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# GET OFF THE COURTS: USING ADR PRINCIPLES TO RESOLVE HIGH SCHOOL SPORT DISPUTES

DOMINIC D. SATURDAY, \* AMANDA M. SIEGRIST, \*\* & WILLIAM A. CZEKANSKI\*\*\*

## I. INTRODUCTION

A two-week suspension from high school and an indefinite disqualification from all varsity sports: that was the punishment that made quarterback Hayden Long kill himself.<sup>1</sup>

On October 3, 2015, Geneva High School administrators accused Long and five other student-athletes of smelling like marijuana at the homecoming dance. In a private room, the principal and his assistant interrogated the students and ordered police to search their cars. Long and his friends asked to speak with their parents before they consented to the searches. Administrators responded to their request with laughter, telling the young men that it was “cute” how “they thought they knew their rights.”<sup>2</sup>

The Ashtabula County Sheriff confirmed that *some* of the student-athletes possessed drug paraphilia (a minor misdemeanor in Ohio). Geneva High School administrators handed down a two-week suspension from school and an *indefinite* disqualification from all varsity sports. Long committed suicide two days later.<sup>3</sup>

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1. Kara Pendleton, *High School Quarterback Chose to End His Life. A Damning Letter Shows Who Some Students Are Blaming*, INDEP. J. REV. (Oct. 7, 2015), <http://ijr.com/2015/10/439921-ended-life-discipline-school-admin-now-classmate-fights-hold-responsible/>.

2. *Id.*

3. *Id.*

Hayden Long's story illustrates just how closely a student-athlete's personality can be linked to his sport participation. And countless other United States high school students are just as passionate about their athletic identities.<sup>4</sup> Indeed, there are millions of them.

During the 2016-2017 school year, participation in high school sports reached an all-time high of 7,963,535 student-athletes—a one-year increase of almost 100,000 participants.<sup>5</sup> Statistically speaking, this increase in the number of participants brings with it a growth in the number grievances filed by interscholastic athletes on an annual basis,<sup>6</sup> especially when school administrators make sweeping accusations and dole out harsh punishments for arguably minor offenses (e.g., tweeting,<sup>7</sup> being a designated driver,<sup>8</sup> or associating with students who smoke marijuana<sup>9</sup>). While Long's case was tragic, his circumstances were certainly not unique.

Unfortunately, many state athletic associations still lack uniform standards for how students should conduct themselves off-the-field.<sup>10</sup> Without good bylaws at the state or national levels, it's no surprise that local administrators, coaches, and athletic directors often create their own policies and penalties.<sup>11</sup>

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4. By participating in sport, people make social statements about who they are and how they want others to think about them. Athletic identity often defines the way people evaluate their own competence. And the amount of emphasis that people place on their athletic identity often influences their self-esteem and motivation. See B.W. Brewer et al., *Athletic Identity: Hercules' Muscles or Achilles Heel?*, 24 INT'L J. SPORT PSYCHOL. 237 (1993).

5. NFHS, *High School Sports Participation Increases for 28th Straight Year, Nears 8 Million Mark*, NAT'L FED'N OF ST. HIGH SCH. ASS'NS (Sept. 6, 2017), <https://www.nfhs.org/articles/high-school-sports-participation-increases-for-28th-straight-year-nears-8-million-mark/>.

6. Amanda Siegrist et al., *Interscholastic Athletics and Due Process Protection: Student-Athletes Continue to Knock on the Door of Due Process*, 6 MISS. SPORTS L. REV. 1, 2 (2016).

7. Ricardo Arguello, *Wisconsin Athlete Suspended for Tweet About State Athletic Association*, USA TODAY HIGH SCH. SPORTS, Jan. 10, 2016, <http://usatodayhss.com/2016/wisconsin-athlete-april-gehl-hilbert-high-suspended-for-tweet-about-state-athletic-association> (five-game suspension for Wisconsin women's basketball player who tweeted "EAT SHIT" in response to a [Wisconsin Interscholastic Athletic Association] email).

8. Brendan Hall, *High School Athlete in Massachusetts Suspended for Driving Drunk Friend*, ESPN (Oct. 15, 2013), [http://www.espn.com/boston/story/\\_/id/9826842/high-school-athlete-massachusetts-suspended-driving-drunk-friend](http://www.espn.com/boston/story/_/id/9826842/high-school-athlete-massachusetts-suspended-driving-drunk-friend) (five-game suspension for Massachusetts volleyball player who drove her drunk friend home).

9. Claudette Riley, *Parkview High Teen Fights Suspension, Loss of A+ Scholarship*, SPRINGFIELD NEWS LEADER, Dec. 18, 2016, <http://www.news-leader.com/story/news/education/2016/12/18/parkview-high-teen-fights-suspension-loss-scholarship/95197434/> (twenty-eight-day athletic suspension and loss of scholarship for Illinois wrestler who went to school dance with friend who smoked marijuana).

10. Siegrist et al., *supra* note 6, at 2.

11. Take, for example, the Ohio High School Athletic Association's (OHSAA) Bylaw 4-5-1. This Bylaw gives member high schools a seemingly unlimited amount of freedom to sanction off-the-field conduct: "In matters pertaining to personal conduct in which athletic contests and their related activities are not involved, the school itself is to be the sole judge as to whether the student may participate in athletics." OHSAA,

These inconsistent punishments are the result of wide-ranging athletic codes. On one hand, most schools craft exceptional codes of conduct that outline particular off-the-field actions and the corresponding progressive discipline.<sup>12</sup> On the other hand, many schools construct poorly written or purposely vague codes of conduct to preserve the status quo.<sup>13</sup> Worse yet, some schools have no codes of conduct at all.

Ambiguous or non-existent codes give administrators almost-unfettered disciplinary discretion. As a result, they can ban student-athletes from the playing fields and courts without any investigation, evidence, or hearing. Nevertheless, student-athletes and their parents—with the help of sport lawyers—have taken athletic disputes to a new kind of “court,” filing thousands of lawsuits alleging violations of their free speech, due process, and equal protection rights.

