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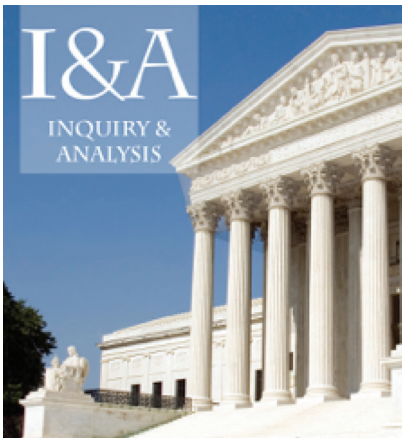

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Formed in 1967, the NSBA Council of School Attorneys provides information and practical assistance to attorneys who represent public school districts. It offers legal education, specialized publications, and a forum for exchange of information, and it supports the legal advocacy efforts of the National School Boards Association.

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All Work and No Play: Legal Issues Regarding "Playing Time" and Student-Athletes

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A. Introduction

So long as schools offer extracurricular activities, students may be disappointed by their playing time, or lack thereof. Most of these dissatisfied student-athletes will keep their displeasure out of the courthouse. However, a handful of disgruntled students will ask the judiciary to intervene. Indeed, it seems increasingly common for student-athletes to seek (or threaten to pursue) a restraining order or injunction to allow their continued participation in extracurricular activities. As a result, school attorneys need to be familiar with the caselaw on "playing time" and common legal claims in these cases.

B. Discrimination and Retaliation Claims

Perhaps the most common claims in "playing time" cases involve discrimination or retaliation. Of course, in order to establish a viable claim for discrimination or retaliation, there must be underlying protected conduct, or the student must be a member of a protected class.

i. Race

Schools must be particularly mindful of situations involving the playing time of a student who has previously complained of racial hostility. In one instance involving allegations of racial discrimination, a high school senior's parents filed an Office of Civil Rights ("OCR") complaint against her school, alleging that the school fostered a racially hostile environment to the detriment of African-American students.[1] The OCR complaint also alleged that this racially hostile environment resulted in diminished playing time for the senior. The OCR ultimately concluded that there was insufficient evidence to substantiate a claim that the school district allowed a racially hostile environment to exist. As part of the OCR's investigation, the OCR interviewed the head coach. After the OCR made its determination, the varsity coach called the senior to her office, at which time she dismissed her from the basketball team for her poor attitude and performance on the court. Believing that the dismissal was in retaliation for her having filed the OCR complaint, the senior filed suit.

At the Temporary Restraining Order ("TRO") stage of the case, the court described the senior's performance and ability as "hotly contested." On the one hand, the coach claimed that, from the start, the plaintiff had an "attitude problem," such as becoming visibly upset, dejected, and uncooperative when she was not allowed to play and would "act out" after basketball games in which she had little playing time or did not get to play at all. Other players expressed concern about her attitude and conduct to the coach. In addition, the senior missed an important sub-state game the prior year without explanation. On the other hand, the senior noted that she had been on the varsity team since her sophomore year. Her ability to make the varsity team as a sophomore was, evidently, a rare accomplishment at the school. Additionally, the senior pointed the court's attention to the fact that she had not been dismissed by the team for a poor attitude or misconduct until after the OCR investigation, despite the coach's allegations that her attitude and conduct had been a continuing problem over the prior years.

In the end, the court found most compelling the fact that the same coach had previously dismissed "a Caucasian player . . . for reasons 'strikingly similar' to those for which Plaintiff was dismissed - poor performance and poor attitude."[2] With the limited evidence available to the court at the TRO stage, the court found that this fact tended to show that both parties were equally likely to succeed on the merits and therefore denied the request for a TRO.

