The WIAA as a State Actor: A Decade Later, *Brentwood Academy's* Potential Effect on Wisconsin Interscholastic Sports

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THE WIAA AS A STATE ACTOR: A DECADE LATER, BRENWOOD ACADEMY’S POTENTIAL EFFECT ON WISCONSIN INTERSCHOLASTIC SPORTS

I. INTRODUCTION

For almost every rule, there is an exception. And, for every exception made, there are countless others that are denied. The Wisconsin Interscholastic Athletic Association’s (WIAA) bylaws exemplify this axiom. If an athlete believes he should be exempt from a rule, he is able to apply for a waiver. Through the tedious waiver process, it is inherent that not all athletes will feel that they had their “day in court” or the chance to have their case fairly heard. Some athletes will believe that they were slighted or wronged by the WIAA’s denial of their waiver. This Comment will pose a hypothetical situation where standout high school football player Mike Stasiewski feels so wronged that he brings a claim against the WIAA for violating his Fourteenth Amendment right to due process. In all likelihood, the WIAA would assert that it is not a state actor and, as such, that it has not infringed on Stasiewski’s constitutional rights.

In Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n, the Supreme Court held that an interscholastic athletic association comprised of both public and private schools could fall under the state action doctrine. In the years preceding that decision, courts nationwide found high school athletic associations to be state actors and, thus, within the purview of the U.S. Constitution. One court that has not decided whether its state’s interscholastic athletic association is a state actor is the Wisconsin Supreme Court.

The WIAA is the sole governing authority over high school athletics in Wisconsin. It is a voluntary, nonprofit organization that regulates both public and nonpublic high schools and middle schools. Despite the guidance set out for state action in *Brentwood Academy*, in the ten years since, the issue has never reached the Supreme Court of Wisconsin nor has it been specifically ruled on in Wisconsin’s lower courts. Therefore, it is unknown if the WIAA is a state actor. This Comment will demonstrate that, because of its pervasive entwinement with the State, the WIAA should be considered a state actor.

Part II of this Comment will pose a hypothetical situation where Mike Stasiewski, a high school football player from a fictitious high school in Wisconsin, brings a due process claim against the WIAA after being suspended. To provide the background for an analysis of Stasiewski’s claim, Part III will provide an overview of the state action doctrine and the relevant tests employed by the U.S. Supreme Court to find state action. This part will culminate with an explanation of the U.S. Supreme Court’s landmark *Brentwood Academy* decision. Part IV will then provide an in-depth look at the WIAA’s makeup and functions, look at the scattered relevant Wisconsin case law, and finally will analyze whether Stasiewski has a viable constitutional claim by virtue of the WIAA potentially qualifying as a state actor.

II. MIKE STASIEWSKI’S CLAIM

Mike Stasiewski was a standout quarterback ready to begin his senior year at Lambeau West High School. Stasiewski’s parents divorced over the summer, and, despite his adamant objections, Stasiewski was forced to live with his mother and continue attending Lambeau West, the closest public school to her home. After leading the team to a WIAA Division I state title his junior year, Stasiewski was named the preseason First-Team All-State quarterback for his senior season.

During the first week of practice, Stasiewski was notably detached. As a result of his living situation, he had problems concentrating and would lose his composure at practice. After a tumultuous week, Stasiewski could not handle the stress of living with his mother, so he packed up and moved in with his father on the other side of town. Because his father lived in a different district, Stasiewski had to transfer to Lambeau East before the school year began, and, upon arrival at Lambeau East, he sought to play football. When he met with
the athletic director at Lambeau East, he was informed that he was ineligible per WIAA transfer rules.

A. WIAA Bylaws

Unfortunately for Stasiewski, the WIAA Rules of Eligibility provide a significant obstacle in obtaining eligibility to play football at Lambeau East. With regard to a student residence and transfer, the Rules of Eligibility state, in pertinent part:

A. A full time student, whether an adult or not, is eligible for varsity interscholastic competition only at the school within whose attendance boundaries his/her parents reside, within a given school district, with these additional provisions . . .

3) In the event of a divorce or legal separation, whether pending or final, a student’s residence at the beginning of the school year shall determine eligibility except in situations involving transfer after the fourth consecutive semester following entry into Grade 9. For the purpose of this rule, attendance at one day of school and/or attendance at one athletic practice shall determine ‘beginning of school year.’ Under this rule, a student who transfers after the beginning of the school year shall be ineligible at the new school unless approval is granted by the Board of Control in accordance with the transfer and/or waiver provisions . . .5

Any student who transfers after his fourth consecutive semester is ineligible to practice or compete for one calendar year unless the transfer was “made necessary by a total change in residence by parent(s).”6 Furthermore, in cases of divorced parents, a student who has established eligibility with one parent is ineligible to play sports if the student moves to live with the other parent and attends a different school.7 Because Stasiewski practiced for a full week at Lambeau West, he established eligibility there. As such, he is ineligible to play at Lambeau East. The only way for Stasiewski to challenge his ineligibility is to apply for a waiver.

