



Winter 2020

Show Us the Money: How Patchwork State Freedom-Of-Information Laws Impede Accountability in High School Athletics

Frank D. LoMonte
University of Florida

Harrison O'Keeffe
University of Florida

Recommended Citation

Frank D. LoMonte & Harrison O'Keeffe, *Show Us the Money: How Patchwork State Freedom-Of-Information Laws Impede Accountability in High School Athletics*, 50 N.M. L. Rev. 87 (2020).
Available at: <https://digitalrepository.unm.edu/nmlr/vol50/iss1/5>

SHOW US THE MONEY: HOW PATCHWORK STATE FREEDOM-OF-INFORMATION LAWS IMPEDE ACCOUNTABILITY IN HIGH SCHOOL ATHLETICS

By Frank D. LoMonte* and Harrison O’Keeffe**

I. INTRODUCTION AND OVERVIEW

High school sports, particularly high school football, are an integral element of the American educational experience. School-sponsored competitive sports in the United States draw an estimated 8 million participants every year.¹ Over 1.03 million high schoolers play tackle football alone, making it the most-played interscholastic sport.² The number of high schoolers participating in school-sponsored athletics has grown every year over the past decade, according to the National Federation of State High School Associations, an umbrella entity for state-level governing bodies.

High school athletics are a matter of public concern because of their benefits, their risks, and their outsized cultural significance. Because sporting events reliably draw crowds and media attention, athletics have become a venue for social and political debate. Athletes kneel in solidarity with victims of police brutality.³ Cheerleaders and coaches fight for the right to engage in religious expression in conjunction with sporting events.⁴ And currently, the rights of transgender students

* Professor and Director of the Joseph L. Brechner Center for Freedom of Information at the University of Florida in Gainesville, Fla. B.A. 1992, Political Science, Georgia State University; J.D. (Order of the Coif), 2000, University of Georgia School of Law.

** Senior Research Associate, the Brechner Center for Freedom of Information; B.A. 2019, University of Florida; J.D. (anticipated) 2022, Levin School of Law, University of Florida.

1. NAT’L FED’N OF STATE HIGH SCH. ASS’NS, 2017–18 HIGH SCHOOL ATHLETIC PARTICIPATION SURVEY 54 (2018), https://www.nfhs.org/media/1020205/2017-18_hs_participation_survey.pdf [<https://perma.cc/HZ2B-PUE2>]. Note that “participants” means that some individuals are double-counted because they compete in more than one sport.

2. *See id.* at 53.

3. *See* Evie Blad, *Taking a Stand: How Schools Should Respond to National-Anthem Protests*, EDUC. WEEK (Oct. 4, 2016), <https://www.edweek.org/ew/articles/2016/10/05/taking-a-stand-how-schools-should-respond.html> [<https://perma.cc/TBU9-YSR8>] (documenting multiple instances of high school athletes kneeling during the National Anthem inspired by the example of NFL quarterback Colin Kaepernick, whose silent protest followed a string of highly publicized killings of African-Americans at the hands of police).

4. *See* Kountze Indep. Sch. Dist. v. Matthews *ex rel.* Matthews, NO. 09–13–00251–CV, 2017 WL 4319908 (Tex. App. Sept. 28, 2017) (finding that “run-through” banners displayed by cheerleaders at the start of football games are the private speech of the individual student creators and not “government speech”). In 2018, a Bremerton, Washington, football coach petitioned the Supreme Court to hear his First Amendment case, after he was disciplined for kneeling and praying on the field immediately after a game in view of his students. Chris Henry, *Coach Kennedy Asks U.S. Supreme Court to Hear Bremerton School Prayer Case*, KITSAP SUN (June 26, 2018, 12:48 PM), <https://www.kitsapsun.com/story/news/local/2018/06/26/bremerton-school-prayer-case-coach-joe-kennedy-supreme-court/734402002/> [<https://perma.cc/TCW3-A5FB>]. A split panel of the Ninth Circuit

are being fought out in the stadiums and arenas of the public school system.⁵ For all of these reasons, the public has a manifest interest in being informed about—and having input into—the way interscholastic sports are run.

The governance of high school athletics falls into a gray nether zone of the law. In every state and the District of Columbia, a statewide umbrella organization, typically referred to as a High School Athletic Association or HSAA, sets and enforces standards for participation in competitive interscholastic sports. These organizations are neither strictly private nor strictly public. While nominally incorporated as not-for-profit corporations, they enjoy many of the benefits of governmental status. Regardless of the many indicators pointing in favor of “governmental” status, HSAAs typically have resisted being categorized as “public,” which would obligate them to open their board meetings and disclose their records to the public. Legal battles have been waged across the country over access to information that athletic associations prefer to keep secret, with mixed outcomes for the requesters.⁶

Just as state laws entitle journalists and citizen watchdogs to obtain records and attend meetings to oversee other aspects of education policymaking, the public should have a clear entitlement to know how decisions involving school athletic programs are made. As one commentator has observed, “Even the American legal system recognizes that athletic participation plays an integral part in a school’s educational mission.”⁷ Simply put, sports are too costly, too dangerous, and too central to the educational experience of millions of young people for policy decisions to be made in the dark.

As the adverse health consequences of playing professional football became widespread public knowledge,⁸ attention turned to the frequency of head injuries in

found no constitutional violation in *Kennedy v. Bremerton School District*, 869 F.3d 813, 831 (9th Cir. 2017).

5. See Michael Lenzi, *The Trans Athlete Dilemma: A Constitutional Analysis of High School Transgender Student-Athlete Policies*, 67 AM. U. L. REV. 841, 871–74 (2018) (collecting cases in which students have sued for the right to play on single-sex scholastic teams other than those corresponding to their biological sex); see also Malika Andrews, *How Should High Schools Define Sexes for Transgender Athletes?*, N.Y. TIMES (Nov. 8, 2017), <https://www.nytimes.com/2017/11/08/sports/transgender-athletes.html> [<https://perma.cc/7WLQ-K6VB>] (describing cases in Texas and Indiana in which students have fought to be allowed to compete on teams matching their gender identity, and how governing bodies have had difficulty adapting their rules).

6. See *infra* Section B.1. (collecting rulings and interpretations applying state open-governments laws to athletic associations).

7. Morgan Shell, *Transgender Student-Athletes in Texas School Districts: Why Can’t the UIL Give All Students Equal Playing Time?*, 48 TEX. TECH. L. REV. 1043, 1052–53 (2016); see also Fla. High Sch. Activities Ass’n, Inc. v. Bryant, 313 So. 2d 57, 57 (Fla. Dist. Ct. App. 1975) (quoting the trial court’s finding about the important of playing high school basketball to the student plaintiff: “[I]t is an important and vital part of his life providing an impetus to his general scholastic and social development and rehabilitation from his prior problems as a juvenile delinquent. It has resulted in the improvement of his grades, attitude, self-confidence, discipline and maturity.”).

8. A 2009 article in GQ about the work of emergency-room doctor Bennet Omalu in raising awareness about the frequency of traumatic brain injury in the National Football League inspired a 2015 feature film, “Concussion,” starring Will Smith. See generally Jeanne Marie Laskas, *Bennet Omalu, Concussions, and the NFL: How One Doctor Changed Football Forever*, GQ MAG. (Sept. 15, 2009), <https://www.gq.com/story/nfl-players-brain-dementia-study-memory-concussions> [<https://perma.cc/TQ2L-7VBR>].

prep football as well. By one estimate, high school football alone accounts for between 43,200 and 67,200 U.S. concussions each year.⁹ Between 2005 and 2014, 24 high school athletes died from head and neck injuries playing or practicing football, according to the Centers for Disease Control.¹⁰ Concerned parents and policymakers are increasingly demanding data about concussions in high school sports and insisting that schools improve safety measures to minimize serious injuries.¹¹ The concern became so acute that the Obama administration convened a White House summit in 2014 dedicated to addressing health risks in youth sports.¹² Over the past decade, legislatures in all 50 states and the District of Columbia have enacted some form of legislation (commonly referred to as “return to play” laws) addressing the treatment of scholastic athletes with concussion symptoms.¹³

As president, George W. Bush brought national attention to the issue of steroid abuse among youth athletes, a health risk that continues to plague prep sports as players search for a competitive advantage.¹⁴ Whether student-athletes can be forced to submit to drug testing as a precondition to competing even made its way to the U.S. Supreme Court, which in 1995 found the practice constitutional.¹⁵ Prep sports are a recurring matter of concern as high as the White House and Supreme Court level, which demonstrates the public’s need for complete and accurate information about the way youth sports are managed.

9. Lance K. Spaude, *Time to Act: Correcting the Inadequacy of Youth Concussion Legislation Through a Federal Act*, 100 MARQ. L. REV. 1093, 1102 (2017).

10. Kristen L. Kucera *et al.*, *Traumatic Brain and Spinal Cord Fatalities Among High School and College Football Players—United States, 2005–2014*, 65 MORBIDITY & MORTALITY WKLY. REP. 1465–69 (2017).

11. A May 2014 study published in the *Journal of the American Medical Association* documented a sharp rise in emergency-room visits for head injuries from 2006 to 2010, with 2.5 million people seeking treatment in 2010, one-third of them children. Dina Fine Maron, *A Generation Loses Consciousness, and Grows More Conscious of Headbanging*, SCI. AM. (May 13, 2014), <https://www.scientificamerican.com/article/a-generation-loses-consciousness-and-grows-more-conscious-of-headbanging/> [https://perma.cc/26TL-BH67].

12. Dina Fine Maron, *Obama to Host Sports Concussion Summit*, SCI. AM. (May 28, 2014), <https://www.scientificamerican.com/article/obama-to-host-sports-concussion-summit/> [https://perma.cc/P6VL-EE99].

13. Chris Lau, *Leaders and Laggards: Tackling State Legislative Responses to the Youth Sports Concussion Epidemic*, 85 FORDHAM L. REV. 2879 (2017); *see also* Lee Van Der Voo, *How Max’s Injury Became Max’s Law*, INVESTIGATEWEST (May 23, 2018), <https://www.invw.org/2018/05/23/how-maxs-injury-became-maxs-law/> [https://perma.cc/L8UX-4GZX]; Maggie FitzRoy, *New Florida Law Protects Young Athletes Recovering from Concussions*, FLA. TIMES-UNION (Aug. 10, 2012, 3:18 PM), <https://www.jacksonville.com/community/shorelines/2012-08-10/story/new-florida-law-protects-young-athletes-recovering-concussions> [https://perma.cc/55DD-VRRB].

14. The Associated Press, *President: ‘Get Rid of Steroids Now,’* ESPN.COM (Jan. 21, 2004, 1:14 PM), <http://www.espn.com/gen/news/2004/0120/1714001.html> [https://perma.cc/BU7C-XCKS] (reporting that President Bush used his State of the Union address to Congress to call on professional sports leagues to set a better example for youth athletes by policing steroid use). The Partnership for Drug-Free Kids reported that its 2013 survey of high school students found 11 percent had tried Human Growth Hormone and 7 percent had tried anabolic steroids. Bob Cook, *What Are We Supposed To Do About More Teenagers Taking HGH?*, FORBES (July 30, 2014, 1:03 AM), <https://www.forbes.com/sites/bobcook/2014/07/30/what-are-we-supposed-to-do-about-more-teenagers-taking-hgh/#6f1a681c2f0c> [https://perma.cc/6FNQ-WZRH].

15. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664–65 (1995).

Aside from the health concerns surrounding high school athletics, the economic impact is considerable. High school sports have been called “an economic juggernaut,” with communities spending as much as \$60 million on new facilities and sponsors signing six-figure deals for the naming rights to stadiums.¹⁶ Multimillion-dollar deals have also been made between broadcasting companies and state high school athletic agencies for the rights to telecast the highest-interest games.¹⁷

School districts around the country allocate millions of dollars yearly to fund their high school athletic departments.¹⁸ For instance, in 2017, 36 high school football head coaches made over \$100,000 in Georgia, a state where football is central to the high school experience.¹⁹ By comparison, the average salary of a public school teacher in Georgia that year was \$55,532.²⁰ As author Amanda Ripley said in a 2013 indictment of American schools’ obsession with sports: “In many schools, sports are so entrenched that no one—not even the people in charge—realizes their actual cost.”²¹ It is manifestly the public’s business whether athletic competitions are managed in a safe and financially responsible way.

High school athletic associations are the governing entities that oversee high school athletics in every state. These agencies’ main responsibilities include, but are not limited to: establishing game rules and regulations, determining students’ eligibility to play, organizing tournaments, hiring officials, negotiating broadcasting arrangements, issuing awards of recognition, and imposing sanctions on athletes and

16. Mark Koba, *High School Sports Have Turned Into Big Business*, CNBC.COM (Dec. 9, 2012, 11:29 AM), <https://www.cnbc.com/id/100001024> [<https://perma.cc/6BQK-GXYR>]; The Associated Press, *Texas High Schools Spending Tens of Millions on Football Stadiums*, CBS NEWS (Apr. 29, 2016, 5:33 PM), <https://www.cbsnews.com/news/texas-schools-spending-millions-on-football-stadiums/> [<https://perma.cc/3U5A-J9MC>].

17. *Id.*; see also Diane D’Amico, *High School Sports Spending Grows as Budgets Get Tighter in New Jersey*, PRESS OF ATLANTIC CITY, (Oct. 26, 2009), https://www.pressofatlanticcity.com/news/local/high-school-sports-spending-grows-as-budgets-get-tighter-%20in/article_91e4be4c-c182-11de-b076-001cc4c03286.html [<https://perma.cc/KF4H-D3RA>] (stating that New Jersey public schools spend \$200 million per year on athletics).

18. See *The Case for High School Activities*, NAT’L FED’N OF STATE HIGH SCH. ASS’NS, <http://www.nfhs.org/articles/the-case-for-high-school-activities/> [<https://perma.cc/6W3M-6CDW>].

19. Matthew Head, *Georgia High School Football Coaches Score Big with \$100k-Plus Salaries*, FIRST COAST NEWS, (Feb. 4, 2018, 7:18 PM), <https://www.firstcoastnews.com/article/sports/high-school/football/georgia-high-school-football-coaches-score-big-with-100k-plus-salaries/77-514484550> [<https://perma.cc/ML4F-BNQ3>]. In another study, New Haven’s newspaper, the Register, looked at athletic budgets for 30 Connecticut schools and found athletic directors earning as much as \$129,000 a year. See Chris Hunn, *A Revealing Look into Area High School Athletic Budgets*, NEW HAVEN REG. (June 15, 2013, 12:00 AM), <https://www.nhregister.com/connecticut/article/A-revealing-look-into-area-high-school-athletic-11430036.php> [<https://perma.cc/CUZ5-ZHCC>].

20. NAT’L EDUC. ASS’N, RANKINGS OF THE STATES 2017 AND ESTIMATES OF SCHOOL STATISTICS 2018, at 26 (2018), http://www.nea.org/assets/docs/180413-Rankings_And_Estimates_Report_2018.pdf [<https://perma.cc/GU4D-S6UJ>].

21. Amanda Ripley, *The Case Against High-School Sports*, ATLANTIC (Oct. 2013), <https://www.theatlantic.com/magazine/archive/2013/10/the-case-against-high-school-sports/309447/> [<https://perma.cc/S528-Z2A7>].

school athletic programs.²² While they differ in scope, structure, and function, these associations share a common feature: they are incorporated as nonprofit business entities with a degree of legal separation from their member schools. That corporate status has fostered uncertainty about whether HSAs must obey state open-government laws as their member public schools do.

The unclear status of the state athletic associations is symptomatic of a larger failure of state transparency laws to take account of the ways in which core state functions are performed by nominally private quasi-governmental actors. State laws do not always afford the public adequate opportunity to oversee the way delegated state authority is being exercised by private designees.²³ Because they are supported largely by public dollars, and because they exert authority over the way school employees do their jobs and the way school programs are run, high school sports governing bodies should be clearly made subject to open-government laws, just as their member public schools already are.

This article examines the legal status of the nonprofit organizations that make and enforce the rules governing high school sports competition. Researchers from the Brechner Center surveyed all 51 of the statewide associations to ascertain their willingness to comply with state open-records laws. The associations responded with varying levels of cooperation (if they responded at all).

In Part II, the article explains how high school associations are structured and how they resemble government agencies. Part III explains how the courts have treated these quasi-public entities, both for purposes of state open-government laws and, more generally, when their “state” status becomes significant to a claim brought by an aggrieved party. Part IV describes the findings of the Center’s nationwide open-records survey and how the associations’ responses—or lack of responses—squares with the applicable open-government statutes. Finally, Part V concludes with recommendations for clarifying state open-government laws to more explicitly apply to associations comprised predominantly of public agencies, so that the public can reliably obtain information about how important policy decisions are made.

II. HIGH SCHOOL ASSOCIATIONS: HISTORY, STRUCTURE, AND AUTHORITY

“We don’t have a large university that has thirty or forty thousand students in it. We don’t have the art museum that some communities have and are world-renowned. When somebody talks about West Texas, they talk about football.”

—H.G. Bissinger, *Friday Night Lights: A Town, a Team, and a Dream*

A. The governance structure of high school sports

To understand the importance of public oversight of state athletic associations, it is helpful to evaluate how these entities got into the business of

22. See Diane Heckman, *Fourteenth Amendment Procedural Due Process Governing Interscholastic Athletics*, 5 VA. SPORTS & ENT. L.J. 1, 6–9 (2005) (describing scope of associations’ rulemaking authority).

23. See generally Alexa Capeloto, *Transparency on Trial: A Legal Review of Public Information Access in the Face of Privatization*, 13 CONN. PUB. INT. L.J. 19 (2013).

managing athletic competitions formerly run by state employees, and how much influence these associations have over the lives of students.

State high school associations emerged around the turn of the 20th century, in part as a means of promoting fair competition by enforcing standardized rules (for instance, so that players would compete against those of comparable ages and sizes).²⁴ Most date their existence to the early 1900s; the oldest, the Wisconsin Interscholastic Athletic Association, was formed in 1895.²⁵ The most recent addition, the D.C. State Athletic Association, was founded in 2012.²⁶ To varying degrees, these associations function as extensions of state and local governments or in concert with them; a 2001 survey of 46 associations found that 14 operated under the authority of their state legislatures, and 27 had one or more designated seats on their governing boards for the state education commissioner and/or that person's appointee(s).²⁷

Strictly speaking, state associations operate only postseason competitions and not regular-season games. But their authority extends to eligibility for all sporting events, not just the championship round. For instance, state associations commonly enforce age limits and residency limits that restrict participation even in regular-season competition.²⁸ They also restrict how much football teams can practice and under what weather conditions.²⁹ In this way, high school athletic associations exercise supervisory authority over their member schools and even over individual students. Other rules and standards commonly enforced by state associations include minimum academic performance, dress and grooming, use of illegal or performance-enhancing drugs, amateur status and acceptance of

24. See Stephen S. Goodman IV, *The University Interscholastic League of Texas: Who Are These Guys and What Can They Do?*, 16 ST. MARY'S L.J. 979, 983–84 (1985) (explaining founding purposes of Texas athletic association); see also *Robinson v. Kansas State High Sch. Activities Ass'n*, 917 P.2d 836, 840, 842 (Kan. 1996) (tracing history and purpose of Kansas' association, including extent of ongoing oversight by Kansas' legislature and State Board of Education); ARIZ. INTERSCHOLASTIC ASS'N, *THE HISTORY, RATIONALE AND APPLICATION OF THE ESSENTIAL ELIGIBILITY RULES OF THE ARIZONA INTERSCHOLASTIC ASSOCIATION* (2014), <http://aiaonline.org/files/3010/the-history-rationale-and-application-of-the-essential-eligibility-rules-of-the-arizona-interscholastic-association.pdf> [<https://perma.cc/QB2V-66PM>].

