Get Off the Courts:

Using Mediation Principles to Resolve High School sport Disputes

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# 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.[[1]](#footnote-1)

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.”[[2]](#footnote-2)

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.[[3]](#footnote-3)

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.[[4]](#footnote-4) 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.[[5]](#footnote-5) 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,[[6]](#footnote-6) especially when school administrators make sweeping accusations and dole out harsh punishments for arguably minor offenses (e.g., tweeting,[[7]](#footnote-7) being a designated driver,[[8]](#footnote-8) or associating with students who smoke marijuana[[9]](#footnote-9)). 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.[[10]](#footnote-10) And without good bylaws at the state or national levels, it’s no surprise that local administrators, coaches, and athletic directors create their own policies and dish out their own—often questionable—penalties.[[11]](#footnote-11)

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.[[12]](#footnote-12) On the other hand, many schools construct poorly written or purposely vague codes of conduct to preserve the status quo.[[13]](#footnote-13) Worse yet, some schools have no codes of conduct at all.

Ambiguous or non-existent codes give power-hungry administrators almost-unfettered disciplinary discretion. And as a result, they can ban student-athletes from the 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 loathed code of conduct cases. And they relied on inconsistent legal precedent to rule against student-athletes.[[14]](#footnote-14) Without much serious consideration, most courts held that high school students have no constitutional right to participate in sports or other extracurricular activities.[[15]](#footnote-15) In addition, courts reasoned that students have no property interest in their athletic participation, even when hefty college scholarships were on the line.[[16]](#footnote-16) After wasted time and wasted money,[[17]](#footnote-17) the cases were usually dismissed on summary judgment motions.

The process could have been quicker and cheaper. In fact, many high school sport disputes could be resolved using mediation, arbitration, or med-arb-like[[18]](#footnote-18) processes. Yet, no one—including the parties with a vested interest in designing an effective dispute system—seems eager to apply ADR principles in the interscholastic athletic arena. Only one state athletic association has incorporated mediation into its bylaws.[[19]](#footnote-19) 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.[[20]](#footnote-20) When a student has a governmentally created expectation to an education, she has a property interest in her education.[[21]](#footnote-21) A property interest in education naturally creates a procedural due process right.[[22]](#footnote-22)

In theory, administrators who suspend student-athletes without due process will only encounter problems if courts find a property interest in sport participation. And while sports have always played an important role in education,[[23]](#footnote-23) few—if any—courts were willing to say that athletic participation or other extracurricular activities played an “integral role.”[[24]](#footnote-24) Until recently, “[t]he main purpose of high school” has been “to learn science, the liberal arts, and vocational studies, *not* to play football and basketball.”[[25]](#footnote-25) But due process tides are changing. The present day “intertwining of [interscholastic athletics] and education[[26]](#footnote-26) creates a much stronger argument” that high school sport is, in fact, part of the total educational process.[[27]](#footnote-27)

If courts begin recognizing that the “intertwining”—as Professor Siegrest calls it—of sport and education creates a procedural due process right,[[28]](#footnote-28) then the number of winnable lawsuits will skyrocket.[[29]](#footnote-29) Ultimately, at some point in the not-so-distant future, high school athletes may have viable Fourteenth Amendment claims[[30]](#footnote-30) when they’re suspended or disqualified from interscholastic competition.[[31]](#footnote-31) Sport lawyers can hear the echo 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.[[32]](#footnote-32) 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.[[33]](#footnote-33) This article discusses developing a mediation 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 mediation clauses for all of its member institutions in the United States.

# Mediation Principles

Mediation is negotiation carried out with the assistance of a neutral third party.[[34]](#footnote-34) In mediation, the mediator leads parties who disagree to common ground.[[35]](#footnote-35) A mediator is basically a non-party to the negotiations.[[36]](#footnote-36) She helps participants navigate their contested issues and reach a mutually acceptable resolution.[[37]](#footnote-37) In addition, the mediator typically reminds the parties about privileged communications and that the mediation process itself—with some exceptions—is confidential.[[38]](#footnote-38)

Unlike an arbitrator or judge, the mediator has no power to impose an outcome on the participants or make decisions for them.[[39]](#footnote-39) Instead, the disputing parties have significant control over the mediation process and its substance.[[40]](#footnote-40) 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.[[41]](#footnote-41)

# Mediating Interscholastic Athletic Disputes

Mediation has secured a permanent place in the pantheon of dispute resolution mechanisms.[[42]](#footnote-42) But there are few, if any, cases illustrating court-ordered mediation in amateur sports.[[43]](#footnote-43) 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 associations can begin developing mediation programs that resolve interscholastic athletic conflicts in the quickest, cheapest, and fairest way possible.