6. Id. § 3(A)(1).
B. Mike Stasiewski’s Challenge

The WIAA bylaws provide a small exception for a waiver of the transfer requirement if the school requests it in advance, on behalf of a student, and with a presentation of clear documentation showing extenuating circumstances.8 Stasiewski pled his case to the Lambeau School Board and the WIAA’s executive staff, but was summarily denied at each level without much consideration. Because it was his senior year and losing a year of eligibility could potentially cost him a college scholarship, Stasiewski immediately filed for a preliminary injunction against enforcing the transfer rule as well as a federal civil rights claim under 42 U.S.C. § 1983. His claim under § 1983 was that the WIAA did not give him an adequate opportunity to defend his waiver request, resulting in a violation of his constitutionally guaranteed right to procedural due process under the Fourteenth Amendment. Furthermore, because § 1983 is a fee-shifting statute, which forces the losing party to pay the attorney’s fees of the prevailing party, if Stasiewski’s claim carries the day, the WIAA will be responsible for paying the reasonable attorney’s fees that he incurred as a result of the suit.9

The trial court held in favor of the WIAA on the grounds that the WIAA is not a state actor and, thus, cannot infringe on Stasiewski’s due process rights. The court of appeals affirmed, and the issue of whether the WIAA is a state actor is now before the Wisconsin Supreme Court. If Stasiewski’s appeal and subsequent claim are successful, the WIAA will be enjoined from enforcing the transfer rule and will have to grant his waiver to play football at Lambeau East his senior year.

III. THE STATE ACTION DOCTRINE: FROM THE CIVIL RIGHTS CASES TO BRENTWOOD ACADEMY

Before Stasiewski’s case can be heard on the merits, a threshold analysis is required. A Fourteenth Amendment due process claim requires that Stasiewski establish that the adverse party is a state actor.10 Because the most important issue before the Wisconsin Supreme Court is whether the WIAA is

8. WIS. INTERSCHOLASTIC ATHLETIC ASS’N RULES OF ELIGIBILITY, art. II, § 5(A)(2) (2011). “Such documentation must include communications from (a) parents, (b) person(s) with whom student is living within requesting school’s attendance boundaries and (c) school officials within whose attendance boundaries parents reside.” Id.
10. See Diane Heckman, Fourteenth Amendment Procedural Due Process Governing Interscholastic Athletics, 5 VA. SPORTS & ENT. L.J. 1, 3 (2005). The other three elements a claimant must establish in a due process claim are: (1) the plaintiff is a person; (2) he has a life, liberty, or property interest involved; and (3) the adverse party denied him procedural due process. Id.
a state actor, this Comment will be restricted to that analysis.

Any direct or indirect action by a government entity, public school, state university, state college, or any of its officials is always considered state action for the purposes of the U.S. Constitution because those entities act on behalf of the government. However, issues can arise when the purported state actor is not a part of one of these public entities because there is not a bright-line, all-encompassing test for finding state action. The requirement that the adverse party be engaged in state action recognizes that the majority of the rights secured by the Constitution are protected from government infringement. The doctrine preserves individual citizens’ autonomy by providing that private citizens can act freely without being subject to the constraints of the Constitution.

Throughout the U.S. Supreme Court’s history, the state action doctrine has undergone relatively dramatic changes. One of the first instances where the Court was presented with the issue of state action was in The Civil Rights Cases, a consolidation of five cases in which the Court determined that discrimination by private individuals against African-Americans was constitutional under the Fourteenth Amendment. Writing for the majority, Justice Bradley opined, “[i]ndividual invasion of individual rights is not the subject-matter of the amendment.” Although this decision is recognized as the first broad test for finding state action, the following sections will discuss two of the main state action tests discussed in the Brentwood Academy case: the public function test and the sufficient nexus analysis. These tests are integral to the progeny of state action cases in the sports context because they served as the backbone for the Supreme Court’s entwinement test articulated in Brentwood Academy.

A. The Public Function Test

The Court famously revisited the doctrine of state action in Marsh v.
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Alabama.\(^{18}\) In Marsh, the Court was asked to decide whether a state could convict a Jehovah’s Witness for criminal trespass for distributing religious literature within the confines of a company-owned town.\(^{19}\) The town had the same characteristics of any American town, except it was owned by the Gulf Shipbuilding Corporation.\(^{20}\) The plaintiff asserted that her conviction was in violation of her First and Fourteenth Amendment rights and claimed that the privately held town was a state actor.\(^{21}\) The Court agreed and, in doing so, set out the parameters for the public function test for finding state action.\(^{22}\) The Court held that mere ownership does not constitute absolute and uninhibited dominion.\(^{23}\) Rather, the more an owner opens up his property for use by the general public, the more his rights become limited by the constitutional rights of those who use the property.\(^{24}\) Because the town was built and operated to benefit the public, its operation was deemed a public function.\(^{25}\) Thus, despite its private ownership, the town itself was a state actor and had to operate under the constraints of the Constitution.\(^{26}\)