Historically, judges disliked code of conduct cases and relied on inconsistent legal precedent to rule against student-athletes.<sup>14</sup> Without much serious consideration, most courts held that high school students have no constitutional right to participate in sports or other extracurricular activities.<sup>15</sup> In addition, most courts reasoned that students have no property interest in their

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2017-18 OHSAA HANDBOOK Bylaw 4, 4-5-1, at 50 (May 2017) *in* OHIO HIGH SCH. ATHLETIC ASS’N (emphasis added).

12. *E.g.*, Upper Arlington High School, 2017–18 ATHLETICS & EXTRACURRICULAR ACTIVITIES CODE (June 6, 2017). This code goes to great lengths to outline specific progressive discipline actions. It also describes the evidentiary standard administrators must use for deciding violations:

The standard used to determine whether a student has violated the Athletics and Extracurricular Activity Code will be the preponderance of evidence standard. The administrator making a determination . . . will consider evidence presented to him/her, including assessing the credibility of witnesses . . . . [T]he anonymity of the source or complaint will be considered when assessing the quality of the evidence.

*Id.* at 4.

13. Consider a high school who tells its student-athletes that a “[v]iolation of these rules and regulations . . . is prohibited and will result in disciplinary action.” Trotwood-Madison High School Athletics Department, 2017–18 STUDENT CODE OF CONDUCT, at 1 (2017). This particular athletic code is purposely ambiguous about discipline: “Such disciplinary action *could lead to* suspension, expulsion, or *removal from school and/or the athletic activity . . .*” *Id.* (emphasis added). Presumably, even minor violations could result in removal from athletic activity.

14. See Siegrist et al., *supra* note 6, at 3; see also Ray Yasser & Matthew Block, *Upon Further Review: Recognizing Procedural Due Process Rights for Suspended High School Athletes*, 26 ENT. & SPORTS L. 1 (2008).

15. *Seger v. Ky. High Sch. Athletic Ass’n*, 453 F.App’x 630, 634 (6th Cir. 2011); *Taylor v. Enumclaw Sch. Dist.* No. 216, 133 P.3d 492, 496–97 (Wash. Ct. App. 2006); *Angstadt v. Midd-West Sch. Dist.*, 377 F.3d 338, 344 (3d Cir. 2004); *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 180 F.3d 758, 763 (6th Cir. 1999); *Alerding v. Ohio High Sch. Athletic Ass’n.*, 779 F.2d 315, 319 (6th Cir. 1985); *Niles v. Univ. Interscholastic League*, 715 F.2d 1027, 1031 (5th Cir. 1983).

athletic participation, even when college scholarships were on the line.<sup>16</sup> After wasted time and wasted money,<sup>17</sup> the cases were usually dismissed on summary judgment motions.

However, the process could have been quicker, cheaper, and fairer. In fact, many high school sport disputes could be resolved using mediation, arbitration, or med-arb-like<sup>18</sup> processes. Yet, few parties—including the parties with a vested interest in designing an effective dispute system—seem eager to apply alternative dispute resolution (ADR) principles in the interscholastic athletic arena. For example, only one state athletic association has incorporated mediation into its bylaws.<sup>19</sup> Overall, student-athletes, parents, school districts, colleges, communities, and courts (who are ultimately tasked with deciding the rising number of sport cases on their dockets) lack the necessary motivation.

That motivation is coming. In 1975, the United States Supreme Court ruled that, because students are required to attend school up to a certain age, they have a governmentally created expectation to an education.<sup>20</sup> When a student has a governmentally created expectation to an education, she has a property interest in her education.<sup>21</sup> A property interest naturally creates a procedural due process right.<sup>22</sup>

In theory, administrators who suspend student-athletes without due process will only encounter problems if courts begin to find a property interest in sport participation. While sports have always played an important role in education,<sup>23</sup> few courts have been willing to say that athletic participation or other

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16. *Ryan v. Cal. Interscholastic Fed'n-San Diego Section*, 114 Cal. Rptr. 2d 798, 807 (Cal. Ct. App. 2001) (holding that scholarship opportunities do not elevate athletic participation to a protected property interest); *Jordan ex rel. Edwards v. O'Fallon Twp. High Sch. Dist. No. 203 Bd. of Educ.*, 706 N.E.2d 137, 141 (Ill. App. Ct. 1999).

17. Schools risk “large amounts of money, resources, and . . . unwanted press in defending” against interscholastic athletic disputes. Siegrist et al., *supra* note 6, at 20.

18. Med-arb has features of both mediation and arbitration. The parties first try to resolve their dispute through mediation. If mediation does not resolve the dispute, then the process switches to a binding arbitration, with the mediator serving as the arbitrator.

19. In 2014, Florida designed a mediation process for eligibility (i.e., grade-related) appeals. *FHSAA Adopts PED, Enrollment, Mediation Changes to Protect Student-Athletes and Fair Play*, FLA. HIGH SCH. ATHLETIC ASS'N (Jan. 14, 2014), <https://www.fhsaa.org/news/2014/0114>.

20. *Goss v. Lopez*, 419 U.S. 565, 584 (1975).

21. *Id.* at 572–74.

22. *Id.* at 576.

23. The objective of school sports is to enrich the school experiences of students in the context of the educational mission of schools. School sports should be educational and contribute to the overall education of all students, not just student-athletes. See Thomas W. Gutowski, *Student Initiative and the Origins of the High School Extracurriculum: Chicago, 1880–1915*, 28 HIST. EDUC. Q. 49 (1988). But see Bradley James Bates, *The Role and Scope of Intercollegiate Athletics in U.S. Colleges and Universities*, ST. U., <http://education.stateuniversity.com/pages/1853/College-Athletics.html> (last visited July 30, 2018).

extracurricular activities played an “integral role.”<sup>24</sup> Until recently, “[t]he main purpose of high school,” as stated by the United States Court of Appeals for the Sixth Circuit, has been “to learn science, the liberal arts, and vocational studies, *not* to play football and basketball.”<sup>25</sup>

But due process tides are changing. The present day “intertwining of [interscholastic athletics] and education”<sup>26</sup> creates a much stronger argument<sup>27</sup> that high school sport is, in fact, part of the total educational process<sup>27</sup> described by the United States Supreme Court in *Goss v. Lopez*.<sup>28</sup>

If courts begin recognizing that the “intertwining” of sport and education creates a procedural due process right,<sup>29</sup> then the number of winnable lawsuits will skyrocket.<sup>30</sup> At some point in the not-so-distant future, high school athletes may have viable Fourteenth Amendment claims<sup>31</sup> when they’re suspended or disqualified from interscholastic competition.<sup>32</sup> Sport lawyers can hear the echo

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24. *Ind. High Sch. Athletic Ass’n, Inc. v. Carlberg by Carlberg*, 694 N.E.2d 222, 228 (Ind. 1997) (athletics play an “integral role” in the state’s “constitutionally-mandated system of education . . .”).