What's more, the court offered that it did not find appropriate the decision to place the senior back on the team after the disruption that she had caused:

> Entry of an injunction requiring Plaintiff to be placed back on the team will cause harm to Defendants and others. In particular, Coach Smith's authority and decision-making ability

would be substantially undermined. As head coach, Coach Smith made a determination to dismiss Plaintiff from the team because she believed the action was in the best interests of the team. If this Court were to countermand her decision, her authority would be diminished and her decision would be subject to ridicule. Coach Smith testified that Plaintiff's temper tantrums, sulking, and crying were disruptive and divisive to the moral of the team. As coach, she expected the seniors to be leaders and set an example for the younger players. She viewed Plaintiff's actions as selfish and undermining to the unity of the team. . . . . Obviously, an important part of coaching is the freedom to make tough decisions and not be second-guessed by those unfamiliar with the strengths and abilities of those in her charge. . . . the Court does not believe it to be in the public interest for a federal judge to insert himself or herself into the role of the basketball coach in determining when and how much playing time a player should have and whether the coach was justified in dismissing a player from the team because of inappropriate conduct and poor performance. . . . [t]he Court knows virtually nothing about this year's team at Livingston Academy or the dynamics between the coach and players and between the players. Although there have been allegations of racial animus by the coach against the Plaintiff, there has been no proof of it, and the Defendants have presented proof of non-discriminatory reasons for the actions of the coach, including the dismissal of Plaintiff from the team.

. . .

The basketball team is well into its season and is doing very well. If Plaintiff were to be placed back on the team, should she merely be relegated to sitting on the bench and not playing, something she herself and her father have previously complained about? If she is not granted playing time, would this now be embarrassing to Plaintiff and the coach, and would this situation cause more problems or cause a distraction to the team? If she is to play, how many minutes should she play? How much playing time is enough time? When and under what should she be substituted?[3]

Practice Pointer: Cases involving student-athletes and claims of racial discrimination are generally very fact-specific.[4] However, in general, schools should be mindful of the temporal proximity between certain protected events (such as filing an OCR complaint or a student complaining of a coach using derogatory language) and removing a student from the team or reducing the student's playing time. If a change nonetheless needs to be made, school attorneys should work with district staff to document contemporaneously the non-discriminatory basis for the change.

ii. Religion

How does a coach's grooming policy comport with a student-athlete's religious rights? In one case, a family of devout Roman Catholics kept a strand of hair on the back of the children's heads uncut since birth.[5] The children adopted that belief as their own affirmation of faith and heritage and continued to maintain the single long braid down their backs. The family viewed the long braid of hair as a promise to God and believed that, by cutting their hair, they would be violating their commitment to God.

For several years, the school district granted a religious exception for the children from the dress code and its hair grooming policy to accommodate the hair braids. However, in 2017, the school adopted a different approach and notified the children that they could not participate in extracurricular activities unless they complied with the new hair grooming policy. The policy would have required the children to cut their braids. When the family objected to this requirement, they explained that they treated their braids as "a promise to God that, if broken, would be a sin, would disappoint Jesus, and would result in divine punishment."[6] The school did not relent and the family filed suit.

On summary judgment, the district court declined to rule in favor of the school, given the number of fact questions that a jury would need to decide. Specifically, the court declined to dismiss the case based on religious discrimination grounds, concluding that "[b]y granting

the religious exemption to Plaintiffs for many years, based upon their claim that they made a sacred [promise] not to cut the children's hair, [the district] acknowledged the sincerely held religious belief."[7] The court elaborated that "[the school's] hair grooming policy requires cutting the Children's hair. This would fully eliminate their religious effort of maintaining a [promise], now 14 years strong."[8]

Practice Pointer: If a school establishes a "precedent" for certain religious activities or dress, schools must be careful when implanting new rules that would deviate from this "precedent." Schools should be extra vigilant in the context of extracurricular activities, given how a coach's team rules may be inconsistent with a student's religious beliefs, such as student's growing a beard or refusing to cut their hear.

iii. Age

Can a school limit participation on a team to certain grade levels, without violating the age discrimination laws? A Missouri case provides a good illustration. In that case, the school's soccer program fielded three boys teams each year: freshmen, junior varsity and varsity.[9] After tryouts, a junior was not selected for any team. This upset the student, since he made the junior varsity team the year before (his sophomore year). When the student approached the coach about the decision, the coach explained that he did not place juniors on the junior varsity team. The coach reasoned that the junior varsity team was reserved for younger players to develop their skills for the varsity team later in their careers. The student perceived this as age discrimination and asked a court to enter a TRO to permit the student to be on the JV team.