B. The Sufficient Nexus Analysis

The next step in the evolution of the state action doctrine was the “nexus analysis,” which finds state action when the government has required or significantly encouraged the specific act that infringes on an individual’s constitutional rights.\(^{27}\) The U.S. Supreme Court employed this analysis in Burton v. Wilmington Parking Authority.\(^{28}\) In Burton, an African-American man was refused service at a coffee shop based solely on his race.\(^{29}\) The question of state action arose because the coffee shop was located in a parking

\(^{19}\) Id. at 502.  
\(^{20}\) Id.  
\(^{21}\) Id. at 504.  
\(^{23}\) Marsh, 326 U.S. at 506.  
\(^{24}\) Id.  
\(^{25}\) Id. at 508–09.  
\(^{26}\) Id.  
\(^{28}\) Burton, 365 U.S. at 723–24; Madry, supra note 22, at 378.  
\(^{29}\) Burton, 365 U.S. at 716.
structure that was owned and operated by a Delaware state agency. The land was publicly owned, the facility obtained funding from the city, and the facility was operated by the State. The Court held that the coffee shop, by virtue of its "involvement" with the State, was considered a state actor and had thus violated Burton’s Fourteenth Amendment protections. It opined that, "private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it." When a state becomes sufficiently involved in a private project, the private entity has putatively become a state actor and can be held liable under constitutional standards through the nexus analysis.

C. State Action and Amateur Athletics Collide Before the Supreme Court

The 1970s–1980s were times of great change for the U.S. Supreme Court in both its composition and its approach to the state action doctrine. Between 1969 and 1972, three new Justices—Warren, Powell, and Rehnquist—were appointed. During this period, Justice Rehnquist wrote five decisions applying the doctrine, notably strengthening the threshold for finding state action and making it more difficult for a plaintiff to show state action. This series of decisions arguably molded the state action test into its present form. However, until 1973, the issue of state action in amateur athletics had never reached the Court under any of the previously articulated state action tests.

In 1973, Jerry “The Shark” Tarkanian took over as head coach of the basketball team at the University of Nevada-Las Vegas (UNLV), a team that had previously been perennially mediocre at best. Within four years, Tarkanian had transformed UNLV into a powerhouse, going 29–3 and finishing third in the National Collegiate Athletic Association (NCAA) tournament in 1977. Nevertheless, the sudden turnaround precipitated a

30. Id.
31. Id. at 716–19.
32. Id. at 724.
33. Id. at 722.
34. Madry, supra note 22, at 378.
35. Koller, supra note 14, at 186.
36. Madry, supra note 22, at 382.
37. Id.
38. Id.
40. Throwing in the Towel: Fresno State’s Tarkanian Retires after 38 Years in Coaching, SI.COM
NCAA investigation of the basketball program, where the NCAA found thirty-eight violations of NCAA rules by UNLV, including ten committed by Tarkanian himself. The NCAA put UNLV on probation for two years and ordered UNLV to sever all ties with Tarkanian during the probationary period. Tarkanian brought suit against UNLV and the NCAA, alleging that he had been deprived of his due process rights under the Fourteenth Amendment and that the NCAA had engaged in state action when it recommended his suspension.

Although in National Collegiate Athletic Association v. Tarkanian the U.S. Supreme Court found that UNLV, as a state university, was unquestionably a state actor, it refused to hold that the NCAA also qualified as a state actor. Because the NCAA used no governmental powers in its investigation, as well as the fact that it gave UNLV options other than suspension, the Court found that the NCAA could not be a state actor. The Tarkanian Court noted that its finding applied to the NCAA but gave little guidance as to the application at the interscholastic level beyond an abstract footnote simply stating, “[t]he situation would, of course, be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign.” The issue of high school athletic associations as state actors did not reach the nation’s highest court until 2001 in Brentwood Academy. It was in Brentwood Academy that the U.S. Supreme Court first articulated the entwinement test for finding state action; the factors discussed therein would be applicable for a Wisconsin court examining the WIAA.

D. The Entwinement of the Tennessee Secondary School Athletic Association

Brentwood Academy is a private Christian school in Tennessee and a perennial powerhouse in high school football. It has been nationally ranked by USA Today and has won numerous Tennessee Secondary School Athletic
Association (TSSAA) state championships. The TSSAA is a voluntary high school athletic association. At the time of the lawsuit, the TSSAA was comprised of 290 public schools and 55 private schools. Public schools made up eighty-four percent of the TSSAA’s voting population. Its power resided in the Board of Control, which consisted of nine elected members representing different regions of Tennessee. All of the board members were principals or superintendents of member schools serving in ex officio roles. At all times relevant to the suit, the board members were exclusively from public schools, although private school administrators were technically eligible for election to the board as well. The TSSAA’s staff members were not paid by the State, but they were still eligible for the State’s public retirement system for school employees. The majority of the board meetings were held during official school hours. TSSAA received no state funding—revenues were derived primarily from ticket sales and, in small part, from dues paid by member schools. As for the actual competitions, the schools scheduled all athletic events, with the exception of the state tournaments. When the TSSAA used public facilities for events, it entered into contracts with the State and paid for their use.