25. *Crocker v. Tenn. Secondary Sch. Athletic Ass’n*, 980 F.2d 382, 387 (6th Cir. 1992).

26. For example, some schools offer academic credit for sport participation or write educational goals into their athletic department’s mission.

27. The Tenth Circuit, in dicta, suggested that:

[t]he educational process is a broad and comprehensive concept with a variable and indefinite meaning. It is *not* limited to classroom attendance but ‘includes innumerable separate components, *such as participation in athletic activity* and membership in school clubs and social groups, which combine to provide an atmosphere of intellectual and moral advancement.’

*Albach v. Odle*, 531 F.2d 983, 985 (10th Cir. 1976) (emphasis added).

28. 419 U.S. at 565.

29. Siegrist et al., *supra* note 6, at 4. Combine this “intertwining” effect with the chance to earn competitive college scholarships at progressively younger ages, and the argument is even stronger. Today, it is not uncommon for elementary school students to receive verbal athletic scholarship offers. USA TODAY High School Sports, *Nevada Offers 9-year-old Football Star, Trainer Says*, USA TODAY HIGH SCH. SPORTS, June 23, 2017, <http://usatodayhss.com/2017/havon-finney-jr-nine-year-old-nevada-football>.

30. Secondary schools should be prepared to see an increase in lawsuits fighting eligibility, suspension, and expulsion issues in sport. The continual growth in prominence of sport in our society suggests that the Supreme Court may be called upon to address the issue in the near future. Siegrist et al., *supra* note 6, at 4.

31. See *Robbins by Robbins v. Ind. High Sch. Athletic Ass’n, Inc.*, 941 F. Supp. 786, 791 (S.D. Ind. 1996) (indicating that adequate notice and a hearing might be required for athletic suspensions because “[p]articipation in . . . sports, even if not a constitutional right, is perhaps a non-constitutional ‘privilege’ protected by the Fourteenth Amendment”) (emphasis added).

32. Several lawsuits illustrate that due process tides are changing. For example, the U.S. District Court for the District of Oregon granted a temporary restraining order and preliminary injunction against the Portland Public School System when administrators issued a twenty-eight-day suspension to a lacrosse player who was accused of asking a friend to buy him alcohol. See Ben Rohrbach, *Parents Successfully Overturn Lacrosse Player’s Drug-and-Alcohol Suspension in Court*, YAHOO! SPORTS (Apr. 18, 2014), <https://sports.yahoo.com/blogs/highschool-prep-rally/parents-successfully-overturn-lacrosse-player-s-drug-and-alcohol-suspension-in-court-164930191.html>. In addition, many courts are now refusing to apply the legal standard that

of Justice Fortas's oft-cited rebuke in *Tinker v. Des Moines Independent Community School District*: students do not shed their constitutional rights at the schoolhouse gates.<sup>33</sup> And because those schoolhouse gates lead to athletic playing fields, local administrators and state athletic associations should be concerned.

To help avoid lawsuits, schools should follow a standard process before suspending or expelling student-athletes. A consistent procedure would establish consistent punishments and would more fairly govern each individual case.<sup>34</sup> Even without precedent that establishes a property interest in sport participation, ADR principles remain valuable. This article discusses developing an ADR system to resolve high school sport disputes in the quickest, cheapest, and fairest way possible; how at least one state athletic association has implemented and codified in its bylaws a basic mediation process; and how the National Federation of State High School Associations (NFHS)—if it wants to lead by example—should recommend uniform sport ADR clauses for all of its member institutions in the United States.

## II. ADR PRINCIPLES

Alternative dispute resolution methods allow parties to resolve a legal conflict without going to trial.<sup>35</sup> For example, mediation is negotiation carried out with the assistance of a neutral third party.<sup>36</sup> In mediation, the mediator leads parties who disagree to common ground.<sup>37</sup> A mediator is basically a non-party to the negotiations.<sup>38</sup> She helps participants navigate their contested issues and reach a mutually acceptable resolution.<sup>39</sup> In addition, the mediator typically reminds the parties about privileged communications and that the mediation process itself—with some exceptions—is confidential.<sup>40</sup>

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interscholastic sport participation is a privilege (rather than a right) when freedom of speech issues are involved in sanctions imposed on students. See Lee Green, *2016 Sports Law Year-In-Review*, NAT'L FED'N OF ST. HIGH SCH. ASS'NS (Jan. 4, 2017), <https://www.nfhs.org/articles/2016-sports-law-year-in-review/>.

33. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

34. Siegrist et al., *supra* note 6, at 21.

35. See LINDA SHARP ET AL., *SPORT LAW: A MANAGERIAL APPROACH* 33 (3d ed. 2014).

36. See STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, ARBITRATION, AND OTHER PROCESSES* 121 (6th ed. 2012).

37. See JOHN M. HAYNES & GRETCHEN L. HAYNES, *MEDIATING DIVORCE* 1 (1989).

38. GOLDBERG ET AL., *supra* note 36, at 121.

39. MERRICK T. ROSSEIN, *2 EMPLOYMENT LAW DESKBOOK FOR HUMAN RESOURCES PROFESSIONALS* § 39:6 (2016).

40. See Sarah Rudolph Cole, Symposium, *Secrecy and Transparency in Dispute Resolution: Protecting Confidentiality in Mediation: A Promise Unfulfilled?*, 54 U. KAN. L. REV. 1419, 1423 (2006). It is fairly common for parties, either in a court-ordered or voluntary mediation, to sign a separate confidentiality

Unlike an arbitrator or judge, the mediator has no power to impose an outcome on the participants or make decisions for them.<sup>41</sup> Instead, the disputing parties have significant control over the mediation process and its substance.<sup>42</sup> In this regard, mediation is much different than traditional dispute resolution forums like arbitration or litigation.

