

Prep Plus: Evaluating the Motivations for and Effects of Enrollment Multipliers and Other Measures in High School Sports

BY

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ABSTRACT

Increasingly, private school high school students are disproportionately winning state championships to the exclusion of their public school peers. This disparity has caused many states, including Illinois and Tennessee, to implement enrollment “multipliers,” placing private school sports teams into divisions comprised of much larger, more competitive public schools, purportedly making state championships more difficult to achieve for private schools. The reasons for such multipliers vary, with an emphasis on the alleged unfair advantage that private schools enjoy due to their ability to enroll students outside of “boundaries.” This article provides a case study of states that already implemented this multiplier, and evaluates whether this tactic achieved its goal in “leveling the playing field.” It further analyzes the alternative approaches taken by other states, and assesses the alleged need for such tactics in states without any multipliers or similar measures. Finally, based on these observations, this article analyzes whether the multiplier is the most effective way to quiet the age-old private v. public debate and whether there should be a proportionate number of state championships for public schools in the first place.

SUMMARY

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I. INTRODUCTION

I saw the wonder of a group of boys coming together with little more than a dream in their heads and somehow getting an inch away from that dream, the dream of a state championship. I saw the miracles that can happen when a community puts all its resources behind something, and I began to wonder what would have happened if the value of that community wasn't a state championship but something different.¹

Winning a state championship has been the dream of many of America's youths and their parents. Yet, increasingly, private school students have disproportionately achieved this goal to the exclusion of their public school peers. In 2008, five out of the nation's top twenty-five high school football teams hailed from private schools.² In boys' basketball, eleven out of the top twenty-five came from private high schools in 2009.³ In light of the

1. H.R. Bissinger, Address to the National Association of Independent Schools (March 1, 2001) (transcript available at <http://www.fridaynightlightsbook.com/address.html>).

2. Jim Halley, Fort Lauderdale's Aquinas Finishes Season Atop Super 25, <http://www.usatoday.com/sports/preps/football/poll/2008-super25.htm> (last visited June 29, 2009).

3. Jim Halley, Findlay Leads Final Super 25 After National Tourney Win, <http://www.usatoday.com/sports/>

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fact that the number of public schools far outweighs the number of private schools⁴ such disproportionate numbers of state championship wins for private schools have inspired many state athletic associations to implement strategies aimed at reducing the number of state championships won by private schools so that all students have a fair chance to compete for a state championship.⁵

In states like Illinois, controversial enrollment multipliers have been implemented. Under Illinois' formula, a "non-boundaried"⁶ school will have its actual enrollment multiplied by 1.65 to determine the classification in the State's high school playoff system.⁷ The enrollment multiplier causes private schools to be placed in divisions comprised of much larger, more competitive public schools, making achieving state championships significantly harder. This formula is not unique to Illinois: states nationwide have begun to create ways to curb the disproportionate amount of championships won by private schools. In some of these states, a multiplier system has been implemented while others have used separate playoff systems or drafted proposals limiting the boundaries from which private schools can draw their students.⁸

This article will provide a case study on the use of multipliers in regulating high school athletic competitions and address whether these multipliers have produced the intended result or whether said multipliers have only added to growing tensions between public and private schools. The overarching goal advocated by proponents of multipliers and similar measures is to level the athletic playing field between boundaried and non-boundaried schools. Multiplier advocates state that non-boundaried schools have an advantage of being able to draw from a larger pool of athletes; in other words, logic dictates that the larger pool of student-athletes a school may draw from, the more likely that school will have a better student-athlete in attendance come the fall. While most states have rules against high schools recruiting students for athletic purposes, both sides concede that an underlying motivation for the multiplier is to give an artificial advantage to boundaried schools to compensate for real or perceived illicit recruiting that is not adequately or effectively policed. Multiplier proponents also cite to other advantages of non-boundaried (often private) schools that need to be leveled, including: better facilities, better coaching, greater access to facilities and staff out of season, greater parental involvement, and that non-boundaried schools pick their students and maintain low attendance numbers to compete at lower division levels. Those against multipliers and similar measures in high school sports fight against such measures, not just because of a potential loss of trophies, but because they say such measures punish students and schools by setting up unfair matchups with much larger public schools ("David v. Goliath"), punish all for the alleged transgressions of a few, preemptively punish all non-boundaried schools when there are existing rules and punishments in place for recruiting violations, discount the academic advantages that students seek in non-boundaried schools, and discount the religious and

preps/basketball/poll/2008-09-super25m.htm (last visited June 29, 2009).

4. According to Schooltree.org, there are 18,627 public high schools in the nation versus 2,226 private schools. Schooltree.org, <http://schooltree.org/high/> (last visited July 9, 2009).

5. Mark Gokavi, *50 States, 51 Systems*, DAYTON DAILY NEWS, Feb. 6, 2006., <http://www.daytondailynews.com/sports/content/shared/oh/fbnation/fbstalist.html>.

6. A non-boundaried school is defined as "[a]ny private school, charter school, lab school, magnet school, residential school, and any public school in a multi-high school district that does not accept students from a fixed portion of the district." IHSA Non-Boundaried Schools, <http://www.ihsa.org/school/nonbound.htm> (last visited June 29, 2009).

7. See IHSA, Administrative Procedures, Guidelines and Policies § 18 (2008-09).

8. See *infra* Part V (discussing methods employed by other states).

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spiritual guidance sought in parochial schools.⁹ Further, some opponents of multipliers allege that at its base it is a bias against religious (often Catholic) schools.

The purpose of this article is not to advocate for one side's motivations over another's, but to examine the approaches different states have taken or are contemplating in this latest battle in the "public/private" debate, and what the result has been.¹⁰ The article will first discuss the multiplier effort in Illinois, beginning first with some history on how the multiplier was first enacted, then turning to the legal challenge to the multiplier, and finally discussing the events after the lawsuit was settled. After consideration of the Illinois system, the article will address how other states have dealt with the "public / private" debate and how concerns over athletic recruiting has led to harsh rules and sometimes harsh consequences for private schools faced with recruiting allegations. Finally, the article will conclude with observations concerning the effectiveness of multipliers and similar measures in producing the intended goals of proponents.

II. BACKGROUND ON THE ILLINOIS MULTIPLIER

In most sports, the Illinois High School Association ("IHSA") conducts state championships in two classes.¹¹ Class A consists of schools with enrollments of 754 students or less, while Class AA consists of schools with enrollments higher than 754.01.¹² A school's classification is based on its Fall Housing Report submitted to the State Board of Education.¹³ The IHSA adjusts the enrollments of single-sex schools and schools that are less than four year institutions so that all schools are evaluated as traditional four year co-educational schools for seeding purposes.¹⁴

For football state championships, schools are grouped according to a different class system.¹⁵ Under this system, the IHSA conducts state championships in eight classes with each class consisting of thirty-two teams.¹⁶ Each school is placed into a class based on the school's own enrollment, or for non-boundaried schools, its adjusted enrolment.¹⁷ For example, Nazareth Academy in LaGrange Park, Illinois has an actual enrollment of 787 and

9. "If there is a private school advantage such as non-boundaried admission, it is clearly not a universal advantage of all non-boundaried schools. Some non-boundaried schools (public and private) have deplorable records, and applying a multiplier to all non-boundaried schools is patently unfair to those that have not fully developed this alleged advantage. The fact that this alleged advantage appears only in a few sports is an added complexity. If private schools have inordinate success in basketball in Pennsylvania, should their enrollments be multiplied for football? If private schools in Nebraska have inordinate success in football, should their enrollments be multiplied for non-athletic endeavors like the one-act play competition?" James, John T. "How much does a private school student count? A critical analysis of the athletic multiplier." CATHOLIC EDUCATION (June 1, 2007).