In 1997, several rival football coaches alleged that Brentwood Academy violated the TSSAA rules for a number of reasons. The TSSAA promptly investigated the allegations and found three specific violations. The two violations that were analyzed by the Sixth Circuit pertained to the recruiting rule.

The use of undue influence on a student (with or without an athletic record), his or her parents or guardians of a student by any person connected, or not connected, with the school to
secure or retain a student for athletic purposes shall be a violation of the recruiting rule.\textsuperscript{62}

The first violation occurred when Brentwood’s football coach gave free football game tickets to a middle school coach and two of his players.\textsuperscript{63} The second violation involved a letter sent to all incoming ninth-graders committed to Brentwood, which invited them to join the team for spring practice.\textsuperscript{64}

As a result of the TSSAA’s finding that Brentwood violated the recruiting rule, Brentwood was ineligible to qualify for TSSAA tournaments in football and basketball for one year and was also given two years probation.\textsuperscript{65} Brentwood appealed, but after the process ran its course, the penalties were increased.\textsuperscript{66} Brentwood was banned from tournaments for 2 years, placed on probation for 4 years, and fined $3000.\textsuperscript{67} Brentwood sued the TSSAA, praying for an injunction against enforcement of the recruiting rule, and filed a federal claim under 42 U.S.C. § 1983. The § 1983 claim alleged that Brentwood had been deprived of its First and Fourteenth Amendment rights.\textsuperscript{68} The district court granted Brentwood’s summary judgment motion on its First Amendment claim and enjoined the TSSAA’s enforcement of the recruiting rule.\textsuperscript{69} The Sixth Circuit reversed the district court’s grant of summary judgment, vacated the injunction, and remanded for proceedings consistent with its opinion.\textsuperscript{70} The court analyzed the TSSAA’s involvement with the State and applied the public function test as well as a variation of the nexus analysis.\textsuperscript{71} In regard to both, the court held that Brentwood failed to establish that the TSSAA’s actions were fairly attributed to the State.\textsuperscript{72}

The Supreme Court granted certiorari and reversed the Sixth Circuit, holding that the TSSAA was a state actor by way of the newly articulated “entwinement test.”\textsuperscript{73} Justice Souter, writing for the majority, began by noting that “no one fact can function as a necessary condition across the board

\textsuperscript{62} Id. at 761.
\textsuperscript{63} Id. at 760.
\textsuperscript{64} Id. at 760–61.
\textsuperscript{65} Id. at 761.
\textsuperscript{66} Id. There is no articulated reason in either of the Brentwood Academy decisions for why the penalties were increased.
\textsuperscript{67} Id.
\textsuperscript{68} Id.
\textsuperscript{69} Id.
\textsuperscript{70} Id. at 766.
\textsuperscript{71} Id. at 763–64.
\textsuperscript{72} Id. at 766.
\textsuperscript{73} Brentwood, 531 U.S. at 304.
for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.”

The Court found that the TSSAA’s private nature was greatly outweighed by the pervasive entwinement of its member public schools and officials. The public school ex officio staff could only be reasonably viewed as actors representing their institutions within the scope of their public school duties. The TSSAA provided the mechanism for producing rules for its members, and regulating eighty-four percent of which were Tennessee’s public school athletic teams. The Court found entwinement from the bottom up between the public school officials and the TSSAA.

The Court opined further that the State had provided entwinement from the top down by assigning ex officio members to control the TSSAA’s legislative arm and by providing all officials with eligibility for the State’s retirement system. The Court reasoned that the entwined relationship was further evidenced by the TSSAA’s enforcement of the same preamendment regulations that were reviewed and approved by the State Board. The TSSAA argued that under the public function test, it could not be viewed as a state actor. However, the Court disagreed, stating, “[w]hen, therefore, the relevant facts show pervasive entwinement to the point of largely overlapping identity, the implication of state action is not affected by pointing out that the facts might not loom large under a different test.”

The Brentwood Academy holding was a landmark decision because it was the first time the Supreme Court found that a high school athletic association was a state actor. However, the Supreme Court did not hold that all athletic associations are state actors. It merely held that the TSSAA is a state actor. Thus, the importance of Brentwood Academy is not its holding, but rather the test it employed to get to that holding. In deciding whether the WIAA is a state actor for the purposes of Mike Stasiewski’s claim, a careful analysis of

74. Id. at 295–96.
75. Id. at 298.
76. Id. at 299.
77. Id. at 299–300.
78. Id. at 300.
79. Id.
80. Id. at 301.
81. Id. at 302–03.
82. Id. at 303.
83. Id. at 302.
84. Id.
the entwinement test, as set out in *Brentwood Academy*, will likely be
determinative for the Wisconsin Supreme Court.

