2002). There are two directions where cases have led in terms of such constitutional claims: *Due Process* and *Equal Protection*.

At this point it should be reiterated how crucial the actual offer of an athletic scholarship is for the plaintiff. Oftentimes, it is the key to litigation in the U.S. opening up the door to a property right, which was afforded to a non-U.S. citizen (e.g. by means of an athletic scholarship), and literally allows the IPSA to uphold that right through the legal means provided by the U.S. Constitution. Making a clear distinction, it may be much harder for a plaintiff who seeks to preempt an interscholastic Athletic Association from declaring him/her ineligible, compared to a plaintiff within the realm of NCAA DI, where the conditions for the creation of a property right appear more transparent.

To succeed in a federal constitutional claim, three factors must be present:

- State Action
- Claim is not frivolous
- Claim concerns a right of sufficient importance for a federal court.

State Action

In order for constitutional rights' violations to be brought to a federal court, the defendant must meet the State Action requirement (Altman, 2003; Wong, 2002). State Action means any action taken directly or indirectly by a state, local, or federal government. Additionally, any public school, state college, or state university, or any of their officials, can be held to meet the State Action requirement. Moreover, private organizations that are performing public functions or are authorized under state laws also constitute State Actors. The subject of whether a specific Athletic Association regulation falls under the State Actor requirement has been one of the most controversial issues in recent legal history (Altman, 2003; Wong, 2002). Through the course of litigation and case law, two theories

have evolved to determine which action in the private sector constitutes State Action:

Nexus or Entanglement theory examines whether a state's involvement or entanglement with a private actor's conduct is sufficient to transform the latter into State Action and thus subject to constitutional review.

Public Function theory renders private parties' actions as State Actions, should they undertake actions or assume powers that usually are characterizing state entities.

According to the latter theory, private activities only constitute State Action if:

- The activities involve a function that traditionally has been performed only by the government; or
- The private entity's assumption of the function substantially replaced the government's traditional performance of the function (Altman, 2003; Wong, 2002).

In *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001), the U.S. Supreme Court ruled that the High School Athletic Association for the State of Tennessee was a State Actor, and therefore subject to litigation for violations of the 1ST and the 14TH Amendment. The court held that members of the state government were so involved in the Association that the latter must be considered a State Actor. Using the wording of the court "... the association's regulatory activity is State Action owing to the pervasive entwining of state school officials in the association's structure, there being no offsetting reason to see the association's acts in any other way". It is important to note how procedurally significant the element of State Actor requirement is, and the fact becomes evident in the analysis that follows.

One of the most important cases in the past dealing with amateur Athletic Associations and their regulatory framework, dealt with the NCAA and its legal characterization. In the highly controversial case of *NCAA v. Tarkanian*, 488 U.S. 179 (1988), the U.S. Supreme Court, in a 5-4 decision, reversed a prior judgment by the Supreme Court of Nevada, and ruled that the National Collegiate Athletic Association cannot be held a State Actor. University of Nevada Las Vegas head basketball coach Jerry Tarkanian brought the case against the NCAA arguing that his constitutional rights had been violated by the sanctions against him and his program, after evidence of NCAA violations. Using the Supreme Court's wording, "...it would be more appropriate to conclude that the university conducted its athletic program under the color of the policies adopted by the Association, rather than those policies were developed and enforced under color of the law of Nevada" thus the NCAA could not be held a State Actor, and did not deprive Tarkanian of his constitutional rights. However, as can be noted in recent cases, a body of court decisions grant judgment on cases involving NCAA rules, to achieve fairness and uphold a plaintiff's constitutional rights; rights that pertain to Due Process and Equal Protection.

Due Process

Going into the actual legal analysis and the process by which SAs can challenge Athletic Association rules that deprive them of rights upheld by the Constitution, Due Process, via the 5th and 14th Amendment, refers to certain fundamental rights (Schoonmaker, 2003, Wong, 2002):

"No person...shall be deprived of life, liberty, or property without due process of law" (5th Amendment)

"...Nor shall any state deprive any person of life, liberty, or property without due process of law..." (14th Amendment).

One definition of Due Process came after *Pennoyer v. Neff*, 95 U.S. 714 (1877): "Due Process is an expected course of legal proceedings which have been established in our system of jurisprudence for the protection and enforcement of private rights".

Since the element of State Action is identified, then the question that follows deals with the right that was deprived (Life, Liberty, or Property interests). Ultimately, the plaintiff's constitutional rights pertaining to Due Process will have been violated either by means of procedural, or substantive Due Process.