10. This article will sometimes use non-boundaried interchangeably with private, and boundaried interchangeably with public. The author does not assume that all non-boundaried schools are private or parochial.

11. IHSA Non-Boundaried Schools, *supra* note 7.

12. *Id.*

13. *Id.* at §18.1.

14. *Id.* at §18.10 (a), (d) (a boys-only school has its enrollment doubled; a school that only has students in one grade has their enrollment quadrupled).

15. School Classification Policy and Changes – 2009-10, <http://www.ihsa.org/school/change10.htm> (last visited June 30, 2009).

16. IHSA, Boys Playoff Terms and Conditions § I.A (2008-09).

17. *Id.* at §I.B. The football enrollment number provision (I.C) was eliminated in 2007. To determine a school's "football enrollment," the IHSA first took the average enrollment of a school's opponents, discarding the largest and smallest school. Thereafter, the IHSA would add fifty percent of the difference between the school's average opponents' enrollment and the school's own enrollment to the school's own enrollment to get the school's "football enrollment."

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an adjusted enrollment of 1298.55.¹⁸ For most sports, Nazareth is a class AA school.¹⁹ Alternatively, Nazareth plays in the 5A class for football championships.²⁰

Problems with this formula arose when private “non-boundaried schools” earned disproportionate success in state tournaments. For example, in 2001, Riverside-Brookfield, a public school and the top-seeded team in its class, had its season cut short by Joliet Catholic, a private school with a rich history of football success, losing by the score of 56-50.²¹ The result likely led Riverside-Brookfield coach Otto Zeman to push for an enrollment multiplier, whereby private schools would have their enrollments multiplied, forcing said schools to compete against larger public schools.

The Football Advisory Committee, of which Coach Zeman was a member,²² suggested a 2.0 multiplier to the IHSA’s Athletic Administration Committee.²³ In January 2004, that committee voted unanimously to table the proposed multiplier.²⁴ In March 2004, the IHSA Board approved a special Public/Private Task Force Committee to explore the issue of classification.²⁵ Following a series of meetings, the IHSA announced in October 2004 that the Task Force would make recommendations for consideration of its Members in March or April 2005.²⁶ In November 2004, the IHSA held its annual state championships in football, and private schools still took home a majority of the titles.²⁷ In January 2005, the Task Force held a meeting to vote on the multiplier proposal. At that meeting, the Task Force voted again to reject the multiplier.²⁸

Following that vote, some public schools in favor of the multiplier lobbied the IHSA’s Board of Directors directly to enact the multiplier in spite of the Task Force’s recommendation. As a result of this pressure, on March 19, 2005, the IHSA Board of Directors voted 8-2 to multiply the enrollments of “non-boundaried” schools with enrollments of 450 and above by 1.65 for the purposes of slotting the schools into classes for athletic tournament purposes.²⁹ Regarding the necessity for a multiplier, private schools challenging the decision have received the following common explanations: (1) recruiting, (2) lack of enrollment boundaries, and (3) an un-level playing field as evidenced by the success of the private schools in state tournaments.³⁰ However, the private schools’

18. School Enrollments (Alphabetical), <http://www.ihsa.org/school/enrolla.htm> LaGrange Park (last visited June 30, 2009).

19. LaGrange Park (Nazareth Academy), <http://www.ihsa.org/school/schools/1202.htm> (last visited June 30, 2009).

20. See Boys Football Playoff Scores, <http://www.ihsa.org/activity/fb/records/xbysch11.htm> (last visited June 30, 2009).

21. Complaint at 8, *De La Salle Inst. v. Ill. High School Ass’n*, (No. 05 CH 16410) (Ill. Cir. Ct. Cook Co., Sep. 27, 2005) [hereinafter *De La Salle*].

22. IHSA, IHSA Advisory Committee Meeting Minutes 2004-05, <http://www.ihsa.org/org/admin/2004-05/05-sm-minutes.htm> (last visited March 1, 2009).

23. IHSA, IHSA Announcements, April 27, 2004, <http://www.ihsa.org/announce/2003-04/040427b.htm> (last visited October 30, 2008).

24. Announcement from IHSA, Board Approves task Force on Classification (Mar. 6, 2004), <http://www.ihsa.org/announce/2003-04/040306.htm> (last visited Oct. 30, 2008).

25. *De La Salle*, *supra* note 21, at 9.

26. *Id.* at 10.

27. IHSA, <http://www.ihsa.org/activity/fb/x2004-05.htm> (last visited Oct. 30, 2008).

28. *De La Salle supra* note 21, at 11.

29. Barry Temkin, *Private Schools Sue IHSA; Claim Enrollment Multiplier Unfair*, CHI. TRIB., Sept. 28, 2005, at C9.

30. *De La Salle, supra* note 21.

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complaint alleges that these explanations are simply pretext and quotes news articles in which IHSA officials have stated “We’re not trying to, in any way, say that non-boundaried schools are cheating, that they’re recruiting, that they’re doing anything against our rules.”³¹

As a result of the multiplier, twenty-four of the IHSA’s 751 member schools—seventeen private and seven public—went from Class A to AA.³² An additional twenty schools moved up a class in football.³³ Thus, almost one-third of all the “non-boundaried” schools were affected by the multiplier in some way.³⁴ Although the IHSA Board provided an internal appeals process for schools looking to avoid the application of the multiplier,³⁵ to which nineteen schools applied for a waiver, only ten succeeded at obtaining one.³⁶

The multiplier decision prompted both legislative and judicial intervention. In April of that year, members of the Illinois General Assembly attempted to intervene in the issue on behalf of the private schools.³⁷ However, those efforts died in committee, with members voting against the measure saying they did not believe it was the place of state government to regulate the association.³⁸

III. DE LA SALLE V. ILLINOIS HIGH SCHOOL ASSOCIATION

On September 27, 2005, thirty-two “non-boundaried” schools brought suit in the Circuit Court of Cook County challenging the multiplier system.³⁹ The suit contended that the IHSA violated its own bylaws and procedures in implementing the system by not bringing the multiplier decision to a member vote.⁴⁰ In addition, the affected schools characterized the multiplier as “a deliberate effort to dictate wins and losses.”⁴¹ Specifically, these schools alleged the Board’s unilateral action caused immediate and irreparable injury in six specific ways: (1) the schools’ right to participate in State tournaments and schedule contests among schools of equal enrollment, (2) the right to host State tournament games, (3) the loss of their students’ educational and personal development associated with equitable participation in interscholastic athletics, (4) equal

31. *Id.* at 15.

32. Temkin, *supra* note 29.

33. Matt Trowbridge, *Public v. Private Part II: When a win becomes a loss*, ROCKFORD REGISTER STAR, Oct. 27, 2005. Given the fact that football conducts championships in eight classes, whereas most other sports conduct two class championships, the increase in affected schools for football is not surprising.

34. See Barry Temkin, *Public-Private Debate Isn’t Over*, CHI. TRIB., Jan. 21, 2005, C8 (noting 118 schools fit the “non-boundaried” definition and are subject to the multiplier).

35. IHSA, *Admin. Procedures, Guidelines, and Policies*, *supra* note 7, at §18.16.

36. Temkin, *supra* note 29. Some of these appeals were quite lengthy. Wheaton Academy succeeded at getting a waiver after submitting a 124-page appeal. Bob Sakamoto, *9 Area Schools Receive Waivers on Multiplier*, CHI. TRIB., Aug. 30, 2005, at C9. The schools receiving waivers included: CICS-Northtown Academy, Cristo Rey, Noble Street Charter School, St. Scholastica, University High, St. Edward, Mt. Assisi and Chicago Christian. Among those denied a waiver included Leo, Illiana Christian, Montini, St. Francis, Bishop MacNamara, and Marian Central Catholic. *Id.* All of the schools that did not receive waivers had significant success at the state level.

