

## **Supreme Court Tackles High School Recruiting**

On April 18th of this year, the United States Supreme Court (“USSC”) heard arguments from the Tennessee High School Athletic Association and one of its member schools over the recruiting of middle school students. The case involved the Tennessee Secondary School Athletic Association (“TSSAA”), which regulates interscholastic sports among its members, 290 public and 55 private high schools, and Brentwood Academy (“Brentwood”), a private school located in suburban Nashville and one of the State’s top schools in sports. At issue was whether a letter sent by Brentwood’s football coach to eighth grade boys, which violated TSSAA’s rule prohibiting members from using undue-influence in recruiting middle school students for their athletic programs, also violated the First Amendment right to freedom of speech.

Since the early 1950’s, TSSAA has prohibited using undue influence on a student, or his or her parents, by any person connected or unconnected with the school to secure or retain a student for athletic-purposes for their athletic programs. In April of 1997, Brentwood’s football coach sent a letter to a group of Eighth grade boys inviting them to attend spring practice sessions. The letter indicated that football equipment would be distributed and that getting involved as soon as possible would definitely be to their advantage. It was signed “Your Coach.” Each of the boys who received the letter had already signed a letter of intent to attend Brentwood, but none of them had officially enrolled in the school within the meaning of TSSAA rules.

TSSAA sanctioned Brentwood by banning Brentwood from the playoffs for two years and fined the school \$3,000.00. After exhausting two internal TSSAA reviews, Brentwood filed a lawsuit in Federal Court against TSSAA and its executive director under 42 USC § 1983 alleging, in relevant part, that a) enforcement of the rule was state action in violation of the First and Fourteenth Amendments and b) that TSSAA’s adjudication of its appeal had deprived the school of due process. The District Court ruled in favor of Brentwood and on appeal from TSSAA, the Court of Appeals reversed, holding that TSSAA was a private voluntary association that did not act under color of state law. The USSC granted review for the first time and reversed the Court of Appeals, holding that the District Court was correct in finding TSSAA did act under color of state law. On remand, the Court of Appeals sent the case back to the District Court, which again ruled for Brentwood. TSSAA appealed again and the Court of Appeals affirmed. The Court of Appeals held that the anti-recruiting rule is a content-based regulation of speech that is not narrowly tailored to serve its permissible purpose. It also ruled that TSSAA improperly considered some evidence thereby denying Brentwood due process during its internal review hearings. The USSC again agreed to hear the matter on appeal, and again reversed, finding that the TSSAA rule does not violate the First Amendment and that Brentwood’s due process rights were not violated.

In its decision, the USSC noted that TSSAA did not have unbounded authority to condition membership on the relinquishment of constitutional rights and could impose only those conditions that are necessary to managing an efficient and effective state-sponsored high school athletic league. The USSC found TSSAA’s argument that hard-

sell tactics directed at middle school students could lead to exploitation and distort competition within high school teams, and foster an environment in which athletics are prized more than academics, were necessary conditions to run an efficient and effective league and discouraged the type of conduct that might lead to those harms. In the end, the Court found that TSSAA's limited regulation of recruiting conduct created no significant First Amendment concerns because it is necessary for TSSAA to operate effectively and efficiently. For the USSC, the needs of TSSAA outweighed the curtailment of speech by its voluntary members.

As for Brentwood's claim that its due process rights were violated, the USSC disagreed, concluding that any such violation was harmless beyond a reasonable doubt. Brentwood argued that despite an investigation, several meetings, exchanges of correspondence and hearings before the director and an advisory panel (plus the fact that Brentwood was represented by counsel), its constitutional rights were violated because the TSSAA board heard from witnesses and considered evidence during its deliberations without affording Brentwood the opportunity to respond. The USSC held that Brentwood's claim of prejudice rested on the unsupported premise that it would have adopted a different and more effective strategy at the board meeting had it been given the opportunity to cross-examine the investigators and review the notes. As a result, TSSAA had not violated Brentwood's due process rights.

This decision sends a strong message to high schools across the country on two major points. First, while the First Amendment protects a school's right to publish truthful information about the school and its athletic programs, it is still subject to certain limitations on its communications because certain rules might be necessary for efficient and effective management of the entire high school league. Second, the Court sent a message to schools that are involved in disciplinary hearings with the high school leagues that the standards of due process otherwise commonly afforded defendants will not be strictly applied.

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