At the end of the day, mediation is less time-consuming, less formal (e.g., there are no specific discovery rules or evidentiary requirements), less costly, and less intimidating for unwary or inexperienced participants.<sup>43</sup> Mediation also fosters a better post-dispute relationship if the parties, like high school athletes and administrators, must continue working together<sup>44</sup>

Arbitration, on the other hand, usually results in a final and binding decision, made by a neutral third party.<sup>45</sup> Unlike a mediator, the arbitrator has the authority to determine factual and legal issues.<sup>46</sup> Arbitrations are more formal than mediation, though less formal than litigation.<sup>47</sup> Arbitrators are often experts in their fields,<sup>48</sup> and their decisions are extremely difficult to overturn in court.<sup>49</sup>

Some industries, such as construction, use med-arb principles.<sup>50</sup> There, mediation is attempted first, and if there is no resolution, the parties submit their dispute to arbitration, using either the same pre-selected mediator or a separate arbitrator.<sup>51</sup>

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agreement that is intended to ensure *all communications made during the mediation* will not be revealed either in subsequent proceedings or to the public or the media. *Id.* (emphasis added).

41. GOLDBERG ET AL., *supra* note 36, at 121.

42. See Nancy A. Welsh, Symposium, *Conflict Resolution and the Economic Crisis: Integrating "Alternative" Dispute Resolution Into Bankruptcy: As Simple (and Pure) as Motherhood and Apple Pie?*, 11 NEV. L.J. 397 (2011).

43. See Tom Arnold, *A Vocabulary of Alternative Resolution Procedures*, in ADR: HOW TO USE IT TO YOUR ADVANTAGE!, (A.B.A 1996).

44. SHARP ET AL., *supra* note 35, at 33.

45. *Id.*

46. ROSSEIN, *supra* note 39, § 39:13.

47. *Id.* § 39:14.

48. *Id.*

49. *Id.*

50. JOHN W. HINCHEY & TROY L. HARRIS, INTERNATIONAL CONSTRUCTION ARBITRATION HANDBOOK § 1:13 (2017).

51. *Id.*

### III. USING ADR PRINCIPLES TO RESOLVE INTERSCHOLASTIC ATHLETIC DISPUTES

Mediation is an obvious starting point because it has secured a “permanent place in the pantheon of dispute resolution mechanisms.”<sup>52</sup> But there are few, if any, cases illustrating court-ordered mediation in amateur sports.<sup>53</sup> School districts and athletic associations need to understand why they should mediate sport disputes in the first place. Once they understand why sport disputes are worth mediating, they need to know how they can incorporate mediation clauses into their codes of conduct and bylaws. Then, schools and state athletic associations can begin developing mediation programs that resolve interscholastic athletic conflicts in the quickest, cheapest, and fairest way possible.

#### *A. Why Should High Schools Develop ADR Programs?*

In mediation, student-athletes can participate directly and can craft tailor-made solutions for the specific dispute at hand. Depending on the reason for the mediation, the mediator might encourage the exchange of new information; help student-athletes and administrators understand each other’s views; support emotional expression; stimulate creative options; and design win-win settlements.<sup>54</sup>

Student-athletes obviously benefit from this process,<sup>55</sup> but they are not alone. As parties to a mediation, school administrators are in a much better position to adopt utilitarian philosophies on punishment, rather than doling out traditional (retributive) athletic disqualifications.<sup>56</sup>

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52. Cole, *supra* note 40, at 1419.

53. Arbitration has been used in many amateur sport cases where courts were forced to send disputes to the American Arbitration Association under the Amateur Sports Act of 1978, 36 U.S.C. §§ 371-96 (1994).

54. GOLDBERG ET AL., *supra* note 36.

55. Countless case studies have documented the success of mediation in high school education. See Kathy Kolan, An Analysis of the Short-Term Impact of Peer Mediation on High School Disputants in an Ethnically Diverse Suburban School System (May 16, 1999) (doctoral dissertation, George Washington University) (in-school suspensions decreased by 15%; out-of-school suspensions decreased by 29%); see also Raija Churchill, *Today’s Children, Tomorrow’s Protectors: Purpose and Process for Peer Mediation in K-12 Education*, 13 PEPP. DISP. RESOL. L.J. 363, 373 (2013) (44% drop in suspensions after one year of introducing peer mediation).

56. Under a utilitarian philosophy, punishment for wrongdoing should be designed to deter future wrongdoing, rehabilitate the offender, and provide a net benefit for the community. See generally Joel Meyer, *Reflections on Some Theories of Punishment*, 59 J. CRIM. L. & CRIMINOLOGY 595 (1969). Some studies illustrate how mediation changes not only student perspectives, but also administrator perspectives. For example, many administrators report less disputes and perceive an overall increase in a positive school environment after a mediation program begins. See HILARY CREMIN, PEER MEDIATION: CITIZENSHIP AND SOCIAL INCLUSION REVISITED (2007).

The notion of a utilitarian approach to punishment is well supported by the legal work of Thibaut and Walker, who argued “that the procedure most likely to produce justice is that procedure which facilitates the fullest possible report of inputs prior to determination of the distribution.”<sup>57</sup> Termed procedural justice, their theory postulates that perceptions of the fairness of a punishment are tied to the assignment of control over decisions and control over the processes.<sup>58</sup> As such, systems structured to allow the affected parties to have input during the process of determining a punishment, while giving control over the process to a party not affected by the outcome would be perceived as having the greatest levels of fairness. In other words, “[t]he theory . . . suggests that the justice objective will best be served by a procedure that assigns maximum process control to the disputants (i.e. the individuals affected by the decision) while assigning decision control to a third party.”<sup>59</sup>

Take, for example, a football player who is accused of egging houses or smashing mailboxes. The school district and the student-athlete will both perceive the punishment as more just if they engage in a dialog that allows all parties to state their sides and to have input in the punishment. Furthermore, if they work together, the school district, student-athlete, and the community stand to gain more when he agrees to a punishment like painting the concession stand or planting flowers near the stadium entrance instead of serving a five-game suspension.