Procedural Due Process reflects upon the rights to a hearing and advanced notice of the latter. It examines the decision-making process that is followed in determining whether a rule has been violated and what sanction should be imposed. In order to provide fairness courts examine and weigh the interests that are being argued. Through the *Matthews v. Eldridge* case, 424 U.S. 319 (1976) the Balancing Theory test was developed. According to the balancing test, criteria that should be evaluated in determining the extent of procedural due process are:

- The private interest affected by the official action.
- The risk of an erroneous deprivation of such interest through the procedures used, and the probable values of the additional or substitute procedural safeguards.
- The government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Substantive Due Process is one of the two main elements of legal focus used in Athletic Associations regulations' challenges. Substantive Due Process requires that the rule under scrutiny be reasonable and fair in both application and content. It is generally accepted in legal procedure and challenges regarding constitutional issues that, if the regulation does not involve fraud, mistake, collusion, or arbitrariness, courts decline to interfere with internal affairs of Athletic Associations.

Since the focus is ISAs challenging Athletic Association rules, the first question to be answered deals with what is the fundamental right being deprived. Mostly, this deals with the right of property. Types of property for Due Process purposes are not identified, which initiates a series of legal arguments as to whether the right allegedly deprived constitutes a property interest.

Wong (2002) defines property as "all valuable interests that can be possessed outside oneself, which have an exchangeable value or which add to an individual's wealth or estate". In *Board of Regents v. Roth*, 408 U.S. 564 (1972), property is defined as all interests to which an individual may be deemed "entitled". Entitlement to property has to be more than an abstract and ambiguous need or desire. Some form of current interest in or current use of the property has to be established. Due Process protection is only triggered where there is actual deprivation of the entitled right (Wong, 2002). Furthermore, the inquiry in Substantive Due Process investigation is twofold:

- Does the rule challenged have a proper purpose?
- Does the rule clearly relate to the accomplishment of that purpose?

This analysis leads to the examination of the legal characterization of an athletic scholarship. It is generally accepted legal theory (Wong, 2002, Schoonmaker, 2003, Breaux, 2005) that there is a property interest in a scholarship, by means of the benefits derived by it. However, the element of participation in athletic activities as part of the extracurricular program in academic institutions has been evasive and controversial as to whether it would be considered a privilege or a protectable right.

The important distinction to be made once more is between inter-scholastic and intercollegiate athletic participation. Plaintiffs in the latter area, especially dealing with DI NCAA athletics, have succeeded claiming property interests due to the proximity of college sports and professional sports¹. Therefore, not only can a plaintiff argue that a property interest was deprived based on the immediate monetary value of an athletic scholarship (*Gulf South* case), but the opportunity of landing a professional contract has been examined and found closely related to the fundamental right of property (*Hall* case, protected property right based upon future opportunity to play professional basketball).

In *Behagen v. Intercollegiate Conference of Faculty Representatives*, 346 F. Supp. 602 (D. Minn. 1972), a college student-athlete was found to have a protectable property interest in a future professional con-

1 *Hall v. University of Minnesota*, 530 F. Supp. 104 (D. Minn. 1982); *Gulf South*

Conference v. Boyd, 369 So.2d 553 (Ala. 1979)

tract. Nevertheless, depending on the jurisdiction, courts have had conflicting opinions on the subject; a number of courts shift toward a numerical reasoning, exploring how many college athletes turn professional in a respective sport². Those decisions argued that there is no legitimate property interest in a future professional contract, as it would be deemed too speculative a concept to fall under federal and substantive due process protection. At the same time, certain courts have added an interesting twist, deciding that a protectable property interest is found only if there is a professional league in that particular sport (Wong, 2002, p209). The latter's significance becomes intensified, bearing in mind women's professional sport leagues in the U.S. that are facing or have faced survival problems (soccer, basketball).

In the high school area, the major opinion is that there is no present monetary value and interest, causing the pendulum to lean toward the privilege and not the protectable property right interest³. Courts have found that the interest to a college athletic scholarship is too speculative to receive protection, and this is even more so evident, courts argue, on the possibility of obtaining a future professional contract (Wong, 2002, p209). The recent trend in some sports for high school SAs to make the transition straight to the professional leagues of their respective sports gives rise to further arguments and examination on a case-by-case basis.

What ISAs, their families, and legal representatives have had challenges with, bearing in mind the differences in the legal systems around the world, is that it has been difficult to establish a protectable right to an education, and thus extend it to participation in interscholastic athletics. Cases have dealt with appeals against State High School Athletic Association regulations preventing high school exchange SAs from participation, thus arguably costing them opportunities for exposure and the chance of earning an athletic scholarship⁴. It is useful to add that both the Department of State and the respective Council on Standards for International Educational Travel (CSIET) have implemented legislation that allows exchange program students (the ones who have been affiliated with a registered exchange program) to participate in extracurricular activities as part of their educational experience, and that includes athletics⁵. State High School Athletic Associations have conformed to these regulations and have amended their respective bylaws, so that they can accommodate international exchange students.