IV. IS MIKE STASIEWSKI’S CLAIM AGAINST THE WIAA VIABLE?

The WIAA is the first organized high school athletic association in the
country, with its roots dating back to 1895.85 The WIAA is a self-proclaimed
voluntary, nonprofit organization made up of public and private high schools
and middle schools throughout Wisconsin.86 In 2000, the WIAA became the
state’s sole governing body over high school athletics when the Wisconsin
Independent School Athletic Association, the governing authority over private
high schools, disbanded and its private member schools joined the WIAA.87

A. How the WIAA Works

The WIAA is presently comprised of 506 schools, about 70 of which are
private.88 Member schools govern the WIAA, and its rules and policies are
developed by its membership through vote or by membership-elected
committees.89 Several advisory committees exist and are comprised of
coaches, athletic directors, and school administrators.90 All WIAA
committees meet during school days and during school hours.91 Three of
those committees, the Board of Control, the Advisory Council, and the Sports
Advisory Committee are made up of elected high school administrators, and
each has only one requisite representative from a non-public school.92 The
other committees—the Sportsmanship Committee, the Ad hoc Committees,
the Officials Advisory, the Coaches Advisory, and the Medical Advisory—are

86. *About the WIAA*, supra note 3.
87. *A Decade of Voluntary Membership for All Schools*, WIS. INTERSCHOLASTIC ATHLETIC
89. WIS. INTERSCHOLASTIC ATHLETIC ASS’N CONST. art. IX.
90. WIS. INTERSCHOLASTIC ATHLETIC ASS’N HANDBOOK 2011–12 - INTRODUCTION TO THE
WIAA 3, 5 [hereinafter INTRODUCTION TO THE WIAA].
php?id=158 (last visited Jan. 21, 2011); *Advisory Council*, WIS. INTERSCHOLASTIC ATHLETIC ASS’N,
http://wiaawi.org/index.php?id=159 (last visited Sept. 5, 2011); *Sports Advisory Committee*, WIS.
(last visited Sept. 5, 2011); *Sportsmanship Committee*, WIS. INTERSCHOLASTIC ATHLETIC ASS’N,
92. INTRODUCTION TO THE WIAA, supra note 90, at 5, 7.
all appointed positions. 93 All of these positions are unpaid. 94 The WIAA retains liaisons to the Board of Control outside of these committees, 95 which are necessary because the WIAA’s relationship with these organizations is so close that it is important for them to be present to feed information back and forth during meetings. 96 These liaisons are representatives from the Wisconsin Department of Public Instruction, the Wisconsin Association of School Boards, and the Wisconsin Athletic Directors Association. 97

The WIAA receives no state funding; therefore, the majority of its funding comes from gate admissions at playoff games, officials’ fees, and dues from its member schools. 98 Scheduling regular season competitions is the responsibility of local school districts or individual conferences; however, once the playoffs roll around, the WIAA does all the scheduling and facilitates the games. 99

Each school is provided with the WIAA handbook and is expected to fully understand the rules it sets out. 100 Compliance with the rules is the responsibility of each individual school. 101 The WIAA’s executive staff is informed when a rule is broken or when there is a question of whether a rule applies in a given situation. 102

Rules are amended by a vote of the entire membership, but the Board of Control makes the final decisions in determining the outcome of rule changes. 103 A simple majority is required to amend a rule. 104 All of these characteristics would need to be analyzed to determine if the WIAA is a state actor for the purposes of Stasiewski’s claim. Although the issue has never been addressed by the Wisconsin Supreme Court, a few lower courts have touched on state action and the WIAA in the past forty years.

93. Telephone Interview with Todd Clark, Director of Commc’n and Advanced Media, Wis. Interscholastic Athletic Ass’n (Aug. 24, 2010) (recording on file with author).
94. Id.
95. INTRODUCTION TO THE WIAA, supra note 90, at 3, 5.
96. Interview with Todd Clark, supra note 93.
97. INTRODUCTION TO THE WIAA, supra note 90, at 3.
98. Interview with Todd Clark, supra note 93.
99. Id.
100. About the WIAA, supra note 3.
101. Id.
102. Interview with Todd Clark, supra note 93.
104. WIS. INTERSCHOLASTIC ATHLETIC ASS’N CONST. art. IX, § 2(B).
B. Case Law on State Action with Regard to the WIAA