Or consider the cheerleading captain who goes to a party where students drink and later drive home drunk. Again, affording both the school district and the student-athlete a voice in the process of determining an outcome will increase perceptions of fairness. All actors stand to gain more when the cheer captain agrees to teach fifth graders about drugs and alcohol or tutor struggling middle-schoolers than when she’s kicked off the cheer squad for the rest of the season.

Because mediation affords the parties more leeway, and perhaps more creativity, in a resolution, it is a good first attempt at coming to a productive and good-willed outcome. However, if the football player or cheerleading captain is not receptive to the possibilities presented in the mediation, or the parties are too far apart in their stances on the facts or interpretation of the governing rules, arbitration should be the next step. Arbitration allows for a more factual and legal determination of the issue from the neutral arbitrator’s perspective, with the authority to award any relief that would have been available had the parties

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57. John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541, 542 (1978).

58. *Id.* at 546.

59. *Id.* at 556.

gone to court.<sup>60</sup> By making arbitration the succeeding step in the process, the outcome will now rely more heavily on the enforcement and interpretation of the school or athletic association's bylaws and governing rules, rather than merely on compromise and good will. Both sides will be able to fairly present facts, evidence and statements in support of their claim. The arbitrator will then make a determination based on the evidence heard. Depending on the totality of the circumstances surrounding the dispute, arbitration may be the more necessary and appropriate approach.

It is important to note, however, that arbitration can be binding or non-binding. In dealing with interscholastic athletics, the majority of the student-athletes involved will be minors. As such, binding arbitration could be problematic in that, in most states, a contract with a minor is voidable by the minor<sup>61</sup> and therefore if the parties choose to proceed to court, neither the mediation or arbitration agreement would likely be enforced against the minor. Yet, due to the nature of interscholastic athletic disputes, in the interest of timeliness, expense, fairness and production of due process, ADR processes are worth the attempt for both sides.

Of course, in a few American cities, high school sports are just games played by fourteen-to-eighteen-year-olds. But elsewhere, sports matter much more.<sup>62</sup> In particular, small-town high school athletic contests are often the most visible and most popular events in the community, and the local teams are very important in the lives of the townspeople.<sup>63</sup>

The bottom line is that many communities rally around their high school athletic programs as a source of pride and collective identity.<sup>64</sup> Indeed, some sports are so popular that even athletes who've committed serious offenses (e.g., assaults, rapes, etc.) have received overwhelming community support.<sup>65</sup> At the end of the day, communities don't want school districts to suspend their star

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60. See SHARP ET AL., *supra* note 35, at 33.

61. 5 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 9:3 (4th ed. 1990).

62. Michael Oriard, *Football Town Under Friday Night Lights: High School Football and American Dreams*, ROOTING FOR THE HOME TEAM: SPORT, COMMUNITY, & IDENTITY 68 (2013).

63. In most small towns, high school sports establish ways of thinking about—and doing—things. JAY COAKLEY, SPORTS IN SOCIETY: ISSUES AND CONTROVERSIES 117 (10th ed. 2008).

64. Residents receive “psychic income” when they identify with winning sports teams. Psychic income is the emotional and psychological benefit fans perceive, even if they do not physically attend games and aren't involved in organizing them.

65. The town of Smithfield, a small farming community in Utah, was outraged when a member of the high school football team was taken naked from the shower by ten of his teammates and put on display in front of the school. Interestingly, however, the outrage was directed at the victim rather than the abusers. In fact, high school sports were so popular in the community that when the victim reported how he was abused by ten of his teammates, the townspeople started sending him death threats. MICHAEL SCARCE, MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME 50 (1997).

players or cut their championship seasons short because of controversy.<sup>66</sup> Some ADR mechanism would be the quickest, cheapest, and fairest process for all parties involved.

Another good reason to resolve interscholastic athletic disputes using ADR principles is that high schools are often concerned about their reputations, and they risk jeopardizing community support with public controversies involving student-athletes. Confidentiality is a major benefit of most ADR mechanisms. For example, if suspended black athletes allege racial discrimination against school principals and athletic directors,<sup>67</sup> then publicizing the dispute might ignite support for the suspended students while significantly harming the school.<sup>68</sup> In an ADR forum, administrators and student-athletes can resolve their conflicts privately, away from direct public scrutiny.<sup>69</sup>

Some might argue that controversial disputes like discrimination should be publicized; if anti-discrimination laws exist to eliminate the scourge of racism in our society, then private ADR processes are just another part of the problem. But several cases indicate that public disclosure prompts long, brutal lawsuits by causing the parties to harden their positions.<sup>70</sup> With that in mind, neutral third parties like a mediator or arbitrator are uniquely situated to help high schools and student-athletes present their issues in a non-intrusive manner and facilitate productive communication.<sup>71</sup>

Athletic associations might not be motivated by the inherent value of utilizing ADR for high school sport disputes, maintaining a sense of community pride, or avoiding public controversy. Nevertheless, the financial incentive to avoid an increasing number of lawsuits—especially in difficult budgetary environments—should suffice.<sup>72</sup>

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66. E.g., Tracey Smith, *Community Upset After Basketball Team Has Entire Season Suspended*, ABC 8 NEWS, Jan. 11, 2017, <http://wric.com/2017/01/11/community-upset-after-basketball-team-has-entire-season-suspended/> (school board canceled remaining basketball season when players fought in self-defense after tournament).