The court refused to enter the TRO. The court explained that "forcing the [school] to roster [the student] would have a significant negative impact on [the district] by undermining the soccer program's legitimate philosophy of prioritizing the development of players with more years of eligibility and involving the Court in any of the District's innumerable other extracurricular activities. Likewise, the Court agrees that granting a TRO in this case would invite future motions." The court further determined that the team's policy did not amount to age discrimination: "Even if grade were a legitimate proxy for age, taking into account a player's grade level—and therefore his remaining years of eligibility—'bears a direct and substantial relationship' and is 'necessary' to the normal operation of developing and maintaining a successful soccer program."[10]

Practice Pointer: If a school seeks to prevent certain students of certain ages from participating on a team, the school should establish a policy or procedure to outline the basis of the rule. For instance, younger students may be precluded from playing varsity-level athletics for safety reasons. Similarly, older students may be prevented from joining the freshmen team for safety reasons, or because there are too many participants that the freshmen students would have no playing time themselves.

C. First Amendment Claims

The First Amendment is often implicated in "playing time" cases. These claims can range from retaliation against protected speech, speech off school grounds and coaches requiring students to apologize.

i. Criticizing the Coach

How much leeway does a student have under the First Amendment to criticize or complain about a coach? A Texas case involved a disgruntled baseball player who did not receive as much playing time as he had hoped.[11] Resorting to federal court, the student alleged, among other causes of action, a First Amendment retaliation claim. The basis of the complaint involved allegations that the varsity coach made sexual comments about the student's mother and encouraged the student to cheat while playing in a game. The student reported the comments and cheating to the principal. After this report, the student alleged that the coach retaliated against the coach by reducing his playing time and refusing to speak to him.

During litigation, the court expressed skepticism and reluctance about wading into the muddy waters of high school athletics:

> If education and faculty appointments are ill suited for federal court supervision, disputes involving playing time, coaching decisions, and interactions between players and coaches at the high school level are even less suited. Furthermore, "the established policy and precedent of this circuit" cautions against micromanagement of such matters.[12]

In the end, the court concluded that the student had not produced enough evidence to support a viable claim:

> Moreover, the Court finds that Plaintiff's allegations of retaliation, even if true, are at most, trivial matters common to interactions between coaches and players—especially as it relates to disagreement with coaching decisions—and therefore, as a matter of law, do not give rise to an actionable First Amendment retaliation claim.[13]

In reaching this conclusion, the court also deferred to the school's explanation that the reduced playing time was due to a "strategic coaching decision." The court analyzed that the student's playing time complaint "establishes only that Plaintiff disagreed with Bollinger's coaching decisions." The school also introduced evidence that there were reasons, other than the complaints lodged against the coach, to explain the student's decreased playing time, such as his refusal to lift weights with the team, following the direction of his privately hired trainer instead of taking direction from Bollinger, leaving practice early, and sitting in the dugout when the team was taking batting practice.