25. *What is the WIAA? Why Was It Established?*, WIS. INTERSCHOLASTIC ATHLETIC ASS'N, <https://www.wiaawi.org/aboutwiaa.aspx> [<https://perma.cc/YJC4-SH4A>].

26. *About DCSAA*, D.C. ST. ATHLETIC ASS'N, <https://www.dcsaasports.org/page/show/3453123-about-dcsaa> [<https://perma.cc/V499-ZUEF>].

27. Alan R. Madry, *Statewide School Athletic Associations and Constitutional Liability*; *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 12 MARQ. SPORTS L. REV. 365, 394 (2001).

28. See, e.g., *Sandison v. Mich. High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026 (6th Cir. 1995) (challenge to high school athletic association's maximum-age limit for boys' sports); *Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926 (8th Cir. 1994) (same); *Okl. High Sch. Athletic Ass'n v. Bray*, 321 F.2d 269 (10th Cir. 1963) (challenge to rule restricting athletic participation by student who moves to school different from school of family's residency); *Ind. High Sch. Athletic Ass'n, Inc. v. Carlberg ex rel. Carlberg*, 694 N.E.2d 222 (Ind. 1997) (same).

29. See Sam C. Ehrlich, *Gratuitous Promises: Overseeing Athletic Organizations and the Duty to Care*, 25 JEFFREY S. MOORAD SPORTS L.J. 1, 10–11 (2018) (explaining breadth of state associations' regulatory authority over practice conditions).

compensation, and other threshold eligibility standards to compete in interscholastic sports.³⁰

The National Federation of State High School Associations (“NFHS”) was founded in 1920, with the initial goal of setting more uniform standards and organization of high school sports.³¹ Over the years, as new state associations formed, the NFHS would absorb them as members, so that today, the Federation encompasses every state’s athletic association.³² Correspondingly, NFHS has continually expanded its functions. Although its initial role was to facilitate competition between schools and codify rules, it is now involved in almost everything relating to high school extracurriculars and athletics. For instance, the federation conducts research projects, provides training courses, and digitally broadcasts games.³³ Policies promulgated by the national association, such as protocols for preventing concussions, trickle down to the state level and become binding on public schools and their employees by way of state HSAA regulation.³⁴

NFHS’ governance structure is driven by the voting members, which are the 51 state member associations.³⁵ Each member delegates one representative to serve on the National Council, the rulemaking body of the organization. The National Council elect the Board of Directors, comprised of 12 members, which has management authority over the organization. Eight directors represent a corresponding geographical section of the country and four directors hold “at-large” seats. An eight-member Appeal Board, appointed by the National Council, serves a quasi-judicial role reviewing disputes over the Board’s determinations of member violations. The Federation operates under a constitution and set of Bylaws.

While each state association maintains their own unique governance structure, they all essentially follow the same three-branch governance model as the NFHS. For each state agency, there is a corresponding board of directors (sometimes referred to as the executive committee). While HSAA boards are almost always made up of administrators from member school districts—superintendents, principals, athletic directors—daily operations are run by a full-time “commissioner” or “president.” Many associations also have a legislative body comprised of principals and/or athletic directors who vote on revisions to the rules of competition. Some associations also maintain a quasi-judicial appeal board that can review sanctions or disqualifications imposed on schools, coaches, or individual athletes. Demonstrating that they are creatures of their constituent schools, HSAA bylaws and constitutions

30. See Heckman, *supra* note 22, at 6–9 (describing scope of associations’ rulemaking authority).

31. See *About Us*, NAT’L FED’N OF ST. HIGH SCH. ASS’NS, <https://www.nfhs.org/who-we-are/aboutus> [<https://perma.cc/R2JA-BA5U>].

32. *State ex rel. Mo. State High Sch. Activities Ass’n v. Schoenlaub*, 507 S.W.2d 354, 356 (Mo. 1974) (en banc).

33. See NAT’L FED’N OF ST. HIGH SCH. ASS’NS, *supra* note 31.

34. See Ehrlich, *supra* note 29, at 10–11 (asserting that “dozens” of states have enacted rules to reduce the risk of concussions in accordance with NFHS recommendations); see also *Smith v. Runnels Schools, Inc.*, 2004-1329, p. 111 (La. App. 1 Cir. 3/24/05); 907 So. 2d 109 (“The National Federation of State High School Associations . . . drafts the rules that govern the play of high school basketball.”).

35. NAT’L FED’N OF STATE HIGH SCH. ASS’NS 5–6, https://www.nfhs.org/media/885655/nfhs_company_brochure.pdf [<https://perma.cc/THP9-A5EL>] (includes information about the workings and structure of the National Federation of State High School Associations).

commonly provide that, in the event of dissolution, their assets will be distributed back to their member schools.³⁶

Structurally, some state associations are more clearly “governmental” than others. Perhaps the clearest case for governmental status is in Texas. The University Interscholastic League (“UIL”) is housed within the University of Texas, where its staff members are salaried employees of a state university and League rule changes must be reviewed by the State Board of Education.³⁷ Yet even with the great weight of factual evidence that the League operates as an integral part of Texas state government, courts have still reached diverging conclusions as to whether it is a private club or a public agency.³⁸

HSAs are structured as membership organizations comprised of member schools, often with a membership dues structure. Because most members of these associations are public schools, considerable public money flows through them, either directly (in the form of membership dues and entry fees for tournaments) or indirectly (in the form of free or subsidized use of school facilities and personnel). While some associations control the conduct of other extracurricular activities such as music or debate, most of the 51 associations deal exclusively with the administration and oversight of athletics.

Although membership is not generally made legally mandatory, it is debatable how “voluntary” membership really is, since non-members lose the ability to compete in postseason tournaments and may not be able to play regular-season interscholastic games against member schools.³⁹ Member schools may need their state association’s permission to play or even practice against a nonmember school.⁴⁰ As a practical reality, schools concerned with offering a meaningful opportunity to compete in athletics at a high level find that they have no choice but to join.⁴¹

B. Small athletes, big bucks: Sponsorships and broadcast rights

High school athletic competitions are increasingly becoming a mass spectator event in the model of college sports. States have even begun issuing Rating

36. See, e.g., ARIZ. INTERSCHOLASTIC ASS’N, 2019-2020 CONSTITUTION, BYLAWS, POLICIES AND PROCEDURES 2, <http://aiaonline.org/files/14046/2018-2019-aia-constitution-bylaws-policies-and-procedures-book.pdf> [https://perma.cc/4AX4-FY2N] (“In the event of dissolution of this corporations, all assets remaining after payments of all debts and liabilities shall be distributed to the member schools.”).

37. Goodman, *supra* note 24, at 992–93, 995 n.121, 1001.

38. See Goodman, *supra* note 24, at 988–93 (stating that the UIL’s legal status is “ambiguous” and collecting cases reaching differing outcomes).

39. See Fla. High Sch. Activities Ass’n v. Thomas, 409 So. 2d 245, 246–47 (Fla. Dist. Ct. App. 1982), *rev’d in part on other grounds sub nom.* Fla. High Sch. Activities Ass’n v. Thomas *ex rel.* Thomas, 434 So. 2d 306 (Fla. 1983) (finding that membership in Florida state association “is, in effect, mandatory” because membership is a prerequisite to competing in interscholastic activities).

40. See Ashley J. Becnel, Note, *Friday Night Lights Reach the Supreme Court: How a Case About High School Football Changed the First Amendment*, 15 SPORTS LAW. J. 327, 328 (2008) (explaining this approval mechanism in Texas).

41. See Michelle Newman, Note, *Foul Territory: Identifying Media Restrictions in High School Athletics Outside the Bounds of First Amendment Values*, 14 TEX. REV. ENT. & SPORTS L. 59, 70 (2012) (“‘[V]oluntary’ is not the most accurate word to define sports association membership. In each state, there are very limited, or in most instance, no alternatives to membership in the single sports association.”).

Percentage Indexes, or RPI, that rank the strength of high school teams,⁴² and colleges' recruiting and signing of highly rated high school prospects is a matter of intense fascination across talk radio and the blogosphere.⁴³ The "professionalization" of high school sports means more corporate money flowing into athletic programs, with some programs signing seven-figure deals to promote local or national brands.⁴⁴ These sponsorship deals have, at times, raised ethical concerns, especially where coaches benefit from deals they help negotiate.⁴⁵ During the 2010 season, researchers visited 24 high school basketball games across Indiana and found an average of nearly 44 visible corporate sponsorship appearances per event, with Coca-Cola, Pepsi, and McDonald's being the most-represented brands.⁴⁶

As the popularity of high school sports has increased,⁴⁷ broadcast rights for postseason sports, especially football, have become a valuable and sought-after commodity. The NFHS and its commercial partner, PlayOn! Sports, televise some 40,000 prep sporting events, which one broadcast executive termed "the final frontier" now that the viewing public is saturated with coverage of college games.⁴⁸

42. David Pierce & Jeffrey Petersen, *Corporate Sponsorship Activation Analysis in Interscholastic Athletics*, 4 J. OF SPONSORSHIP 272, 278 (2011).

43. See Becnel, *supra* note 40, at 331 (noting that nationwide media attention paid to recruiting of high-schoolers has raised the stakes for authorities that regulate recruiting practices); see also Special to the Oregonian, *1080 The Fan, Andrew Nemec Announce Weekly Recruiting Radio Show*, OREGONLIVE.COM (Jan. 9, 2019), https://www.oregonlive.com/recruiting/index.ssf/2017/08/1080_the_fan_andrew_nemec_anno.html [<https://perma.cc/PB7P-VN6E>] (announcing debut of weekly radio program dedicated to Oregon athletic recruiting); Bob Cook, *NCAA Research Shows Pervasiveness of Early Recruiting—Especially of Female Athletes*, FORBES, (Dec. 29, 2017 3:17 PM), <https://www.forbes.com/sites/bobcook/2017/12/29/ncaa-research-shows-pervasiveness-of-early-recruiting-especially-of-female-athletes/> [<https://perma.cc/E9TT-HLGC>] (noting that an NCAA survey published in 2017 showed that students increasingly are reporting contact by college recruiters as early as their freshman year in high school, if not before).

44. See, e.g., Carol Thompson, *Under \$1.5 Million Proposed Deal, LVHN Logo Would Appear on East Penn's Football Field, Gyms and More*, MORNING CALL (May 23, 2018, 8:35 AM), <https://www.mcall.com/news/education/mc-nws-lvhn-east-penn-sponsorship-20180515-story.html> [<https://perma.cc/7LTP-DTQ3>] (reporting on healthcare conglomerate's 10-year sponsorship arrangement to put company name on stadiums, gyms and tickets at Pennsylvania school district); Bob Cook, *School District Tries to Scare Up \$3 Million in Advertising to Pay for Sports*, FORBES (Aug. 30, 2012, 5:19 PM), <https://www.forbes.com/sites/bobcook/2012/08/30/school-tries-to-scare-up-3-million-in-advertising-to-pay-for-sports/> [<https://perma.cc/5RLG-44Y8>] ("For years, schools have gotten more aggressive and ambitious about selling off space to corporate sponsors to make up for money they can't get—or would rather not try to get—from taxpayers, including offering naming rights to facilities.").

45. See, e.g., Amy Donaldson, *High School Sponsorship Contracts Raise Concerns, but Also Benefit Programs*, DESERET NEWS (March 5, 2013, 9:30 PM), <https://www.deseret.com/2013/3/5/20515622/high-school-sponsorship-contracts-raise-concerns-but-also-benefit-programs> [<https://perma.cc/F99T-YKSK>] (noting that Utah state auditors raised concerns about compliance with bidding and conflict-of-interest laws in coaches' deals with apparel companies).

46. See Pierce & Petersen, *supra* note 42, at 278.

47. See Becnel, *supra* note 40, at 332 (observing that nearly 1 million ESPN viewers watched a football game between two Florida high school teams in 2005, and cable channel MTV based an entire "reality" show on an especially successful Alabama high school football program).

48. Brandon Costa, *'Stepping Over Dead Bodies': Has the NFHS Network Figured Out Live High School Sports Production?*, SPORTS VIDEO GROUP NEWS, (Nov. 25, 2014, 1:55 PM), <https://www.sportsvideo.org/2014/11/25/stepping-over-dead-bodies-has-the-nfhs-network-figured-out-live-high-school-sports-production/> [<https://perma.cc/DPU9-W5Q9>].

PlayOn!, regarded as the largest and most influential company specializing in producing prep sports events, reporting revenue of \$10 million in 2013, an annual revenue growth rate of 80 percent, and it deals with 600 schools in 32 states, with a per-school annual fee of \$2,000 to \$3,000 for the company to produce telecasts of games.⁴⁹ In addition to the fees from schools, rights-holders profit from pay-per-view fees, which run around \$10 for a single game or \$120 for a yearly viewing pass.⁵⁰

As state associations have locked up broadcast rights in exclusive long-term contracts, journalists have seen their access diminish.⁵¹ Local television outlets have been limited in how much footage they can air and archive on their websites, and journalists have been placed under restrictive credentialing conditions, at times leading to litigation.⁵²

In 2009, the Wisconsin Interscholastic Athletics Association (“WIAA”) sued the owners of the Appleton, Wisconsin newspaper seeking a declaratory judgment upholding the association’s exclusive contract for video coverage of postseason sports, which the newspaper defied by posting video of four high school football games to its website.⁵³ Under a 10-year agreement, WIAA gave a private vendor, American Hi-Fi, Inc., exclusive rights to all video depictions of postseason tournaments (live broadcasting, online streaming, video-on-demand) in exchange for a share of revenues.⁵⁴ Media outlets could purchase video highlight clips from American Hi-Fi, but were limited to posting no more than two minutes of game action on their sites, a limit that the newspaper’s owners, Gannett Co., deemed unacceptable.⁵⁵

Gannett, joined by the Wisconsin Newspaper Association, argued that a government actor cannot enter into a contract that restrains the ability of news organizations to stream images of newsworthy events. But the federal Seventh Circuit found no constitutional violation.⁵⁶ What Gannett sought to do—stream and

49. Bill Hendricks, *Media Company Scores by Broadcasting Prep Games*, ATLANTA J.-CONST. (June 1, 2013), <https://www.ajc.com/business/media-company-scores-broadcasting-prep-games/thnYfqFaItki1we8u2GuHI/> [https://perma.cc/V98K-ZQUF] (interviewing company’s chief executive officer, who characterizes PlayOn! as “the largest rights holder, producer and aggregator of high school sporting events”).

50. See Michael Lycklama, *IHSAA Ends Webcasting Contract with IdahoSports.com*, IDAHO STATESMAN: VARSITY EXTRA BLOG (Apr. 16, 2016, 9:51 AM), <https://www.idahostatesman.com/sports/high-school/varsity-extra-blog/article70272697.html> [https://perma.cc/LT5M-H9QB] (setting out fees for subscriber packages from NFHS Network, a joint venture of the National Federation of State High School Associations and PlayOn! Sports).

51. See Samantha Vicent, *Exclusivity Contracts Limit Student Journalists’ Live Sports Coverage*, STUDENT PRESS L. CTR. (Feb. 1, 2014), <https://splc.org/2014/02/exclusivity-contracts-limit-student-journalists-live-sports-coverage/> [https://perma.cc/QYR5-99DQ] (describing how high school journalists in California and Colorado have been denied opportunities to cover their own schools’ games because of exclusionary contracts with broadcasters).

52. Alicia Wagner Calzada, *Shut Out: The Dispute over Media Access Rights in High School and College Sports*, 7 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 1–4 (2010).

53. Wis. Interscholastic Athletic Ass’n v. Gannett Co., 716 F. Supp. 2d 773 (W.D. Wis. 2010), *aff’d on other grounds*, 658 F.3d 614 (7th Cir. 2011).

54. *Id.* at 777–78.

55. *Id.* at 780.

56. Wis. Interscholastic, 658 F.3d at 629.

archive video of games start-to-finish on its newspapers' websites—did not constitute protected news coverage, the court held, but rather was the unprotected appropriation of a valuable entertainment product:

An exclusive contract for transmission of an event is not a gag order or 'prior restraint' on speech about government activities. The media are free under the policy to talk and write about the events to their hearts' content. What they cannot do is to appropriate the entertainment product that WIAA has created without paying for it.⁵⁷

The court afforded special deference to the WIAA's authority because, in the judges' view, the telecast of a high school football game was a case of government employing private contractors to transmit the government's own speech.⁵⁸ Because the WIAA was acting in a "proprietary" role as the purveyor of speech, the court reviewed its actions merely for reasonableness.⁵⁹

A similar dispute arose in Illinois in 2008, when the Illinois High School Association denied media credentials to news organizations that were found to have sold reprints of game photos contrary to an IHSA rights agreement giving a private vendor, Visual Image Photography, Inc., exclusive resale rights to game-action images.⁶⁰ News organizations sued to challenge the restrictions, but in the face of state legislative proposals to assure journalists the right to sell their game photographs, the IHSA settled the case.⁶¹

The dispute reemerged, though, in 2012. The same news organizations again challenged the IHSA's authority to assess fees for airing news webcasts including game footage shot at postseason sporting events. But an Illinois trial court found no breach of the 2008 settlement, which covered only still photography and not online streaming.⁶²

As these legal conflicts illustrate, there is significant public interest in access to high school sporting events, and that interest translates into great commercial value. When public entities enter into exclusive long-term contracts for

57. *Id.* at 621–22. There was no dispute that the First Amendment applied to the WIAA, because both parties stipulated that WIAA qualified as a state actor. *Id.* at 616.

58. *Id.* at 623.

59. *See id.* at 626. This analysis is fundamentally flawed. A football game is not "speech." The telecast of the game is speech. And the telecast of the game was the speech of the broadcaster (in this case, American Hi-Fi), so there was no "government message" in the case. The WIAA's restriction on Gannett's use of game footage is properly analyzed as a regulatory act and not, as the Seventh Circuit characterized it, a "proprietary" one. As a regulatory act, the exclusivity rules should have been scrutinized for content-neutrality and, if found to be content-based, subjected to strict scrutiny. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46–47 (1986) (stating that content-based restrictions on speech are presumptively unconstitutional).