*Why Should High Schools Mediate Athletic Disputes?*

Student-athletes can participate directly in mediation 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.[[44]](#footnote-44)

Student-athletes obviously benefit from this process.[[45]](#footnote-45) 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.[[46]](#footnote-46)

Take, for example, a football player who is accused of egging houses or smashing mailboxes. The school district, the student-athlete, and the community stand to gain more when he agrees to help paint the concession stand or plant flowers near the stadium entrance than when he serves a five-game suspension. Or consider the cheerleading captain who goes to a party where students drink and later drive home drunk. The school district, the student-athlete, and the community stand to gain more when she 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.

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.[[47]](#footnote-47) 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.[[48]](#footnote-48)

The bottom line is that many communities rally around their high school athletic programs as a source of pride and collective identity.[[49]](#footnote-49) Indeed, some sports are so popular that even athletes who’ve committed serious offenses (assaults, rapes, etc.) have received overwhelming community support.[[50]](#footnote-50) At the end of the day, communities don’t want school districts to suspend their star players or cut their championship seasons short because of controversy.[[51]](#footnote-51) Mediation is an obvious first step.

Another good reason to mediate interscholastic athletic disputes 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 mediation. For example, if suspended black athletes allege racial discrimination against school principals and athletic directors,[[52]](#footnote-52) then publicizing the dispute might ignite support for the suspended students while significantly harming the school.[[53]](#footnote-53) Mediation allows administrators and student-athletes to resolve their conflicts privately, away from direct public scrutiny.[[54]](#footnote-54)

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 mediation is 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.[[55]](#footnote-55) With that in mind, mediators are uniquely situated to help high schools and student-athletes discuss their issues in a non-intrusive manner and facilitate productive communication.[[56]](#footnote-56)

Athletic associations might not be motivated by the inherent value of mediating 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.[[57]](#footnote-57)

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

Contracts are important mechanisms for moving disputing parties toward mediation.[[58]](#footnote-58) And, at first glance, athletic codes of conduct or association bylaws seem like the perfect vehicles.[[59]](#footnote-59) 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.[[60]](#footnote-60)

First, it’s unlikely that codes and bylaws can bind student-athletes.[[61]](#footnote-61) According to the Restatement of Contracts, parties lack the capacity to form enforceable agreements—with few exceptions—until they are 18 years old.[[62]](#footnote-62) Nearly every United States jurisdiction follows this rule.[[63]](#footnote-63)

Most high school students won’t turn 18 until some point during their senior year. And many of them (on the younger side of the spectrum) won’t ever turn 18 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’s also unclear what effect—if any—parental consent might have on these agreements.[[64]](#footnote-64)

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*.[[65]](#footnote-65)

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.[[66]](#footnote-66)

But that doesn’t necessarily mean that mediation 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.[[67]](#footnote-67) And many courts have applied this rule to high school sports.[[68]](#footnote-68) 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 after all.

The National Federation of State High School Associations (NFHS) must lead the way. Frequently, the NFHS issues bulletins, makes recommendations, and guides its member institutions through policy changes. Introducing a sports mediation program should not be an exception. To start, the organization should encourage state athletic associations to write mediation 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 prior to pursuing any other recourse.[[69]](#footnote-69)

This language creates and defines a contractual underpinning for mediation[[70]](#footnote-70) and, at the same time, provides a new layer of due process for student-athletes.[[71]](#footnote-71) For safe measure, member high schools could ensure that coaches, athletic directors, and administrators comply with this mediation clause by including a provision in their employment contracts that requires them to honor it.[[72]](#footnote-72)

However, no matter what contractual mechanism is used, a contract with a mediation clause is only the first step in the mediation process.[[73]](#footnote-73) Once the parties are contractually obligated to use mediation, state governing bodies and their member institutions must develop and communicate effective mediation policies and procedures.[[74]](#footnote-74)

*What Would Interscholastic Athletic Mediation 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., grade-related)[[75]](#footnote-75) and infraction (i.e., conduct or rules-related)[[76]](#footnote-76) appeals. In 2014, the FHSAA announced that it would “introduce a new layer of mediation to the appeals process, providing even greater due process opportunities for student-athletes and schools that wish to challenge sanctions.”[[77]](#footnote-77)