Twenty years prior to Brentwood Academy, two Wisconsin district court decisions addressed whether the WIAA could be considered a state actor against constitutional claims. In Kelly v. Wisconsin Interscholastic Athletic Association, the U.S. District Court for the Eastern District of Wisconsin found that, because the plaintiffs failed to plead anything about state action in their complaint, the WIAA could not be a state actor.\textsuperscript{105} Four years later, in Leffel v. Wisconsin Interscholastic Athletic Association, the Eastern District Court was called upon to determine whether co-educational athletics violated equal protection under a § 1983 claim when a group of female students brought a class action suit against the WIAA alleging that a WIAA rule was in violation of Title IX.\textsuperscript{106} The court found the WIAA was a state actor because the WIAA exerted direct influence upon the school’s athletic programs.\textsuperscript{107} However, these cases would likely be of little precedential value today because they were decided more than thirty years ago, long before the Supreme Court’s decision in Brentwood Academy. In the years since Kelly and Leffel, the WIAA has undergone significant changes in its makeup, most notably becoming the sole governing body for interscholastic sports in Wisconsin.\textsuperscript{108} Any state action case involving an interscholastic athletic association would need to be analyzed in light of the Brentwood Academy case, which was decided almost thirty years after Kelly and Leffel.

The first post-Brentwood Academy decision in Wisconsin was Bukowski v. Wisconsin Interscholastic Athletic Association, an unpublished court of appeals decision.\textsuperscript{109} Bukowski is the only instance where a Wisconsin state court was called on to determine whether the WIAA qualifies as a state actor.\textsuperscript{110} Bukowski, a male student at a public high school, sought an injunction to enjoin the WIAA from enforcing a rule that disallowed him from competing on the girls’ gymnastics team.\textsuperscript{111} Bukowski alleged that the rule violated the Equal Protection Clause of the Fourteenth Amendment, as well as Title IX.\textsuperscript{112} The court gave short shrift to Bukowski’s argument that the WIAA qualifies as a state actor because “Bukowski failed to produce any

\textsuperscript{105} Kelly v. Wis. Interscholastic Athletic Ass’n, 367 F. Supp. 1388, 1390 (E.D. Wis. 1974).
\textsuperscript{106} Leffel v. Wis. Interscholastic Athletic Ass’n, 444 F. Supp. 1117, 1119–21 (E.D. Wis. 1978).
\textsuperscript{107} Id. at 1119; see Leffel v. Wis. Interscholastic Athletic Ass’n, 398 F. Supp. 749, 750 (E.D. Wis. 1975).
\textsuperscript{108} A Decade of Voluntary Membership for All Schools, supra note 87.
\textsuperscript{109} Bukowski v. Wis. Interscholastic Athletic Ass’n, 2007 WI App 1, ¶ 9.
\textsuperscript{110} Id.
\textsuperscript{111} Id. ¶ 1.
\textsuperscript{112} Id.
evidence, by affidavit or otherwise, demonstrating that the WIAA is a state actor.\textsuperscript{113} The only evidence Bukowski brought forward to establish state action was an affidavit by the district superintendent stating that the high school receives federal funding.\textsuperscript{114} However, the mere receipt of federal funds does not qualify the entity as a state actor.\textsuperscript{115} Because Bukowski was unable to proffer any legitimate evidence, the court found for the WIAA.\textsuperscript{116}

In a 2008-unpublished decision, the Milwaukee County Circuit Court held the exact opposite, finding that the WIAA is a state actor in \textit{Wakefield v. Wisconsin Interscholastic Athletic Association}.\textsuperscript{117} In \textit{Wakefield}, a student challenged the WIAA’s transfer rule that disallowed transfer students from competing in athletics for one calendar year.\textsuperscript{118} As a preliminary matter, to determine whether the court could review the WIAA’s decisions, the court examined whether the WIAA was a state actor and thus subject to judicial review.\textsuperscript{119} Citing \textit{Brentwood Academy} as authority, the court found that the WIAA is a state actor.\textsuperscript{120} The court noted that its entwinement mirrors some of the factors of \textit{Brentwood Academy}.\textsuperscript{121} For instance, every public senior high school is a member, and there is no competing regulatory athletic association in Wisconsin.\textsuperscript{122} Both the WIAA and the TSSAA receive funding through dues from members, which largely consist of public schools that are funded from state tax dollars.\textsuperscript{123} Furthermore, the court found that the member schools have clearly delegated the power to regulate interscholastic athletics to the WIAA because the students have no status with the WIAA, whereas the schools do.\textsuperscript{124} Finally, the court found it determinative that the WIAA works closely with the Wisconsin Department of Public Instruction by having a liaison present at meetings.\textsuperscript{125}

Lastly, in June 2010, the United States District Court for the Western District of Wisconsin, in \textit{Wisconsin Interscholastic Athletic Association v.}
Gannett Co., decided a case challenging the WIAA’s media policy.\textsuperscript{126} Gannett claimed that the WIAA violated its First Amendment and equal protection rights by giving a company the exclusive license to stream certain tournament games.\textsuperscript{127} Although the issue of whether the WIAA was a state actor was not the main point of contention in the case, the WIAA went so far as to stipulate that it was a state actor for the purposes of both claims.\textsuperscript{128} In a footnote, the district court stated, “[b]ecause the parties have stipulated that WIAA is a ‘state actor’ for purposes of the First and Fourteenth Amendment, that issue will not be addressed.”\textsuperscript{129} On appeal, the Seventh Circuit reiterated that “[t]he parties have stipulated that WIAA is a state actor. This means that its actions are constrained by the First Amendment. (We note that in other cases where courts had to decide if similar organizations were state actors, the answer has been yes . . . .)”\textsuperscript{130} By its own stipulation, the WIAA conceded that it is a state actor. Since Gannett, no reported decisions have addressed state action and the WIAA.