37. See 2005 IL H.J.R. 46 (April 14, 2005) (Rep. Verchoore sponsor); 2005 IL H.J.R. 45 (April 15, 2005) (Rep. Sullivan sponsor).

38. Erika Slife, *Multiplier Challenge Fails; Enrollment policy Stands, but Legislators may Examine IHSA*, CHI. TRIB. Apr. 15, 2005, at C12.

39. De La Salle, *supra* note 21, at 1.

40. *Id.*

41. *Id.*

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treatment generally, (5) the realistic opportunity to compete successfully in a State championship series, and (6) benefits that accrue from successful performance in the State tournament.⁴²

After a five-hour conference, the parties reached a settlement on terms that seemed to favor multiplier supporters.⁴³ In the settlement agreement, the 1.65 multiplier would be used for the Fall 2005 competitions only.⁴⁴ After that, the multiplier would expire in its current form, but any member schools would be given an opportunity to submit proposals for legislation on how a multiplier should work.⁴⁵ Those proposals would then be submitted to the Legislative Commission for a full member vote.⁴⁶

IV. THE PROPOSALS, THE VOTE AND THE AFTERMATH

On November 28, 2005, the IHSA's Legislative Commission reviewed these proposals, as well as a number of others, to determine which deserved a state-wide vote of the member high schools.⁴⁷ Following review, two "multiplier" proposals were approved by the Legislative Commission for a member-wide vote, both of which included a definition of "non-boundaried" not previously defined in the original multiplier provision. Each proposal defined the phrase as "any private school, charter school, lab school, magnet school, residential school, and any public high school in a multi-high school district that does not accept students from a fixed portion of the district."⁴⁸ The first proposal simply stated that any regulations regarding the classification of a non-boundaried school should apply to all non-boundaried schools regardless of whether the school is a "private" or "lab."⁴⁹ The second proposal provided the IHSA Board of Directors with complete authority to establish and implement a classification system for state tournaments.⁵⁰ Additionally, the proposal called for the re-instatement of a 1.65 multiplier for all "non-boundaried" schools that could not be changed by the Board.⁵¹ On December 28, 2005, the member schools of the IHSA voted to keep the 1.65 multiplier system in place⁵² without any limitations of waivers.⁵³

As a result, small private schools were forced to play against much larger public schools in statewide tournaments. In one case, tiny Cristo Rey High School,⁵⁴ a 10-year old

42. *Id.* at 21.

43. IHSA, Press Release, *IHSA Announces Settlement to Multiplier Lawsuit*, October 5th, 2005, available at <http://www.ihsa.org/announce/2005-06/051005.htm>.

44. *Id.*

45. *Id.*

46. *Id.*

47. IHSA, Press Release, *Legislative Committee Votes to Put 5 of 26 Proposals on Annual Referendum Ballot*, November 28, 2005 available at <http://www.ihsa.org/announce/2005-06/051128.htm>.

48. IHSA, 2005-2006 Proposed Amendment No. 4, available at <http://www.ihsa.org/announce/2005-06/051128.htm> (click on the link that says text of all proposals)

49. *Id.*

50. IHSA, 2005-2006 Proposed Amendment No. 14, available at <http://www.ihsa.org/announce/2005-06/051128.htm> (follow link that says text of all proposals).

51. *Id.*

52. IHSA, IHSA Schools Approve 5 of 5 Proposals, Including Multiplier, Dec. 29, 2005, <http://www.ihsa.org/announce/2005-06/051229.htm> (last visited July 6, 2009)

53. *Id.*

54. To compare, Cristo Rey's enrollment in the 2008-09 school year was a mere 530 students compared with Marshall's which boasts 1375 students. School Enrollments, *supra* note 18.

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Jesuit school serving Chicago's Pilsen community that has never won a regional in any sport, was forced to play Marshall High School, a powerhouse of the Chicago Public League, in the first round of the state basketball tournament. Marshall won the game by an embarrassing score of 130-30, prompting the Chicago Tribune to label the multiplier system as about "as fair as a political campaign ad."⁵⁵

Attempts by private schools to reinstitute the waiver have been unsuccessful.⁵⁶ One private school principal proposed a bylaw amendment that would give schools that have had little state tournament success a chance to receive a waiver from having the schools' enrollment multiplied.⁵⁷ IHSA member schools were unable to vote on this bylaw amendment because the organization's Legislative Commission rejected it in a 5-27-2 preliminary vote.⁵⁸ Not a single public school on the Commission voted in favor of allowing the amendment to be voted upon by the IHSA's members.⁵⁹

The experiences of the Cristo Rey basketball team and the Riverside-Brookfield football team encapsulate a national issue surrounding high school athletic competition. ESPN has announced its listing of the Top 50 high school basketball teams in 2009.⁶⁰ Four out of the top five high schools it ranked were private high schools.⁶¹ USA Today carried similar disproportionate numbers.⁶² Based on these numbers, it is easy to sympathize with Coach Zeman's position on the competitiveness of public schools versus private schools. However, it is equally as easy to sympathize with a school like Cristo Rey, that has been legislated into David and Goliath matches it never wanted to play.

In comparison, some non-boundaried school teams see the multiplier as a positive opportunity to play against more competitive teams. Recently, Chicago's St. Viator's 2009 enrollment figures caused it to fall from class 4A to become the largest school in class 3A.⁶³ Although St. Viator has a history of success in playing in the larger classes, it will be forced to play against smaller schools in the 2009-2010 season due to its decline in enrollment.⁶⁴ The basketball team in particular harbors mixed sentiments over the move.⁶⁵ Head coach Joe Majkowski commented that although he "know[s] there are some real good, quality teams in [3A]," half of his team still says they "want to play the best."⁶⁶ Unfortunately, St. Viator's class changes often because its enrollment teeters between different enrollment categories, some years falling into 3A and some years rising into 4A.⁶⁷ For St. Viator, the multiplier has allowed the school to face competition it would not have

55. Barry Temkin, *IHSA Can't Seem to Figure This Out*, CHI. TRIB., Nov. 12, 2006, Sports, at 10.

56. *Id.* At the time of publication, private schools continue to be unsuccessful in reinstating the waiver. However, the IHSA Board is set to vote on this issue in late November of 2008 in 2008-09 Proposal No. 7 to Amend By-law 3.170 (Classification). The Proposal was rejected by a vote of 197-218. As of the time of publication, there are no further proposals to reinstitute the waiver. See Illinois High School Association, <http://www.ihsa.org/announce/2008-09/2009-01-08.htm> (last visited July 10, 2009).

57. Temkin, *supra* note 55, at 29.

58. *Id.*

59. *Id.*

60. Chris Rossi, *Findlay Captures NHSI Crown, National Title*, <http://sports.espn.go.com/highschool/rise/basketball/boys/news/story?id=4048744> (last visited July 6, 2009).

61. *Id.* (showing that four out of the top five best high school basketball teams in 2009 were private schools).

62. Halley, *supra* note 3.

63. Marty Maciaszek, *St. Viator's Drop from 4A to 3A Draws Mixed Review*, CHI. DAILY HERALD, June 18, 2009, at S5.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

seen had it been placed in a class based on actual enrollment alone.⁶⁸ Therefore, the question remains whether a more flexible system allowing schools like Cristo Ray to receive waivers while also permitting schools that fall within the cracks of several different classes, such as St. Viator, to opt to play against more competitive, larger schools, should be in place.

V. ALTERNATIVE APPROACHES

The issues involving competition in high school athletics are not unique to Illinois; however, different states have adopted a wide range of approaches to address this perceived problem. The following is a summary of these approaches that other states have taken to determine their respective state championship classes and the effects it has had on the public vs. private debate.