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.[[78]](#footnote-78) 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.”[[79]](#footnote-79) At this point, the FHSAA may accept or decline the student or school’s request for mediation.[[80]](#footnote-80)

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”[[81]](#footnote-81) designated by the organization.[[82]](#footnote-82) 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.[[83]](#footnote-83) 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 proceeding toward a positive resolution, the mediation session may be extended.”[[84]](#footnote-84) Mediations are paid for “equally by both parties.”[[85]](#footnote-85)

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.[[86]](#footnote-86) 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.[[87]](#footnote-87)

The FHSAA program is a good start. However, there are both substantive[[88]](#footnote-88) and procedural[[89]](#footnote-89) flaws in the system. Many of the mediation bylaws are, at best, ambiguous. And additionally, there are still serious questions about the mediator and the mediator’s neutrality. While 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. The FHSAA bylaws illustrate what one dispute system might look like. But they don’t go far enough.

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.[[90]](#footnote-90) If the FHSAA and other state associations are serious about resolving disputes with efficiency and fairness, then the mediation process should apply to *all* disputes—not just eligibility questions. The solution is to require parties to mediate *both* eligibility and conduct (or rules-related) infractions.

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.[[91]](#footnote-91) This is a serious waste of time and resources. In almost every context, mediation is used as a condition precedent to other binding dispute resolution mechanisms,[[92]](#footnote-92) 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 mediate *before* they appeal.

There are also serious questions about the mediator and the mediator’s neutrality. While the FHSAA bylaws say that the association will select from a “panel of experienced mediators,”[[93]](#footnote-93) 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.[[94]](#footnote-94)

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. For example, schools could form relationships with community mediators. Schools could also consider athletic officials, like umpires or referees. After all, they’re 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, parents, and school administrators.[[95]](#footnote-95) Either way, there is plenty of room for creativity in selecting a cost-effective and neutral mediator.

# Conclusion

It’s been almost 100 years since the NFHS started leading interscholastic athletics and other extracurricular activities.[[96]](#footnote-96) 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-exist 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[[97]](#footnote-97) that high school sports are, in fact, part of the total educational process outlined in *Goss v. Lopez.*[[98]](#footnote-98) 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 mediation 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. The process is private. It keeps controversies away from public scrutiny, and it prevents parties from hardening their positions. But most importantly, mediation could help school districts avoid dangerous lawsuits by forming a much-needed layer of due process for student-athletes.

Mediation programs won’t be implemented overnight. It will take months or years of careful planning. It will take community buy-in, effective contract language, and visible leadership from the NFHS. It will also take help from mediation 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, or some other form of alternative dispute resolution, is their safe harbor.

1. \* Dominic D. Saturday, J.D., is a Union Representative for AFSCME Ohio Council 8 in Youngstown. He thanks his girlfriend, Brenna, for her patience, love, and support; his friends and family for their unwavering confidence in him; and Professors Sarah Cole and Bill Froehlich for their helpful advice and caring instruction both inside and outside the Mediation Clinic at The Ohio State University Moritz College of Law.