However, the fact remains that there is no constitutional right to education, as the Supreme Court affirmed in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). At the state level, a right to an education may be granted by requirements of school attendance. The latter, either explicitly or implicitly, establishes a protectable property right to an education, abiding by the Due Process clauses of the U.S. Constitution, as is found in *Pegram v. Nelson*, 469 F. Supp. 1134 (M.D.N.C. 1979), and *Goss v. Lopez*, 419 U.S. 565 (1974). Such a right to an education is also applicable to non-citizens joining legitimate foreign exchange educational programs, as posed in the regulations of the State Department and the CSIET.

Furthermore, it is important to mention that many courts have decided that a protectable right to education does not refer to the total educational process, covering athletics, but instead focuses on classroom learning, rendering extracurricular activities privileges. Examples are found in *Indiana High School Athletic Association v. Carlsberg*, 694 N.E. 2d 222 (Ind. 1997), *Scott v. Kilpatrick*, 237 So.2d 652 (Ala. 1970). However, importantly for foreign students and IPSAs joining foreign exchange programs with education -arguably- as the main motivating factor⁶, there have been cases that did, in fact, establish a right to an education extending to extracurricular activities, and specifically sports' participation (Schoonmaker, 2003, p445). These cases are: *Duffley v. New Hampshire Interscholastic Athletic Association*, 446 A.2d 462 (Sup. Ct. N.H. 1982), *Stone v. Kansas State High School Activities Association*, 761 P.2d 1255 (Kan. App. 1988), and *Moran v. School District #7, Yellowstone County*, 350 F. Supp. 1180 (D. Mont. 1972). Using the court's wording from the latter case: "...sports are an integral part of the total educational process. This educational process is extremely important, and sports participation may not be denied when

there is no reasonable basis upon which to distinguish among the various parts of the educational process..."

Equal Protection

The 14th Amendment of the U.S. Constitution declares: "No State shall... deny to any person within its jurisdiction the equal protection of the laws". Next to the federal character of the aforementioned Due Process clauses, an IPSA is protected at the state level by any form of discriminatory practices, including those that fall within regulatory frameworks of Athletic Associations, should the element of State Action exist. The Equal Protection provision requires that no person be singled out from similarly situated people, or have different benefits bestowed or burdens imposed, unless a constitutionally permissible reason for doing so exists (Wong, 2002; Clausen, 2003).

In order to determine whether an alleged discriminatory practice is permissible, reference is first made to the affected class. The class affected by the practice under scrutiny will determine the standard of review used by the court. This is precisely where IPSAs as a protected class are fortunate, as the highest level of review, strict scrutiny, is imposed, if it is established that an alleged discrimination was based on their national origin or alienage. Along with race, national origin (foreign birth) and alienage (foreign domicile) are specifically protected classes by the U.S. Constitution. The legal extension of Equal Protection in cases of discriminatory practices referring to national origin or alienage is that the highest standard, which is strict scrutiny, demands the defendant Athletic Association demonstrates that the rule is supported by a compelling state interest (Wong, 2002; Clausen, 2003).

If the defendant fails to bear that crucial burden of proof, the plaintiff can be successful in a specific case that jointly invades the suspect classes of national origin or alienage, in relation to the right of property and the interests that one may have according to the aforementioned analysis. An example would be the regulations of an Athletic Association that govern amateurism and eligibility rendering an IPSA ineligible for interscholastic or intercollegiate athletics participation; should it be found that by the evidence brought forth no compelling state interest is served, the regulation would be found unconstitutional, thus allowing for further action and/or injunctive relief. The following section will scrutinize case law on the matter of equal protection, as well as NCAA DI amateurism rules and eligibility decisions challenged by IPSAs on the grounds of Due Process.