A. A Sport-Specific System: The New York Option

The State of New York has four separate bodies governing High School athletics: the Catholic High School Athletic Association, the New York State Public High School Athletic Association, the New York State Association of Independent Schools Athletic Association, and the Public School Athletic League.⁶⁹ Over these governing bodies is the New York State Federation of Secondary Schools, which is run by the State Board of Education.⁷⁰ In basketball, cross-county, and golf, each association conducts its own state championship, with the winners advancing to a final “Federation Championship.”⁷¹ In swimming, gymnastics, track, wrestling and girl’s tennis, the Federation runs a combined tournament.⁷² In the other sports (including football), the Federation does not play a role in determining a state champion.

B. Separate Public and Private Championships - The Maryland Option

The State of Maryland has separate playoffs for public and private high schools.⁷³ Recently, this system has come under attack by some private schools seeking access to the public school competitions. On March 22, 2005, Progressive Christian Academy wrestling coach and attorney Carlos Sandoval brought suit against the Maryland Public Secondary Schools Athletic Association (“MPSSAA”) alleging the MPSSAA discriminated against his

68. *Id.*

69. See New York Catholic High School Athletic Association Homepage, <http://www.nychsaa.org> (governing basketball, lacrosse and soccer in the diocese of New York and Brooklyn-Queens); New York State Public High School Athletic Association Homepage, <http://www.nysphsaa.org> (governing championships for all public schools outside of New York City); Public School Athletic League of the City of New York Homepage, <http://www.psal.org> (governing championships for New York City Public Schools); New York State Association of Independent Schools Homepage, <http://www.nysais.org> (governing New York private schools not in the CHSAA) (last visited July 6, 2009).

70. New York State Public High School Athletic Association, *Memberships and Affiliates*, <http://www.nysphsaa.org/membership/nysfed.asp> (last visited July 6, 2009).

71. *Id.*

72. *Id.*

73. Eli Saslow, *A Great High School Divide*. WASH. POST, May 24, 2007, at A1.

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program by prohibiting public school teams from competing against his primarily non-high school and home-schooled athletes.⁷⁴ Interestingly, Sandoval's lawsuit demanded monetary damages to the tune of \$7.7 million.⁷⁵ In an effort to settle Sandoval's case, the MPSSAA submitted a series of proposals to the State Board of Education and the U.S. District Court designed to create "competition standards" that all schools within the MPSSAA and all schools wishing to schedule competitions against MPSSAA member schools would have to follow.⁷⁶ The State Board of Education ultimately approved these proposals on July 19, 2005.⁷⁷

There was concern following this decision that such changes could not be implemented in time for the Spring competitions, leaving private schools barred from competing against public schools altogether.⁷⁸ Ultimately, the parties reached a compromise that added a series of requirements for home-schooled children.⁷⁹ Under this compromise, a home-schooled child must: (1) be affiliated with and represent the private school during the entire school year; (2) refrain from representing more than one school during one academic year unless the student's primary residence changes; (3) comply with the private school's own requirements; and (4) be home-schooled pursuant to Maryland home-school regulations.⁸⁰ The compromise also requires the private school to: (1) obtain written permission from the parents for their child to play on the team; (2) make sure each student has passed a medical exam; (3) make sure the student is "registered" in a "bona fide" home instruction program as defined in the Maryland home-school regulations; (4) make sure the student makes "educational progress" in all required subjects while on the team; (5) permit home-school students to compete in no more than 4 seasons from the 9th through 12th grades; and (6) if a student enrolled in a private school becomes ineligible to compete because of academic or disciplinary reasons, enrollment in a home-school program does not remove the ineligibility.⁸¹

C. Merging Public and Private Championships - Wisconsin's Dilemma

For almost 100 years, the State of Wisconsin had separate tournaments for public and private schools. In 1902, in response to a controversial finish at the 1901 state track finals, the Wisconsin Interscholastic Athletic Association ("WIAA") amended its constitution to limit its membership to public schools.⁸² Private schools eventually formed what became known as the Wisconsin Independent Schools Athletic Association ("WISAA") and

74. Lem Satterfield, *Church school's wrestling coach cites discrimination in lawsuit*, BALTIMORE SUN., March 24, 2005, at 10C (noting the Progressive Christian School has students ranging from Grades 3 to 10).

75. *Id.*

76. Lem Satterfield, *MPSSAA, Private Schools Still Trying to Make Deal*, BALTIMORE SUN., Aug. 26, 2005, at 3F. (Unless non-public schools agree to standards, Sparks will not sanction contests High Schools.") These competition standards included age limits, four year eligibility clauses, a prohibition on Sunday competition, and a limit on the starting dates and number of practices for certain sports. *Id.*

77. *Id.*

78. *Id.* (Rick Diggs, executive director of the Maryland Interscholastic Athletic Association felt "there's a 50-50 chance we won't be playing public schools in the spring.")

79. Luke Broadwater, *Home-school Lawsuit Against State is Ended Compromise by MPSSAA is ruled to be fair 'solution' HIGH SCHOOLS*, BALTIMORE SUN., Sep. 28, 2005, at 8E.

80. Homeschool Legal Defense Association, *Federal Judge Orders State Athletic Association to Permit Homeschool Students to Compete on Private School Teams*, July 27, 2005, <http://www.hsllda.org/hs/state/md/200507270.asp> (last visited Mar. 1, 2009).

81. *Id.*

82. Cliff Christl, *WISAA 1957-2000; Time for a Change?*, MILWAUKEE J. SENTINEL, June 11, 2000, at C1.

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conducted their own state tournaments from 1957-2000.⁸³ Due to dwindling enrollments in the WISAA member schools and political pressures brought by State Senator Gary George, the WIAA finally agreed to allow private schools into their association beginning in June 2000.⁸⁴

Private schools entered on equal footing, as the WIAA decided against using an enrollment multiplier, but cautioned that the issue would be revisited two years later.⁸⁵ After the initial two-year test period, the WIAA added a seventh tier for football instead of using any kind of a multiplier.⁸⁶ While sports writers initially praised the inclusion of the WISAA into the WIAA on the grounds of creating a unified state champion for all sports, some in Wisconsin claim the current system has created an imbalance in favor of the old-WISAA schools.⁸⁷ Boys basketball is particularly controversial in this state, with seven of the twelve teams in Division Two, Three, and Four participating in the 2009 state tournament hailing from private schools, with two becoming champions.⁸⁸ Meanwhile, only 15 percent of the WIAA's member schools are private.⁸⁹

On May 15, 2009, the WIAA Board of Control received a proposal attempting to address this disparity that would require certain Division Three and Four private schools to automatically move up one division in boys and girls basketball.⁹⁰ Private schools in cities home to more than one public high school along with private schools in the same city as one of the top 30 largest high schools in Division One would be affected.⁹¹ There would be an exception made for private schools that are one of the smallest 30 schools in their Division.⁹² The WIAA will further explore this proposal in the fall of 2009,⁹³ and with new Executive Director Dave Anderson in place,⁹⁴ a change is possible.

83. *Id.*

84. *Id.* In 1988, State Senator George introduced an amendment to a state budget that permitted private schools to join the WIAA. *Id.* Governor Tommy Thompson vetoed the measure, but began to voice his support for an integrated championship. *Id.*

85. Mark Stewart, *Response to WIAA plan is better than expected; Actual enrollment numbers would be used in placement*, MILW. J. SENTINEL, Apr. 29, 1999, at C10.