60. Corinna Zarek, *Sidelined?*, REPS. COMMITTEE FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/journals/the-news-media-and-the-law-winter-2008/sidelined/> [<https://perma.cc/9LB2-DU96>].

61. Frank LoMonte, *Access to Student Athletic Events*, STUDENT PRESS L. CTR. (Apr. 1, 2008), <http://www.splc.org/article/2008/04/access-to-student-athletic-events> [<https://perma.cc/SX4A-72QP>].

62. Samantha Raphelson, *Illinois Schools Association Can Charge Newspapers Who Broadcast Sports Events*, STUDENT PRESS L. CTR. (Nov. 20, 2012), <http://www.splc.org/article/2012/11/illinois-schools-association-can-charge-newspapers-who-broadcast-sports-events> [<https://perma.cc/JE87-FA44>].

the use of valuable public assets, the need for oversight and transparency is readily apparent.

III. THE LEGAL STATUS OF SPORTS ASSOCIATIONS

A. Sports associations as “state actors”

When a student is wrongfully denied an educational opportunity by a public school, the student has recourse under the U.S. Constitution.⁶³ The Constitution guarantees all citizens the right to freedom of expression and association, the right to receive due process before a government benefit is taken away, and the right to receive equal protection of laws that implicate fundamental rights. But where the wrong is attributable to a private corporation, an injured party normally has no recourse under the Constitution.

“State action” is a prerequisite to maintaining a constitutional claim.⁶⁴ Because the Constitution acts as a check only on governmental authority, a plaintiff alleging a constitutional injury must establish that the defendant acted “under color of” state law.⁶⁵ A private corporation normally is not regarded as a state actor responsible for adhering to the Constitution.⁶⁶ But at times, the courts have found “state action” where a private entity acts in place of, at the behest of, or in close collaboration with a government agency, particularly where the function being performed is governmental in nature.⁶⁷

High school associations commonly face constitutional challenges alleging denial of equal protection or due process. Transfer rules that restrict players from hopping from team to team have been challenged as interfering with familial privacy and with the fundamental right to travel.⁶⁸ Regulations that forbid girls from playing on boys’ teams, and vice-versa, have been attacked as impermissible gender-based discrimination.⁶⁹ Whether an athletic association engages in “state action” when

63. See *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (recognizing that because states require students to attend school, there is a property interest in the receipt of a public education that cannot be taken away without process).

64. See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349–50 (1974).

65. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978).

66. See *id.* at 156.

67. See Joseph P. Trevino, *The WIAA as a State Actor: A Decade Later*, Brentwood Academy’s Potential Effect on Wisconsin Interscholastic Sports, 22 MARQ. SPORTS L. REV. 287, 291 (2011) (observing that “there is not a bright-line, all-encompassing test for finding state action” and that, over time, the Supreme Court’s view of what constitutes state action by a private entity “has undergone relatively dramatic changes”).

68. See, e.g., *Zander v. Mo. State High Sch. Activities Ass’n (In re United States)*, 682 F.2d 147 (8th Cir. 1982) (dismissing challenge to Missouri HSAA rule requiring students who switch schools to forfeit a year of playing eligibility, which student plaintiffs challenged as unduly burdening their constitutionally guaranteed right to travel and right of free association); *Niles v. Univ. Interscholastic League*, 715 F.2d 1027 (5th Cir. 1983) (summarily rejecting student’s claim that Texas HSAA restrictions on eligibility for transfer students, meant to prevent “hopping” between athletic programs, infringed the student’s right to travel or right of familial privacy).

69. See, e.g., *Clark v. Ariz. Interscholastic Ass’n*, 695 F.2d 1126 (9th Cir. 1982) (rejecting constitutional challenge to Arizona HSAA rule that forbade boys from playing on girls’ teams); *Attorney Gen. v. Mass. Interscholastic Athletic Ass’n, Inc.*, 393 N.E.2d 284 (Mass. 1979) (striking down HSAA prohibition against boys playing on girls’ sports teams on equal protection grounds).

regulating interscholastic athletics has been a decisive question in dozens of legal disputes involving students' eligibility to play. The general consensus, with a few exceptions, is "yes."

Finding that an athletic association is a state actor for constitutional purposes does not automatically mean it will also be a public body for purposes of open-government statutes.⁷⁰ But the two inquiries have substantial overlap; in each instance, courts will look at whether the function being performed is of "governmental" character, and whether the private entity is acting under state supervision or exercising state-delegated power.⁷¹ Because there are far more reported cases about high school associations' governmental status in the constitutional context than in the open-government context, the "state action" body of caselaw is instructive by analogy.

1. Early caselaw

In a much-disputed 2001 ruling, the U.S. Supreme Court decided that a high school athletic association governed by a board entirely made up of public school administrators and with a membership comprised 84 percent of public schools was a "state actor" susceptible to First Amendment and due process claims.⁷² Leading up to that ruling, lower courts had struggled for decades with the legal status of these neither-fish-nor-fowl entities.⁷³

The earliest caselaw treated athletic associations as private clubs, virtually immune to judicial intervention in their enactment and enforcement of rules.⁷⁴ But as pressure mounted for long-segregated schools to afford minority students the full benefits of public education, the judiciary began getting more involved in overseeing the affairs of high school associations.

In one 1968 case, an all-black Catholic high school in New Orleans challenged the Louisiana High School Athletic Association's refusal to grant the school membership without explanation; at the time, the association had only recently begun to accept integrated public schools as members.⁷⁵ The district court

70. See Goodman, *supra* note 24, at 1002 ("Classification of the League's activities as 'state action' is a distinct legal question from the League's status as a state agency or private association.").

71. See, e.g., *Ohio ex rel. Schiffbauer v. Banaszak*, 2015 Ohio St. 3d 1854, 2015-Ohio-1854, 33 N.E.3d 52 (finding that a private university's police department was a "public office" subject to Ohio's open-records act, which extends coverage to "any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government." (citing OHIO REV. CODE § 149.011(A))) (emphasis supplied).

72. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001).

73. See, e.g., *Quimby v. Sch. Dist. No. 21*, 455 P.2d 1019, 1022 (Ariz. 1969) (rejecting argument that rules of high school association were unreviewable because it is a voluntary membership organization, and observing that largest portion of association's budget came from dues paid by public schools, and that its rules affected students' ability to take part in public school activities); *Crandall v. N.D. High Sch. Activities Ass'n*, 261 N.W.2d 921, 925 (N.D. 1978) (citing *Quimby* case and finding that rules of North Dakota association are subject to judicial review "because the Association is primarily supported by public funds and is performing a quasi-governmental function").

74. See John C. Weistart, *Rule-Making in Interscholastic Sports: The Bases of Judicial Review*, 11 J. L. & EDUC. 291, 335 (1982) (noting judges' gradually increasing willingness to scrutinize HSAA decisions in context of discrimination complaints).

75. *La. High Sch. Athletic Ass'n v. St. Augustine High Sch.*, 396 F.2d 224 (5th Cir. 1968).

held, and the federal Fifth Circuit agreed, that Louisiana's high school athletic association engages in state action, and found the exercise of state authority for the purpose of maintaining segregation to be unlawful.⁷⁶ The appeals court was persuaded both by the structure and operations of the LHSAA—its staff members were classified as “teachers” eligible for state retirement benefits, and most of the association's money came from ticket sales for events held in state facilities—and also by the power that the association wielded to compel schools and administrators to conform to association rules:

The power of the Association reaches not only to the stadiums, the gymnasiums and the locker rooms but into the public classrooms, the public principals' offices and the public pocketbook. It exercises control over curricula—a coach must teach a designated minimum number of classes per week. Principals are required to submit certain reports to the Association. The Association has the power to investigate, discipline and punish member schools by fine and otherwise. If a public school principal does not comply with the mandate of the Association, or if a public school coach uses an athlete whose eligibility is questioned by the Association, or if the student body of a public school act improperly in connection with an athletic event, the school—a state agency—is subject to Association discipline.⁷⁷

The Fifth Circuit's view in the Louisiana case became the near-unanimous view everywhere.⁷⁸ Courts have concluded that high school associations engage in state action in Florida,⁷⁹ Illinois,⁸⁰ Indiana,⁸¹ Kentucky,⁸² Massachusetts,⁸³ Missouri,⁸⁴ New Hampshire,⁸⁵ Oklahoma,⁸⁶ Pennsylvania,⁸⁷ Rhode Island,⁸⁸ and Tennessee.⁸⁹ The conclusion that HSAsAs engage in state action is often based on the finding that they perform duties that would otherwise have been performed by public schools or districts; for instance, the Sixth Circuit found that the Kentucky association “apparently funded in part through dues paid by the state's public schools, performs the [school board's] statutory functions with respect to interscholastic athletics.”⁹⁰ Other rulings emphasize the entwinement of functions

76. *Id.* at 228.

77. *Id.* at 227.

78. See Heckman, *supra* note 22, at 10; *supra* notes 37, 38 (collecting cases).

79. Fla. High Sch. Activities Ass'n, Inc. v. Bradshaw, 369 So. 2d 398, 402 (Fla. Dist. Ct. App. 1979).

80. Griffin High Sch. v. Ill. High Sch. Ass'n, 822 F.2d 671, 674 (7th Cir. 1987).

81. Ind. High Sch. Athletic Ass'n, Inc. v. Carlberg, 694 N.E.2d 222, 229 (Ind. 1997).

82. See Horner v. Ky. High Sch. Athletic Ass'n, 43 F.3d 265 (6th Cir. 1994).

83. Davis v. Mass. Interscholastic Athletic Ass'n, Inc., 3 Mass. L. Rptr. 375 (Mass. 1995).

84. Zander v. Mo. State High Sch. Activities Ass'n (*In re* United States), 682 F.2d 147, 151 (8th Cir. 1982).

85. Duffley v. N.H. Interscholastic Athletic Ass'n, Inc., 446 A.2d 462, 466 (N.H. 1982).

86. Okla. High Sch. Athletic Ass'n v. Bray, 321 F.2d 269, 273 (10th Cir. 1963).

87. Pennsylvania v. Pa. Interscholastic Athletic Ass'n, 334 A.2d 839, 842 (Pa. Commw. Ct. 1975).

88. Kleczek v. R.I. Interscholastic League, Inc., 612 A.2d 734, 736 (R.I. 1992).

89. Kelley v. Metro. Cty. Bd. Of Ed., 293 F. Supp. 485, 491 (M.D. Tenn. 1968).

90. Horner v. Ky. High Sch. Athletic Ass'n, 43 F.3d 265, 272 (6th Cir. 1994).

between the state associations and their member public schools, as a federal court did in applying the state-action doctrine to Indiana's HSAA: "The IHSAA is an organization whose very existence is entirely dependent upon the absolute cooperation and support of the public school system of the State of Indiana. . . ." ⁹¹

A few outliers, however, declined to treat the associations' oversight of high school sports as state action. In a 1989 ruling, the federal Sixth Circuit found that the Ohio High School Athletic Association ("OHSAA") did not act under color of state law in establishing and enforcing eligibility requirements for participation in competitive soccer. ⁹² The court found the OHSAA legally indistinguishable from the NCAA, which the circuit had previously determined to be a purely private actor immune from constitutional claims. ⁹³ The OHSAA did not meet either of the circuit's recognized tests for classification as a state actor: it did not perform a function exclusively reserved for the state, and the state did not cause or control its decisions. ⁹⁴

While lopsided, the division of circuit-level authority about the status of high school associations teed up the issue for Supreme Court resolution.

2. *Brentwood Academy: The Supreme Court finds state action*

In 1997, the Tennessee Secondary School Athletic Association ("TSSAA") imposed a \$3,000 fine and two-year ban from postseason competition on Brentwood Academy, a Christian prep school in Nashville, after finding that Brentwood's football coach violated association regulations in recruiting middle-school athletes. ⁹⁵ Brentwood sued the association to enjoin enforcement of the recruiting rule, alleging (among other claims) violations of the school's First and Fourteenth Amendment rights. ⁹⁶

Before reaching the substance of the claims, the federal district court thoroughly analyzed the legal status of high school sports associations and concluded that the TSSAA engages in state action, finding "overwhelming evidence of the symbiotic relationship between TSSAA and the public, state-controlled school system." ⁹⁷ While federal district courts in Tennessee had previously found the association to be a state actor, ⁹⁸ the TSSAA argued that those cases no longer applied, because the state Board of Education (in reaction to the previous rulings) revised its rules to remove references to "delegating" governmental authority to the association. ⁹⁹ But the judge looked beyond this cosmetic revision to the substance of the relationship, and found it unaltered: "[T]he connections between TSSAA and the

91. *Robbins v. Ind. High Sch. Athletic Ass'n*, 941 F. Supp. 786, 791 (S.D. Ind. 1996).

92. *Burrows v. Ohio High Sch. Athletic Ass'n*, 891 F.2d 122 (6th Cir. 1989).

93. *Id.* at 125 (citing *Graham v. NCAA*, 804 F.2d 953, 957 (6th Cir. 1986)).

94. *Id.*

95. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 13 F. Supp. 2d 670, 675-77 (M.D. Tenn. 1998), *rev'd*, 180 F.3d 758 (6th Cir. 1999).

96. *Id.* at 672.

97. *Id.* at 683.

98. *Graham v. Tenn. Secondary Sch. Athletic Ass'n*, No. 1:95-cv-044, 1995 WL 115890, at *4 (E.D. Tenn. Feb. 20, 1995); *Crocker v. Tenn. Secondary Sch. Athletic Ass'n*, 735 F. Supp. 753, 759 (M.D. Tenn. 1990); *Kelley v. Metro. Cty. Bd. of Educ.*, 293 F. Supp. 485, 491 (M.D. Tenn. 1968).

99. *Brentwood*, 13 F. Supp. 2d at 680.

State are still pervasive and entwined. Nothing about the function of TSSAA has changed. Nothing about the realities of control over secondary school athletics has materially changed.”¹⁰⁰

The Sixth Circuit reversed, finding no state action.¹⁰¹ The appeals court applied the Supreme Court’s 1980s “*Blum* Trilogy,”¹⁰² in which the justices offered a series of analytical tests by which a non-governmental entity might be found to engage in state action.¹⁰³ The appeals court found none of those tests to be satisfied; because there is no constitutional entitlement to play sports, the operation of tournaments is not a “public function,” and the state did not “compel” or “coerce” the association to do its bidding.¹⁰⁴ The appellate court was more persuaded by the state school board’s seemingly symbolic gesture of rewording its rules to remove references to “delegation,” regarding the removal as evidencing the state’s intent to revoke its grant of authority.¹⁰⁵ The court was unconvinced by Sixth Circuit precedent holding state athletic associations responsible for adhering to Title IX,¹⁰⁶ finding that even a nonstate private entity could be liable so long as it accepted any federal funding, which would not necessarily qualify the recipient as a “state actor” for constitutional purposes.¹⁰⁷

Brentwood Academy asked the Supreme Court to take the case.¹⁰⁸ The academy pointed to the seemingly overwhelming consensus of other circuits that the regulation of high school athletics qualifies as state action.¹⁰⁹ But the TSSAA waved

100. *Id.* at 681.

101. *Brentwood*, 180 F.3d at 766.

102. *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

103. *Brentwood*, 180 F.3d at 763–64.

104. *Id.* at 763–64.

105. *Id.* at 766.

106. *Id.* at 765 (citing *Yellow Springs v. Ohio High Sch. Athletic Ass’n*, 647 F.2d 651, 653 (6th Cir.1981)).

107. *Brentwood*, 180 F.3d at 765.

108. *Petition for Writ of Certiorari, Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288 (2001) (No. 99-901).

109. *Id.* at 7–8, 8 n.3. The petitioners cited five circuit-level decisions categorizing high school associations as state actors, including: *Louisiana High School Athletic Ass’n v. St. Augustine High School*, 396 F.2d 224, 227–28 (5th Cir. 1968) (“There can be no substantial doubt that conduct of the affairs of LHSAA is state action” and the nominally private status of LHSAA “cannot obscure the real and pervasive involvement of the state in the total program”); *Griffin High School v. Illinois High Sch. Ass’n*, 822 F.2d 671, 674 (7th Cir. 1987) (observing that Illinois association had an “overwhelmingly public character” because its members are predominantly public institutions); *Zander v. Missouri State High School Activities Ass’n (In re United States)*, 682 F.2d 147, 151 (8th Cir. 1982) (stating that MSHSAA rules were state action because the association’s membership is overwhelmingly public schools); *Brenden v. Independent School District*, 742, 477 F.2d 1292, 1295 (8th Cir. 1973) (finding that integral involvement of public school districts in HSAA policymaking rendered the organization a state actor); *Clark v. Arizona Interscholastic Ass’n*, 695 F.2d 1126, 1128 (9th Cir. 1982) (holding that Arizona HSAA engages in state action because the “member public schools play a substantial role in determining and enforcing the policies and regulations of the AIA” and because the association’s “rulemaking procedure integrally involve the member schools and school districts in the decision making process”). *Id.* at 8 n.3. The petition also cited a Third Circuit case, *Moreland v. Western Pa. Interscholastic Athletic League*, 572 F.2d 121, 125 (3d Cir 1978), recognizing the parties’ concession that state action was present. *Id.*

off those cases as either containing minimal analysis or as unpersuasive because they were decided under outdated legal standards predating the Supreme Court's series of 1981-82 *Blum* rulings.

The justices accepted *certiorari* and reversed the Sixth Circuit, finding that the TSSAA engaged in state action in its oversight of interscholastic sports.¹¹⁰

To reach its result, the Court had to circumnavigate its own 1988 ruling in *National Collegiate Athletic Ass'n v. Tarkanian*¹¹¹ that the NCAA did not engage in state action in sanctioning the University of Nevada-Las Vegas ("UNLV") basketball program for ethical violations. In the *Tarkanian* case, UNLV's head basketball coach argued that the NCAA qualified as a state actor, either because the university delegated governmental authority to the organization or because the two acted in concert.¹¹² The justices rejected both arguments.

In a 5-4 opinion authored by Justice John Paul Stevens, the Court found that the NCAA acted neither as an extension of, nor in conjunction with, the university. Stevens framed the enforcement proceeding as an adversarial one, in which the NCAA acted as representative of its members other than UNLV (private and public) in recommending sanctions; UNLV, he wrote, could have ignored the recommendations but chose not to, so the decision afflicting Tarkanian was ultimately made by the university.¹¹³ Justice Byron White, a former college football star, authored the four-justice dissent. White wrote the NCAA "acted jointly with UNLV" in deciding to suspend Tarkanian.¹¹⁴ Tarkanian's suspension resulted from UNLV's agreement to subject itself to NCAA regulations, including the obligation as an NCAA member to defer to the NCAA's factual findings when the institution is investigated; consequently, the NCAA acted in concert with UNLV in bringing about the suspension.¹¹⁵

The *Brentwood* Court found a single state's high school sports association to be decisively different in structure from the NCAA, which by its national scale cannot be said to operate at the behest of any particular state.¹¹⁶ (Indeed, the *Tarkanian* opinion overtly suggested that the analysis might come out differently for a single state's scholastic sports association.¹¹⁷) Justice David Souter, writing for a 5-4 majority in *Brentwood*, characterized the TSSAA as "an organization of public schools represented by their officials acting in their official capacity to provide an

110. *Brentwood Academy*, 531 U.S. 288, 305 (2001).

