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ZERO TOLERANCE ALCOHOL CODE WITHSTANDS CONSTITUTIONAL CHALLENGE

In the case of *Jordan v. O'Fallon Township High School District No. 203*, No. 5-98-0595 (Ill.App. Dist.5 1999), O'Fallon Township High School (O'Fallon) officials withheld a student's participation in interscholastic athletics as punishment for his violation of the school's zero-tolerance conduct code. Before they were allowed to participate in any extracurricular activity, all O'Fallon students had to agree in writing to abide by the code's ban on alcohol and drug use.

Students who violated the code's ban were disciplined by school officials under procedures that did not necessarily comport with due process. Specifically, the student would not be allowed to confront witnesses who provided the evidence upon which the discipline was based. Nor was the student permitted to present witnesses to rebut that evidence. In this particular instance, school officials imposed discipline without affording the student, plaintiff Kevin Jordan, a formal hearing. The facts of the case were as follows:

The 1997 O'Fallon High School football season highlighted the skills of a young man named Kevin Jordan. Jordan's ability to break tackles and find daylight brought several postseason honors, including his selection as team captain for the ensuing 1998 season. Jordan's ability also drew the attention of several universities.

College coaches from across the country wrote to Jordan and expressed their interest in his future. Although the coaches did not extend scholarship offers, they clearly suggested that such offers would be forthcoming provided Jordan continued to excel as a high school football player in his senior season. Thus, the 1998 season appeared to offer Jordan a legitimate chance to earn an athletic scholarship to a major university.

The season's promise ended, however, when Jordan's playing privileges surrendered to enforcement of O'Fallon's zero-tolerance conduct code. School officials determined that Jordan violated the code's ban on alcohol use. As a result, the captain of O'Fallon's football team was suspended from play for the entire 1998 season. Kevin Jordan never played another down of high school football.

The suspension stemmed from an early morning encounter with O'Fallon police officers. The officers answered Jordan's 9-1-1 emergency call from a phone booth near an O'Fallon convenience store. When they arrived at the convenience store, they found a disheveled and shoeless Jordan standing in the parking lot. It was 3 o'clock in the morning, and according to the officers, Jordan evidenced obvious signs of inebriation. His eyes were glazed, his speech was slurred, and he smelled of alcohol. Jordan's

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condition was confirmed when, according to the officers, he admitted to alcohol consumption.

The officers, pursuant to a reciprocal reporting agreement with the school, reported the incident to O'Fallon school officials. An assistant principal reviewed their report, discussed it with them, and confronted Jordan. Jordan denied alcohol use. He also denied any admission to the contrary. He explained that his condition resulted from an attack by unknown assailants who threw beer bottles at him during the assault. He insisted that the smell of alcohol detected by the officers was misconstrued. The assistant principal weighed what the officers and Jordan told him and decided that Jordan violated his commitment to remain alcohol- and drug-free. Jordan had a prior violation of the code's alcohol ban. Therefore, the assistant principal cited him for a second violation and informed him that he was suspended from participation in high school athletics for a period that encompassed the entire football season.

The assistant principal's action was reviewed by the O'Fallon Activity Council (Activity Council). The Activity Council is a body comprised of the principal, all assistant principals, the dean of students, the athletic director, the assistant athletic director, the band director, the head of speech activities, and the student council sponsor. The Activity Council reviews discipline only to determine whether the conduct code is interpreted consistently and applied uniformly. Its members agreed unanimously that the code was properly applied in Jordan's case.

Jordan's stepfather appealed to the school superintendent, who was empowered to review and override the disciplinary action. After agreeing to review the matter, the superintendent met with Jordan, his attorney, and his stepfather. Jordan, assisted by counsel, reiterated his version of the early morning encounter with O'Fallon police officers. Jordan was afforded the opportunity to present any information or make any comment he deemed important to the superintendent's review.