Practice Pointer: The courts seem very reluctant to second guess a coach's strategic coaching decision. As such, when preparing an affidavit or witnesses for a preliminary injunction or temporary restraining order, a school attorney should focus on the coach's strategic decision-making process. Additional facts or statistics that support the coach's strategy may be helpful in demonstrating to the judge that the coach's decisions are based on strategy, not retaliation.

ii. Speech Off School Grounds

What authority do schools have to impose extracurricular discipline for a student-athlete's social media use? The case of *Johnson ex rel. S.J. v. Cache Cty. Sch. Dist.* presents an interesting analysis.[14] The case centered on S.J., who tried out for the high school cheerleading squad. When S.J. tried out for the cheerleading squad, she signed the "Cheer Constitution," which included a provision that "[m]embers will be dismissed for improper social media usage." The Cheer Constitution also required members of the squad to uphold all standards of the school constitution and conduct themselves appropriately at the school and other schools because they are representing the school wherever they go.

During tryouts, the cheer squad advisor spoke at length about social media usage. The advisor further explained to the potential cheerleaders that there was a history of inappropriate social media usage by members of the cheer squad. Interested cheerleaders were warned to "clean up their social media." The advisor further admonished "the prospective cheerleaders not to post any derogatory or nasty comments, to refrain from bullying or any 'catty comments,' and not to post anything that would do dishonor to themselves, their family, or their school."[15]

After the tryouts, the advisor notified the successful applicants. Students who were not selected for the squad did not find out until the next day's assembly. In light of this "knowledge gap," the selected squad members were directed "not to post anything about making the cheerleading squad to social media until the formal announcement of the cheerleading squad was made at a school assembly the following day." The school's principal also notified the successful applicants that "there was a 'zero tolerance' policy for violations of the cheer constitution and that violations would result in expulsion from the cheer squad."[16]

That night (prior to the school assembly), S.J. and four of her fellow cheerleaders went to dinner to celebrate. While they were driving to the restaurant in a private vehicle, S.J. recorded the girls singing along to some of the lyrics of Big Sean's song "I.D.F.W.U." S.J. posted an eight-second video to her SnapChat story of the girls singing the following lyrics from the song: "I don't f*** with you, you little stupid a** b****, I ain't f***ing with you." S.J. posted this video to a private story that included approximately thirty to forty of her contacts. S.J. and the other girls were wearing school cheer shirts that they were given when they learned they made the squad.

Approximately thirty minutes after S.J. posted the video, S.J. deleted the video from her SnapChat story. But before S.J. deleted the video, a former member of the team viewed the video and reported it to the administration. Once the administration investigated the incident, they concluded that S.J.'s video violated the terms of the Cheer Constitution. In reviewing the video, the cheer advisor "thought

the inappropriate language bordered on threatening and was informed that the video made other girls who had not been chosen [] feel bullied and that S.J. and the other girls were gloating."[17]

When the administration met with S.J., she was "unrepentant and insistent that the post was accidental and unintentional." However, it would have required several clicks for S.J. to post the video—making S.J.'s excuse extremely unlikely. Given the content of the video, S.J.'s unapologetic attitude and failure to be honest with the administration, the principal and cheer advisor informed S.J. that they had removed her from the cheer squad. In response, S.J. appealed the decision to the Superintendent. In the interim, S.J. was offered an opportunity to return to the team if she completed fifty hours of community service, apologized to the cheer squad, prepared a research-based presentation on improper social media usage, and met with administrators regarding a positive plan to move forward. S.J. refused, claiming that she had done nothing wrong. The Superintendent then affirmed the expulsion.

Shortly thereafter, S.J. petitioned a federal court to enjoin the district from excluding her from the cheer squad. The district court ultimately declined to enter the preliminary injunction, citing the fact that "the requested injunction would put the court in the position of supervising potential future discipline." Further, in response to S.J.'s First Amendment claim, the court concluded that S.J. was not likely to succeed on the merits:

> In this case, the school officials did not prevent the girls from any social media access or posts between the new member meeting and the school assembly. The new cheerleaders were merely asked not to post anything during that time frame about making the cheer squad. S.J. was disciplined because she posted something to SnapChat during that time frame that the cheer coach and school administrators viewed as being boastful about making the team and hurtful to the girls who did not make the squad. The new cheerleaders in S.J.'s video were in Mountain Crest shirts that they had received for making the cheer squad, and the school officials believed that fact would be readily understood by anyone viewing the post. Although the school officials asked the girls to refrain from posting about their selection to the cheer squad, they did not generally monitor the new cheerleaders' social media that night. A former cheerleader brought the post to their attention, and the school officials felt that they needed to be responsive in that situation.[18]
>
> . . .
>
> To the extent that Plaintiff argues that S.J. is irreparably harmed because the cheer squad's policy not to post inappropriate content on social media subjects her to continuing censorship of her protected, private speech, Plaintiff has not shown that the alleged censorship is "great or substantial" as is required for irreparable harm.[19]

. . .

It is not abundantly clear that a minor has a constitutional right to use profanity to an audience of other minors or that limiting that right as a condition of being a school leader is great or substantial harm.

The court also took umbrage with S.J.'s refusal to accept the conditions of reinstatement, noting that S.J. could have completed those objectives and returned to the squad by the time the court had resolved the matter.

Finally, the court determined that the public interest weighed against the court granting the preliminary injunction. In so doing, the court recognized the deference needed to be given to school administrators to operate school districts:

> By choosing to "go out for the team," [students] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally, [and] have reason to expect intrusions upon normal rights and privileges. It is well-established that students do not have a constitutional right to participate in extra-curricular activities. [internal citations omitted][20]
>
> . . .
>
> The cheer coach, principal, student handbook, and cheer constitution reinforce the importance of courtesy, character, honor, and humility.

> The school emphasized the need for this year's cheer squad to overcome a history of negative behavior . . . S.J.'s conduct violated the standards discussed at the cheer meetings and the post itself was a direct violation of the cheer coach asking the new members of the squad to refrain from posting to social media prior to the assembly the following day. . . . These are the types of judgment calls school administrators make day in and day out to ensure the orderly functioning of schools. The video undermines the authority of the cheer coach to set a direction for the team. . . . [the video] could have easily been seen by administrators to be insubordination.[21]

Practice Pointer: Perhaps the biggest takeaway from the *S.J.* case is the importance that the court stressed regarding S.J.'s insubordination. School attorneys would be wise to incorporate any applicable insubordination into the defense of a "playing time" lawsuit. A defense involving insubordination can be bolstered by testimony from assistant coaches or other players on the negative effects of insubordination on the team.

iii. Requiring Apologies

Can a school district condition a student-athlete's return to the team on the student's issuance of an apology to a coach, without violating the First Amendment? The Eighth Circuit concluded that such a requirement is permissible.[22] In that case, a sophomore was a member of the school's basketball team. Before the season, the student believed she would be a member of the varsity team. But when the season began, she remained on the junior varsity team. The student was upset with this decision. As a result, she wrote and distributed a letter to her teammates that was critical of the coach and encouraged her team members to question the coach's decisions.

The coach eventually obtained a copy of this letter and met with the student to discuss it. At that meeting, the coach relayed that the letter was disrespectful and demanded a student apology. The coach gave her twenty-four hours to apologize, and, if she did not, she would not be allowed to return to the team. The student refused to apologize and did not practice or play with the team in the season's remaining six games.

After her removal from the team, the student filed suit, contending that the required apology violated her First Amendment rights. Specifically, the student argued that "the First Amendment prevents the school from disciplining her for distributing a letter which was a personal communication to other students containing her personal expression."[23] The Eighth Circuit disagreed. In so holding, the court noted that the school's handbook "indicated that disrespect and insubordination will result in disciplinary action at the coach's discretion."[24] The court also emphasized the need for student-athletes to respect coaches in the team setting:

> [T]he school sanction only required an apology. The school did not interfere with Wildman's regular education. A difference exists between being in the classroom, which was not affected here, and playing on an athletic team when the requirement is that the player only apologize to her teammates and her coach for circulating an insubordinate letter. We agree with the district court's conclusions that the letter did suggest, at the least, that the team unite in defiance of the coach (where Wildman wrote that the coach "needs us next year and the year after and what if we aren't there for him?" and "it is time to give him back some of the bullshit that he has given us" and "we now need to stand up for what we believe in" and "I think that we have to fight for our position") and that the actions taken by the coaches in response were reasonable. Moreover, coaches deserve a modicum of respect from athletes, particularly in an academic setting.[25]

As noted above, judges have found little sympathy with insubordinate student-athletes.