111. 488 U.S. 179 (1988).

112. *Id.* at 191-92.

113. *Id.* at 196.

114. *Id.* at 200 (White, J., dissenting).

115. *Id.* at 201-02.

116. *Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 298 (2001).

117. *Tarkanian*, 488 U.S. at 193 n.13 ("The 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."). Some commentators have found the *Brentwood* Court's distinction unpersuasive and likely to invite confusing line-drawing problems. See, e.g., Aaron Echols, *Fair Play: The Tension Between an Athletic Association's Regulator Power and Free Speech Rights of Member Schools*, 28 J. NAT'L ASS'N OF ADMIN. L. JUD'Y 237, 273 (2008) ("At some point, the judicial system is going to be forced to further delineate exactly what causes an athletic association such as TSSAA to be a state actor when an organization like the NCAA has continually been seen as a private organization.").

integral element of secondary public schooling.”¹¹⁸ For the majority, the “entwinement” between the association, the state of Tennessee, and the public school system was decisive: members of the state Board of Education served ex-officio roles with the association by virtue of their state office, TSSAA employees were entitled to state fringe benefits, and the state deemed participation in association-sponsored events to satisfy the state’s physical education requirement.¹¹⁹

The association argued that the result should be dictated by the Court’s 1982 ruling in *Rendell-Baker* that a private high school was not performing a sufficiently “public” function to be liable for a constitutional claim.¹²⁰ While conceding that the TSSAA might fall short of the threshold for state action staked out in *Rendell-Baker* (“an exclusively and traditionally public” function), the Souter majority regarded *Rendell-Baker* as merely one of several alternative ways in which a private organization might qualify as a state actor.¹²¹

Justice Clarence Thomas wrote the four-justice dissent, finding that the Tennessee association did not perform a sufficiently governmental function to be regarded as a state actor under *Blum*.¹²² Thomas enumerated all of the ways in which the TSSAA resembled a private enterprise—state law does not make membership mandatory, membership is open to private as well as public entities, private-school administrators are eligible to sit on the board, the bulk of its revenues come from ticket sales and not governmental appropriations—and concluded that the association’s actions are not “attributable to the State.”¹²³

Notably, in the *Brentwood* case, the aggrieved party was a parochial school and not an individual student-athlete. The case underscores the interests of educational institutions themselves, not just students and their families, in holding associations accountable for the way they make and enforce rules.

The *Brentwood* decision was widely viewed as an expansive application of the state-action doctrine, breaking with decades of narrow Court interpretations.¹²⁴ Critics regarded the “entwinement” standard recognized by the majority as both overly malleable and unnecessary, since the Tennessee association could readily have been categorized as a state actor under even the more rigorous *Blum* standard.¹²⁵

Though often cited when constitutional claims involve quasi-governmental entities, the *Brentwood* ruling has been put to the test only a handful of times in the context of high school athletics. Two circuits have applied *Brentwood* to find that the athletic associations in Michigan and Oklahoma engage in state action for

118. *Brentwood*, 531 U.S. at 299–300.

119. *Id.* at 300–02.

120. *Rendell-Baker v. Kohn*, 457 U.S. 830, 843 (1982).

121. *Brentwood*, 531 U.S. at 302–03.

122. *Id.* at 309–11 (Thomas, J., dissenting).

123. *Id.* at 306 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)); *see also id.* at 312.

124. *See Madry, supra* note 27 at 369 (commenting that *Brentwood* came after almost thirty years of both the Burger Court and the Rehnquist Court systematically shrinking the state action doctrine and rejecting efforts by plaintiffs to hold private parties liable under constitutional standards).

125. *See Megan M. Cooper, Dusting Off the Old Play Book: How the Supreme Court Disregarded the Blum Trilogy, Returned to Theories of the Past, and Found State Action Through Entwinement in Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*, 35 CREIGHTON L. REV. 913, 991 (2002) (criticizing “overly inclusive entwinement test” that, in author’s view, deviated from precedent and exposed private entities to greater litigation risk).

purposes of constitutional claims.¹²⁶ But in a break with the prevailing view, a Wisconsin court distinguished *Brentwood* and found no state action in the state athletic association's enforcement of a rule barring a male competitor from a girls' gymnastics team.¹²⁷

In addition to constitutional challenges, the "governmental" status of HSAs is regularly tested when federal statutory claims are litigated. These include the Title IX anti-discrimination statute, which applies to educational institutions "receiving Federal financial assistance."¹²⁸ Even though the Department of Education does not directly subsidize the operations of athletic corporations, courts agree that the associations are bound by Title IX just as their member schools are.¹²⁹ Similarly, courts widely agree that athletic associations are "public entities" subject Title II of the Americans with Disabilities Act, which obligates public entities to reasonably accommodate the access needs of disabled participants.¹³⁰ This growing body of law demonstrates that—outside of the freedom-of-information context—courts have no difficulty looking beyond the corporate status of HSAs to their actual structure, purpose, and function.

While the substance and resolution of claims against HSAs is beyond the scope of this article, it is worth noting that, even where plaintiffs succeed in establishing that athletic associations are state actors, their claims face uncertain prospects. Courts commonly dismiss due process challenges to HSA rules or enforcement actions on the basis that no fundamental right is implicated, either because education itself is not a constitutionally guaranteed right or because sports participation is regarded as a luxury not integral to education.¹³¹ In the latter

126. *Christian Heritage v. Okla. Secondary Sch. Activities Ass'n*, 483 F.3d 1025, 1030 (10th Cir. 2007); *Communities for Equity v. Mich. High Sch. Athletic Ass'n*, 459 F.3d 676, 692 (6th Cir. 2006).

127. *Bukowski v. Wisc. Interscholastic Athletic Ass'n*, No. 2005AP650, 2006 WL 3437313 at *3 (Wis. App. Nov. 30, 2006) (unpublished). The ruling appears to have turned more on the way the plaintiff chose to litigate the case—relying solely on evidence that the WIAA receives federal subsidies—rather than a searching inquiry into whether the association is intertwined with state government. *See id.*

128. 20 U.S.C. § 1681(a) (2012).

129. *See, e.g., Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 272 (6th Cir. 1994) (finding that Kentucky high school association qualifies as a recipient of federal education funding for purposes of Title IX liability because it acts as an agent of federally funded public schools).

130. *See* 42 U.S.C. § 12132 (2006) (providing that no individual may be denied the benefit of the "services, programs, or activities of a public entity" on the basis of disability); *Washington v. Ind. High Sch. Athletic Ass'n*, 181 F.3d 840, 846 (7th Cir. 1999) (applying ADA in challenge to Indiana association's eligibility standards, brought by learning-disabled student who was held back a grade); *see also* John T. Wolohan, *Are Age Restrictions a Necessary Requirement for Participation in Interscholastic Athletic Programs?*, 66 U.M.K.C. L. REV. 345 (1997) (surveying cases); Diane Heckman, *Athletic Associations and Disabled Student-Athletes in the 1990s*, 143 Ed. L. Rep. 1, 12 nn.52–54 (2000) (same).

131. "State and federal courts have, by a wide margin, rejected the argument that students have a constitutionally protected property interest in participating in extracurricular activities such as interscholastic sports." *J.K. v. Minneapolis Public Schools*, 849 F. Supp. 2d 865, 875 (D. Minn. 2011); *see also* *Indiana High School Athletic Ass'n, Inc. v. Carlberg*, 694 N.E.2d 222, 228–229 (Ind. 1997) ("there is no right or interest to participate in interscholastic sports that is entitled to protection under the federal Equal Protection or Due Process Clauses"); *Maroney v. University Interscholastic League*, 764 F.2d 403, 406 (5th Cir. 1985) (holding that participation in interscholastic athletics is not an interest protected by the Fourteenth Amendment); *Spring Branch I.S.D. v. Stamos*, 695 S.W.2d 556, 560 (Tex. 1985) (same); *Berschback v. Grosse Pointe Public School District*, 397 N.W.2d 234, 241 (Mich. Ct. App. 1986) (same); *Makanui v. Dep't of Education*, 721 P.2d 165, 170 (Hi. Ct. App. 1986) (same). For a

category, a federal appeals court ushered a would-be Texas football player's claims out the door with a dismissive wave:

We repeat: we are not super referees over high school athletic programs. Questions about eligibility for competition may loom large in the eyes of youths, and even their parents. We do not disparage their interest in concluding, as here, that these issues are not of constitutional magnitude. Behind this observation rest important values of federalism and the reality that the mighty force of the constitutional commands ought not to be so trivialized.¹³²

On similar reasoning, a district court in Maryland dismissed the constitutional claims of students excluded from playing interscholastic sports because, during their off-hours outside of athletic participation, they violated a rule against drinking alcohol: "[The Fourteenth Amendment] protects only liberty and property interests that are viewed by the courts as of a high enough dignity to warrant due process protection, and the ability of a high school student to engage in extracurricular activity is simply not of that dignity."¹³³ Recognizing state sports associations as governmental, then, need not result in undue exposure to constitutional litigation, since courts have become adept at dismissing challenges on the merits. Indeed, that was the ultimate fate of the constitutional claims in the *Brentwood Academy* case, which—in its second trip to the Supreme Court, six years after the first—ended with a ruling that the Tennessee association did not violate the Academy's free-speech or due-process rights in imposing sanctions for a coach's overzealous recruiting tactics.¹³⁴

contrary view, see the New Hampshire Supreme Court's decision in *Duffley v. New Hampshire Interscholastic Athletic Ass'n*, 446 A.2d 462, (N.H. 1982), in which the court—relying on New Hampshire statutes that treat athletics as a "curricular" part of the school day—opined that athletic participation may not be taken away without procedural due process. *See id.* at 467. For a more detailed treatment see Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 132–36 (2008) (surveying cases and concluding that the majority view is that "rendering a student-athlete ineligible to participate in interscholastic supports does not violate the Constitution").

132. *Hardy v. Univ. Interscholastic League*, 759 F.2d 1233, 1235 (5th Cir. 1985).

133. *Farver v. Bd. of Educ.*, 40 F. Supp. 2d 323, 324–25 (D. Md. 1999); *see also Rhodes v. Ohio High Sch. Athletic Ass'n*, 939 F. Supp. 584, 589, 591 (N.D. Ohio 1996) (concluding that Ohio sports association is a state actor, but rejecting student-athlete's challenge to eligibility rules on the merits, finding that the rules were of neutral general application and did not discriminate based on student's disability). A handful of courts have bucked the general consensus and found that athletic participation is a sufficiently important interest to entitle a student to procedural due process before the opportunity to participate may be taken away. *See, e.g., Boyd v. Board of Directors*, 612 F. Supp. 86, 93 (E.D. Ark. 1985) (finding in favor of a black football player who was summarily dismissed from football because he engaged in a protest against perceived racial discrimination in the school's selection of a homecoming queen).

134. *Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291, 300, 303 (2007). Nevertheless, the ultimate dismissal of the constitutional claims did not disturb the precedent-setting determination in *Brentwood I* that high school associations are state actors that must adhere to constitutional standards. *See id.*

B. Interpretations applying state freedom-of-information law

1. *Open-government law and high school athletics*

While the governmental status of high school associations is regularly litigated in the context of athlete-rights cases, the issue is less well-developed in the context of open-government law. “State actor” status for purposes of a constitutional claim is not decisive of whether an entity is subject to state open-government law.¹³⁵ Nevertheless, many of the same legal and public-policy considerations go into both judgments: is the entity performing a governmental function, under government supervision, that is imbued with a public interest? So, an entity’s legal status as a “state actor” is, at the very least, a persuasive factor in considering whether the entity qualifies as “public” for purposes of state access law.¹³⁶

As a starting point, every state recognizes a legal entitlement to inspect the business records of government entities and to attend the meetings of their governing boards. These statutes—collectively referred to here as “freedom-of-information” or FOI laws—start with the strong presumption that agencies should err on the side of openness and that, accordingly, the courts should broadly construe the public’s right of access and apply statutory exceptions narrowly.¹³⁷ As the Hawaii legislature wrote in its preamble setting forth the philosophy behind the state’s Uniform Information Practices Act:

In a democracy, the people are vested with the ultimate decision-making power. Government agencies exist to aid the people in the formation and conduct of public policy. Opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public’s interest.¹³⁸

Open-government laws are intended to promote responsible stewardship of public dollars and to serve as a check on the abuse of governmental power.¹³⁹ As one federal appeals court observed in the context of a dispute over the right to film police:

135. See *‘Ōlelo: The Corp. for Cmty. Television v. Office of Info. Practices*, 173 P.3d 484, 494 (Haw. 2007) (citing and following federal caselaw that “state actor” status for constitutional purposes does not necessarily equate to “state agency” status for freedom-of-information purposes).

136. Some have argued that it is logical to conflate the two tests. See, e.g., Craig D. Feiser, *Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities Under Federal Law*, 52 FED. COMMS. L.J. 21, 59 (1999) (“Arguably, if these [privatized] entities can be termed ‘state actors’ under the Constitution, they should be subject to access as governmental agencies under the FOIA.”).

137. See, e.g., *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1100 (Pa. Commonw. Ct. 2013); *Gannon v. Bd. of Regents*, 692 N.W.2d 31, 38 (Iowa 2005); *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 884 P.2d 592, 597 (Wash. 1994); *Booth Newspapers, Inc. v. Univ. of Mich. Bd. of Regents*, 507 N.W.2d 422, 341 (Mich. 1993); *Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d 584, 589 (Alaska 1990); *Capital Newspapers Div. of the Hearst Corp. v. Burns*, 496 N.E.2d 665, 667 (N.Y. 1986).

138. HAW. REV. STAT. ANN. § 92-1 (West, Westlaw through Act 286 of 2019 Reg. Sess.).

139. See DAVID L. CULLIER & CHARLES N. DAVIS, *THE ART OF ACCESS: STRATEGIES FOR ACQUIRING PUBLIC RECORDS* 6 (2011) (“[T]he mere knowledge that records are being kept, and that some day they will be reviewed, serves to remind stewards of the public till to mind the store.”).

“Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs.”¹⁴⁰ Although the final decisions of governmental bodies are ultimately made public, access to agencies’ records and meetings enables citizens to have informed input before the decision is finalized or to figure out after-the-fact what went into the decision. It is therefore appropriate for disclosure laws to extend to entities that collect and spend public money or wield governmental authority, regardless of whether they are structured as “agencies” or as “corporations.”

Every state’s suite of open-government statutes applies to agencies that, indisputably, are part of state, county, or city government, including public K-12 schools. Those agencies must, at a minimum, make their business records accessible for public inspection (with recognized exemptions for sensitive confidential information) and open the meetings of decision-making bodies to public attendance. To varying degrees, state FOI statutes extend beyond agencies of state, county, and city government, entitling the public to also obtain records held by private entities that reflect the performance of governmental functions.¹⁴¹ At least some courts have found that conducting athletic competitions is a “governmental” function that is central to the duties of a public school district.¹⁴²

To what extent a private corporation or association can be compelled to allow public inspection of its business records is a frequent point of dispute reaching well beyond high school athletics. Disputes are becoming more acute as government increasingly turns over core state functions to private contractors or does its business through “authorities,” “special districts,” and other entities with hybrid public/private characteristics.¹⁴³

(a) Rulings affording the public access to records

In a handful of cases, courts have directly addressed whether state FOI law applies to the private entities that oversee high school sports. Courts in Massachusetts

140. *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (internal quotes and citation omitted).

141. Alexa Capeloto of John Jay College of Criminal Justice/City University of New York examined all 51 open-records statutes in 2013 and found that at least 11 explicitly reach the operations of quasi-governmental entities that “perform a public function,” while 13 others consider the nature of the function as one among multiple factors. See Alexa Capeloto, *Transparency on Trial: A Legal Review of Public Information Access in the Face of Privatization*, 13 CONN. PUB. INT. L.J. 19, 28–34 (2013).

142. See, e.g., *Richards v. Birmingham Sch. Dist.*, 83 N.W.2d 643, 653 (Mich. 1957), (finding that, “in allowing athletic competition with other schools,” a school district is “performing a governmental function vested in it by law”) *overruled in part on other grounds*, *Williams v. City of Detroit*, 111 N.W.2d 1 (Mich. 1961).

143. See Craig D. Feiser, *Protecting the Public’s Right to Know: The Debate Over Privatization and Access to Government Information Under State Law*, 27 FLA. ST. U. L. REV. 825, 833 (2000) (acknowledging efficiencies that accompany “privatizing” delivery of government services, but observing that the contractual offloading of responsibility for services “should not come without statutory or contractual provisions leaving public accountability intact.”); see also Tara Parker, Comment, *Private Prisons Behind Bars: Why Corrections Corporations Must Abide by Public Information Laws*, 48 TEX. TECH L. REV. ONLINE ED. 39, 69 (2016) (calling for legislative reforms to clarify that privatized correctional institutions must obey public-records statutes as their state-operated counterparts do).

and Tennessee have required their states' high school athletic associations to comply with open-government laws despite their nominally private status.

In Tennessee, reporters from an alternative weekly newspaper in Nashville submitted requests under the state Public Records Act for documents relating to the Tennessee Secondary School Athletic Association's investigation of a private school accused of improprieties.¹⁴⁴ The case involved allegations of widespread cheating in the football and basketball programs of an elite Nashville school, Montgomery Bell Academy, including improper financial aid to athletes by school boosters and trustees.¹⁴⁵ The TSSAA insisted that, as a private corporation, it was beyond the reach of the public records statute. The newspaper sued.¹⁴⁶

Both a trial court and the state Court of Appeals found in favor of the journalists, relying in part on the Supreme Court's holding in *Brentwood* that the TSSAA is a state actor for constitutional purposes.¹⁴⁷ The appeals court found that the association's records qualified under the statutory definition of records "made or received . . . in connection with the transaction of official business by any governmental agency."¹⁴⁸ The "utmost" factor,¹⁴⁹ the court held, was that the association performs a core public function that would otherwise be performed by a government agency:

[A] private entity can become subject to the Act if its relationship with the government is so extensive that the private entity serves as the functional equivalent of a governmental agency. . . . '[W]hen an entity assumes responsibility for providing public functions to such an extent that it becomes the functional equivalent of a governmental agency, the Tennessee Public Records Act guarantees that the entity is held accountable to the public for its performance of those functions.'¹⁵⁰

The court found that the association benefited from its quasi-governmental status in ways that would not be afforded to ordinary nonprofit corporations, including participation in the state retirement system.¹⁵¹ Although just two percent of the association's annual operating budget came directly from public sources in the form of school membership dues, the court found that the TSSAA benefited from millions of dollars in "indirect government funding" by virtue of the exclusive use of publicly owned facilities to stage the tournaments generating most of its

144. *City Press Commc'ns, LLC v. Tenn. Secondary Sch. Athletic Ass'n*, 447 S.W.3d 230, 233 (Tenn. Ct. App. 2014).