67. This hypothetical is based on a real case. In Billings, Montana, high school administrators issued a five-game suspension to a black basketball player after seeing “a picture of him at [a] party where alcohol was involved . . . .” Matt Hoffman, *West High Athlete’s Suspension Was Motivated by Race, Lawsuit Argues*, BILLINGS GAZETTE, Sept. 25, 2017, [http://billingsgazette.com/news/local/west-high-athlete-s-suspension-was-motivated-by-race-lawsuit/article\\_05abae44-68de-500d-83ea-0f79893f6ed1.html](http://billingsgazette.com/news/local/west-high-athlete-s-suspension-was-motivated-by-race-lawsuit/article_05abae44-68de-500d-83ea-0f79893f6ed1.html). The student-athlete was never shown the picture. *Id.* As a result, his family filed a high-profile lawsuit, alleging that the “School District . . . knew . . . non-minority [athletes] were present at the same party, but these students were not suspended from [sports].” *Id.*

68. Gil Fried & Michael Hiller, *ADR in Youth and Intercollegiate Athletics*, 1997 BYU L. REV. 631, 636 (1997).

69. *Id.*

70. *Id.*

71. *Id.*

72. See Siegrist et al., *supra* note 6.

*B. How Could the NFHS, State Athletic Associations, or Member High Schools Incorporate ADR Clauses into Bylaws or Student Codes of Conduct?*

Contracts are important mechanisms for moving disputing parties toward mediation or arbitration.<sup>73</sup> ADR, more specifically arbitration, is enforced in many professional sport contexts, such as CDM Fantasy Sports and Major League Baseball, and it is used by the United States Olympic Committee (USOC).<sup>74</sup> “An agreement to arbitrate can appear in an individual contract with an athlete, in a collective bargaining agreement between a players association and an owners group, or in a particular sport organization’s constitution and bylaws.”<sup>75</sup>

At first glance, athletic codes of conduct or association bylaws seem like the perfect vehicles for such agreements.<sup>76</sup> Schools craft rules and regulations that set forth formal requirements for continued participation and eligibility. In exchange for the privilege to participate, student-athletes (and/or their parents) review these guidelines and “agree” to them—often by signing a form and returning it to the athletic director or principal.

Codes of conduct not only set expectations for student-athletes and their parents, but also provide administrators with justifications for exercising their authority. Athletic codes and association bylaws are important documents; but they raise serious questions for member high schools who might want to use them as contractual underpinnings for mediation.<sup>77</sup>

First, it’s unlikely that codes and bylaws can bind student-athletes.<sup>78</sup> According to the Restatement of Contracts, parties lack the capacity to form enforceable agreements—with few exceptions—until they are eighteen years old.<sup>79</sup> Nearly every United States jurisdiction follows this rule.<sup>80</sup>

73. Fried & Hiller, *supra* note 68, at 642.

74. SHARP ET AL., *supra* note 35, at 34.

75. *Id.* at 34.

76. For some examples of athletic codes of conduct, see *supra* notes 12 & 13.

77. A contractual relationship establishing employment terms generally exists between schools and their coaches and administrators. Through these contracts, schools can, in theory, require coaches and administrators to pursue ADR before resorting to litigation. However, while coaches and administrators can be contractually bound to pursue ADR, student-athletes do not have the same contractual relationship. Fried & Hiller, *supra* note 68, at 642.

78. To form a valid contract, the parties must be capable of contracting in the first place. Generally, “[n]o one can be bound by contract” if they don’t have the “legal capacity to incur at least voidable contractual duties.” RESTATEMENT (SECOND) OF CONTRACTS § 12 (AM. LAW INST. 1981).

79. “Unless a statute provides otherwise, a natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person’s *eighteenth birthday*.” *Id.* § 14 (emphasis added).

80. WILLISTON & LORD, *supra* note 61, § 9:3.

Most high school students won't turn eighteen until some point during their senior year and many of them (on the younger side of the spectrum) won't ever turn eighteen during their high school athletic careers. In short, athletic codes of conduct are not effective contractual mechanisms for moving student-athletes to mediation because, as minors, student-athletes lack the capacity to form enforceable contracts with the high schools they play for. It is also unclear what effect—if any—parental consent might have on these agreements.<sup>81</sup>

Second, student-athletes have little to no influence on the codes of conduct or the association bylaws that govern them. Put another way, state associations and member high schools make the rules. Student-athletes just follow them. Perhaps the Indiana Supreme Court said it best:

[F]or a student athlete in public school, membership in [the state athletic association] is not voluntary, and actions of the [association] arguably should be held to a stricter standard of judicial review. (citation omitted). Therein lies what is for us a crucial distinction . . . : [the student] has not voluntarily subjected himself to the rules of the [association]; *he has no voice in its rules or leadership*.<sup>82</sup>

At most, a high school student spends only four years playing sports. This is a relatively short span of time compared to the many months or years often required to change institutional policies.<sup>83</sup>

But that doesn't necessarily mean that ADR clauses are doomed to fail. Generally, constitutions or bylaws entered into by an association and consenting parties are enforceable contracts between the association and its members.<sup>84</sup> And many courts have applied this rule to high school sports.<sup>85</sup> If state athletic associations and their member high schools can be bound by the rules that they write, then these documents may be effective mechanisms for advancing mediation or arbitration after all.

The National Federation of State High School Associations (NFHS) should lead the way. Frequently, the NFHS issues bulletins, makes recommendations, and guides its member institutions through policy changes. Introducing an ADR

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81. The extent to which parents are personally bound by the contracts that they make on a minor's behalf raises the same question. *Id.* § 9:1.

82. *Carlberg by Carlberg*, 694 N.E.2d at 230 (emphasis added).

83. *See id.* ("We note as well the *relatively short span of time* a student spends in high school . . . .") (emphasis added).

84. *Int'l Bhd. of Elec. Workers, Local Union No. 8 v. Gromnicki*, 745 N.E.2d 449, 453 (Ohio Ct. App. 2000).

85. *E.g., Ulliman v. Ohio High Sch. Athletic Ass'n.*, 919 N.E.2d 763, 771 (Ohio Ct. App. 2009).

program should not be an exception. To start, the organization should encourage state athletic associations to write ADR clauses into their bylaws.