The Eighth Circuit's reasoning tracks a similar Sixth Circuit case involving a number of students who had been dismissed from the football team after they circulated a petition that said "I hate Coach Euvard [sic] and I don't want to play for him."[26] The coach learned about the petition and interviewed players about it. The players who signed the petition, but later apologized to the coach, remained on the team. Those players, including the plaintiff, who signed the petition but refused to apologize, were removed from the team.

After the dismissal, the plaintiffs filed suit under the First Amendment, claiming that their petition was protected free speech. The Sixth Circuit found little sympathy with the plaintiffs, noting that: "This case is not primarily about Plaintiffs' right to express their opinions, but rather their alleged right to belong to the Jefferson County football team on their own terms."[27] The court also emphasized the importance of the hierarchy of the team concept: "A high school athletic team could not function smoothly with an authority structure based on the will of the players."[28] Finally, the court found troubling the "disrespect" the petition demonstrated towards the coach, and how the petition necessarily disrupted the team by "divid[ing] players into two camps, those who supported Euverard and those who didn't. . . . For Euverard and the other coaches to have turned a blind eye to a potential threat to team unity would have been a grave disservice to the other players on the team."[29]

These cases demonstrate that students have limited First Amendment rights in the extracurricular context. These rights rarely permit a student to criticize a coach or undermine coach's authority.

D. Conclusion

Ultimately, it is worth remembering that the courts are very deferential to coaches involving playing time decisions.[30] But that does not mean that all "playing time" cases will be dismissed. Instead, as demonstrated above, students have been successful in establishing certain claims in these cases.

Endnotes

1 *Jackson v. Overton County Sch. Dist*., 2007 U.S. Dist. LEXIS 5667 (M.D. Tenn. January 18, 2007).

2 *Id.*

3 *Id.*

4 *See, e.g., Resendez v. Prance.,* 2018 U.S. Dist. LEXIS 52966 (N.D. Ind. 2018) (summary judgment denied when student complained of reduced playing time after student reported coach's racial slurs and false accusation of student's misconduct); *Allen-Sherrod v. Henry County Sch. Dist., 2007 U.S. Dist.* LEXIS 23376 (N.D. Ga. March 28, 2007) (summary judgment granted for lack of evidence when student's playing time was reduced around the same time as his parents complained about the coach calling students "thugs" and "drug dealers").

5 *Gonzales v. Mathis Indep. Sch. Dist.,* 2018 U.S. Dist. LEXIS 216577 (S.D. Tex. December 27, 2018).

6 *Id.*

7 *Id.*

8 *Id.*

9 *Doe v. Ladue Horton Watkins High Sch.,* 2018 U.S. Dist. LEXIS 169074 (E.D. Mo. October 1, 2018).

10 *Id.*

11 *Wright v. Denison Indep. Sch. Dist.,* 2018 U.S. Dist. LEXIS 140975 (E.D. Tex. August 29, 2018).

12 *Id.*

13 *Id.*

14 *Johnson ex rel. S.J. v. Cache Cty. Sch. Dist.,* 323 F. Supp. 3d 1301 (D. Utah July 3, 2018).

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

[22] *Wildman v. Marshalltown,* 249 F.3d 768 (8th Cir. May 7, 2001).

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Lowery v. Euverard,* 497 F.3d 584 (6th Cir. August 3, 2007).

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Heike v. Guevara,* 2013 U.S. App. LEXIS 5420 (6th Cir. March 18, 2013).