86. Art Kabelowsky, *Football playoffs expand; WIAA adds seventh tier, invites 32 more teams*, MILW. J. SENTINEL, Jan. 19, 2002, at C9. The enrollment multiplier contemplated in 2002 was 1.12, significantly lower than the 1.65 multiplier used in Illinois. Bobbi Roquemore, *Current debate is a private matter*, MILW. J. SENTINEL, Apr. 22, 2004, at C11.

87. Compare Charles F. Gardner, *Whole new world in public sector; Private schools up ante after merger with WIAA*, MILW. J. SENTINEL, June 24, 2001, at C1 (discussing the increased competitiveness of the first season following the merger) with Roquemore, *supra* note 86, at C11 (quoting WIAA executive director Doug Chickering in regards to questions presented to him following the state's basketball championships as stating "[f]or the first time, I had more questions about the private schools winning state championships than I did about the quality of the referees").

88. Scott Venci, *There are No Easy Answers in Public v. Private Debate*, GREEN BAY PRESS GAZETTE, Apr. 9, 2009, at B1.

89. *Id.*

90. Rob Hernandez, *Board Eyes Basketball Division Model*, WIS. ST. J., May 16, 2009, at B9.

91. *Id.*

92. Adam Thompson, *Major Hoops Change Gets Looks*, THE SHEBOYGAN, June 30, 2009, at SHE2.

93. *Id.*

94. Paige Pearson, *Prep hoops: Public vs. Private*, http://www.fox11online.com/dpp/sports/sports_wluk_public_vs_private_schools_200906072231_rev1 (last visited July 1, 2009).

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D. Add More “Championship” Games – The Indiana Option

For generations, every high school in the State of Indiana competed in the same high school basketball tournament for one state championship. Public schools would routinely play private schools, and schools of 4,000 students played schools of just 40. Over the years, this single tournament came under attack as being unfair to smaller schools that could not compete against the larger schools.⁹⁵ Ultimately, this single class system came to an end in 1997 when the Indiana High School Athletic Association (“IHSAA”) decided to conduct championships in four classes. Since that time, private schools, which educate about 10% of Indiana’s high school students,⁹⁶ have won nine out of the forty-eight (19%) basketball championships.⁹⁷ In football, the success of the state’s private schools has been even more pronounced. Since 1997, private schools have won thirty out of the sixty championships (50%).⁹⁸ This figure is even more staggering when removing the state’s largest class from consideration.⁹⁹ In the remaining four classes, private schools have won seven, nine, five and two out of the past twelve championships, respectively.¹⁰⁰

E. The Multiplier Option

Illinois is not the only state to implement the enrollment multiplier for its private schools. In 2002, Missouri enacted a 1.35 multiplier rule to be effective for the 2003-2004 athletic seasons and the 2004-2005 football season.¹⁰¹ Like Illinois, Missouri’s system faced judicial and legislative scrutiny.¹⁰² Missouri’s athletic association was similarly able to defeat the challenges and enact a multiplier in time for football season. However, unlike the Illinois situation, Missouri officials have agreed to continue to study the issue and have created a task force to revisit the multiplier to see if the intended result of restoring competitive balance amongst public and private schools has been met.¹⁰³

Though still in its infancy, the Missouri multiplier system has simply not achieved the desired result of reducing the percentage of state championships won by private schools. About 20% of Missouri’s schools are private.¹⁰⁴ In the last ten years before the multiplier went into effect, private schools won 33.2% of all state championships and have been state

95. In fact, in the eighty-seven year history of the single class tournament, only one small school, Milan, was able to capture the state championship. Milan had 161 students at the time, and their story became immortalized in book and film. See e.g. GREG GUFFEY, *THE GREATEST BASKETBALL STORY EVER TOLD: THE MILAN MIRACLE* (2003); *HOOSIERS* (Orion Pictures 1986).

96. Indiana State Board of Education, Indiana Education Data, <http://mustang.doe.state.in.us/SAS/sas1.cfm> (last visited Oct. 30, 2008) (indicating that non-public schools enrolled 129,285 students while public schools enrolled 1,034,729 students).

97. See Indiana High School Athletic Association, *IHSAA Boys Basketball State Champions through 2008-2009*, http://www.ihsaa.org/b-basketball_frame.htm (last visited July 1, 2009).

98. See Indiana High School Athletic Association, *IHSAA Football State Champions through 2008-2009*, <http://www.ihsaa.org/b-football/TeamChampions.htm> (last visited July 1, 2009).

99. *Id.* In 4A, the state’s sixty-two largest schools compete.

100. *Id.*

101. Mark Gokavi, *Ohio to Study 'Multiplier' Plan; Some states make private schools play in bigger divisions*, DAYTON DAILY NEWS, Nov. 4, 2005, at C8.

102. H.B. 631, 2003 H.R. (Mo. 2003).

103. Press Release, Missouri State High School Activities Association, *Task Force to Study Enrollment Differences between Public and Nonpublic Schools and Classification Committee*, (Dec. 1, 2003), available at http://www.mshsaa.org/advisory/index.asp?Committee_News_ID=258 (last visited July 1, 2009).

104. SchoolTree.org,, *supra* note 4. In Missouri, there are 2406 public schools and 615 private schools.

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semifinalists 26.9% of the time.¹⁰⁵ Three years after the multiplier was enacted, private schools constituting 20.3% of Missouri's schools won 32.3% of the state's championships and were one of the top four in a sport 29.0% of the time.¹⁰⁶ Hence, the multiplier did not appear to address the disproportionate amount of championships won by private schools, and in fact, the numbers became ever more disproportioned.¹⁰⁷

Arkansas private schools comprise about 6% of membership in the state's athletic association but have won about 40% of the state championships.¹⁰⁸ The Arkansas Activities Association responded to this disparity by multiplying its private schools' enrollments by 1.35.¹⁰⁹ However, unlike Missouri's enrollment multiplier, the Arkansas' multiplier began to accomplish its goal. In the 2004-2005 sports seasons, championships won by private schools plummeted to 15%.¹¹⁰ Based on the initial "success" of its multiplier system, the Arkansas Activities Association decided to strengthen its multiplier to 1.75.¹¹¹ However, this enlarged multiplier still did not prevent private schools from winning. Central Arkansas Christian defeated public school, Pine Bluff Dollarway, 34-20 in the State's 2004 3A state championship football game.¹¹² The following year, Central Arkansas Christian also advanced to the Class 3A state championship game, this time falling to public school, Nashville, 28-14.¹¹³

Some argued that this stronger 1.75 multiplier worked to level the playing field.¹¹⁴ However, the multiplier caused more problems¹¹⁵ than it attempted to solve,¹¹⁶ and

105. Sam Mellinger, *Missouri's Multiplier Effect Just Doesn't Figure*, KAN. CITY STAR, Mar. 3, 2006.

106. *Id.*

107. The multiplier's unsuccessful attempt to create more proportionate numbers in state championships won by private schools is evidenced by the fact that three years after the multiplier's enactment, the percentage of state championships won by private schools decreased by only .9%, while private schools still represented around twenty percent of the participating schools. Thus, even with the multiplier in effect, private schools are still able to have success against larger public schools. In the 2006 Class 5A girl's basketball championship game, two private schools made it to the finals of the class that by design should have contained large public schools. Instead, Incarnate Word Academy, with an enrollment of 584, defeated Notre Dame de Sion, with an enrollment of 428, by the final score of 43-31. *See Id.*; Incarnate Word School Profile, available at <http://www.iwacademy.org/?page=SchoolProfile>; Missouri State High School Activities Association, Brackets and Results Page, available at <http://www.mshsaa.org/results/>.

108. Gokavi, *supra* note 101.

109. *Id.*

110. Aaron Sadler, *AAA Splits Top Classification*, JONESBORO SUN, Aug. 3, 2005, http://www.jonesborosun.com/archived_story.php?ID=15319.