If state associations lack the expertise to write these clauses, then the NFHS and its lawyers should guide them by providing model contract language. For example:

The student-athletes and athletic department personnel of this high school represent the high school to the general public. Therefore, whenever a dispute arises regarding a violation of a student-athlete's personal rights by a high school employee or representative, the student-athlete, administrators, and/or athletic director shall attempt to resolve the dispute through mediation before pursuing any other recourse.<sup>86</sup>

This language creates and defines a contractual underpinning for one type of ADR mechanism: mediation.<sup>87</sup> At the same time, it provides a new layer of due process for student-athletes.<sup>88</sup> For safe measure, member high schools could ensure that coaches, athletic directors, and administrators comply with such clauses by including a provision in their employment contracts that requires them to honor it.<sup>89</sup>

However, no matter what contractual mechanism is used, a contract with an ADR clause is only the first step in the process.<sup>90</sup> Once the parties are contractually obligated to use an ADR mechanism, state governing bodies and their member institutions must develop and communicate effective policies and procedures.<sup>91</sup>

### *C. What Would Interscholastic Athletic ADR Look Like?*

One state governing body—the Florida High School Athletic Association (FHSAA)—has made a serious effort to incorporate mediation principles into its bylaws. When Florida student-athletes are suspended by the FHSAA or one of its member high schools, they can request both eligibility (i.e.,

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86. Professor Gil Fried recommends incorporating arbitration clauses into student-athlete codes of conduct at the collegiate level. This high school sport mediation clause is modeled after Professor Fried's recommendation. See Fried & Hiller, *supra* note 68, at 648.

87. *Id.*

88. Athletic associations and member schools who provide student-athletes with a new layer of due process create an environment of fairness and consistency. That environment consequently weakens the merits of Fourteenth Amendment claims. Siegrist et al., *supra* note 6, at 21.

89. Fried & Hiller, *supra* note 68, at 649.

90. *Id.* at 648.

91. See *id.*

grade-related)<sup>92</sup> and infraction (i.e., conduct or rules-related)<sup>93</sup> appeals. In 2014, the FHSAA announced that it would “introduce a new layer of mediation to the FHSAA appeals process, providing even greater due process opportunities for student-athletes and schools that wish to challenge sanctions.”<sup>94</sup>

In an eligibility appeal, the Sectional Appeals Committee holds a hearing and decides the underlying dispute. Within five days of appearing before the Sectional Appeals Committee, the student-athlete—or her member high school—may file a request for mediation.<sup>95</sup> The request must include a “declaration of what the member school, as the representative of the student, is seeking as a successful mediation of the eligibility issue.”<sup>96</sup> At this point, the FHSAA may accept or decline the student or school’s request for mediation.<sup>97</sup>

If the Executive Director accepts the mediation request, he will schedule an eligibility mediation. The FHSAA will select a mediator from a panel of experienced mediators<sup>98</sup> designated by the organization.<sup>99</sup> Then, the mediator will meet with the FHSAA Executive Director, a representative from the member high school, and the student and/or the student’s parents.<sup>100</sup> The mediation sessions are conducted in-person or via phone and last no longer than twenty minutes; but, “if the mediator determines that the mediation is

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92. When a student is deemed ineligible by a member school and/or is deemed ineligible by the FHSAA, the member school principal may appeal the ruling of the FHSAA if he/she or the student takes issue with it, and must do so at the student’s request. FHSAA, 2017-18 BYLAWS OF THE FLORIDA HIGH SCHOOL ATHLETIC ASSOCIATION, INC. art. 10, 10.4.1, at 34 (Oct. 23, 2017).

93. FHSAA bylaw 10.4.2 governs rules violations appeals:

Any student athlete, coach or member school who is found to be in violation of the rules of this Association may appeal the finding of the [FHSAA] if he/she takes issue with it, or may appeal the penalty imposed if he/she believes it to be too severe, and must be done at the student’s request.

FHSAA, *supra* note 92, art. 10.4.2.

94. FHSAA Adopts PED, Enrollment, Mediation Changes to Protect Student-Athletes and Fair Play, *supra* note 19.

95. Under FHSAA bylaw 10.6.5.1, the student-athlete or member high school may request mediation in writing to the [FHSAA] on the form(s) provided by the Association. The request “must be signed by the member school principal or his/her designee and must be received in the office of this Association within five (5) business days following the date of the Appeals Committee hearing.” FHSAA, *supra* note 92, art. 10.6.5.1, at 37.

96. *Id.* at 37–38.

97. *Id.* at 38.

98. The Supreme Court of Florida, through the Florida Dispute Resolution Center, offers certification for mediators. As of August 2017, there were 5,674 individuals certified as mediators. *About ADR & Mediation*, FLA. CTS., <http://www.flcourts.org/resources-and-services/alternative-dispute-resolution/about-adr-mediation.shtml> (last visited July 30, 2018).

99. FHSAA, *supra* note 92, art. 10.6.5.2, at 38.

100. FHSAA bylaw 10.6.5.3 describes who the parties to the mediation shall be. FHSAA, *supra* note 92, art. 10.6.5.3, at 38.

proceeding toward a positive resolution, the mediation session may be extended.”<sup>101</sup> Mediations are paid for “equally by both parties.”<sup>102</sup>

If the parties reach an agreement at the mediation session, then the member high school and the student-athlete waive their rights to pursue the matter further.<sup>103</sup> If, however, the parties don’t reach an agreement, then the member high school or student-athlete may proceed with an appeal, which is ultimately heard and decided by the FHSAA Board of Directors.<sup>104</sup>

While the FHSAA program is a good start, and state associations and their member institutions should be eager to adopt an approach like Florida’s, there are plenty of opportunities to improve interscholastic athletic mediation. More specifically, associations should seek to improve upon both substantive<sup>105</sup> and procedural<sup>106</sup> flaws in the system.

The first issue with the FHSAA’s mediation program is substantive. Student-athletes, the athletic association, and its member institutions may only mediate eligibility (or grade-related) infractions. Again, this is a good start. But eligibility infractions are only one type of controversy that the association deals with on a regular basis.<sup>107</sup> If the FHSAA and other state associations are serious about resolving disputes with efficiency and fairness, then the ADR process should apply to *all* disputes—not just eligibility questions. The solution is to require parties to resolve *both* eligibility and conduct (or rules-related) infractions through an ADR mechanism.