The superintendent listened to everything Jordan presented and reserved judgment until he could meet with the officers involved in the incident. Jordan's attorney was apprised of a planned meeting with the officers and was invited to attend. His schedule did not permit attendance, and the meeting was held without him. The superintendent told the officers of Jordan's claims. The officers questioned the veracity of those claims, noting that Jordan's story had significantly changed from what he had earlier told them. They insisted that Jordan admitted to them that he had been drinking alcohol. They also

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expressed their opinion that Jordan's glassy eyes and slurred speech were the result of alcohol consumption. The possibility that the smell of alcohol resulted from an assault with beer bottles did not alter their opinion of Jordan's inebriated condition.

The superintendent told Jordan's attorney what the officers conveyed to him. He advised Jordan's attorney that he would not overrule the suspension and invited him to appeal to the O'Fallon Board of Education, the final arbiter of student discipline.

Throughout this process, Jordan's stepfather and attorney repeatedly requested a more formal proceeding. They wanted to confront the police officers and to call witnesses who could account for most of Jordan's activities on the night in question. Their call for a formal hearing went unheard. Jordan did not appeal to the O'Fallon Board of Education. Instead, he commenced this action.

The student, plaintiff Kevin Jordan, sued to enjoin the disciplinary action. The trial court refused to grant an injunction (i.e., judicial intervention prohibiting the school's action.) In so doing, the trial judge found that "the evidence failed to establish a protected property or liberty interest." Jordan appealed.

PROTECTED PROPERTY INTEREST?

On appeal, Jordan claimed that "O'Fallon school officials violated the procedural due process component of the fourteenth amendment" of the United States Constitution. Specifically, Jordan argued that "school officials were constitutionally obliged to afford him a minimal due process hearing before discipline could be administered." As characterized by the appeals court, the specific issue was, therefore, "whether a talented high school football player with college athletic scholarship opportunities possesses an interest in playing high school football that due process protects."

Jordan challenges the school's power to sideline him in the manner employed. He argues that school officials cannot suspend him from participation in interscholastic athletics without first affording him a minimal due process hearing to contest the disciplinary action. At a minimum, he claims a right to confront his accusers and to present witnesses who could corroborate his denial of alcohol use.

As cited by the appeals court, "[t]he fourteenth amendment forbids the State to deprive any person of life, liberty, or property without due process of law." However, to establish a constitutional claim for denial of procedural due process, the appeals court noted that plaintiff "must demonstrate that a protectable property or liberty interest is at stake."

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Protected property interests are created and their dimensions are defined by an independent source such as State statutes or rules entitling citizens to certain benefits...

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Applying this definition to the circumstances of this case, the appeals court acknowledged that “courts have repeatedly held that there is no property or liberty interest in taking part in interscholastic athletics.”

Students can need, want, and expect to participate in interscholastic athletics, but students are not entitled to participate in them. Football is neither an integral part of a quality education nor a requirement under any rule or regulation governing education in this State. Consequently, not every public high school in this State fields a football team. Those students who attend O'Fallon Township High School thus enjoy an opportunity that many other high school students are not permitted to enjoy. Simply put, playing high school football is a privilege rather than a right.

OPPORTUNITIES & EXPECTATIONS

On appeal, Jones acknowledged that, “standing alone, participation in interscholastic athletics does not rise to the level of a protected interest.” Accordingly, Jones conceded that “[m]ost students can be suspended from play without a constitutional right to a due process hearing.” Notwithstanding, Jordan argued on appeal that “he should be treated differently.” The appeals court characterized Jordan’s argument as follows:

Since he possesses athletic prowess, his participation in high school football can develop into something of substantial economic value. Unlike his less talented teammates, Jordan can turn participation in interscholastic athletics into a college scholarship. His participation thus rises to a protectable property interest that commands procedural due process. It follows that school officials could not ban him from a playing field where scholarship opportunities awaited, without first conducting a minimal due process hearing.