111. *Id.*

112. Arkansas Activities Association, *2005 Football Playoff Brackets*, <http://ar.prepcountry.com/?t=5&w=9&sc=9047&s=1&tm=1&wy=2006> (last visited July 6, 2009).

113. ArkansasPrepCountry.com, *Central Arkansas Christian Mustangs*, <http://ar.prepcountry.com/?t=5&w=9&sc=9047&s=1&tm=1&wy=2006> (last visited July 6, 2009).

114. *See* Doug Crise, *High School Football Report*, ARK. DEMOCRAT-GAZETTE, Dec. 12, 2006, at Sports. ("Fans of the multiplier . . . claimed the rule was needed to curb the built-in institutional advantages private schools had over public schools.")

115. Problems for the Arkansas Athletic Association arose in the form of lawsuits. After the multiplier increased to 1.75, Gary Holt, a parent of a private school student, sued the Arkansas Athletic Association on the grounds that football players in particular would be harmed. He argued that requiring smaller private schools to play against larger public schools would result in more injuries and longer bus rides. *Judge hears debate over football reclassification plan*, ARKANSAS NEWS, <http://arkansasnews.com/2006/07/31/judge-hears-debate-over-football-reclassification-plan/> (last visited July 9, 2009). Ultimately, the court denied Holt's motion for a preliminary injunction to change the 206-2008 schedules after citing important differences in private schools that warrant a multiplier. John T. James, *How much does a private school student count? A critical analysis of the athletic multiplier*, CATHOLIC EDUC., June 1, 2007.

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Arkansas decided not to renew the multiplier for 2006, instead opting to take the Indiana option, splitting its four class state championship into a seven class state championship.¹¹⁷ This change will be in effect through the 2010-11 school year.¹¹⁸

The Tennessee multiplier, enacted in 2004, is the highest in the nation at 1.8.¹¹⁹ Unlike the other multiplier states, Tennessee tried alternative methods to improve the public/private “competitive balance” before switching to a multiplier. The Tennessee Secondary Schools Athletic Association (“TSSAA”) began its efforts by implementing a two-tiered system for those schools that offer need-based financial aid and those that do not.¹²⁰ In this system, 35 private schools and a handful of public schools went to a new Division II, and the remaining 35 private schools who choose not to give financial aid stayed within the much larger 294-member Division I.¹²¹ This system did not provide a workable situation to alleviate the concern that public schools with fixed boundaries could not compete with non-boundaried private schools that were suspected of recruiting athletes.¹²² The TSSAA responded to these concerns by enacting the multiplier system.¹²³ Since the enactment of the multiplier system, ten private schools out of fifty schools made it to the finals and three out of twenty-five won the championship in Division I football.¹²⁴ Additionally, two private schools out of thirty made it to the finals and one private school out of fifteen won the championship in Division I boys’ basketball.¹²⁵ In addition to using the multiplier as a method of obtaining “competitive balance”, the TSSAA has also taken a tough stance on enforcing its recruiting ban and has twice litigated issues related to recruiting ban enforcement in front of the United States Supreme Court.¹²⁶

In Georgia, the state’s athletic association recently voted to end its 1.5 multiplier in the year 2008.¹²⁷ There, private schools have their own Independent League; however, about one-third of private schools choose to compete in the larger public school group,

116. “The efforts to make some public schools happy by penalizing a handful of good private programs have ended up hurting other privates who aren’t that serious about football.” Jim Harris, *Berryville Football Program Should ‘Man Up’*, http://www.arkansasbusiness.com/sports_blog_post.asp?pid=4478 (last visited July 9, 2009).

117. Barry Gromes, *AAA Releases Reclassification Numbers for 2008-2010, Hootens Arkansas Football*, <http://www.hootens.com/Articles/ArticleViewer.aspx?ArticleID=afbd16a2-8d74-4a2e-b253-939eed056250> (last visited July 6, 2009).

118. *Id.*

119. C. Ray Hall, *A Closer Look at Other States*, LOUISVILLE COURIER J., Oct. 18, 2005, <http://www.courier-journal.com/apps/pbcs.dll/article?AID=/20051018/SPORTS05/51017018>.

120. TENN. SECONDARY SCH. ATHLETIC ASS’N CONSTITUTION AND BY-LAWS, §1,3 (2005-06); *see also* Interview with Gene Menees, GrideonDigest.Net, <http://forum.gridirondigest.net/index.php?showtopic=14970&st=20> (last visited Oct. 30, 2008) (indicating a proposal to force all private schools into their own Division failed 5-4).

121. Gokavi, *supra* note 101.

122. Recruiting athletes is expressly banned in the TSSAA constitution. TENN. SECONDARY SCH. ATHLETIC ASS’N, CONSTITUTION AND BY-LAWS, Art. II, § 17 (stating “the use of undue influence on a student (with or without an athletic record), the parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes shall be a violation of the recruiting rule”). However, this has not stopped accusations that private schools violate this rule in order to obtain an advantages on the playing field. *See infra* Part V (addressing the recruiting question in Tennessee).

123. Interview with Gene Menees, *supra* note 120.

124. *See* 2008-09 TSSAA State Championships, <http://www.tssaa.org/2008Champions/2008Champs.htm> (last visited July 6, 2009).

125. *See Id.*; *see also* Tenn. Secondary Sch. Athletic Ass’n, *Past TSSAA State Championships*, <http://www.tssaa.org/pastchampions/index.htm> (last visited July 6, 2009).

126. *See infra* Part V.B.

127. Hall, *supra* note 119.

while the other two-thirds compete amongst themselves independently.¹²⁸ According to one journalist, the fact that public schools historically “dominate football” in Georgia has headed off the need for more dramatic measures like those in the other multiplier states.¹²⁹ However, in 2008-2009, the first year without a multiplier, private schools won approximately 45 percent of the state championships and twelve out of the fourteen Class A championships in the mostly-public Georgia High School Sports Association.¹³⁰ This outcome has reignited this emotional debate.¹³¹ If Georgia ultimately decides to take the Wisconsin route and merge its smaller independent school league with its larger public-dominated league, it may encounter increasing difficulties in dealing with competitive balance.

VI. OTHER STATES CONSIDERING THE MULTIPLIER

Several states, including Arizona,¹³² Nebraska,¹³³ and Ohio,¹³⁴ have begun the process of investigating enrollment multipliers. Nebraska faced the biggest hurdle in restoring balance to state championships. In Nebraska, approximately ten percent¹³⁵ of schools are private, yet in 2005, these schools won five out of six state football championships.¹³⁶ In late 2005 Nebraska officials have proposed a 1.35 multiplier. Then in 2006, Nebraska held its 2006 state boys basketball championships with private schools taking home four out of six state titles.¹³⁷ Although private schools won four out of the six state championships in boy’s basketball in 2006, this proportion decreased even without a multiplier in place. In 2007 and 2008, private schools won two out of six boys basketball state championships, and only one in 2009.¹³⁸ Football similarly seems to have leveled on its own. This suggests that Nebraska may not need a multiplier yet, if at all, and that the problem present in other states with private schools winning a disproportionate number of championships is not an issue for Nebraska. If this disparity arises again, perhaps Nebraska

128. *Id.*

129. *Id.* (indicating that private schools excel in sports that are not emphasized in the public school setting, i.e., golf, tennis, soccer and volleyball).

130. Jeff Cochran, *Domination Last Season Revs Up Private-vs-Public Debate*, http://onlineathens.com/stories/062109/pre_452972181.shtml (last visited July 1, 2009) (stating that private schools represent only 10 percent of the membership of the Georgia High School Association).