145. See Steve Cavendish, *What a Three-Year Public Records Fight Revealed About the TSSAA's Financial Aid Rules and the School that Broke Them*, NASHVILLE SCENE (Nov. 27, 2014, 4:00 AM), <https://www.nashvillescene.com/news/article/13057048/what-a-threeyear-public-records-fight-revealed-about-the-tssaas-financial-aid-rules-and-the-school-that-broke-them> [<https://perma.cc/EMC9-FX79>].

146. *City Press*, 447 S.W.3d at 234.

147. *Id.* at 237.

148. *Id.* at 235 (quoting TENN. CODE ANN. § 10-7-503(a)(1)(A) (amended 2018)).

149. *Id.*

150. *Id.* (quoting *Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d 67, 79 (Tenn. 2002)).

151. See *id.* at 239.

revenue.¹⁵² Because all nine members of the association's board were principals of public schools, and the state was given two additional *ex officio* appointments to the board, the court found the government's control over the association to be "substantial."¹⁵³ The court thus analyzed the journalists' request just as it would analyze a request for records of a traditional government agency and found the documents to be non-exempt and publicly accessible.¹⁵⁴

In Massachusetts, a former high school athlete won his legal challenge to the practice of adjudicating students' appeals to the Massachusetts Interscholastic Athletic Association in closed-door proceedings of which the athletes received no notification.¹⁵⁵ The student, Daniel Hansberry, alleged that the MIAA violated the state open-meetings statute, which requires a "government body" to admit the public to its meetings when considering whether he had exhausted his eligibility to play sports.¹⁵⁶ A superior-court judge agreed, noting that 77 percent of the association's members were public schools, themselves governed by the state open-meetings law:

Since the public school committees have collectively delegated their ability to control athletic programs to the MIAA, and the MIAA has agreed to act as their agent by performing this important public function, it adopts the attributes of its principals and is subject to the same requirements as other governmental bodies.¹⁵⁷

While only a trial-court decision, the reasoning of the *Hansberry* case is noteworthy because the judge relied in part on legal authority from the constitutional context, where it is now almost unanimously agreed that high school athletic associations are "state actors."¹⁵⁸

Whether Hansberry's case continues to set the standard in Massachusetts today is in doubt, however, due to a contrary and more recent administrative interpretation. In a 2012 case, the state Public Records Division issued a letter ruling finding that the MIAA does not qualify as a "public entity" under the state Public Records Law.¹⁵⁹ The ruling focused on the fact that taxpayers do not directly subsidize the MIAA through appropriations, that the association was chartered as a corporation from inception in 1978 and not created by state enactment, and that the governance of student athletics is not a function reserved exclusively to the state.¹⁶⁰ Although unpublished and without precedential force, the interpretation may provide legal cover for the Massachusetts association to exclude the public from its proceedings.

152. *Id.* at 235–36.

153. *Id.* at 236–37.

154. *Id.* at 242.

155. *Hansberry v. Mass. Interscholastic Athletic Ass'n, Inc.*, No. 95-6807-B, 1998 Mass. Super. LEXIS 706 (Oct. 21, 1998).

156. *Id.* at *1.

157. *Id.* at *8, *10.

158. *See id.* at *6.

159. Letter of Shawn A. Williams, Supervisor of Records, to Geoffrey R. Bok, Esq., Case No. SPR12/181 (Sec'y of Commonw., Pub. Rec. Div., Nov. 16, 2012) (copy on file with authors).

160. *Id.* at 2–3.

Interpretations from the state attorneys general in Florida and Kentucky have found their states' athletic associations to be subject to open-government laws.

In Florida, then-Attorney General Robert A. Butterworth found that the Florida High School Activities Association must open its board meetings as a governmental body subject to Florida's "sunshine law."¹⁶¹ The opinion relied on indicia that the association performs a governmental function under the supervision of state government.¹⁶² Among those indicia were: (1) the association is recognized in Florida statutes as the official governing body of interscholastic sports, (2) the association's books are reviewed by the state auditor, and (3) the association's board composition is dictated by state statute and includes appointees chosen by the state commissioner of education.¹⁶³

Kentucky's attorney general has, on multiple occasions, ruled that the Kentucky High School Athletic Association must honor requests for its business records made pursuant to the Kentucky Open Records Act.¹⁶⁴ In a 1978 opinion, the attorney general advised that the association board must open its meetings to the public because it qualifies as a "public agency" for purposes of the Kentucky open-meetings law.¹⁶⁵ Despite its corporate status, the association operates as "an arm of the State Board of Education, a public agency created by statute," which is itself subject to the open-meetings law, the attorney general explained.¹⁶⁶ Because the governance of interscholastic athletics is a non-delegable duty statutorily assigned to the Board of Education, the HSAA's board operates as a de facto "subcommittee" of the Board of Education, which retains ultimate policymaking authority, the attorney general wrote.¹⁶⁷

(b) Rulings denying the public access to records

Illustrating the elusive status of athletic associations, Louisiana's courts have been on both sides of the transparency issue. In a 1981 ruling, the state Supreme Court declared the Louisiana High School Athletic Association to be a "public body" compelled to open its board meetings for public attendance.¹⁶⁸ The court looked to four primary factors, including (1) that the LHSAA's own constitution asserted the authority to control school policy decisions; (2) that membership in the association was functionally compulsory, since refusing to join would be "tantamount to obscurity in athletics;" (3) that the association received both direct and indirect financial support from state government; and (4) that the association's governing body was comprised almost entirely of public-school administrators, and the purpose

161. Fla. Att'y Gen., Opinion Letter 98-42 on Sunshine Law, Florida High School Activities Ass'n (July 14, 1998).

162. *See id.*

163. *See id.*

164. *See* Ky. Att'y Gen., Opinion 78-191 (March 1, 1978); Ky. Att'y Gen. Open Meetings Decision No. 98-OMD-94 (June 1, 1998); Ky. Att'y Gen. Open Records Decision No. 04-ORD-244 (Dec. 21, 2004).

165. Ky. Att'y Gen., Opinion 78-191, *supra* note 157.

166. *Id.*

167. *Id.*

168. *Spain v. La. High Sch. Athletic Ass'n*, 398 So. 2d 1386 (La. 1981), *overruled by* *La. High Sch. Athletic Ass'n v. State*, 2012-1471 (La. 1/29/2013), 107 So. 3d 583 (La. 2013).

of the open-meetings statute was to give the public insight into the conduct of public officials.¹⁶⁹

But the court reversed course in 2013 and vacated its earlier ruling.¹⁷⁰ Perplexingly, the latter case had nothing to do with the public's interest in attending association meetings. The open-meetings issue was collateral to a larger debate over whether the legislature acted unconstitutionally in enacting laws treating the LHSAA as a public entity, including one requiring the association to open its books to the legislature's auditor. In finding those laws unconstitutional, the state Supreme Court (perhaps unnecessarily) swept aside its 1981 ruling in *Spain*, finding that the open-meetings law applied only to "committees or subcommittees" of public agencies, not to private corporations performing government-like functions.¹⁷¹ Having eliminated the prior holding that the LHSAA is a "public body," the court was then free to strike down the challenged regulatory statutes as inapplicable to a purely private corporation.

Illinois courts have refused to apply the state's public-records statute to the state athletic association. In 2014, the Better Government Association, a nonprofit advocacy group that employs investigative journalists, sought access to records of the Illinois High School Association's contracts for professional services and applications for vendor licenses.¹⁷² The journalists asserted entitlement to the records on two related theories: that the IHSA is itself a "public body" under the Illinois Freedom of Information Act, or that its records are the property of its member public schools.¹⁷³ Illinois' appellate courts rejected both theories.

The Illinois Supreme Court applied a four-factor analysis to determine whether a private association could be categorized as a "subsidiary body" of its public-agency members for purposes of opening its records and meetings: (1) the extent to which the entity has a legal existence independent of government resolution, (2) the degree of government control exerted over the entity, (3) the extent to which the entity is publicly funded, and (4) the nature of the functions performed by the entity.¹⁷⁴

The journalists pointed out that, hypocritically, the IHSA had asserted an irreconcilably different position in seeking immunity from tort liability under a statute that protects "local public entit[ies]."¹⁷⁵ In that case, the association had emphasized all the ways it is inseparable from its local-government members and performs a governmental function.¹⁷⁶ Applying the immunity statute literally, the Court of Appeals declined to extend it to a nonprofit entity comprised of representatives from more than one local entity.¹⁷⁷ But the courts in the *Better Government* case found that assertions made in pursuing tort immunity were not

169. *Spain*, 398 So. 2d at 1390.

170. *La. High*, 2012-1471 (La. 1/29/2013), 107 So. 3d 583.

171. *Id.* at 606.

172. *Better Gov't Ass'n v. Ill. High Sch. Ass'n*, 2016 IL App (1st) 151356, ¶ 1, 56 N.E.3d 497, 499, *aff'd*, 2017 IL 121124, 89 N.E.3d 376.

173. *Better Gov't Ass'n*, 2017 IL 121124, ¶ 1, 89 N.E.3d at 379.

174. *Id.* ¶¶ 34–55, 89 N.E.3d at 386–91.

175. *Hood v. Ill. High Sch. Ass'n*, 835 N.E.2d 938, 939–40 (Ill. App. 2005).

176. *See id.* at 940–41.

177. *Id.* at 942.

conclusive of the legal determination of whether the IHSA qualifies as a public body under the open-records law.¹⁷⁸

Similarly, Michigan courts have declined to extend the state open-records statute to the state high school sports association. In a 2004 ruling, Michigan's Supreme Court determined that the Michigan High School Athletic Association ("MHSAA") was not required to answer freedom-of-information requests from the parents of a disqualified student-athlete.¹⁷⁹

The justices looked at the history, structure, and finances of the association and found that it did not qualify as a "public body" for purposes of the Michigan Freedom of Information Act, which extends to bodies that are "created by" state or local law or "funded primarily by" government agencies.¹⁸⁰ The MHSAA, the court ruled, does not meet either standard. Although initially created as a subunit of the state Department of Education, the association was spun off in 1972 as a nonprofit corporation and, in 1995, was removed from state statutes as the officially designated overseer of interscholastic sports.¹⁸¹ Because of its reincorporation as a "wholly self-regulated" private corporation, the court found, the Association no longer met the definition of an entity "created by" statute.¹⁸² About 90 percent of the association's revenue comes from ticket sales at sporting event—too indirect, in the court's view, to qualify as governmental funding for purposes of the open-meetings act, which applies only to entities funded "by" or "through" public agencies.¹⁸³ Finally, the court concluded, the Association could not be regarded as functionally equivalent to a public agency because of the scope of its authority: "Member schools do not relinquish authority or decision-making capacity to the MHSAA, nor does the MHSAA have any independent authority over its members."¹⁸⁴

Central to the Michigan ruling is whether revenues from student athletic competitions are viewed as belonging to a private oversight organization or belonging to the participant schools; the Michigan justices believed the former. However, even their opinion noted that, in some unspecified percentage of games, the ticket receipts were actually collected by the member schools and then remitted to the MHSAA.¹⁸⁵ It seems unlikely that ticket-buyers to high school sporting events believe themselves to be contributing to an independent nonprofit organization rather than to the competing schools—especially when the schools collect the money. Moreover, auditors hold schools responsible for managing the ticket revenues they collect, reinforcing the status of that revenue as "school money," regardless of where it ultimately ends up.¹⁸⁶ If associations are benefiting financially from blurring the

178. See *Better Gov't Ass'n*, 2017 IL 121124, ¶¶ 41–45, 89 N.E.3d at 387.

179. See *Breighner v. Mich. High Sch. Athletic Ass'n*, 683 N.W.2d 639, 648 (Mich. 2004).

180. *Id.* at 644 (citing MICH. COMP. LAWS § 15.232(d) (1997)).

181. *Id.* at 641.

182. *Id.* at 647.

183. *Id.* at 642, 644.

184. *Id.* at 647.

185. *Breighner*, 683 N.W.2d at 642.

186. See, e.g., DETROIT PUB. SCHS., OFFICE OF THE AUDITOR GEN., OFFICE OF HEALTH, PHYSICAL EDUCATION, SAFETY AND ATHLETICS: CASH RECEIPTS FROM ATHLETIC EVENTS, REPORT NO. 09-209 *passim* (Sept. 25, 2009), http://detroit.k12.mi.us/admin/inspector_general/docs/audit_reports/2009.11.05_Cash_Receipts_from_A

distinction between themselves and their member schools—that is, if revenues subsidizing the association are being collected by and for the apparent benefit of public schools, which remain legally responsible for their management—it is questionable whether those revenues can fairly be characterized as “private.”¹⁸⁷

Moreover, the majority’s view that the Michigan association does not exercise authority over its members is difficult to reconcile with the view of the association’s authority in a long-running federal discrimination case brought on behalf of female athletes. In that litigation, female students alleged that the MHSAA purposefully scheduled the seasons for their sports at disadvantageous times, guaranteeing low attendance and adverse playing conditions, so that boys’ athletic teams could have the more desirable dates.¹⁸⁸ Relying on the Supreme Court’s *Brentwood* case involving MHSAA’s sister association in Tennessee, the Sixth Circuit found that the Michigan association is a state actor sueable under the federal Title IX anti-discrimination statute and under the Fourteenth Amendment’s Equal Protection Clause:

MHSAA, like TSSAA, is comprised primarily of public schools, and MHSAA’s leadership is dominated by public school teachers, administrators, and officials. Students at MHSAA-member schools, like Tennessee students, may satisfy physical education requirements for high school by participating in MHSAA-sanctioned interscholastic sports. Because MHSAA, like TSSAA, is so entwined with the public schools and the state of Michigan, and because there is such a close nexus between the State and the challenged action, MHSAA is a state actor.¹⁸⁹

Two justices in the *Breighner* case authored a vigorous dissent, pointing out all the ways in which the association was intertwined with state and local government.¹⁹⁰ The Michigan association should be regarded as one “created by state or local authority” because it is indistinguishable from its initial 1924 incarnation as a vehicle for school districts to organize interscholastic competitions and because schools agree upon becoming members that they must adopt the regulations of the association “as their own.”¹⁹¹ Joining the MHSAA is “voluntary” in name only, the dissenters wrote, because failure to join and to abide by association rules “would

thletic_Events.pdf [https://perma.cc/E8UF-UV7P] (examining how Detroit schools managed football ticket sales); see also Jeremy P. Kelley, *Dayton Public Schools looks for missing football ticket money*, DAYTON DAILY NEWS (Apr. 6, 2018), https://www.daytondailynews.com/news/local-education/dayton-public-schools-looks-for-missing-football-ticket-money/unaLuDBUYIKsUG9MkRzHPJ/ (reporting that athletic director resigned after unfavorable audit questioning handling of football ticket money that could not be accounted for).

187. In its *Brentwood* opinion, by contrast, the U.S. Supreme Court regarded sharing in the proceeds of ticket sales from athletic competitions as an indicator of “state actor” status, since the Tennessee association was piggybacking on the fundraising mechanisms of its member schools. *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*, 531 U.S. 288, 299 (2001).

188. *Communities for Equity v. Mich. High Sch. Athletic Ass’n*, 459 F.3d 676, 679 (6th Cir. 2006).

189. *Id.* at 692 (internal quotes omitted).

190. *Breighner*, 683 N.W.2d at 648 (Weaver, J., dissenting).

191. *Id.* at 652.

effectively prevent the schools from participating in interscholastic athletics.”¹⁹² Relying on the Supreme Court’s *Brentwood* ruling, the dissent found it logically inconsistent that the same organization could be a “state actor” for constitutional purposes and yet private for freedom-of-information purposes, which “would undercut the stated purpose of the FOIA” entitling the public to “full and complete information regarding the affairs of government.”¹⁹³

In Arizona, the state attorney general opined in a 1989 advisory ruling that the Arizona Interscholastic Association does not qualify as a “public body” under the state open-meetings statute.¹⁹⁴ The attorney general found that the Association does not fit the definition of bodies to which the law applies, because it is neither a “board or commission” of a state agency or political subdivision nor a “multi-member governing body” of a state agency or political subdivision.¹⁹⁵ The opinion, however, was influenced by the Supreme Court’s then-recent pronouncement in the *Tarkanian* case that the NCAA does not qualify as a “state actor,” which the attorney general found to be persuasive as to the status of a high school athletic association—before the Supreme Court held otherwise in *Brentwood Academy*.¹⁹⁶ Further, the attorney general took no note of the provision of Arizona’s open-meetings statute that seems most applicable to a high school athletic association—defining a “public body” to include “all corporations and other instrumentalities whose boards of directors are appointed or elected by the state or political subdivision.”¹⁹⁷ The Arizona league is, arguably, a corporation with a board of directors appointed by political subdivisions. Its constitution allocates certain board seats to each “conference”—a subset of schools apportioned by size and location—and member schools nominate their administrators for ratification by the Executive Board as members.¹⁹⁸ The attorney general’s opinion did not acknowledge this feature of the statute.

This handful of divergent interpretations across the country leaves no clear consensus as to whether the public may attend the board meetings of high school

192. *Id.* at 651–52.

193. *Id.* at 653.

194. See Ariz. Off. Att’y Gen., Opinion Letter on Applicability of Arizona’s Open Meeting Law to the Board of Directors to the Ariz. Interscholastic Ass’n (Jan. 25, 1989), 1989 WL 407502.

195. *Id.* at 1.

196. See *id.* at *1 n.2 (citing Nat’l Collegiate Athletic Ass’n v. Tarkanian, 488 U.S. 179 (1988)).

197. See *id.* at *1 (emphasis added) (citation and footnote omitted) (“The Open Meeting Law, being applicable only to public bodies, requires us to look to the legislature’s definition of the term ‘public body’ to determine whether the AIA is subject to the law’s provisions. The term ‘public body’ as used in the statute means: ‘[T]he legislature, all boards and commissions of the state or political subdivisions, all multi-member governing bodies of departments, agencies, institutions and instrumentalities of the state or political subdivision, including without limitation *all corporations and other instrumentalities whose boards of directors are appointed or elected by the state or political subdivision*. Public body includes all quasi-judicial bodies and all standing, special or advisory committees or subcommittees of, or appointed by, such public body.’”).

198. See ARIZ. INTERSCHOLASTIC ASS’N, 2019-2020 CONSTITUTION, BYLAWS, POLICIES, AND PROCEDURES 15 (2019), <http://aiaonline.org/files/14046/2018-2019-aia-constitution-bylaws-policies-and-procedures-book.pdf> [https://perma.cc/TKQ9-Y7YG] (explaining that six of 10 governing board seats are allocated to nominees submitted by athletic conferences comprised of AIA member schools, while three others are reserved for a school administrator, superintendent and school board member).

athletic associations or obtain access to their records. Whether public-access laws apply will depend both on the breadth of the state's statute (whether it narrowly applies only to publicly funded entities, or more broadly to those that perform public functions) and the degree to which the HSAA is tied to or subsidized by state agencies. This fragmentation of authority points to the need for lawmakers to clarify the status of athletic associations so that similarly situated entities are held to the same disclosure rules everywhere. Some have tried.

