The Journal of Law and Education

Volume 20 | Issue 2 Article 8

Spring 1991

Law Review Digests

Law Review Digests

College athletes should be afforded constitutional due process before being deprived of their athletic eligibility. In order for a student-athlete to maintain a claim of deprivation of due process, he must show that the deprivation was committed by a person or organization acting under color of state law. In *National Collegiate Athletic Association v. Tarkanian,* 488 U.S. 179 (1988), the court held that the NCAA was not a state actor for the purpose of bringing a due process claim. The effect of this decision was that student-athletes will almost always be refused judicial review of their claims when the NCAA revokes their eligibility. The author advocates judicial review on the theory that the athletes are being deprived of a property interest. Sahl, *College Athletes and Due Process Protection: What's Left After National Collegiate Association v. Tarkanian,* 488 U.S. 179 (1988), 21 ARIZ. L. REV. 621 (1989).

The recent Supreme Court decision in Kadrmas v. Dickinson Public School District is a retreat from the commitment of equal educational opportunity. This article examines a 1988 Supreme Court decision which held that a public school transportation fee policy did not violate the equal protection clause of the fourteenth amendment. The policy at issue required public school students to pay a fee for transportation to and from school which the parents of the student in this case were unable to pay. According to the author, the decision was basically sound. Because education is not a fundamental right guaranteed by the Constitution, statutes that discriminate on the basis of wealth alone have not been considered unconstitutional. The author does, however, challenge the way in which the Court framed the issue in the case. Under the majority's analysis, the statute at issue needed to satisfy only the minimal scrutiny level of review. Such "facile analysis" was inadequate in light of the facts presented. The statute compelled a family that lived sixteen miles from school to pay a fee to have their child transported to school. The author points out the difficulty in discerning the Court's position that such a fee is not identical in practical effect to placing a fee directly on education. Ultimately, by placing a heavier burden on a family that could not afford to pay, the statute discriminated against an indigent by denying access to public educational facilities. The author concludes that the ruling was in effect, a proclamation that a student is not denied access to education when he or she cannot afford to reach the schoolhouse gate. Burke, *Constituional Law — Equal*

Protection — Indigent Public School Students Denied Free Ride — Kadrmas v. Dickinson Pub. Schools, [48 U.S. 450 (1988)] 20 SETON HALL 1 (1989-90).

While the constitutional implications of mandatory drug testing of college athletes are yet to be determined, student-athletes wanting to protect their right to privacy ought to seek protection under their state constitutions. In this article, the authors recognize the trend toward mandatory drug testing of college athletes as an outgrowth of the war against drugs, attempt to examine the programs which college student-athletes are presently being subjected to, and present policy arguments in favor of and against such programs. It also examined the legitimacy of the students' legal claims that have challenged the validity of these programs. Also discussed are the legal decisions that have emerged from the drug-testing controversy and the resulting implications for colleges and students. The article concludes that, in light of the very real threat being posed to fundamental constitutional rights, student-athletes should challenge the constitutionality of mandatory drug testing by refusing to submit to testing under the current system. The authors urge student-athletes to seek protection under state constitutions. State constitutions typically offer students more expansive protection of their rights than is afforded by the Supreme Court's interpretation of the United States Constitution. This broader protection is achieved through the adoption of uniquely worded statutes such as the explicit privacy provisions in the California Constitution, among others. Covell & Gibbs, *Drug Testing and the College Athlete,* 23 CREIGHTON L. REV. 1 (1989-90).

Effective implementation of Brown v. Board of Education requires a reorientation of traditional Brown thought to reflect the political reform movement of the eighties concurrent with the implementation of new measures to address the availability of educational opportunities for disadvantaged children. The reorientation of *Brown* should specifically concentrate on eliminating racial motivations from the political process. It is admitted that such an approach only incidentally enhances educational opportunities and would not aid a significant number of disadvantaged students. To address this problem, new measures are needed. The author suggests including new measures in the competency-testing provisions found in many state statutes. To enforce pure competency-testing provisions requires that such tests be used punitively. If this is done, there is a legitimate basis for requiring public officials to insure that all children are provided with the educational opportunities and instructions necessary to enable the students to pass these tests. The distributive impact by applying such a reform would avoid the now fatal charge of using judicially man-

dated race-based distribution. Liebman, *Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform,* 76 VA. L. REV. 349 (1990).

Changes must be made in the public school systems to correct the current educational crisis. The author cites open enrollment statutes as a reform that could possibly put an end to the current educational crisis. Open enrollment statutes allow students to cross district lines, thereby allowing them to choose the public school of their choice. This reform creates a Darwinistic atmosphere in the educational system by using competition as the means to improve the public schools. Two states, Nebraska and Minnesota, have already initiated statewide open enrollment programs. Supporters of open enrollment cite improved scholastic quality through greater parental involvement, highly motivated students and antonomous teachers who can provide a specialized learning environment. Meanwhile, critics who oppose the program fear the reform will disadvantage lower-income families and mentally and physically handicapped students and allow athletics to become the main factor in a student's choice of schools rather than academics. Mascia, *Open Enrollment: Social Darwinism at Work,* 23 CREIGHTON L. REV. 441 (1990).

The National Collegiate Athletic Association (NCAA) must reshape its operation of athletic programs by developing a coherent academic foundation through structural and substantive reform. The author contends that reform should focus primarily on academic and educational values. Amateurism and cost-containment values should only be used in so far as they promote and support the educational value. Structural changes that would further the educational value include accrediting intercollegiate athletics; submitting academic impact statements along with each significant piece of legislation to be considered by the NCAA; and making organizational changes within the NCAA. For the reform to be successful, the structural and substantive changes must be implemented in a coherent fashion rather than as individualized programs. Smith, *An Academic Game Plan for Reforming Big-Time Intercollegiate Athletics,* 67 DEN. U.L. REV. 213 (1990).

In the wake of initial furor over drug testing and its constitutionality, universities must now consider the impact of the more traditional theories of contracts and torts. In this article, the author notes that much of the recent discussion concerning drug testing of student-athletes has centered on the fourth amendment implications of the practice as a search and seizure. Proponents of drug testing have often raised the issue of consent as the answer to these fourth amendment challenges. However, consent is a significant issue in other contexts as well. The article first approaches the

question from a contracts perspective, noting that the relationship between universities and student-athletes has long been seen as contractual. If, however, this proposition is accepted, and that of drug testing consent requirements as implied contractual terms, there is a question as to the extent such terms would be judicially enforced. Specifically, the application of traditional rules of contract avoidance such as duress, undue influence and unconscionability would act as stumbling blocks to judicial enforcement. Anticipating the concern a college might have over the rejection of its drug testing consent program, the author proposes several courses of action. The common thread among these proposals is the removal of oppression from the drug testing consent process. The author also examines consent programs from an equally problematic torts perspective. He believes that consent, if valid, would effectively bar recovery in tort, but such effective consent would be dependent on the considerations of several factors. The author concludes by stating that signed consent form should not be considered by the university as a shield to invasion of privacy liability. What is certain, is that universities must be vigilant in guarding the confidentiality of the student and at the same time work to assure a more prominent role for free choice. Pernell, *Drug Testing of Student Athletes: Some Contract and Tort Implications,* 67 DEN. U.L. REV. 279 (1990).