131. *Id.*

132. Steve Burks, *Proposal Seeks to Level Playing Field for Public Schools in 2A Preps*, MESA TRIB., Feb. 14, 2006, <http://www.eastvalleytribune.com/story/59106>.

133. Stu Pospisil, *Private Schools Won’t Face Multiplier*, OMAHA WORLD HERALD, Nov. 10, 2005.

134. Tim Rogers & Tim Warsinskey, *Checkin’ in with the Commish*, CLEVELAND PLAIN DEALER, Mar. 5, 2006.

135. There are 39 private schools and 278 public schools in the Nebraska School Activities Association. Pospisil, *supra* note 133.

136. Gokavi, *supra* note 101.

137. George Ayoub, *Multipliers, Good Music, Sagging Pants*, THE GRAND ISLAND INDEP., Mar. 14, 2006. Nebraska Sch. Activities Ass’n, *Basketball History/Records*, <http://www.nsaahome.org/bb.php> (last visited Nov. 20, 2008).

138. See Nebraska Sch. Activities Ass’n, *Boys Basketball Past Results, 2006-2007 State Championship Results*, <http://www.nsaahome.org/textfile/bask/bbres07.htm> (last visited July 10, 2009); Nebraska Sch. Activities Ass’n, *Boys Basketball Past Results, 2007-2008 State Championship Results*, <http://www.nsaahome.org/textfile/bask/bbres08.pdf> (last visited July 10, 2009); Nebraska Sch. Activities Ass’n, *Boys Basketball Past Results, 2008-2009 State Championship Results*, <http://www.nsaahome.org/textfile/bask/bbres08.pdf> (last visited July 10, 2009).

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schools would be willing to approve a multiplier measure that has been rejected on two other occasions.¹³⁹

Within Arizona's 2A Conference, four out of five football champions over the past five years have been private schools,¹⁴⁰ which comprise just 38% of the 2A membership.¹⁴¹ When evaluating these same figures over the past three years, two out of the three state championships have been from private schools.¹⁴² The Arizona multiplier faced opposition from the Arizona state legislature. One house bill, sponsored by Representative Steven Yarbrough, a 24-year board member of a private Christian school, would prohibit any public school from contracting with any organization that does not count students equally.¹⁴³ While the state's athletic association indicated the House Bill did not have a bearing on its decision to drop the multiplier proposal, it is clear that outside factors did play a role in its determination, as it decided to table the measure in spite of support from a majority of its members.¹⁴⁴ The decision to drop the multiplier came just two weeks after Rep. Yarbrough's bill passed the Arizona House Education Committee.¹⁴⁵

Taking a specific cue from Missouri and Illinois, the Ohio High School Athletic Association ("OHSAA") has decided to explore the use of the multiplier to "make the playing field more level."¹⁴⁶ In Ohio, concerns arose when private schools continued to achieve a disproportionate level of success. As of 2009, 7.6 percent of high school students in Ohio are educated in private schools.¹⁴⁷ However, private schools won four out of six football state championships in 2008.¹⁴⁸ The success rates in other sports are just as high, with private schools winning the state title in Division 1 for thirty-two years in a row in wrestling, twenty-two years in a row in boys swimming, and eight years in a row in hockey.¹⁴⁹ The disparity has led to a call for more drastic measures to restore "competitive balance" in Ohio.

In one newspaper interview, the Ohio association's new executive director, Dan Ross, indicated he would consider the use of a multiplier.¹⁵⁰ However, Ross recognized the controversial nature of the multiplier stating "you need to make sure when you come up with that multiplier, you can defend it because you're probably going to end up in front of a judge somewhere talking about it."¹⁵¹ The state athletic association considered separate tournaments in 1994, but that measure was overwhelmingly defeated.¹⁵² Surprisingly, Ross indicated that the multiplier has been well received by both private and public schools; however, he did acknowledge that receptiveness to the proposal would ultimately ride on

139. *Id.* Full text of these two previous proposals may be found at http://www.nsaahome.org/nsaaforms/attachments/ElmwoodMurdock_Dist2_1128460380.html and http://www.nsaahome.org/nsaaforms/attachments/Tecumseh_Dist1_1130872384.html, respectively.

140. See AIA Bracket/Meet Results, <http://www.aiaonline.org/athletics/brackets.php> (last visited July 1, 2009).

141. Burks, *supra* note 132.

142. AIA, *supra* note 140.

143. Burks, *supra* note 132. 2006 Ariz. H.B. 2772.

144. Brad Falduto, *AIA Abandons Plan to Use Multiplier*, MESA TRIB., Feb. 25, 2006.

145. Mark Armijo, *Does Multiplier Policy Figure?*, ARIZ. REPUBLIC, Feb. 28, 2006, at 6.

146. Rogers & Warinskey, *supra* note 134.

147. Bob Dyer, *Prep Sports Imbalance Getting Worse*, AKRON BEACON J., Apr. 9, 2009, at State and Regional News.

148. *Id.*

149. *Id.*

150. Rogers & Warsinskey, *supra* note 134.

151. *Id.*

152. Hall, *supra* note 119.

the severity of the multiplier.¹⁵³ Additionally, some call into question the potential effectiveness of a multiplier in a state like Ohio where private schools dominate the largest division, Division I, without a multiplier.¹⁵⁴ One former girl's basketball coach, Michael Murphy, is pushing for Ohio to follow the lead of New Jersey, New York, and Texas by separating private and public schools in postseason play.¹⁵⁵ The OHSAA insists that other measures, such as open enrollment, have appropriately remedied the situation and that no change is necessary to the current rules.¹⁵⁶

VII. THE RECRUITING "PROBLEM"¹⁵⁷

Lurking in the background of the multiplier debate is the belief that private schools win more often because of their ability to enroll students from a wide geographical area. Some believe that these private schools are able to impermissibly recruit athletes, thus making the schools more successful on the athletic field.¹⁵⁸ While recruiting is almost universally prohibited, there are still those who use recruiting as explanation for the disproportionate number of state championships won by private schools and evaluate seemingly benign actions on the part of private schools as deliberate efforts to recruit athletes.¹⁵⁹

A. The Kentucky Proposals

In Kentucky, concerns regarding the disparity in state championships won by private versus public schools led the members of the Kentucky High School Athletic Association (KHSAA) to vote 195-78 to create separate state championships for public and private high schools.¹⁶⁰ Kentucky is the last state in the union to have all of its high schools compete for a single state championship¹⁶¹ in all sports except for football,¹⁶² cross country,¹⁶³ and track.¹⁶⁴ As the Association's board of directors was sharply divided on the issue, the proposal was sent to the State Board of Education without a definitive endorsement from

153. Rogers, *supra* note 132 ("There is a perception from many school systems that have specific boundaries that for the schools that have non-boundaried enrollments, the multiplier would balance out inequities").

154. Dyer, *supra* note 147.

155. *Id.*

156. *Id.*

157. Unfortunately, while many people connected to high school sports claim that recruiting is a problem, evidence of the same is almost exclusively anecdotal. As such, the concept of high school recruiting as a problem is difficult to substantiate and quantify.

158. C. Ray Hall, *Public vs. Private Proposals sent to Board of Education*, COURIER-JOURNAL, Mar. 18, 2006.

159. *Id.* (suggesting that athletic recruiting is often a difficult charge to prove).

160. *Id.*

161. Robert Carter, *Happy time: It's Hoops Season*, THE N. JEFFERSON NEWS, Nov. 17, 2008, available at http://www.njeffersonnews.com/localsports/local_story_322171303.html?keyword=topstory.

162. See Final Football Alignment for 2007-2008 Through 2008-2009, available at <http://www.khsaa.org/football/realignment/6classfinalalignmentfor2007and2008.pdf>.