(c) Attempts at clarifying the status of HSAA's

In a handful of states where the public's entitlement to access is uncertain, lawmakers have tried, with mixed success, to clarify that high school associations are public bodies for purposes of opening their records and meetings. In California, the state Interscholastic Federation has been subject to the open-meetings and open-records law since the 1980s as part of its statutory delegation of authority to administer interscholastic athletics.¹⁹⁹

Georgia legislators voted in 2000 to require high school sports associations to comply with open-records and open-meetings laws "to the extent that such records and meetings relate to the athletic association's activities with respect to public high schools."²⁰⁰ In Pennsylvania, state legislators voted in 2001 to extend the state open-meetings law to cover board meetings of the Pennsylvania Interscholastic Athletic Association.²⁰¹ Legislation attempting to bring the Nebraska School Activities Association within the coverage of state open-government laws was proposed, but not adopted, in 2000.²⁰²

In states where the legal status of a sports association has not been established, courts can take guidance from caselaw involving open-government disputes with other quasi-public organizations. Whether state open-government laws extend to entities beyond state, county, and city governments varies both with the nature of the entity and with the scope of each state's statute.

Some state public-records statutes are understood to cover entities based on their receipt of public financial support; applying this rationale, the Texas attorney general has found that nonprofit "community-action" agencies that receive public money to create jobs are subject to the Texas Open Records Act.²⁰³ Other indicia that a private entity may be "public" for purposes of state open-government law include: (1) whether the organization was created by governmental act; (2) whether the organization is subject to governmental oversight, or is otherwise intertwined with government agencies; (3) whether the organization performs a duty or function

199. See CAL. ED. CODE § 33353(a)(5) (West, Westlaw through Ch. 860 of 2019 Sess.).

200. GA. CODE ANN. § 20-2-316(b)(2) (2000).

201. 24 PA. STAT. AND CONS. STAT. ANN. § 16-1604-A(b)(1) (West, Westlaw through 2019 Sess. Act 75).

202. See Legis. Neb. 1021, 101st Leg., 2d Sess. (2010); see also Nicole Ocran, *Law Would Subject NSAA to Open Records, Meetings Regulations*, STUDENT PRESS L. CTR. (Feb. 2, 2010), <http://www.splc.org/article/2010/02/law-would-subject-nsaa-to-open-records-meetings-regulations> [<https://perma.cc/V943-YHL8>].

203. See Byron C. Keeling, *Attempting to Keep the Tablets Undisclosed: Susceptibility of Private Entities to the Texas Open Records Act*, 41 BAYLOR L. REV. 203, 209 (1989).

traditionally, or exclusively, associated with government, or (4) whether the organization exercises powers delegated by the government.²⁰⁴

The approach taken by Oregon courts is illustrative. There, judges have looked to federal freedom-of-information law and applied a multi-factor test to assess whether an entity qualifies as a “public body” that must open its records: (1) whether it was created by government, (2) whether it performs a traditional governmental function, (3) whether it has authority to make decisions or merely to make recommendations, (4) whether it receives direct or indirect government financial support, (5) whether it operates under government supervision or control, and (6) whether members of the body are government officials or employees.²⁰⁵ This functional approach gives fullest effect to the imperative that open-government laws apply expansively, defaulting when in doubt toward public access.

While cases involving HSAAs are few, courts and attorneys general have had occasion to apply open-government law to analogous “membership” entities comprised wholly or primarily of government agencies or government officials. For the most part, these entities have been deemed sufficiently “governmental” to require compliance with open-government laws.

The New Jersey Supreme Court found that a collective body representing city government officials was a “public agency” subject to the Open Public Records Act, although chartered as a nonprofit corporation.²⁰⁶ Among the decisive factors was that the League of Municipalities received partial funding from the taxpayers through its members, and that its staff participated in the state retirement benefits system.

Washington’s Court of Appeals held that two associations of county appointed and elected officials were quasi-public agencies subject to Washington’s public records law.²⁰⁷ Noting that membership dues were paid for by the counties, some of the associations’ employees were covered by state health insurance, the associations were under exclusive control of government officials, and the associations discharged statutorily designated responsibilities (duties that “could not be delegated to the private sector”), the court concluded, “Although WSAC and WACO retain some characteristics of private entities, their essential functions and attributes are those of a public agency.”²⁰⁸

The Arkansas Supreme Court found that the state’s Freedom of Information Act applied to the North Central Association of Schools (NCA), a voluntary association of schools and colleges responsible for school accreditation.²⁰⁹ Though

204. In his 2000 study, Craig D. Feiser characterizes states’ approaches to records requests from quasi-public entities as either “flexible” or “restrictive.” Within those categories, Feiser finds that the more flexible states apply a variety of approaches to assessing the nature of the entity at issue, including whether the entity performs a public function or whether the records themselves are of a governmental nature. Courts in the more restrictive states look to such factors as whether the entity receives direct support from taxpayers, or whether the entity was created or chartered by the state. *See* Feiser, *supra* note 140, at 836–60.

205. *Marks v. McKenzie High Sch. Fact-Finding Team*, 878 P.2d 417, 424–25 (Or. 1994).

206. *Fair Share Hous. Ctr. v. League of Municipalities*, 25 A.3d 1063, 1065 (N.J. 2011).

207. *Telford v. Thurston Cty. Board of Comm’rs*, 974 P.2d 886, 888 (Wash. Ct. App. 1999).

208. *Id.* at 895.

209. *N. Cen. Ass’n of Colls. and Schs. v. Troutt Bros., Inc.*, 548 S.W.2d 825, 826 (Ark. 1977).

NCA was a private not-for-profit corporation, membership dues paid by public schools supported the organization. State personnel were used to carry out the functions of both organizations, and the association was headquartered in a publicly owned building. Citing the NCA case, the Arkansas court subsequently held that an athletic association of public and private colleges—an organization analogous to high school associations that, like HSAAs, was partly supported by taxpayer dollars—was subject to the state’s public-records law although chartered as a nonprofit corporation.²¹⁰

Similarly, Missouri’s attorney general ruled that the Missouri School Boards Association is a “quasi-public governmental body” that must obey the state open-meetings act, because it performs the public function of oversight of education, acts primarily through contracts with governmental bodies (county school boards), and receives membership dues paid with taxpayer money.²¹¹

Breaking from the majority view, Wisconsin’s Court of Appeals declined to apply the state public-records act to the Wisconsin Counties Association, an unincorporated organization providing training and advocacy, in support of the state’s 72 county governments.²¹² The decision rested on a technicality in the state public-records statute, which extends to “quasi-governmental corporations” as well as to government agencies; since the counties association was not a “corporation,” the court found that provision inapplicable.²¹³

The prevailing understanding that nonprofit membership corporations comprised of local-government entities are state actors performing governmental functions further supports the position that high school sports associations should be opening their meetings and records to the public.²¹⁴

IV. A SURVEY OF HSAA ADHERENCE TO OPEN-RECORDS LAW

A. Methodology and findings

To determine whether state associations believed themselves to be subject to open-records statutes, Brechner Center researchers sent requests to all 51 associations, requesting copies of the same two sets of the following documents:

- 1) The minutes for the most recent available meeting minutes for the Board of Directors (or the controlling executive body of the organization)

210. Ark. Gazette Co. v. S. State Coll., 620 S.W.2d 258, 259–60 (Ark. 1981).

211. See Mo. Off. Att’y Gen., Opinion Letter No. 103-88 on the Missouri School Board Association’s Status as a “Quasi-Public Governmental Body” (Dec. 22, 1988), 1988 WL 426897.

212. See Wisc. Prof’l Police Ass’n v. Wisc. Counties Ass’n, WI App 106, ¶ 12, 357 Wis. 2d 715, 855 N.W.2d 715.

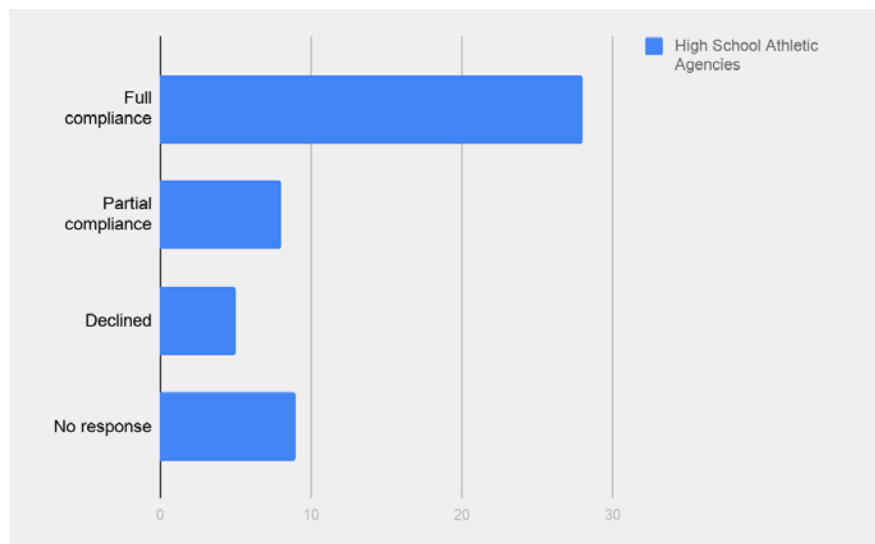
213. *Id.* (citing WIS. STAT. ANN. § 19.32(1) (West, Westlaw through 2019 Act 21)).

214. In another analogous case, Delaware’s attorney general opined in 2002 that a consortium made up of school-board members from six different districts who met periodically to discuss issues of school policy constituted the functional equivalent of a public body for purposes of the state open-records act. See Del. Att’y Gen., Opinion Letter No. 02-IB19 on Freedom of Information Complaint Against Joint School Boards of New Castle County (Aug. 19, 2002). Applying the reasoning of *Spain v. Louisiana High School Athletic Ass’n*, 398 So. 2d 1386 (La. 1981), the attorney general found that the discussion committee could be viewed as a “collective committee” or subcommittee of its member school boards. See *id.*

2) The most current television contract for the rights to broadcast postseason football games.

Each letter specified the corresponding freedom-of-information statute specific to each association's home state. If the initial request letter did not produce a timely response, the association received at least one follow-up email reminder.

The responses to these requests varied considerably. The table below organizes the compliance of the agencies into four categories: Full compliance, partial compliance, declined, and no response.



The “full compliance” category (28 of 51 associations) means that the HSAA did not withhold any responsive document. It encompasses both associations that provided documents responsive to both parts of the request (meeting minutes and television contracts) as well as those that provided minutes but indicated that no television contract exists. Additionally, an association's response is categorized as “fully compliant” if, in its response, the association pointed out the location where its minutes are posted online in lieu of furnishing a paper copy.

The “partial compliance” category (10 states) includes agencies that supplied only meeting minutes (or directions to find them online) without providing the television contract or indicating that no television contract exists. The “declined” category (four states) includes agencies that expressly declined to fulfill any part of the request. “No response” (nine states) indicates that, despite at least two attempts, the HSAA did not acknowledge receipt of the request.²¹⁵

215. The request letter was sent with a Florida return address, and for that reason, some entities may have felt free to ignore it because their state open-records statutes entitle only in-state residents to access. States with such statutes include Alabama, Arkansas, Delaware, Louisiana, Missouri, New Hampshire, New Jersey, Tennessee and Virginia. See *McBurney v. Young*, 569 U.S. 221, 226 (2013) (enumerating jurisdictions with in-state preference, which was held to be constitutionally permissible). Of the states

Associations that responded with partial compliance, or declined to provide either of the requested items, offered a variety of justifications. Some explicitly claimed not to be subject to the state's open-records laws. Those in this category generally contended that, because the association is designated as a 501(c)(3) not-for-profit organization and not a government agency, state freedom-of-information law is inapplicable.

Notably, even 13 of the state associations that cooperated in whole or in part expressly stated in their replies that they believed their associations to be exempt from state open-government laws. When combined with the four that explicitly refused to turn over any documents, and the nine that failed to acknowledge the request, fully half of the state associations (actively or passively) took the position that they were not legally required to respond to requests for public records.

Nine of the 18 associations that provided television contracts sent redacted versions. A majority of the agencies which redacted information from their contracts claimed these redactions were necessary to protect proprietary information of the association and/or its broadcast partners. The redacted information typically included price terms; otherwise, there were with little or no redactions to other substantive contract details.

Most of the organizations publish the meeting minutes of their governing executive body on their websites. A review of their websites indicates that 43 of the 51 associations posted the most recent board minutes online. Of the eight agencies that do not consistently post their minutes or agendas, four are in the practice of posting the meeting times and locations of their executive board.

B. Denials and refusals: How well-founded?

Of the associations that explicitly declined to acknowledge that state open-government laws extend to their organizations—either through a hedged response or an outright refusal—some of the denials are solidly grounded in legal precedent while others are dubiously well-founded. As noted previously,²¹⁶ courts in Illinois and Michigan have declined to apply open-government laws to state high school associations. But in the remaining holdout states, no legal interpretations explicitly address the associations' status. Thus, whether they have a legal duty to comply must be judged by the scope of the state statute and its applications in other contexts.

The state association in Mississippi, for example, refused to produce records in reliance on caselaw declining to treat the HSAA as a state agency in a context other than freedom-of-information law. The association's denial letter cited the state Supreme Court's 2015 decision in *Mississippi High School Activities Ass'n, Inc. v. Hattiesburg High School*, in which the court held that the MHSAA could not take advantage of a state statute circumscribing the scope of appellate review of a "state agency" decision.²¹⁷ In that case, the association argued that it was the legal alter ego of its member schools and entitled to the same deference as a county school board, but the court found that association was a voluntary nonprofit membership

with a statutory preference for in-state requests, those providing no response were Arkansas, Louisiana, New Hampshire and Virginia.

216. See *supra*, Section B.1(b).

217. 2013-CA-01214-SCT, (¶¶ 13–19), 178 So. 3d 1208 (Miss. 2015).

organization distinguishable from a legislatively chartered school board.²¹⁸ But in other contexts, including constitutional challenges, Mississippi courts have readily found that the association is governmental in nature because it exercises supervisory authority delegated by the legislature to school districts and, in turn, to the HSAA.²¹⁹ In the absence of any judicial determination applying the Mississippi Public Records Act, the law is unsettled as to whether the MHSAA qualifies as a “public body” that must make its records accessible.²²⁰

Iowa’s public-records act extends to all “government bodies,” which the statute defines to include “this state, or any county, city, township, school corporation, political subdivision, tax-supported district, nonprofit corporation . . . or other entity of this state, or any branch, department, board, bureau, commission, council, committee, official, or officer of any of the foregoing or any employee delegated the responsibility for implementing the requirements of this chapter.”²²¹ The act thus specifically contemplates that a private, nonprofit corporation can qualify as a “government body” for disclosure purposes.

While there is no published authority in the context of the high school sports association, Iowa courts have extended the open-records act to a somewhat analogous body, the University of Iowa Foundation, which is the nonprofit fundraising arm of the state’s largest university.²²² The Iowa Supreme Court found that, by virtue of its service agreement with a public university, the foundation stood in the shoes of a governmental body: “As written, Iowa Code section 22.2(2) plainly extends the Act’s reach to records held by private entities that perform government duties or functions.”²²³

Iowa courts have long recognized that the IHSAA performs governmental functions and exerts significant authority over the affairs of its member institutions. In adjudicating a 1972 challenge to the disqualification of a football player caught riding in a car with a case of beer, the Iowa Supreme Court observed that, in purporting to enact rules governing the behavior of students, the Association was exercising authority that the state legislature committed to the discretion of elected school boards:

What we have here, in fact, is an association which started out arranging interschool games and tournaments and grew into an organization above individual schools, regulating all manner of affairs relating to athletes. The association did not usurp the

218. *Id.*

219. *See* Miss. High Sch. Activities Ass’n, Inc. v. Coleman, 631 So. 2d 768, 774 (Miss. 1994) (holding, in family’s due process challenge to HSAA anti-recruiting rule, that “the Association’s actions, flowing as they do from statutory authority, are, as this Court and others have implicitly or explicitly found, state action for the purpose of constitutional analysis”).

220. *See* MISS. CODE ANN. § 25-61-3(a) (LEXIS through 2019 legislation) (defining entities covered by the Public Records Act to include “any department, bureau, division, council, commission, committee, subcommittee, board, agency and any other entity of the state or a political subdivision thereof, and any municipal corporation and any other entity created by the Constitution or by law, executive order, ordinance or resolution”).

221. IOWA CODE ANN. § 22.1 (West, Westlaw through 2019 Sess.).

222. *Gannon v. Bd. of Regents*, 692 N.W.2d 31, 33 (Iowa 2005).

223. *Id.* at 43.

regulatory functions of individual schools; the schools turned over those functions to the association.²²⁴

The IHSAA Articles of Incorporation grant the organization “general supervision over all athletic contests of schools of this Association.”²²⁵ The state Department of Education has significant involvement in the Association’s governance. The Association is required to file regular reports with the Iowa Department of Education, including minutes of its meetings, copies of audit reports, a list of all members, proposed changes to its constitution or bylaws, and “detailed reports of all receipts and expenditures.”²²⁶ A Department of Education representative must be present to oversee HSAA elections and certify the legitimacy of ballot-counting.²²⁷ The Association is subject to considerable state statutory and regulatory control beyond what would apply to an ordinary nonprofit corporation, including limits on fees for rebroadcasting sporting events²²⁸ and constraints on how HSAA officers are compensated.²²⁹ Perhaps most significantly for purposes of the Association’s open-government status, all of the Association’s records, without exception, must be made available to the Department of Education on request.²³⁰ Decisions of the Association affecting student eligibility may be appealed to the Department of Education, but only after the Association’s own appeal process is exhausted.²³¹ Likewise, Association decisions about the conference alignment of member schools are appealable to the state Department of Education.²³²

The law is similarly well-developed In New Jersey, where the state Open Public Records Act and interpretive caselaw suggest that the New Jersey Interscholastic Athletic Association (known as the “NJSIAA”) is a sufficiently governmental body to qualify as an “agency” for purposes of the Act.²³³ The state Supreme Court has found that a nonprofit organization operating high school athletic competitions engages in “state action” so as to be liable for adherence to the Constitution, because high school athletics are a substantially public funded activity.²³⁴

The NJSIAA is integrally intertwined with state government. The association must have its charter, bylaws, constitution, and regulations approved by

224. *Bunger v. Iowa High Sch. Athletic Ass’n*, 197 N.W.2d 555, 561 (Iowa 1972).