- 2 *Hall v. NCAA*, 985 F. Supp. 782 (N. D. Ill 1997); *Knapp v. Northwestern University*, No. 95-C-6454 1996 U.S. Dist. LEXIS 12463 (N.D. Ill Aug. 23, 1996)
- 3 *Ryan v. California Interscholastic Federation*, 94 Cal. App. 4th 1048 (Cal. Ct. App. 2001); *Jordan v. O'Fallon Township High School*, 706 N.E.2d 137 (Ill. App. Ct. 1999); *Indiana High School Athletic Association v. Carlsberg*, 694 N.E.2d 222 (Ind. Ct. App. 1997); *Mississippi High School Activities Association v. Coleman*, 631 So. 2d 768 (Miss. 1994); *Palmer v. Merluzzi*, 868 F.2d 90 (3rd Cir. 1989); *Stock v. Texas Catholic Interscholastic League*, 364 F. Supp. 362 (N.D. Tex. 1973); *Taylor v. Alabama High School Athletic Association*, 336 F.Supp. 54, (M.D. Ala. 1972); *Robinson v. Illinois High School Association*, 195 N.E. 2d 38 (Ill. App. Ct. 1963)
- 4 For more: *Indiana High School Athletic Association v. Vasario*, 735 N.E.2d 238 (S. Ct. Ind. 2000); 726 N.E.2d 325 (Ind. Ct. App. 3rd Dist. 2000) www.daytondailynews.com/project/content/project/athletes/

0317enforcement.html, www.doe.state.in.us/legal/pdf/case_reviews/cr_010201-10.pdf, and especially www.doe.state.in.us/legal/pdf/case_reviews/cr_001219-8.pdf

5 For more: www.ifyeusa.org/pdf/csiet_guidelines.pdf, www.csiet.org/mc/page.do?sitePageId=751, and especially § 5 at exchanges.state.gov/education/jexchanges/academic/hsstudent.htm

6 Alternatively, one might argue that the main motivation for IPSAs joining CSIET-acknowledged programs during their senior year of high school is increased exposure while participating on athletics teams, thus attracting college coaches' attention. Considering increased competition opportunities afforded to these prospects by their clubs and national teams, in conjunction with Vassilakopoulos (2005) points on development of a sound financial base for European sport, it may be supported that the IPSAs who will deny the opportunities for international athletic participation have education as the main motivating factor for pursuing an experience at U.S. high schools and universities.

Case Law

Although there has been much discussion concerning NCAA amateurism, there have been relatively few legal challenges for the NCAA's position. Reece (1975) collected and critically evaluated 34 cases involving the rules of the NCAA. His timeframe (1970-1974) was crucial in terms of policy development and court decisions concerning NCAA rules in general and amateurism in specific.

The cases Reece (1975) studied targeted 11 rules of the NCAA, including amateurism, and the so-called "foreign student" rule. Impressively, only three of the 34 cases concluded with the courts disallowing an NCAA rule, due to constitutional scrutiny. Even more remarkably, two of those three NCAA losses occurred in the "field" of amateurism, and the "Foreign Student" rule. What is also of great importance is that in nine of the 14 cases the courts found State Action established by the NCAA.

The NCAA's "Foreign Student" rule contained a classification according to alienage that was found to be unjustified and discriminatory. Under its terms, foreign students lost a year of eligibility for every year after their nineteenth birthday in which they had participated in athletic competition. No such limitation was placed on American citizens. Plaintiffs (*Howard v. NCAA*, 367 F. Supp. 926, 1973) argued that the rule was arbitrary, unreasonable, excessively vague, and designed to favor American citizen students over aliens (Reece, 1975).

Judge Gesell's opinion on the matter is useful: "*While the NCAA is properly concerned with preventing older players coming from abroad on the pretext of educational objectives and dominating championship competition because of age and prior sports activity, it was not demonstrated to the Court's satisfaction that there are not other less restrictive means available for accomplishing these objectives. The flat age restriction, stated in the vague terms of the rule's reference to any team or individual participation in athletic competition, results in arbitrary discrimination against aliens. To meet a felt need, the Association has, in effect, thrown the baby out with the bath.*"

The court declared the "Foreign Student" rule to constitute a denial of Equal Protection under the 14th Amendment of the U.S. Constitution and the Association was permanently enjoined from any future enforcement of the rule. The decision was affirmed by the Court of Appeals under *Howard U. v. NCAA*, 510 F. 2d 213 (1975).

In *Buckton v. NCAA*, 366 F. Supp. 1152 (1973), one of the most important cases applicable to IPSAs and ISAs challenging NCAA DI amateurism, the Association's Constitution was tested for validity of the amateur clause, alien clause, and its jurisdiction over ice hockey players. The Court -again- found that State Action was present; therefore, the Association was subject to constitutional scrutiny. Judge Joseph L. Tauro's comments transcend time and offer invaluable insight on subjects this study is dealing with:

"These regulations constitute and impose disparate eligibility standards, one for student-athletes who have played hockey in the U.S. and another for those who have played in Canada. Because the regulations in effect classify plaintiffs, who are resident aliens, differently than their American counterparts, they are inherently suspect and this court is required to subject such classification to strict scrutiny.