The second issue with the FHSAA’s mediation program is procedural. Student-athletes, the athletic association, and its member institutions can only request mediation *after* the Sectional Appeals Committee hears the underlying dispute.<sup>108</sup> This is a waste of time and resources. In almost every context, mediation is used as a condition precedent to other binding dispute resolution

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101. FHSAA bylaw 10.6.5.5 sets the length and location of the mediation session. FHSAA, *supra* note 92, art. 10.6.5.5, at 38. It is not clear how much a mediator could accomplish in twenty minutes; however, the bylaw notes that—if necessary—the session may be extended when the parties are making progress.

102. Under FHSAA bylaw 10.6.5.7, the parties must split the cost of mediation. FHSAA, *supra* note 92, art. 10.6.5.7, at 38.

103. It is unclear what preclusive effect—if any—this clause would have on litigating the athletic dispute in court. For example, can student-athletes in Florida still attempt Fourteenth Amendment challenges when they are suspended on eligibility grounds?

104. FHSAA, *supra* note 92, art. 10.6.5.6, at 38. “A notice of appeal must be in writing and received within five (5) business days following the mediation session.” *Id.*

105. In other words, the *types* of disputes that will be mediated.

106. Procedural flaws are problems with the structure of the mediation program. For example, questions about *when* disputes will be mediated.

107. FHSAA, *supra* note 92, art. 10.4, at 34.

108. *Id.* art. 10.6, at 37.

mechanisms,<sup>109</sup> such as arbitration, litigation, or, in this case, a hearing before a committee. One major benefit of mediation is its cost-effectiveness. Therefore, the solution is to require parties to pursue ADR *before* they appeal or litigate the dispute in court.

Additionally, to save more time and money, an extra level of dispute resolution should be added to the process. More specifically, if an agreement is not met after the attempted mediation, rather than appealing to the Board, the issue would go to non-binding arbitration. A med-arb approach arguably provides schools and athletic associations with more enforcement power for their rules and regulations. That being said, the rules and regulations must be well written and as uniform as possible across conferences, sections, programs and sports. As many of the current bylaws are, at best, ambiguous this would require associations to review their current codes.

Another concern involves selection of the neutral third party. While the FHSAA bylaws say that the association will select from a “panel of experienced mediators,”<sup>110</sup> it’s not clear who the mediators are or what credentials they have that make them “experienced.” In Florida, this may not be particularly troubling because the state has cultivated a dispute resolution culture where certified mediators are readily available.<sup>111</sup>

However, many states are not this fortunate. Therefore, rather than selecting from a panel of mediators, athletic associations and their member high schools could consider hiring full-time mediators. Individual institutions—or private schools who are not sanctioned by the state governing body—might also consider pooling their resources and hiring full-time mediators who travel throughout the county to resolve interscholastic athletic disputes.

If state associations and their member high schools can’t afford full-time mediators, then they could consider part-time or volunteer options, including local attorneys in need of required pro bono hours. Schools could form relationships with community mediators. Schools could also consider athletic officials, like umpires or referees. After all, they are specifically trained to resolve on-the-field disputes in the most neutral way possible. This makes them ideal candidates for mediating interscholastic athletic disputes.

Finally, schools could provide mediation training for guidance counselors or resource officers. These individuals don’t usually have disciplinary discretion. And they’re generally considered neutral confidants by students,

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109. Kristen M. Blankley, *Agreeing to Collaborate in Advance?*, 32 OHIO ST. J. ON DISP. RESOL. 559, 561 (2017).

110. FHSAA, *supra* note 92, art. 10.6.5.2, at 38.

111. *About ADR & Mediation*, *supra* note 98.

parents, and school administrators.<sup>112</sup> Either way, there is plenty of room for creativity in selecting a cost-effective and neutral mediator.

#### IV. CONCLUSION

It's been almost 100 years since the NFHS started leading interscholastic athletics and other extracurricular activities.<sup>113</sup> Besides the skyrocketing number of student-athletes participating in high school sports, not much has changed over 100 years. State athletic associations and their member institutions still lack uniform standards for how students should act off-the-field. Ambiguous or non-existent codes of conduct still give school administrators almost unlimited amounts of disciplinary discretion. And, still, no one—with the exception of one state governing body—seems interested in applying ADR principles to interscholastic athletic disputes.

But one thing has changed over 100 years. Due process tides are rising, and high school sports are now significantly tangled up with education. This intertwining effect creates a much stronger argument<sup>114</sup> that high school sports are, in fact, part of the total educational process outlined in *Goss v. Lopez*.<sup>115</sup> At some point in the near future, student-athletes may have a protectable property interest in their athletic participation. The risk of losing money and community support as the result of controversial lawsuits should be enough for schools to take notice.

Schools need a process that resolves athletic disputes with speed, efficiency, and fairness. Before suspending or expelling student-athletes who have violated rules or bylaws, schools should sit down with them at the table. Mediation fosters a collaborative environment where administrators and student-athletes can creatively resolve their disputes. ADR mechanisms foster a quicker, cleaner and cheaper option than fighting a lawsuit in court. The ADR process is private and operates under principles of procedural justice to maximize the perceptions of fairness by all parties. It keeps controversies away from public scrutiny, and it prevents parties from hardening their positions. But most importantly, ADR could help school districts avoid dangerous lawsuits by forming a much-needed layer of due process for student-athletes.

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112. A high percentage of high school students are aware of their school counselors and are, overall, satisfied with their interactions. See generally Dorinda J. Gallant & Jing Zhao, *High School Students' Perceptions of School Counseling Services: Awareness, Use, and Satisfaction*, 2 COUNSELING OUTCOME RES. & EVALUATION 87 (2011).

113. National Federation of State High School Associations, *About Us*, NFHS, <https://www.nfhs.org/who-we-are/aboutus> (last visited July 30, 2018).

114. Siegrist et al., *supra* note 6.

115. 419 U.S. 565 (1975).

ADR programs will not filter into high school sports overnight. They will require months or years of careful planning. They will require community buy-in, effective contract language, and visible leadership from the NFHS. They will also require help from ADR practitioners and scholars alike. At the end of the day, state athletic associations and their member institutions will need a lifeboat if they want to float above rising due process tides. Mediation, arbitration, or some combination of both, is their safe harbor.