225. IOWA HIGH SCH. ATHLETIC ASS’N, IHSAA HANDBOOK 19 (2019), <https://www.iahsaa.org/wp-content/uploads/2019/09/201920IHSAAHandbook.pdf> [<https://perma.cc/W6XW-WLGB>].

226. IOWA ADMIN. CODE r. 281-36.3(280), -36.8(280) (2018). The Department of Education can order audits more frequently than once a year at its direction. *Id.* -36.10(280). Failing to make the required financial disclosures to the Department would effectively be fatal to the HSAA, because schools are forbidden from competing in events organized by noncompliant associations. IOWA CODE ANN. § 280.13 (West, Westlaw through 2019 Sess.).

227. R. 281-36.4(280).

228. IOWA CODE ANN. § 280.13B (West, Westlaw through 2019 Sess.).

229. R. 281-36.6(280), -36.7(280).

230. R. 281-36.12(280).

231. R. 281-36.16(280).

232. R. 281-37.3(280).

233. *See* N.J. STAT. ANN. § 47:1A-1.1 (West, Westlaw through L.2019, c. 268 and J.R. No. 22) (defining a “public agency” to include “any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions”).

234. *Christian Bros. Inst. v. N. N.J. Interscholastic League*, 432 A.2d 26 (N.J. 1984).

the state Commissioner of Education.²³⁵ State statutes require the association to establish postseason competition opportunities for athletes enrolled in programs for the disabled.²³⁶ State law defers to the NJSIAA to determine what level of gift or financial assistance to a scholastic athlete is a forbidden inducement.²³⁷ Referees officiating at NJSIAA-sponsored tournaments enjoy the same governmental immunity as those employed by public schools at regular-season sporting events.²³⁸ State regulations provide a formal appeal process by which a decision of the association may be reviewed by the state Commissioner of Education, including a briefing schedule; an aggrieved party may not appeal to the commissioner without first exhausting the internal appeal process of the association.²³⁹ Thus, noncompliance with association formalities is regarded as depriving the state of jurisdiction to consider an appeal. Further, state regulations circumscribe the commissioner's authority in reviewing a decision from the association and require deference to the association's determinations of fact and its application of its own rules, just as if the association was a state administrative agency.²⁴⁰

In its most recent publicly available tax return, the association reports receiving \$1.53 million in membership dues, out of a total of \$4.6 million in program-service revenue. Annual dues for 2018-19 were set at \$2,150 per member school.²⁴¹ The membership of the association is primarily public schools.

While there is no indication that the NJSIAA has been sued for access to its records, the New Jersey Supreme Court ordered an analogous body, the League of Municipalities, to comply with OPRA and disclose its records, even though the League is incorporated as a nonprofit.²⁴² Based on its entwinement with state and local government, and the state's statutory delegation of authority, the NJSIAA is as "governmental" as the municipal association, which is regarded as a public body for purposes of OPRA.

In sum, there is substantial basis to believe that at least some state athletic associations are on wobbly legs in questioning whether open-government laws apply to them. Nevertheless, in the absence of clear guidance from the courts and uniform statutory language, it seems inevitable that the "patchwork" approach to public access will persist.

235. N.J. STAT. ANN. § 18A:11-3 (West, Westlaw through L.2019, c.268 and J.R. No. 22).

236. §§ 18A:11-3.3, 11-3.9.

237. § 18A:36-37.

238. § 2A:62A-6.1.

239. See N.J. ADMIN. CODE § 6A:3-7.1 (2005). In particular, section 6A:3-7.1(c) provides: "The Commissioner shall summarily dismiss any petition seeking to appeal a determination of the NJSIAA in an area that is expressly designated as not appealable by the NJSIAA constitution, bylaws or rules and regulations as adopted by member schools pursuant to law." In other words, the association is recognized as having the authority to determine what decisions are and are not appealable to the state.

240. See § 6A:3-7.5.

241. A copy of the most recent annual dues invoice is available on the association's website at <https://www.njsiaa.org/sites/default/files/document/2019-2020%20Annual%20Dues%20Invoice.pdf> [<https://perma.cc/M5KE-8GGH>].

242. See, e.g., *Fair Share Hous. Ctr. v. League of Municipalities*, 25 A.3d 1063 (N.J. 2011).

C. Takeaways from the 50-state survey

Because no two-state, public-records statutes are identical, it is unsurprising that organizations existing in legal “gray areas” might regard themselves as either covered or not covered, depending on the jurisdiction. Some of the uncertainty stems from varying statutory definitions, and judicial interpretations, of what constitutes a public agency that must open its meetings and records. For instance, the Florida open records law defines an “agency” that must make its records accessible to include:

[A]ny state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law . . . and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.²⁴³

By contrast, Pennsylvania’s narrower open-records law omits any references to partnerships, corporations or business entities, and defines an “agency” to include only a “political subdivision, intermediate unit, charter school, cyber charter school or public trade or vocational school” or a “local, intergovernmental, regional or municipal agency, authority, council, board, commission or similar governmental entity.”²⁴⁴

The survey responses indicate that there is no commonality, or nationwide consensus, among high school athletic agencies as to the legal question of whether they are obligated to provide requested records under their respective states’ open record statutes. This current state of “legal limbo” may lead to inconsistent results for citizens wishing to gain access to agency records across different states. That two comparable associations in neighboring states—say, Arizona and Nevada—might either be fully transparent under state law or completely opaque seems anomalous, since these organizations all discharge comparable duties and are structured in more-or-less similar ways. If the oversight of high school sports is a matter of public interest and concern in Tennessee, then it is equally so in Mississippi. Yet a parent in the latter state would have limited means of exercising oversight over the way sports are organized and regulated. That athletics are an acknowledged matter of public concern is illustrated by the fact that nearly all HSAAAs post some or all information about their board meetings online, which may signal that the associations themselves suspect that their meetings are covered by state open-government law.

While minutes of meetings are a relatively benign document that nonprofits might predictably share without resistance, television contracts are more sensitive; hence, compliance with that aspect of the request is a better gauge of whether HSAAAs consider themselves bound by state open-records laws.

Only 18 of the 51 agencies provided a copy of a contract for the rights to broadcast postseason football games. Of the 33 that did not, 10 indicated that either no such responsive contract existed, or, that such a contract was not yet finalized

243. FLA. STAT. ANN. § 119.011(2) (West, Westlaw through 2019 Reg. Sess.)

244. 65 PA. STAT. AND CONST. STAT. ANN. § 67.102 (West, Westlaw through 2019 Sess. Act 91). Notably, Pennsylvania’s HSAA did comply with the Center’s request for documents even though its statutory obligation to do so is uncertain.

between the agency and the broadcaster. Another 10 explicitly declined to provide an existing contract, and 13 did not address the contract request whatsoever. Even of the 18 agencies that provided a version of their existing contract, the majority withheld some of the information—and one, the University Interscholastic League of Texas, redacted essentially the entire document top-to-bottom, rendering it meaningless. The UIL insisted that the redactions were necessary to protect the trade secrets of its contracting partners, Fox Sports South, and High Field Marketing.²⁴⁵

Television contracts are of public interest for many reasons. They set forth all the essential terms by which state associations (and in states where there are revenue-sharing arrangements, the schools themselves) will be compensated for the right to air student performances. They also address advertising and marketing guidelines, recording and distribution rights, insurance requirements and sponsorship regulations, among other subjects. Of special public impact, these contracts determine how much of any postseason athletic event may be accessible to news media coverage and to the viewing public at home.²⁴⁶

At times, conflicts have arisen over journalists' ability to effectively cover postseason athletic events.²⁴⁷ Because the state HSAA is typically the entity responsible for issuing credentials affording journalists access to the press box and sidelines, associations are in a position to impose conditions on coverage that, at times, may interfere with journalists' ability to present a complete and accurate story.²⁴⁸ As one commentator has observed:

Broad clauses referring to the association's right to deny or revoke credentials without cause or for a media representative's improper conduct can easily lead to implied editorial restrictions. Out of fear of losing access, media representatives may self-censor reports so

245. See Letter of Tex. Assistant Att'y Gen. Matthew Taylor to Ana Vieira Ayala, Office of Gen. Counsel, Univ. of Tex. Sys. (Oct. 10, 2018) (copy on file with authors) (explaining rationale for redactions).

246. For one such clash between public access and profit, see Scott Leber, *IHSA Games Pulled from Free TV*, MYSTATELINE.COM (Sept. 26, 2017, 5:21 AM), <https://www.mystateline.com/sports/ihsa-games-pulled-from-free-tv/818579620> [<https://perma.cc/V4HW-GVVB>] (quoting disappointed fans who, for the first time since 1974, were unable to watch Illinois postseason games, including those in which their own children paid, on free over-the-air television).

247. See Calzada, *supra* note 52; see also John Naughton, *IHSAA Seeking 'Better Solution' for Limited Boys TV Coverage*, DES MOINES REG. (Feb. 7, 2017, 5:14 PM), <https://www.desmoinesregister.com/story/sports/high-school/2017/02/07/ihsaa-seeking-better-solution-limited-boys-tv-coverage-iowa-state-championships/97599492/> [<https://perma.cc/LA27-3P8Q>] (describing fan dissatisfaction with limited ability to view prep boys' football, basketball and wrestling, because exclusive rights-holder's coverage is not accessible in many parts of the state). In North Carolina, for example, broadcasters must apply to the high school athletic association for permission to air, live or on delay, postseason football or basketball games and—only if the exclusive rights-holder declines to air the game—the rights may be purchased for a fee of several hundred dollars. See *Broadcast Request Forms*, N.C. HIGH SCH. ATHLETIC ASS'N, <https://www.nchsaa.org/broadcast-request-forms> [<https://perma.cc/PDA9-9LD4>].

248. See Newman, *supra* note 41, at 62–64 (describing how some HSAAs have reserved unbridled discretion to revoke journalists' credentials at any time for any reason, and how some HSAA credentialing conditions require broadcasters to avoid negative or controversial subject matter).

they are not criticizing event participants or discussing athlete injuries.²⁴⁹

In addition to the action on the field, news regularly happens at high school sporting events; there may be fights, protests, or allegations of dishonest or unsportsmanlike behavior.²⁵⁰ Whether public schools are, through a state association, contracting away the ability of local journalists to fully cover these events is a matter of public interest and concern.

When the public's only source of coverage is the high school athletic association and its contracted broadcast partner, the coverage may be sanitized and lack journalistic objectivity. Some state associations have issued directives instructing broadcasters to avoid mentioning policies of a "controversial nature" or to refrain from "objectionable comments such as criticism of an official, coach, team, player, school or other entity."²⁵¹ For instance, the Pennsylvania Interscholastic Athletic Associations' policy for telecasting or webcasting postseason games encourages the announcers to shade their coverage to emphasize the positive and minimize the negative: "[I]t is respectfully requested that the media of communication refrain from making negative comments towards participants, Coaches, or Contest officials; and report acts of good sportsmanship without giving undue publicity to unsportsmanlike conduct."²⁵² The same document purports to restrict what non-rightsholder media outlets, such as local newspapers and TV stations covering the game, may do with their video and photos, forbidding them from either selling images (or even giving away copies for free) without permission, and limiting them to publishing no more than 90 seconds of game footage only after each game is concluded.²⁵³ Thus, HSAA exclusivity agreements have real

249. *Id.* at 64.

250. Controversy regularly arises over demonstrations by fans, over violence on the field or in the stands, and over political or religious expression to which fans are exposed. In 2015, an assistant football coach was accused of instructing two players to crash into a referee, an episode that received national media coverage and led to a criminal assault investigation. See Ken Rodriguez, *Hearing Raises More Questions in Football Referee Attack Investigation*, SPORTS ILLUSTRATED (Oct. 15, 2015), <https://www.si.com/high-school/2015/10/15/referee-attack-investigation-hearing-texas-high-school-football-robert-watts> [<https://perma.cc/HZ3U-645F>]. For other memorable incidents, see also Tim Stevens, *Abusive Fans Make It Tougher to Recruit High School Sports Refs*, NEWS & OBSERVER (Mar. 25, 2016, 11:55 PM), <https://www.newsobserver.com/sports/high-school/article68495447.html> [<https://perma.cc/H95S-J57K>] (noting that some states have experienced shortages in referees to officiate games, blamed in part on increasing aggressiveness in fans verbally or even physically attacking officials); Jeremy P. Kelley, *Fan Behavior Has Teams, Schools, Arenas on Alert*, DAYTON DAILY NEWS (Jan. 13, 2016), <https://www.daytondailynews.com/sports/fan-behavior-has-teams-schools-arenas-alert/6wyyzhtny1xzQ9U8HjuRQP/> [<https://perma.cc/QZN6-TLCL>] ("[B]ad fan behavior isn't confined to professional sports. It extends all the way down to high school and youth leagues, where administrators have had to take extreme measures in some cases to protect players and the public."); and Calzada, *supra* note 52, at 11 ("While sporting events are often considered entertainment, they are also news.").

251. See Newman, *supra* note 41, at 64 (quoting restrictive conditions imposed by broadcasting agreements in Texas and Florida).

252. PA. INTERSCHOLASTIC ATHLETIC ASS'N, 2019-2020 PIAA POLICIES AND PROCEDURES 101, <https://www.piaa.org/assets/web/documents/Handbook%20-%20Section%20II%20-%20Policies%20and%20Procedures.pdf> [<https://perma.cc/3J34-J9UH>].

253. See *id.* at 103.

consequences on the public's ability to be informed about athletic competitions and on journalists' ability to provide complete coverage.²⁵⁴

To the extent that state associations are perceived as exercising "delegated" governmental authority, the argument for public access becomes easier. It is widely recognized that, when the state delegates its authority to a nominally private entity, the obligation to obey state transparency laws travels with the grant of authority.²⁵⁵ In some states, the delegation of authority to the state HSAA is explicit. For instance, Washington law expressly provides that a county school board "may delegate control, supervision and regulation of any such activity to the Washington interscholastic activities association or any other voluntary nonprofit entity and compensate such entity for services provided," subject to certain statutory conditions, including the right to appeal HSAA decisions through internal district channels as if the decision had been made directly by the school board.²⁵⁶ Since decisions of the Washington Interscholastic Activities Association are regarded as having been made under the authority of the school district and carrying the delegated authority of the district, it cannot seriously be maintained that its decisions are "private" matters.²⁵⁷

Some legal interpretations conclude that the supervision of athletics is so central to the duty of a school or a district that the responsibility cannot be delegated to a third party. For example, South Carolina's attorney general found that, even though the nonprofit South Carolina High School League was statutorily given responsibility for implementing state academic standards, the statute did not unlawfully "delegate" state enforcement powers to a private entity, because the state retained its ultimate authority to establish and enforce standards.²⁵⁸ Similarly, Michigan's attorney general found that, because athletics are a "governmental education function vested in school districts by law," school districts could not delegate "supervision and control" over athletics to a private high school association; consequently, HSAA rules have no binding force unless ratified by member districts.²⁵⁹ That the athletic associations in those states may not technically be exercising delegated state authority—because the authority is non-delegable—may

254. See Newman, *supra* note 41, at 67 (citing Arizona and Florida as examples of states where HSAA credentialing conditions require broadcasters to avoid "negative" coverage, arguably in contravention of the First Amendment's prohibition against prior restraints and viewpoint-based discrimination).

255. See, e.g., *Smith v. Northside Hosp., Inc.*, 807 S.E.2d 909 (Ga. 2017) (deciding that private operator of publicly owned hospital was subject to state open-records act because it was performing a public service or function in service of a government agency); *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029 (Pa. 2012) (ruling that Pennsylvania Right-to-Know Law applies to private contractor that was delegated municipal authority to operate city-owned baseball stadium); *Evertson v. City of Kimball*, 767 N.W.2d 751 (Neb. 2009) (finding that private investigator's report commissioned by city government was a public record because investigator was delegated governmental authority).

256. WASH. REV. CODE ANN. § 28A.600.200 (West, Westlaw through 2019 Reg. Sess.).

257. For another example of explicit statutory delegation, see W.VA. CODE ANN. § 18-2-25 (LexisNexis through 2019 legislation) (statutorily constituting the West Virginia secondary school activities commission and specifying its membership and duties: "The West Virginia secondary school activities commission is hereby empowered to exercise the control, supervision and regulation of interscholastic athletic events and band activities of secondary schools, delegated to it pursuant to this section.").

258. 1985 ATT'Y GEN. ST. S.C. ANN. REP. AND OFFICIAL OPINIONS 237, 237.

259. 1977-1978 MICH. ATT'Y GEN. BIENNIAL REP. 190, 192, 196.

cut against treating them as state entities for freedom-of-information purposes. On the other hand, if the HSAA is exercising delegated authority in all but name—if the association is formulating the rules, which its members ministerially “ratify” but have no ability to vary—then these cases may cut in favor of greater transparency, because they recognize that the oversight of athletics is a core governmental function too important to delegate.

As a final postscript to the survey findings, it is worth noting that an association’s willingness to provide rather benign records in response to a request from university researchers does not necessarily mean that citizens will experience the same level of cooperation when requesting more sensitive documents or seeking to attend an association’s board meeting when issues of controversy are deliberated. When the reputational stakes are higher, the incentive to conceal becomes greater, and agencies may be more inclined to take aggressive legal positions and risk being sued. Since many associations already post their board minutes online, asking for copies of those minutes was a low-stakes request as opposed to, for example, asking to see vendor contracts, employee emails, or travel reimbursements—all documents that unquestionably would be public record at an ordinary state agency.²⁶⁰ The findings of the Center’s survey should (with the exception of the handful of states that may have withheld cooperation on the grounds of state residency) probably be regarded as a high-water mark of cooperation.

V. RECOMMENDATIONS

As this article was being prepared in the fall of 2018, witness after witness was taking the stand at a federal district courthouse in Manhattan, testifying about what one reporter called “a shady world of bagmen, secret payments and bags of cash” that permeates big-time college basketball.²⁶¹ A three-year FBI investigation, which resulted in criminal charges against four major-college assistant coaches, lifted the lid on how money permeates the supposedly amateur world of college sports, including inducements to the families of sought-after student recruits.²⁶²

How educational institutions respond to the unfolding revelations that coaches, agents and corporate sponsors routinely offer money to high school athletes and their families is a matter of self-evident public concern. At such a time, it is especially difficult for those who manage interscholastic athletics to justify shutting the public out from the boardroom where decisions are made.

260. For a discussion of the scope of records obtainable via state freedom-of-information request, see David L. Cuillier & Charles N. Davis, *THE ART OF ACCESS: STRATEGIES FOR ACQUIRING PUBLIC RECORDS* 41–42 (2011).

261. John Marshall, *Federal Trial Pulls Back Curtain on Basketball Recruiting*, ASSOCIATED PRESS (Oct. 7, 2018), <https://apnews.com/dce361999e7041ceb879c09d24eb3722> [<https://perma.cc/5BY6-4BQR>].