A Canadian boy who wants to play hockey at a pace more challenging than at a pick-up level must join one of these (civic groups) teams... this requires a boy to transfer his residence and schooling to the Metropolitan area where the team is located. When he does, it is customary for him to receive room, board, and limited educational expenses from his team, as did the plaintiffs in this case.

An American boy, on the other hand, can leave his home town to attend a prep school for the same dual purpose of playing hockey while receiving an education. When he does, he may receive financial aid from his school to meet his room, board, and educational expenses. Such aid may have even greater dollar value than the aid received by plaintiffs in this case, and yet the American boy need not fear any sanction by the defendant Association.

As stated, the aid received by the American and Canadian student-athletes may be precisely the same, both as to character and dollar value, but the defendant Association would brand the Canadian a professional

while accepting his American counterpart as an amateur. This clearly amounts to a disparity in treatment, a classic example of classification which is subject to judicial review."

This excerpt embodies all the IPSAs arguments against any rule interpretation that would render them ineligible, merely because of the sport structure in their country of origin. Moreover, it directly refers to an important point, in terms of the dollar value of the actual expenses, or the total economic impact of athletic participation in U.S. high school or Amateur Athletic Union (AAU) competition, as opposed to that of e.g. a youth club overseas. Reiterating a suggestion for future research, the financial impact of athletic participation in the U.S. high school and AAU system as opposed to foreign sport structures may involve entertaining the hypothesis of a more commercialized youth sport in the U.S. when compared to overseas youth sport leagues. A question might be: "Who is more of a professional, according to NCAA DI amateurism principles? U.S. High School and AAU players or foreign junior club ones?" In strict financial terms, at this point, conjectures cannot be refuted with economic data. If such a study found, as Judge Tauro above argued, that aid afforded to young prospects (international and U.S.) in its totality is approximately the same, then the application of an NCAA DI amateurism rule rendering an IPSA ineligible, while the respective U.S. SA would be considered eligible, would not make rational or legal sense, and would be subject to judicial review.

In summarizing his decision, Judge Tauro acknowledged that the damages suffered by the two hockey players would be much more than those suffered by the Association. Implications of professionalism are far worse than being academically insufficient (Reece, 1975). This landmark decision provided the basis for the NCAA to alter amateurism guidelines, especially as they pertained to ice hockey.

Rivas Tenorio v. Liga Atlética Interuniversitaria, 554 F. 2d 492 (1st Cir. 1977), was an interesting twist from a procedural standpoint, as the trial court failed to administer strict constitutional scrutiny in reviewing the regulation under question. The Appeals court reversed and remanded the matter to the district court, as it established that an Athletic Association rule was discriminatory. According to the challenged regulation non-Puerto Ricans were banned from competing in intercollegiate competition if they enrolled after their 21st birthday. Plaintiffs Elsy Rivas Tenorio and Bellanira Borrero Castillo were citizens of the Republic of Colombia. On the basis of the challenged regulation promulgated and enforced by the defendants, they were deprived of medals and prizes won at and were denied future participation in certain intercollegiate track and field competitions held annually in the Commonwealth of Puerto Rico. Defendants were the Liga Atletica Interuniversitaria (LAI), the equivalent in Puerto Rico of the NCAA in the U.S., and the individual members of its executive committee. The precise wording of the court in 1977:

"We emphasize that the constitutional difficulties which prompt our reversal arise by virtue of the regulation's facial command that non-Puerto Ricans be treated differently from Puerto Ricans. We do not in any manner impugn the desires of LAI officials to purge intercollegiate athletics in Puerto Rico of professionalism, nor do we in any way suggest that efforts to accomplish that result which are evenhanded between Puerto Ricans and non-Puerto Ricans will run afoul of the Constitution. See Shelton v. NCAA, 539 F.2d 1197 (9th Cir. 1976). But the Constitution does require that actions taken solely on alienage grounds cannot stand unless the standards set forth above are satisfied, and defendants admit that the actions here challenged were taken on the basis of a regulation which on its face so discriminates."

Thus, the *Rivas Tenorio* case alerted Athletic Associations' officials of outright discriminatory rules. Enforcement of such rules would be preempted, regardless of whether the rules served the stated purpose of the Athletic Association. Hence, the Appeals court agreed with the *Buckton* and the *Howard* decisions, in calling for less restrictive means to serve an Athletic Association's "purging of professionalism" purpose.