   Kara Pendleton, *High School Quarterback Chose to End His Life. A Damning Letter Shows Who Some Students Are Blaming*, Independent Journal Review (Oct. 10, 2015), http://ijr.com/2015/10/439921-ended-life-discipline-school-admin-now-classmate-fights-hold-responsible/. [↑](#footnote-ref-1)
2. *Id*. [↑](#footnote-ref-2)
3. *Id*. [↑](#footnote-ref-3)
4. By participating in sport, people make social statements about who they are and how they want others 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, J.L Van Raalte & D.E. Linder, *Athletic identity: Hercules’ muscles or Achilles heel?*, 24 Int’l J. Sport Psychol. 237 (1993). [↑](#footnote-ref-4)
5. National Federation of State High School Associations, *High School Participation Increases for 28th Consecutive Year*, NFHS.org (Sept. 6, 2017), https://www.nfhs.org/articles/high-school-sports-participation-increases-for-28th-straight-year-nears-8-million-mark/. [↑](#footnote-ref-5)
6. Amanda Siegrist, W. Andrew Czekanski & Steve Silver, *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). [↑](#footnote-ref-6)
7. Ricardo Arguello, *Wisconsin athlete suspended for tweet about state athletic association*, USA Today High School Sports (Jan. 10, 2016), http://usatodayhss.com/2016/wisconsin-athlete-april-gehl-hilbert-high-suspended-for-tweet-about-state-athletic-association (5-game suspension for Wisconsin women’s basketball player who tweeted “EAT SHIT” in response to a [Wisconsin Interscholastic Athletic Association] email). [↑](#footnote-ref-7)
8. Brendan Hall, *Athlete suspended for driving friend*, ESPN Boston (Oct. 15, 2013), http://www.espn.com/boston/story/\_/id/9826842/high-school-athlete-massachusetts-suspended-driving-drunk-friend (5-game suspension for Massachusetts volleyball player who drove her drunk friend home). [↑](#footnote-ref-8)
9. Claudette Riley, *Parkview High teen fights suspension, loss of A+ scholarship*, Springfield News Leader (Dec. 18, 2016, 4:21 PM), http://www.news-leader.com/story/news/education/2016/12/18/parkview-high-teen-fights-suspension-loss-scholarship/95197434/ (28-day athletic suspension and loss of scholarship for Illinois wrestler who went to school dance with friend who smoked marijuana). [↑](#footnote-ref-9)
10. Siegrist et al., *supra* note 6*,* at 2. [↑](#footnote-ref-10)
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 bylaw 4-5-1, *reprinted in* Ohio High Sch. Athletic Ass’n, 2017–18 OHSAA Handbook 50 (2017) (emphasis added). [↑](#footnote-ref-11)
12. *E.g.,* Upper Arlington High Sch. Athletics Dep’t, 2017–18 Athletics & Extracurricular Activities Code (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. [↑](#footnote-ref-12)
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.” 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*. . .” Trotwood-Madison High Sch. Athletics Dep’t, 2017–18 Student Code of Conduct 1 (2017) (emphasis added). Presumably, even minor violations could result in removal from athletic activity. [↑](#footnote-ref-13)
14. 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). [↑](#footnote-ref-14)
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, 497 (Wash. App. 2006); Angstadt v. Midd–West Sch. Dist., 377 F.3d 338 (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 (6th Cir. 1985); Niles v. Univ. Interscholastic League, 715 F.2d 1027 (5th Cir. 1983). [↑](#footnote-ref-15)
16. Ryan v. Cal. Interscholastic Fed'n-San Diego Section, 94, 114 Cal. Rptr. 2d 798, 807 (Cal. 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. 1999) (same). [↑](#footnote-ref-16)
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. [↑](#footnote-ref-17)
18. Med-arb has features of both mediation and arbitration. The parties first try to resolve their disputes through mediation. If mediation does not resolve the dispute, then the process switches to a binding arbitration, with the mediator serving as the arbitrator. [↑](#footnote-ref-18)
19. In 2014, Florida designed a mediation process for eligibility (i.e., grade-related) appeals. Florida High School Athletic Association*, FHSAA adopts PED, enrollment, mediation changes to protect student- athletes and fair play*, FHSAA.org (Jan. 14, 2014), https://www.fhsaa.org/news/2014/0114. [↑](#footnote-ref-19)
20. Goss v. Lopez, 419 U.S. 565 (1975). [↑](#footnote-ref-20)
21. *Id*. at 572. [↑](#footnote-ref-21)
22. *Id*. at 576. [↑](#footnote-ref-22)
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*, Education Encyclopedia, http://education.stateuniversity.com/pages/1853/College-Athletics.html (last visited Nov. 8, 2017). [↑](#footnote-ref-23)