262. See generally Matt Norlander, *College Basketball Corruption Trial: Former Adidas Consultant Says He Paid 5 Recruits’ Families, Including Deandre Ayton’s*, CBSSPORTS.COM (Oct. 10, 2018, 5:56 PM), <https://www.cbssports.com/college-basketball/news/college-basketball-corruption-trial-former-adidas-consultant-says-he-paid-5-recruits-families-including-deandre-aytons> [<https://perma.cc/NZ8Q-VPP9>] (recapping trial testimony from former shoe-company executive who admitted paying inducements to family of Louisville basketball recruit).

High school sports have been called “pivotal” to young people’s educational development, affording many thousands of participants a pathway to a college education that might otherwise be beyond their reach.²⁶³ As illustrated by the many dozens of legal challenges implicating high school associations’ status as “state actors,” these associations make life-altering decisions both for individual athletes and for schools. When a school like Brentwood Academy is denied membership in an HSAA or is disqualified from competing for a championship, the school’s stakeholders—and the general public—have a right to know why.

High school sports, football in particular, are an enormously complex financial enterprise. Oversight of this enterprise is, manifestly, the public’s business. Every aspect of high school athletics is intertwined with state-and-local government, including the involvement of government-built facilities and government-salaried coaches. In states where the legal status of these associations is unsettled, legislators should clarify that HSAAs are public entities subject to the same disclosure laws that apply to their public-school members.

If it is accepted that open-government laws can at times apply to entities beyond traditional state, county, or city agencies,²⁶⁴ it is difficult to think of a nominally private entity that is more entwined with government than a high school athletic association. Associations often owe their existence to state legislation²⁶⁵ and make decisions reviewable by state government bodies.²⁶⁶ Many are subject to state financial or performance auditing, just as school districts are.²⁶⁷

While the structure of state associations varies, a common feature of each is that it exerts regulatory authority over public schools, their employees, and their

263. See Van Ann Bui, *Varsity Blues: A Call to Reconfigure the Judicial Standard for High School Athletic Association Transfer Rules*, 34 COLUM. J.L. & ARTS 231, 256–57 (2011) (enumerating the value of sports to individual students: “They help build self-confidence, encourage teamwork and healthy competition and help develop a myriad of other leadership skills. . . . Participation in interscholastic athletics also offers opportunities for students to receive athletic scholarships or, at the very least, to include the activities in their applications.”).

264. See, e.g., *State ex rel. Freedom Comm’n, Inc. v. Elida Cmty. Fire Co.*, 697 N.E.2d 210, 212 (1998) (observing that, for purposes of Ohio’s public-records statute, “[a]n entity need not be operated by the state or a political subdivision thereof to be a public office. . . . The mere fact that [a firefighting organization] is a private, nonprofit corporation does not preclude it from being a public office.”).

265. See, e.g., Jane Hefferan, *Changing Seasons, Changing Times: The Validity of Nontraditional Sports Seasons Under Title IX and the Equal Protection Clause*, 9 VAND. J. ENT. & TECH. L. 861, 870 (2007) (observing that Michigan’s high school association was created by state legislation “as an official state organization,” and that, although subsequently chartered as a corporate entity, “this modification did not substantially change either the structure or the operation”).

266. See, e.g., Patrick Sterk, *To Pray or to Play: Religious Discrimination in the Scheduling of Interscholastic Athletic Events*, 18 SPORTS L.J. 235, 246 47 (2011) (describing the entanglement between Oregon’s high school association and the state, including an appeal process by which HSA decisions are statutorily appealable to the State Board of Education).

267. See MINN. DEP’T OF EDUC., REPORT ON THE MINNESOTA STATE HIGH SCHOOL LEAGUE (2018); see also STATE OF N.C., OFFICE OF STATE AUDITOR, INVESTIGATIVE REPORT, NORTH CAROLINA HIGH SCHOOL ATHLETIC ASSOCIATION, INC. (2009); STATE OF UTAH, OFFICE OF LEGISLATIVE AUDITOR, REPORT NO. 2014-01, A PERFORMANCE AUDIT OF THE UTAH HIGH SCHOOL ACTIVITIES ASSOCIATION (2014). In 2018, Tennessee enacted a statute requiring the state athletic association to undergo an annual audit by the Comptroller of the Treasury or to submit an independent audit satisfactory to the Comptroller. See TENN. CODE ANN. § 49-6-416 (2018).

students.²⁶⁸ If a school or its coaches are found to be in violation of HSAA rules, their teams can be excluded from postseason play or forced to forfeit games.²⁶⁹ Associations have the authority to overrule decisions made by public agencies; for instance, a school or a district may decide that Johnny qualifies to compete in interscholastic sports, but the association can override that determination.²⁷⁰ This distinguishes athletic associations from other private entities with which schools do business. Unlike a vendor or contractor relationship, a school is not free to “take its business elsewhere.” If not legally compulsory, membership is *de facto* compulsory for any school that competes in interscholastic athletics.²⁷¹

While it has been argued that associations are merely club-like associations whose members voluntarily contract away some autonomy, so that an HSAA is more akin to a contractor than a regulator,²⁷² that view is unpersuasive in view of the fact that HSAA regulations extend to students as well as their schools. Student-athletes are compelled to obey HSAA-imposed grooming and dress standards, refrain from certain prohibited types of expression, and refrain from taking performance-enhancing drugs or accepting compensation.²⁷³ Neither students nor their parents

268. In later proceedings following the Supreme Court’s landmark *Brentwood Academy* decision, the Sixth Circuit emphasized that the role of Tennessee’s high school association was a “regulatory” one rather than just a contractual provider of services. See *Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass’n*, 442 F.3d 410, 423 (6th Cir. 2006) (“[T]he appropriate characterization of the TSSAA’s role is as a government regulator, a context to which the First Amendment surely applies.”).

269. See, e.g., Shaddi Abusaid, *Marietta High Must Forfeit 2017 Wins*, MARIETTA (GA.) DAILY J. (July 23, 2018), https://www.mdjonline.com/news/marietta-high-must-forfeit-wins/article_d3cf4ce0-8ecf-11e8-b674-5b50f45a4b54.html [<https://perma.cc/XCB9-KQ52>] (reporting that Georgia High School association ordered high school to forfeit football wins and placed school on disciplinary probation after discovering recruiting violations); Rick Peterson, *Topeka High Ordered to Vacate Football Wins for Using Ineligible Player*, TOPEKA CAP.-J. (Jan. 18, 2018, 6:13 AM), <https://www.cjonline.com/sports/20180117/topeka-high-ordered-to-vacate-football-wins-for-using-ineligible-player> [<https://perma.cc/JJ2J-4NDN>] (describing forfeits and other sanctions levied by Kansas State High School Activities Association after football team was caught using ineligible player); A. Stacy Long, *Lee Generals Shocked, Saddened at Forfeits*, MONTGOMERY ADVERTISER, (Oct. 24, 2016, 4:40 PM), <https://www.montgomeryadvertiser.com/story/sports/high-school/football/2016/10/24/lee-generals-shocked-saddened-ahsaa-forfeits/92695714/> [<https://perma.cc/Z37Y-3FTF>] (reporting that Alabama High School Athletic Association forced high school team to forfeit all of its season’s football victories for playing an ineligible player in violation of association residency rules).

270. See, e.g., *In re M.D. & Cardinal Spellman High Sch.*, Case #02-3997 at 3, 5 (Mass. Bureau Spec. Ed. Appeals, Dec. 9, 2002) (declining to offer relief to track-and-field athlete whose request for a disability accommodation was refused by her school on the grounds that the school was bound by Massachusetts Interscholastic Athletic Association rules governing practices protocols, and that violating MIAA rules could result in the entire team being declared ineligible for competition).

271. See *Bunger v. Iowa High Sch. Athletic Ass’n*, 197 N.W.2d 555, 561 (Iowa 1972) (“To say that a school can withdraw from [the association] is no answer. If it leaves [the association] voluntarily, or involuntarily for violating the rule, its boys’ interscholastic athletic program is at an end . . . Its hands are tied.”).

272. See, e.g., Madry, *supra* note 27, at 391 (remarking, in analyzing the Supreme Court’s conclusion in *Brentwood* that the Tennessee athletic association was a state actor, that “[t]he only authority that the TSSAA had over its members was contractual, and that was true for public as well as private schools.”).

273. See, e.g., *FHSAA Adopts PED, Enrollment, Mediation Changes to Protect Student-Athletes and Fair Play*, FLA. HIGH SCH. ATHLETIC ASS’N (Jan. 14, 2014), <https://www.fhsaa.org/news/2014/0114> [<https://perma.cc/XV8V-4NDR>] (describing new bylaw that declares students ineligible for athletic competition if they use human-growth hormone, or HGH, for performance-enhancing purposes); IOWA

have contracted to become “members” of the state high school association “club.” Even if the school is itself free to belong or not to belong—and whether that freedom is real or illusory is debatable—students are given no such choice.²⁷⁴ Hence, HSAs are more analogous to government regulatory entities than to private clubs.

As illustrated by the broadcast-rights contracts commonplace throughout the country, high school associations have authority to enter into agreements contractually binding on their member schools. A high school in Illinois or Iowa would not be free to schedule a televised postseason football game in competition with the games organized by their associations. Nor would two competitor schools be free to invite their local television stations to carry live play-by-play coverage of the games in contravention of the contracts’ exclusivity provisions. This delegation of contractual authority distinguishes the HSA relationship from a traditional service-provider relationship.

Further, associations are afforded preferential use of state resources that would never be made available to a non-state entity. They are permitted to use state-owned facilities to stage ticketed events from which they retain the proceeds.²⁷⁵ Their “business model” is based on procuring the uncompensated labor of students to stage commercially valuable performances (as courts have characterized postseason athletic tournaments).²⁷⁶ It is only because athletic associations are inseparable in identity from their member schools that schools are willing to—and legally permitted to—allow the associations to share in powers and benefits otherwise reserved to the government. Even where associations are not directly subsidized by payments from school districts, they benefit indirectly from public support in a variety of ways, including drawing on the government-paid time of the public school superintendents, principals, and athletic directors who make up their boards and committees.²⁷⁷

HIGH SCH. ATHLETIC ASS’N, *supra* note 216, at 27 (providing that a student may receive an award worth no more than \$50 from his or her school without forfeiting amateur status and becoming ineligible to compete in athletics, but may not accept a prize in the form of cash).

274. See *Ind. High Sch. Athletic Ass’n, Inc. v. Carlberg*, 694 N.E.2d 222, 230 (Ind. 1997) (finding that, although the judiciary should refrain from second-guessing the management decisions of private associations in internal disputes among members, the same deference does not apply to challenges brought by nonmembers: “as a student, [the plaintiff] has not voluntarily subjected himself to the rules of the IHSA; he has no voice in its rules or leadership”).

275. On this point, see the Tennessee Court of Appeals’ analysis in *City Press Communications, LLC v. Tennessee Secondary School Athletic Ass’n*, 447 S.W.3d 230, 236 (Tenn. Ct. App. 2014), finding that the preferential use of state facilities for revenue generation represents an indirect government subsidy.

276. See *Wis. Interscholastic Athletic Ass’n v. Gannett Co.*, 658 F.3d 614, 622 (7th Cir. 2011) (referring to high school sporting events as an “entertainment product that WIAA has created”). Indeed, the Michigan High School Athletic Association has unabashedly touted the opportunity to influence students as an inducement for businesses to purchase sponsorships. See *Corporate Partner Program*, MICH. HIGH SCH. ATHLETIC ASS’N, <https://www.mhsaa.com/About-the-MHSAA/Corporate-Partner-Program> [<https://perma.cc/QB4F-Z56Q>] (touting benefits of corporate sponsorship packages for MHSAA tournaments: “a partnership provides access to a state-wide population of student-athletes and families from ages 14-18 and 18-54 from various ethnic, cultural, and socioeconomic backgrounds. A partnership can provide a sense of support from your brand to a student, peer, and/or family member by enhancing their experience. The recognition by your brand on the importance of high school athletics will create a statewide sentiment and will maximize brand awareness of a company’s products and/or services.”).

277. See *Trevino*, *supra* note 64, at 305 (pointing out that school officials attend meetings of the Wisconsin association during the workday, so that “the State is essentially paying the WIAA committee members to attend.”).

Athletic associations embrace their “governmental” status when that status is strategically advantageous.²⁷⁸ For instance, when decisions of state associations are challenged, courts have sometimes afforded HSAA corporations the same deference that would be afforded to the Department of Education or another administrative adjudicatory agency.²⁷⁹ Governmental status is not a raincoat that may be donned and shed opportunistically; if an HSAA wishes to enjoy the benefits of being a state entity, then the association can fairly be held to state transparency and accountability standards.

The athletic operations of a single public school undeniably are subject to the open-records laws of the state.²⁸⁰ Equally, state open-records laws would apply if two public schools pooled their resources to organize an athletic event together. If high school athletic operations are a matter of public record whether conducted individually or in collaboration, it is counterintuitive that athletics alchemically become private when hundreds of schools share resources to create a management company to handle their responsibilities. This is doubly so because athletics are accepted to be a matter of public record until the point at which public interest is the highest: The championship round, where the HSAA typically takes over governance from the individual competitor schools. Open-government laws should recognize the commonsense proposition that, if an activity is subject to public scrutiny when done by a single government entity—a school board, a county commission, a city council—then it is equally subject to public scrutiny when performed by a consortium of government entities, notwithstanding the veneer of private incorporation.

Because of the unique status and function of HSAAs, there are no significant downsides in applying open-government laws. If a genuinely private corporation—for instance, a construction company that accepted a contract to build a state building—were held to be subject to state open-government laws, the corporation might have legitimate confidentiality concerns. Its strategic business plans might become known to competing construction companies. The company might even leave the state and take its business elsewhere. There are no comparable

278. See M. Chester Nolte, *Judicial Intervention in School Athletics: The Changing Scene*, 8 ED. L. REP. 1, 9 (1983) (“High school athletic associations, having both the discretion of a voluntary association and the discretionary power of school boards, have a dual protection from judicial intervention.”).

279. See, e.g., *Clay v. Ariz. Interscholastic Ass’n*, 779 P.2d 349, 350 (Ariz. 1989) (treating HSAA as the equivalent to a state agency for purposes of judicial deference, so that agency’s decision can be overturned only if it is found arbitrary and capricious).

280. See, e.g., *State ex rel. Plain Dealer Pub. Co. v. Lesak*, 457 N.E.2d 821 (Ohio 1984) (ordering school to produce records of bank accounts containing gate receipts and school entry fees from athletic tournaments, program and concession sales); *State of Ill. Pub. Access Op. No. 14-007*, 2014 WL 4407593 (Ill. A.G. Aug. 14, 2014) (opining that Chicago Public Schools violated Illinois freedom-of-information law by failing to act diligently to fulfill request for records of ticket receipts for athletic events); *Ky. Op. Att’y Gen. Open Records Decision 06-ORD-061* (Mar. 17, 2006), 2006 WL 1315760 (finding that anonymous misconduct complaint against high school basketball coach was a public record that should have been retained by school district and not destroyed); *Ark. Att’y Gen., Opinion Letter No. 2001-147*, 2001 WL 608467 (May 30, 2001) (advising that “memoranda, letters and notes produced by school district officials” in possession of junior high school coach should be turned over in response to request from journalists investigating recruiting improprieties in Little Rock school athletics).

risks with HSAAAs.²⁸¹ Moreover, like any other governmental entity, an athletic association could invoke the many statutory exemptions recognized in state freedom-of-information law to redact or even entirely withhold records containing legitimately confidential information, such as attorney-client privileged communications or student academic records.²⁸²

Clarifying that collaboratives made up of government agencies or government officials must obey state open-government laws would have benefits beyond high school sports. Disputes regularly arise over the legal status of other governmental umbrella organizations, including those representing cities, school boards, and school administrators.²⁸³ Common to all of these entities is that they receive substantial financial support from taxpayers—often in the form of dues paid by their members out of public money, as well as indirect subsidies—and that their membership is wholly or largely limited to those wielding governmental authority. When government officials or governmental bodies pool resources to conduct business that would be public if done by a single governmental entity, the activity does not shed its “public” nature merely by the ministerial step of incorporation.

VI. CONCLUSION

From desegregation in the 1960s to transgender rights in the present day, the social and political issues of the current moment have always played out on the stage of high school sports. At this moment, disputes are simmering across the country over whether undocumented students, who have a constitutional right to attend public school, can be excluded from interscholastic athletics because of HSAA regulations that require proof of citizenship.²⁸⁴ High school sporting events are perhaps one of the last American “melting pots” where people of diverse backgrounds, cultures, and beliefs come together around a shared interest, at least for a few hours each Friday in the fall.²⁸⁵ For that reason, the governance of high

281. Indeed, some of the most sensitive information that a truly private business would be interested in protecting, such as its managers’ compensation packages and the size of its largest vendor contracts, is already public in the case of HSAAAs because federal tax law requires 501(c) nonprofit corporations to make their tax returns public by way of the annual IRS 990 form. Moreover, as the U.S. Supreme Court recently reemphasized in a case involving the federal analog to state open-records laws, ample exemptions already exist for private entities to protect commercially valuable “trade secrets” from disclosure in response to requests for government documents. *See Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019) (enabling state regulators to invoke “trade secret” rights of grocery retailers to decline federal Freedom of Information Act request for statistics about revenues from food stamps). With the availability of commodious “trade secret” exemptions, there is no compelling reason why an HSAA needs blanket impunity from disclosing any-and-all of its records.

282. For a comprehensive state-by-state survey of the categories of records that must, or may, be withheld from public disclosure, see NAT’L ASS’N OF COUNTIES, *OPEN RECORDS LAWS: A STATE-BY-STATE REPORT* (2010), <https://www.governmentecmsolutions.com/files/124482256.pdf> [<https://perma.cc/VCK2-RMQV>].

283. *See generally* Fair Share Hous. Ctr. v. League of Municipalities, 25 A.3d 1063 (N.J. 2011); *Telford v. Thurston Cty. Bd. of Comm’rs*, 974 P.2d 886 (Wash. Ct. App. 1999).

284. *See generally* Casey Parks, *Immigrant Students Find Hope in Soccer, but Some States Won’t Let Them Play*, HECHINGER REP. (Nov. 7, 2018), <https://hechingerreport.org/immigrant-students-find-hope-in-soccer-but-some-states-wont-let-them-play/> [<https://perma.cc/2E6C-DZJT>].

285. *See* Morgan Shell, *Transgender Student Athletes in Texas School Districts: Why Can’t the UIL Give All Students Equal Playing Time?*, 48 TEX. TECH. L. REV. 1043, 1053 (2016) (enumerating personal

school athletics cannot exist in a sealed bubble impervious to public scrutiny and accountability. The tournaments overseen by high school athletic associations—events built on the backs of unpaid student laborers—are not the “exclusive property” of private promoters. They belong, in a deeper cultural sense, to their communities they enrich—communities that are entitled to know whether sporting events are managed honestly, efficiently, and safely.

and societal benefits of interscholastic sports participation, including promoting teamwork, self-esteem and regard for diversity).