In a closely related Equal Protection case, *Fusato v. Washington Interscholastic Activities Association*, 970 P.2d 774 (Wash. Ct. App. 1999) found that the Athletic Association had violated the plaintiff's Equal Protection rights, discriminating against her due to her nation-

al origin. Using the court's wording: "...the WIAA failed to meet its burden - showing a compelling state interest served by the challenged rule - and made no effort to demonstrate that the least restrictive regulatory means were used to accomplish the stated purposes of their rules". In this case, the court applied the strict scrutiny test, which would mean that the Association would have to demonstrate a compelling state interest to uphold its rule that allegedly discriminated against foreign SAs. Unless the whole family "unit" moved to the respective High School District, the rule mentioned, the SA would not be allowed to compete immediately. An interesting note from this case is that the plaintiff was found not to have a property interest in her high school athletics participation.

Useful insight is obtained by the case of *NCAA v. Lasege and University of Louisville*, 53 S.W.3d 77 (S. Ct. Ky. 2001). A trial court granted Lasege and University of Louisville a temporary injunction, which was affirmed in the Court of Appeals. The Supreme Court of Kentucky granted interlocutory relief at the request of the NCAA, vacating the prior decision. The crucial issue was amateurism, and the impact of a specific relationship the ISA had with a professional club team. The trial court suggested that the NCAA had ignored what it described as "overwhelming and mitigating circumstances" including economic and cultural disadvantages, a complete ignorance of NCAA regulations, and elements of coercion associated with execution of the contracts. The court believed the NCAA's determination conflicted with the NCAA's own amateurism guidelines and past eligibility determinations regarding athletes who had engaged in similar violations. The court expressed its doubts about whether the first contract signed by Lasege was legally enforceable as an agency contract both because of Lasege's minority at the time he executed it and because the trial court disputed that the contract created an agency relationship. The court concluded that a clear weight of evidence suggested Lasege committed these violations not in order to become a professional athlete, but only to obtain a visa which would allow him to become a student-athlete in the United States.

The trial court found that Lasege would suffer substantial collateral consequences from an erroneous and adverse eligibility determination, balanced the equities in favor of Lasege, and ordered "the NCAA and its members ... to immediately restore the intercollegiate eligibility of Muhammed Lasege so as to allow him to participate in all NCAA basketball contests". The trial court also addressed U of L's concern that the NCAA could impose sanctions under NCAA Bylaw 19.8 if the injunction was subsequently vacated. NCAA Bylaw 19.8 allowed the NCAA to seek restitution from member institutions that permit student-athletes found ineligible by the NCAA to compete for their athletic teams pursuant to court orders which are later vacated. The trial court therefore declared that NCAA Bylaw 19.8 is invalid because "it prevents parties from availing themselves of the protections of the courts" and ordered:

"... that the University of Louisville shall abide by this injunction and shall not prohibit Muhammed Lasege from engaging in intercollegiate basketball."

After the trial court entered the temporary injunction, Lasege played basketball for U of L during the 2000-2001 season. In the ensuing process, the Appeals Court denied the NCAA's motion, and the NCAA sought relief at the Supreme Court of Kentucky. The latter supported the NCAA and pontificated on relevant cases:

"This case demonstrates that courts are a very poor place in which to conduct interscholastic athletic events, especially since this type of litigation is most likely to arise at playoff or tournament time. If an injunction or restraining order is granted erroneously, it will be practically impossible to unscramble the tournament results to reflect the ultimate outcome of the case. Since, by definition, temporary injunctions attempt to place the parties in a position most likely to minimize harm before the court can finally decide the issues raised in a complaint, trial courts are asked to make significant decisions with less-than-complete information. As such, these determinations differ from most decisions reached by trial courts. There are no "drive-through windows" on courthouses for a good reason - judicial decision making demands thought and deliberation of all relevant evidence..."Longshot" claims which have little hope of prevailing when the buzzer sounds will not justify injunctive relief."

In his dissenting opinion, Justice Johnstone agreed with the fact there should be no "drive-through windows" while offering injunctive relief. Answering, however, the majority's argument that the trial court substituted the review of the NCAA, he remarks: "I would agree that there has been a substitution of judgment in this case, but it has been the majority substituting its judgment for the trial judge." The dissenting opinion furthermore argues that the NCAA did not satisfy the requirements set by the Kentucky Court of Appeals in *Maupin v. Stansbury*, Ky. App., 575 S.W.2d 695 (1978) about the necessary proof of "extraordinary cause". Thus, it should not have succeeded in achieving interlocutory relief, which led to the revision of the prior decisions that granted the ISA injunctive relief and allowed him to compete.

NCAA v. Yeo, 114 S.W.3d 584 (3rd Ct. App. TX, 2003), is the most recent case in which a decision was reached, where an ISA succeeded in challenging the NCAA's amateurism and eligibility regulations. Yeo's crucial argument was that she had established a protectable property right, through her swimming honors captured in International and Olympic competitions. To fully capture the ramifications of the *Yeo* case, it is useful to quote the opening statement of the Appeals Court opinion: "To characterize this as a case presenting a unique fact pattern requiring a decision of first impression would be an understatement".