C. What to Make of Wisconsin’s Scattered Case Law?

Because the issue of whether the WIAA qualifies as a state actor has never reached the Wisconsin Supreme Court, Stasiewski’s attorney would be forced to sort out the inconsistent decisions of the lower courts when analyzing Stasiewski’s claim. In five decisions, courts found that the WIAA was a state actor three times—once by way of stipulation—and found the opposite twice. Three of these decisions were in federal court and would not be binding, while the two state court decisions were unpublished and, by statute,\textsuperscript{131} carry no precedential value. Two of these cases were decided before the WIAA even accepted private schools into its membership. Other than Bukowski and Wakefield, no Wisconsin court, even outside of the sport context, has analyzed the state action doctrine under Brentwood Academy’s entwinement test.\textsuperscript{132} On their face, the cases that do analyze state action would seem to be of little guidance. However, a closer look reveals a potential explanation for the
inconsistencies.

Judging by the written opinions, it is clear that in the cases where courts found that the WIAA was not a state actor the threshold requirement of state action was not discussed in the plaintiff’s briefs and arguments. For instance, in Kelly, the plaintiffs failed to establish a case for state action in their pleadings.133 Similarly, in Bukowski, the only proffered evidence in support of a finding of state action was an affidavit stating that the school received federal funding, which alone does not trigger state action.134 In order to bring a successful due process claim, Stasiewski’s attorney will need to make a much stronger case with regard to state action before arguing against the transfer rule, akin to the plaintiff in Wakefield, and avoid the pitfalls demonstrated by the advocates in Kelly and Bukowski. The following sections will explain why, under the entwinement standard set forth in Brentwood Academy, Stasiewski will be able to show that the WIAA is a state actor.

D. The WIAA as a State Actor

In analyzing the decisions in the WIAA cases and Brentwood Academy, it is clear that courts apply an incredibly fact-based approach in determining whether an athletic association is a state actor.135 To that end, a fact-based inquiry is likely how the Wisconsin Supreme Court would approach Stasiewski’s due process claim. Because the WIAA, when viewed in the aggregate, is sufficiently entwined with the State of Wisconsin, the court will likely find that it is a state actor.

One of the factors that may be determinative for the court in deciding whether the WIAA is a state actor is the WIAA’s make-up. The WIAA’s committee members are almost exclusively public school employees.136 These committees are ultimately responsible for making and amending the bylaws of the entire WIAA.137 The Board of Control and the Advisory Council are comprised of twenty-eight administrators from high schools around the state and one liaison from the Wisconsin Association of School

136. See generally Board of Control, supra note 91; Advisory Council, supra note 91; Sports Advisory Committee, supra note 91; Coaches Advisory, supra note 91; Sportsmanship Committee, supra note 91.
137. Board of Control, supra note 91; Advisory Council, supra note 91; Sports Advisory Committee, supra note 91; Coaches Advisory, supra note 91; Sportsmanship Committee, supra note 91.
Boards. The public school administrators, who are paid by the State of Wisconsin, are the individuals making the decisions and making the rules for the organization that serves as the sole governing body over athletics in Wisconsin.

The TSSAA’s Board of Control in Brentwood Academy mirrors the make-up of the WIAA. In both organizations, the power chiefly resides with public school officials. In Brentwood Academy, this exact make-up is what was determinative in the U.S. Supreme Court’s finding that the TSSAA was so entwined with the State so as to qualify it as a state actor. The WIAA may counter this assertion by noting that these committee members provide services for the WIAA only in their capacity as committee members. However, as public officials acting as representatives from their respective districts and schools, it is difficult to imagine that they are able to completely “step out” of their roles as administrators when voting on behalf of their schools and constituency.

The entwinement between the WIAA and the State is further evidenced by representatives from state organizations, such as the Department of Public Instruction and the Wisconsin Association of School Boards, which serve as liaisons to the Board of Control. These liaisons are necessary to the WIAA’s functionality because the relationships are so close that they need to constantly feed information back and forth. The liaison for the Wisconsin Association of School Boards even has a voting member on the Board of Control. The entwinement between the WIAA’s decision-makers and the State is arguably stronger than that found in Brentwood Academy because of the close relationship with the liaisons. Furthermore, in Gannett, the WIAA went so far as to stipulate that it was a state actor. Any analysis of this stipulation would be pure conjecture, but the fact remains that an organization cannot simply pick and choose to be a state actor when it is convenient for it.