The appeals court rejected Jordan’s reasoning. In so doing, the appeals court found potential college scholarship opportunities “do not elevate participation in interscholastic athletics into an interest that due process protects because such opportunities are themselves mere expectancies.”

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Since Jordan possessed no independent right to participate in high school football, the existence of a protected property interest depends upon whether he can legitimately claim the right to participate in order to earn college financial assistance. This in turn depends upon whether the hope of earning a college scholarship rises to the level of a protectable property interest...

The acquisition of a scholarship remains contingent on far more than simply maintaining playing privileges. Jordan's expectations of playing college football on an athletic scholarship were no doubt greater than those of other less talented players. Nevertheless, those expectations are no more constitutionally protected than less realistic expectations harbored by others. Jordan was not entitled to an athletic scholarship at the time when school officials considered disciplinary action. Nor did continued participation in high school football guarantee that his scholarship expectations would be fulfilled.

Since Jordan's "scholarship hopes could not meet the criteria for a protected property interest," the appeals court concluded "those hopes could not impart due process protection to participation in high school football."

In holding that the opportunity to earn an athletic scholarship is too speculative to elevate participation in high school football to the level of a constitutionally protected interest, we note several contingencies that impact scholarship hopes. Here, Jordan would have had to again excel on the playing field. He would have had to meet academic and entrance exam requirements. He would have had to overcome the unreliable image that his disciplinary problems conveyed. And, most importantly, he would have had to stay healthy...

[C]ollege football's character tells us why even a player with obvious college-level skills can harbor no more than an expectation of college financial assistance so long as he is still playing high school football. Football can exact a swift and permanent toll on any player's scholarship hopes. The vagaries of the game do not spare talented players and have crushed the aspirations of some of the very best. An athletic scholarship offer can vanish from a running back's future as swiftly as a healthy knee.

Therefore, athletic scholarships remain expectancies, regardless of a player's talent level, until that player completes high school football with his health firmly intact. A player's hopes, no matter how justified, cannot elevate his high school playing privileges to a protectable property interest at any stage where disciplinary action would be taken

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against those privileges.

Applying these principles to the facts of the case, the appeals court found “Jordan did not possess the right to participate in interscholastic athletics.” Moreover, the court found Jordan’s scholarship opportunities did not “confer such a right.” Accordingly, the appeals court held that “a protectable property interest was not at stake when the school imposed discipline, and a due process hearing was not required.” In the opinion of the appeals court, to hold otherwise “would invite a due process claim by every student engaged in interscholastic athletics and extracurricular activities.” In so doing, the appeals court expressed its reluctance to “intrude upon the disciplinary decisions of school districts.”

If the opportunity to earn college financial assistance were to elevate participation in interscholastic athletics into a protected property right, school districts would have to afford procedural due process in practically all disciplinary actions where student participation in outside activities was at stake.... Judicial intervention in school discipline would become the rule rather than the exception unless school districts provided due process hearings in all such disciplinary actions.

REASONABLE DISCIPLINARY PROCESS

On the other hand, the appeals court acknowledged that “school officials cannot impose student punishment in a completely arbitrary and capricious manner.” However, in this particular instance, the appeals court found “the disciplinary process that O’Fallon school officials employed was reasonable under the circumstances presented.”

Jordan was afforded the opportunity to be heard. Despite the informal nature of the process, Jordan’s lawyer was permitted to present the school superintendent with any information deemed favorable to a review of the disciplinary action. This included the existence of witnesses who could attest to Jordan’s alcohol-free condition when he left their presence three hours prior to the police encounter. Jordan’s lawyer was invited to attend a conference with the police officers. He was further invited to appeal to the O’Fallon school board. We find nothing arbitrary or capricious about the inquiry method or the discipline it produced.

Having concluded that “O’Fallon school officials dispensed that process which was due and acted reasonably under the circumstances presented,” the appeals court affirmed the trial court’s denial of Jordan’s claim.

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