Joscelin Yeo, a native of Singapore and the nation's most visible athlete, had competed in the 1992 and 1996 Olympic Games before coming to the U.S. She later competed in the 2000 and 2004 Games. In 1998 she enrolled at the University of California at Berkeley, whose swim coach at the time, Michael Walker, also coached the Singapore national team. Before the 2000-2001 academic year, Walker left Berkeley to coach at the University of Texas at Austin, and Yeo chose to follow Walker to Texas. NCAA rules regarding transferring athletes (Bylaw 14.5.5.1) required Yeo to sit out of collegiate competition for a full academic year (after Berkeley rejected Yeo's request for a waiver of the regulation under Bylaw 14.5.5.2.10), which she did in 2000-2001. Yeo began swimming for Texas in the fall of 2001. But because she had participated in the Olympic Games in the fall of 2000 instead of enrolling in classes - athletes must be enrolled for the time they sit out to count under 2000-2001 NCAA rule 14.1.6.2.2.1.2- Texas erred in letting her compete.

When Berkeley officials protested to the NCAA, Texas acknowledged its error and declared Yeo ineligible to compete for part of the winter. In March 2002, the NCAA SA Reinstatement (SAR) staff ordered Texas to withhold Yeo from four events to make up for the ones it had mistakenly let her compete in earlier in the year. Among the events Yeo was to miss would be the upcoming 2002 women's swimming and diving championship, and she argued that being barred from that meet, when her planned participation had already been promoted, would "harm her reputation as an athlete" and undermine potential endorsements. UT-Austin appealed the SAR staff's decision to the SAR Committee (SARC)⁷. At that point, for the first time, UT-Austin informed Yeo of the problem and advised her to "plea for sympathy" (case transcript, § 5) with the SARC. The latter upheld the staff's decision and required Yeo to sit out the Championship meets. At that point UT-Austin advised Yeo to seek independent legal counsel, which she did, suing UT-Austin and its vice president for institutional relations and legal affairs, Patricia Ohlendorf. Yeo's side sought to enjoin them from disqualifying her from competing in the championship meet two days later and for a declaration that UT-Austin had denied her procedural due process as guaranteed by the Texas Constitution.

It is important to follow the procedure of the *Yeo* case: The same day (March 20th 2002) Yeo moved for an injunction, the trial court granted Yeo a temporary restraining order. As was examined above this development is the deciding factor, in order for the SA to be able to compete with a trial pending. On March 21, the NCAA intervened

⁷ For more on the NCAA DI internal mechanism and SAR process refer to Kaburakis & Solomon (2005).

in the action, but Yeo moved to strike the intervention, and after a hearing later that day, the trial court granted Yeo's motion. The next morning, the NCAA sought mandamus relief from the court of appeals, and UT-Austin appealed from the temporary restraining order. That afternoon, the court of appeals denied the petition for mandamus and dismissed the interlocutory appeal for want of jurisdiction. Thus, Yeo won the important procedural battle and was able to compete in the championship meet.

In November 2002, after a trial to the bench, the trial court rendered judgment for Yeo, declaring that UT-Austin had denied Yeo procedural due process guaranteed by the Texas Constitution, thereby depriving her of protected liberty and property interests. The court permanently enjoined UT-Austin from declaring Yeo ineligible in the future without affording her due process and from punishing her for participating in past competitions, including the 2002 women's championship. The trial court also awarded Yeo \$ 164,755.50 in attorney fees through an appeal to the Texas Supreme Court.

After the championship meet in March 2002, Yeo graduated from UT-Austin, received a Rhodes Scholarship, and ended her college swimming career. Yeo currently pursues graduate studies in Oxford, England⁸. None of the parties involved in the litigation⁹ argued that the case had become moot, because the injunction prevented the NCAA from imposing retroactive sanctions under its "Restitution Rule" (at the time Bylaw 19.8; 19.7 in the 2005-2006 NCAA DI Manual). The latter was challenged in the *Lasege* case as well¹⁰.