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. . .”). [↑](#footnote-ref-24)
25. Crocker v. Tenn. Secondary Sch. Athletic Ass'n, 980 F.2d 382, 387 (6th Cir. 1992). [↑](#footnote-ref-25)
26. For example, some schools offer academic credit for sport participation or write educational goals into their athletic department’s mission. [↑](#footnote-ref-26)
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). [↑](#footnote-ref-27)
28. 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’s not uncommon for elementary school students to receive verbal athletic scholarship offers. *Nevada offers 9-year-old football star, trainer says*, USA Today High School Sports (June 23, 2017), http://usatodayhss.com/2017/havon-finney-jr-nine-year-old-nevada-football. [↑](#footnote-ref-28)
29. 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. [↑](#footnote-ref-29)
30. *See* Robbins by Robbins v. Indiana 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). [↑](#footnote-ref-30)
31. 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 28-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 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*, NFHS.org (Jan. 4, 2017), https://www.nfhs.org/articles/2016-sports-law-year-in-review/. [↑](#footnote-ref-31)
32. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969). [↑](#footnote-ref-32)
33. Siegrist et al., *supra* note 6, at 21. [↑](#footnote-ref-33)
34. *See* Stephen B. Goldberg, Frank E.A. Sander, Nancy H. Rogers & Sarah R. Cole, Dispute Resolution: Negotiation, Mediation, Arbitration, and Other Processes 121 (6th ed. 2012). [↑](#footnote-ref-34)
35. *See* John M. Haynes & Gretchen L. Haynes, Mediating Divorce 1 (1989). [↑](#footnote-ref-35)
36. Goldberg, *supra* note 34, at 121. [↑](#footnote-ref-36)
37. Merrick T. Rossein, 2 Employment Law Deskbook for Human Resources Professionals § 39:6 (2016). [↑](#footnote-ref-37)
38. *See* Sarah Rudolph Cole, *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 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). [↑](#footnote-ref-38)
39. Goldberg, *supra* note 34, at 121. [↑](#footnote-ref-39)
40. *See* Nancy A. Welsh, *Integrating "Alternative" Dispute Resolution into Bankruptcy: As Simple (and Pure) As Motherhood and Apple Pie?*, 11 Nev. L.J. 397 (2011). [↑](#footnote-ref-40)
41. *See* Tom Arnold, *A Vocabulary of Alternative Resolution Procedures, in ADR: How to Use It to Your Advantage!*, A.B.A (1996). [↑](#footnote-ref-41)
42. Cole, *supra* note 38, at 1419. [↑](#footnote-ref-42)
43. 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). [↑](#footnote-ref-43)
44. Goldberg, *supra* note 34. [↑](#footnote-ref-44)
45. 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*, Geo. Wash. U. (1999) (doctoral dissertation) (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 (2013) (44% drop in suspensions after one year of introducing peer mediation). [↑](#footnote-ref-45)
46. 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). [↑](#footnote-ref-46)
47. Michael Oriard, *Football Town under Friday Night Lights: High School Football & American Dreams*, Rooting for the Home Team: Sport, Community, & Identity 68 (2013) [↑](#footnote-ref-47)
48. 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. 2009). [↑](#footnote-ref-48)
49. 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. [↑](#footnote-ref-49)
50. 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 10 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 10 of his teammates, the townspeople started sending him death threats. Michael Scarce, Male on Male Rape: The Hidden Toll of Stigma & Shame 50 (1997). [↑](#footnote-ref-50)
51. *E.g.*, Tracey Smith, *Community upset after basketball team has entire season suspended*, ABC News Richmond (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). [↑](#footnote-ref-51)
52. This hypothetical is based on a real case. In Billings, Montana, high school administrators issued a 5-game suspension to a black basketball player after seeing “a picture of him at [a] party where alcohol was involved.” The student-athlete was never shown the picture. 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].” 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. [↑](#footnote-ref-52)
53. Gil Fried & Michael Hiller, *ADR in Youth & Intercollegiate Athletics*, 1997 B.Y.U. L. Rev. 631, 636 (1997). [↑](#footnote-ref-53)
54. *Id*. [↑](#footnote-ref-54)
55. *Id.* [↑](#footnote-ref-55)
56. *Id.* [↑](#footnote-ref-56)
57. *See* Siegrist et al., *supra* note 6. [↑](#footnote-ref-57)
58. Fried, *supra* note 53, at 642. [↑](#footnote-ref-58)