138. Board of Control, supra note 91; Advisory Council, supra note 91.
139. Board of Control, supra note 91; Advisory Council, supra note 91.
140. A Decade of Voluntary Membership for All Schools, supra note 87.
141. Brentwood, 531 U.S. at 292–93; See generally Board of Control, supra note 91; Advisory Council, supra note 91; Sports Advisory Committee, supra note 91; Coaches Advisory, supra note 91; Sportsmanship Committee, supra note 91.
142. Brentwood, 531 U.S. at 300.
143. INTRODUCTION TO THE WIAA, supra note 90, at 3.
144. Interview with Todd Clark, supra note 93.
145. Board of Control, supra note 91.
Although state funding alone does not amount to state action, it certainly can be a factor. The WIAA’s membership is comprised of more than 500 schools, and, of those, about 420 are public schools. Although it receives no direct funding from the state, nearly all of the WIAA’s funding comes from membership fees and gate receipts from playoff competitions. Almost eighty-five percent of its membership dues are paid by public schools, which, in turn, receive their own funding from federal, state, and local governments. The playoff gate receipts are for competitions held almost exclusively at public schools, which are maintained by public employees. For example, the state championships for all divisions in basketball, football, tennis, swimming and diving, golf, and softball are held at the University of Wisconsin-Madison, while the track and field championships are held at the University of Wisconsin-La Crosse. Furthermore, each and every WIAA meeting is held during the school day. Because a vast majority of the committee members attending these meetings are public school administrators and teachers, the committee members are attending the meetings as a part of their work day. As such, the State is essentially paying the WIAA committee members to attend.

These factors all boil down to one conclusion: the WIAA is so entwined with the State that it can be considered a state actor. Stasiewski’s attorney would be wise to draw parallels between the WIAA and the TSSAA to illustrate just how pervasive the State’s role is in governing the WIAA. By pointing out that, in both cases, the associations are primarily comprised of public schools, the people responsible for creating and amending the rules are public employees, the association’s meetings are held during school hours, and the associations are funded from revenue garnered at public schools for state playoffs and in part by public school dues, Stasiewski will be able to show state action and succeed where the plaintiffs in Bukowski and Kelly did not.

147. In Rendell-Baker v. Kohn, the Court found that a private high school that received ninety to ninety-nine percent of its budget from state and federal funds was not a state actor. 457 U.S. 830, 832, 840 (1982).
149. WIAA Member Schools Directory, supra note 88.
150. Interview with Todd Clark, supra note 93.
151. Id.
152. Id.
154. Board of Control, supra note 91; Advisory Council, supra note 91; Sports Advisory Committee, supra note 91; Coaches Advisory, supra note 91; Sportsmanship Committee, supra note 91.
Because the Wisconsin Supreme Court will likely find that the WIAA is a state actor, Stasiewski’s claim that the WIAA violated his procedural due process rights by denying his waiver to the transfer rule will go forward on its merits. In Brentwood Academy, once the U.S. Supreme Court found the TSSAA to be a state actor, the recruiting rule at issue was subject to judicial review, and eventually the matter made its way back to the Supreme Court. Similarly, because Stasiewski can show that the WIAA engages in state action, the transfer rule at issue could be legally challenged and potentially struck down.

The implications of the WIAA finally being ruled a state actor could be far-reaching, as it opens up the WIAA to constitutional claims. Civil rights claims under § 1983 could be attached to these actions, and, if successful, the WIAA would be responsible for paying the plaintiff’s reasonable attorney fees. Disgruntled athletes who feel their rights have been violated by the WIAA Rules of Eligibility or Bylaws would have grounds to bring claims under a myriad of constitutional claims such as equal protection, due process, and free speech. Eventually, a case such as Stasiewski’s will reach the Supreme Court of Wisconsin, and, once the WIAA is found to be a state actor, it will no longer enjoy immunity from constitutional claims.

V. CONCLUSION

Because of the competitive nature inherent in interscholastic sports, eligibility rules are constantly challenged. And for every challenge, there is an unhappy party on the losing side. Stasiewski’s claim that the WIAA violated his due process rights under the Fourteenth Amendment is not a hypothetical lawsuit that could never occur. Whether the claim involves due process, free speech, or any other violation of an athlete’s constitutional rights, it is only a matter of time before a case along these lines makes it before the Supreme Court of Wisconsin. When it does, it will be heard on its merits because the court will likely find that the WIAA is a state actor. Based on the administrative capacity of public school officials in the WIAA, its function as the sole arm for interscholastic sports, its close relationship with the Wisconsin Department of Public Instruction, its indirect receipt of state funds,
and its revenue derived from use of public facilities, the WIAA is inextricably entwined with the State of Wisconsin and qualifies as a state actor.

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