Conclusion

This paper reviewed the legal procedure and Constitutional Law elements that are applicable on IPSAs cases dealing with NCAA DI amateurism and eligibility rules. IPSAs may pursue injunctive relief against an ineligibility decision in order not to lose the opportunity to participate in intercollegiate athletics. The reason for this is that enrollment in an American educational institution and the offer of an athletic scholarship opens up a door to the U.S. court system. Legal questions raised in this article and this research entailed an examination of past cases featuring foreign SAs being adversely affected by NCAA regulations and decisions. This study established the following points:

- * Courts do not always decline to intervene and grant judicial review when dealing with Athletic Associations' rules challenges. Even in the much-contested area of NCAA DI (after the Tarkanian case in 1988) there have been decisions rendered on these matters
- * There have not been many (successful for that matter) cases against amateurism and eligibility rules moved by international plaintiffs. It may be argued that this is due to the resources' limitations and the unfamiliarity with the system that was mentioned above
- * After investigating the NCAA internal mechanism, NCAA DI amateurism regulations, and the circumstances that are applicable to IPSAs cases in reference to the system of sport governance in their region, it cannot be safely said that there are inherently discriminatory rules against IPSAs, nor that the Association is not serving its purposes (such as Institutional control, Competitive Equity, and SA welfare). These matters need to be examined on a case-by-case basis, as they have been dealt with so far by the U.S. system of Jurisprudence
- * After examining especially the *Buckton*, *Howard*, *Lasege* and *Yeo* cases, useful conclusions include:
 1. A "Foreign Student" rule would not pass Constitutional review under the scope of Equal Protection and the application of the strict scrutiny test by the courts. Neither in the *Howard*, nor the *Rivas Tenorio* case were restrictive rules based on alienage and national origin found to serve compelling state interests
 2. The mere fact that IPSAs come from a different philosophical, cultural, structural, educational, and athletic background, does not mean that they should be rendered ineligible, if they otherwise did not jeopardize their eligibility. As the *Buckton* and the *Lasege* (trial and appeals court) decisions demonstrate, particular circumstances in each region might be deciding factors for judicial decision-making, e.g. acknowledgments by the judges in

these two cases that the Canadian Junior hockey-club system and the International club-based system should not per se render an individual ineligible for intercollegiate athletics participation

3. The *Lasege*, *Yeo* (trial and appeals court) and other cases mentioned above (under Due Process and Property right) establish a Property interest in an athletic scholarship and -under circumstances (which in the *Yeo* case involved global recognition and past extraordinary athletic achievement)-intercollegiate athletics participation
4. As the *Yeo* case and its procedural development points out, it may be appropriate -and shrewd in terms of legal strategy-to pursue a case against a state institution as opposed to a questionable State Actor, such as the NCAA
5. The *Yeo*, *Lasege*, and other recent cases or out-of-court settlements (Bloom, Neuheisel, and MIBA/NIT¹¹) may alarm NCAA administrators, who need to operate preemptively in order to avoid consuming litigation in the future, e.g. render amateurism and eligibility decisions in uniform, non-conflicting fashion, consider revision of rules that appear frequently as major themes of litigation (even though the "Restitution Rule" under NCAA Bylaw 19.7 has exactly that purpose; to ensure that decision reversals in court will be impacting the institution and SAs under question, as well as have specific consideration and value, in the case of paying back broadcast revenue, championships awards, and related items of value; Bylaw 19.7 -arguably- does not deter institutions from initiating litigation against the Association per se).

The International Sports Law Journal

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- 8 For more on Yeo: http://www.collegeswimming.com/index.php?show=iew_news&cid=3
www.utexas.edu/education/kinesiology/0304KHEAnnRpt.pdf
- 9 On August 26th 2005, the Texas Supreme Court, in *NCAA v. Yeo*, 171 S.W.3d 863, 48 Tex. Sup. J. 1016 (Tex. 2005), reversed the Appeals' Court decision and ordered that Yeo receive nothing. According to the Texas S. Ct. the Texas Constitution provides no protection for students' participation in extracurricular activities, as was established in *Spring Branch I.S.D. v. Stamos*, 695 S.W.2d 556, 561, 28 Tex. Sup. Ct. J. 554 (Tex. 1985). In a nutshell, the Texas S. Ct. denied Yeo her previously acknowledged property interest in intercollegiate athletics participation.
- 10 In Texas, the NCAA's Restitution Rule was handled in: *NCAA v. Jones*, 1 S.W.3d 83, 84, 87-88, 42 Tex. Sup. Ct. J. 636 (Tex. 1999).
- 11 For more: *Metro. Intercollegiate Basketball Ass'n v. NCAA*, 339 F. Supp. 2d 545, 2004 U.S. Dist. LEXIS 20418 (S.D.N.Y., 2004), <http://judiciary.house.gov/OversightTestimony.aspx?ID=166>
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Beiträge zum Sportrecht



Band 22

Anu Elina Busch

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Referate der vierten und fünften internationalen
Tagung Sportrecht.
Abb.; VIII, 308 S. 2005 (3-428-11919-3) € 89,80
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