59. For some examples of athletic codes of conduct, see *supra* notes 12 & 13. [↑](#footnote-ref-59)
60. 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, *supra* note 53, at 642. [↑](#footnote-ref-60)
61. 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). [↑](#footnote-ref-61)
62. “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.* at § 14 (emphasis added). [↑](#footnote-ref-62)
63. 5 Samuel Williston & Richard A. Lord, Williston on Contracts § 9:3 (4th ed. 1990). [↑](#footnote-ref-63)
64. The extent to which parents are personally bound by the contracts that they make on a minor’s behalf raises the same question. *Id.* at § 9:1. [↑](#footnote-ref-64)
65. Ind. High Sch. Athletic Ass'n, Inc. v. Carlberg by Carlberg, 694 N.E.2d 222, 230 (Ind. 1997). [↑](#footnote-ref-65)
66. See *id*. (“We note as well the *relatively short span of time* a student spends in high school. . .”) (emphasis added). [↑](#footnote-ref-66)
67. Int’l Bhd. of Elec. Workers, Local Union No. 8 v. Gromnicki, 745 N.E.2d 449, 453 (Ohio Ct. App. 2000). [↑](#footnote-ref-67)
68. *E.g*., Ulliman v. Ohio High Sch. Athletic Ass’n., 919 N.E.2d 763, 771 (Ohio Ct. App. 2009). [↑](#footnote-ref-68)
69. 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, *supra* note 53, at 648. [↑](#footnote-ref-69)
70. *Id.* [↑](#footnote-ref-70)
71. 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. [↑](#footnote-ref-71)
72. Fried, *supra* note 53, at 649. [↑](#footnote-ref-72)
73. *Id*. at 648. [↑](#footnote-ref-73)
74. *See* *id*. [↑](#footnote-ref-74)
75. 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 bylaw 10.4.1, *reprinted in* Fla. High Sch. Athletic Ass’n, 2017–18 FHSAA Handbook 34 (2017) [hereinafter FHSAA Handbook]. [↑](#footnote-ref-75)
76. 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. *Id*. [↑](#footnote-ref-76)
77. Florida High School Athletic Association, *supra* note 19, at para. 8. [↑](#footnote-ref-77)
78. 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 Handbook, *supra* note 75, at 37. [↑](#footnote-ref-78)
79. *Id*. [↑](#footnote-ref-79)
80. *Id*. at 38. [↑](#footnote-ref-80)
81. 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. The Florida Dispute Resolution Center, *About ADR & Medition*, Florida Courts, http://www.flcourts.org/resources-and-services/alternative-dispute-resolution/about-adr-mediation.stml (last visited Nov. 8, 2017). [↑](#footnote-ref-81)
82. FHSAA bylaw 10.6.5.2, *reprinted in* FHSAA Handbook, *supra* note 75, at 38. [↑](#footnote-ref-82)
83. FHSAA bylaw 10.6.5.3 describes who the parties to the mediation shall be. *Id*. [↑](#footnote-ref-83)
84. FHSAA bylaw 10.6.5.5 sets the length and location of the mediation session. *Id*. It’s not clear how much a mediator could accomplish in 20 minutes; however, the bylaw notes that—if necessary—the session may be extended when the parties are making progress. [↑](#footnote-ref-84)
85. Under FHSAA bylaw 10.6.5.7, the parties must split the cost of mediation. *Id*. [↑](#footnote-ref-85)
86. It’s 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’re suspended on eligibility grounds? [↑](#footnote-ref-86)
87. A notice of appeal must be in writing and received within five (5) business days following the mediation session under FHSAA bylaw 10.6.5.6., *reprinted in* FHSAA Handbook, *supra* note 75, at 38. [↑](#footnote-ref-87)
88. In other words, the *types* of disputes that will be mediated. [↑](#footnote-ref-88)
89. Procedural flaws are problems with the structure of the mediation program. For example, questions about *when* disputes will be mediated. [↑](#footnote-ref-89)
90. FHSAA Handbook, *supra* note 75, at 34. [↑](#footnote-ref-90)
91. *Id*. at 37. [↑](#footnote-ref-91)
92. Kristen M. Blankley, *Agreeing to Collaborate in Advance?,* 32 Ohio St. J. on Disp. Resol. 559, 561 (2017). [↑](#footnote-ref-92)
93. FHSAA Handbook, *supra* note 75, at 38. [↑](#footnote-ref-93)
94. The Florida Dispute Resolution Center, *supra* note 81. [↑](#footnote-ref-94)
95. A high percentage of high school students are aware of their school counselors and are, overall, satisfied with their interactions. *See generally* Dorinda Gallant & Jing Zhao, *High School Students’ Perceptions of School Counseling Services: Awareness, Use, and Satisfaction*, 2 Couns. Outcome Res. & Evaluation 87 (2011). [↑](#footnote-ref-95)
96. National Federation of State High School Associations, *About Us*, NFHS.org, https://www.nfhs.org/who-we-are/aboutus (last visited Nov. 8, 2017). [↑](#footnote-ref-96)
97. Siegrist et al., *supra* note 6. [↑](#footnote-ref-97)
98. 419 U.S. 565 (1975). [↑](#footnote-ref-98)