163. KHSAA Rules and Regulations Governing Cross Country Meets IA 2008-09, available at <http://www.khsaa.org/handbook/tournamentrules/xctournamentrules.pdf>.

164. KHSAA Rules and Regulations Governing Track Meets IA 2008-09, available at <http://www.khsaa.org/handbook/tournamentrules/trtournamentrules.pdf>.

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the Board of Directors.¹⁶⁵ Thereafter, the Board referred the issue back to the KHSAA to devise a workable solution.¹⁶⁶

In January 2006, the KHSAA created a 36-member task force (20 public schools and 16 private schools) to produce a compromise.¹⁶⁷ On March 16, 2006, the KHSAA endorsed a compromise, centering on recruiting, and presented it to the state board of education with its endorsement.¹⁶⁸ Under this proposal, the KHSAA would define “feeder patterns” for both private and public high schools. Students who wished to play sports at the high school level would have to attend one of the high school’s feeder schools for two years before becoming eligible. Students who failed to comply with the feeder school requirement would be ineligible for one year of all sports and one additional year of varsity sports.¹⁶⁹ Exceptions would be made for any school within 20 miles of a student’s home and for small private schools.¹⁷⁰ In June 2006, when the KHSAA sent this proposal to member schools in a referendum, schools voted “yes” 124-36.¹⁷¹ Thus, in the 2007-2008 KHSAA Handbook, Bylaw 10, Case BL 10-3(5) noted “it is not considered a violation for a coach to have normal community contact with a student who attends a junior high or middle school of the same system that is a feeder to the high school at which the coach is employed to coach.”¹⁷² In the two years following this change, a private school has won the football state championship only twice.¹⁷³ To compare, private schools won six of the eight state championships in football in the two years before this change.¹⁷⁴

B. Brentwood v. TSSAA

Like private schools facing a multiplier, schools facing recruiting charges often must resort to the judicial system for relief. In the case of Brentwood Academy in Tennessee, the court battle has reached the Sixth Circuit three times, twice advancing to the United States Supreme Court.¹⁷⁵ In this case, the Tennessee Secondary School Athletic Association (“TSSAA”) had a “recruiting” rule which prohibited a coach from contacting a student or his parents prior to enrollment.¹⁷⁶ In the spring of 1997, Brentwood football coach, Carlton Flatt, sent a letter to all incoming ninth grade male students who “had applied, been tested and admitted, and signed enrollment contracts with Brentwood,” inviting them to attend spring football practice.¹⁷⁷ In addition, there was an allegation that tickets for a Brentwood

165. Carter, *supra* note 161.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Referendum Voting Results*, Kentucky High Sch. Athletic Ass’n, June 22, 2006, <http://www.khsaa.org/news/20052006/nr062206.pdf>.

172. *KHSAA Online Handbook, Bylaw 10-Recruitment*, Kentucky High Sch. Athletic Ass’n, Sept. 1, 2007, <http://www.khsaa.org/handbook/bylaws/bylaw10.pdf>.

173. *See* KHSAA Football Information, <http://www.khsaa.org/football/> (last visited July 1, 2009). Note that the two state championships won by a private school were the same school, Trinity, which has won the state championship in its division for the last four years in football. *Id.*

174. *See Id.*

175. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 442 F.3d 410 415 (6th Cir. Tenn. 2006) *reversed* 531 U.S. 288 (2001)

176. *Brentwood Acad.*, 442 F.3d at 416.

177. *Id.* at 417-18.

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football game provided by Coach Flatt to a middle school coach were used by two of the middle school coach's athletes to attend the game.¹⁷⁸

The TSSAA investigated these activities and found Coach Flatt violated the recruiting rule and additionally had conducted an impermissible off-season practice.¹⁷⁹ After a month of administrative review, the TSSAA ultimately imposed numerous penalties, including a four-year probationary period for Brentwood's entire athletic program, a suspension of playoff eligibility for the football and boys basketball teams, and a \$3,000 fine.¹⁸⁰ Unlike the attorneys who challenged the Illinois multiplier under contract law, Brentwood attorneys brought a § 1983 claim arguing the TSSAA violated the school's First and Fourteenth Amendment rights, as well as the Sherman Antitrust Act and Tennessee law.¹⁸¹ The TSSAA argued that it is not a "state actor" but rather a private association out of the reach of the First and Fourteenth Amendments.¹⁸² Ultimately, the United States Supreme Court rejected this argument and ruled that the TSSAA was a state actor subject to the restraints on government conduct imposed by the Constitution, and remanded the case back to the Sixth Circuit for a determination of whether § 1983 summary judgment in favor of Brentwood was appropriate.¹⁸³

The Sixth Circuit then considered the merits of the § 1983 claim and held that summary judgment was not appropriate.¹⁸⁴ The Circuit also made three specific findings: (1) Brentwood did not waive its right to challenge the rule by voluntarily joining the TSSAA, (2) the recruiting rule was not facially overboard, and (3) the rule was not subject to strict scrutiny because it was content neutral.¹⁸⁵ It then remanded the case to the District Court to determine (1) whether the TSSAA's asserted substantial state interests for the recruiting rule were legitimate, (2) whether the application of the rule to Brentwood was narrowly tailored to further the TSSAA's legitimate state interests and (3) whether Brentwood's claims against Director Carter were meritorious.¹⁸⁶ The District Court, on remand, ruled in favor of Brentwood on the equal protection and first amendment grounds and enjoined the enforcement of the TSSAA 1997 penalties.¹⁸⁷

The TSSAA again appealed and the Sixth Circuit issued its ruling on March 17, 2006. In this opinion, the Court found legitimacy in TSSAA's tri-fold justifications of (1) keeping athletics in their proper place subordinate to academics, (2) protecting student athletes from exploitation, and (3) fostering a level playing field among the various member schools.¹⁸⁸ However, the Sixth Circuit ruled that the recruiting rule as applied to the spring practice letter was not narrowly tailored to serve the TSSAA's interests because the students and their families had already signed enrollment contracts with Brentwood.¹⁸⁹ Additionally, the

178. *Id.* at 418.

179. *Id.* at 418-419.

180. *Id.*

181. *Id.* at 419.

182. Brentwood Acad., 442 F.3d at 419.

183. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 291, 305 (2001).

184. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 262 F.3d 543, 547 (6th Cir. 2001).

185. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 442 F.3d 410, 419 (2006) (citing Brentwood, 262 F.3d 543).

186. *Id.* (citing Brentwood, 262 F.3d at 558).

187. *Id.* at 420 (citing Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 304 F. Supp. 2d 981 (M.D. Tenn. 2003)).

188. *Id.* at 425-26

189. *Id.* at 428

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Sixth Circuit held the anti-recruiting rule was a content-based regulation of speech that was not narrowly tailored to service the TSSAA's permissible purposes and that the TSSAA violated Brentwood's due process rights.¹⁹⁰

For the second time, the TSSAA appealed to the Supreme Court. On June 21, 2007, the Supreme Court ruled in favor of the TSSAA and held that the enforcement of a rule that prohibits high school coaches from recruiting middle school athletes does not violate the First Amendment.¹⁹¹ Justice Stevens, writing for the majority, stated that the anti-recruiting rule "strikes nowhere near the heart of the First Amendment."¹⁹² Justice Stevens indicated that freedom of speech analysis differentiates between rules prohibiting speech communicated to the public at large and rules prohibiting speech in a direct, personalized and coercive setting.¹⁹³

Stevens then likened the letter Coach Flatt sent to his incoming students to solicitations lawyers make to potential clients.¹⁹⁴ Stevens cautioned about the risk of undue influence that a potential coach has over an impressionable middle schooler and noted "we need no empirical data to credit TSSAA's common-sense conclusion that hard-sell tactics directed at middle school students could lead to exploitation, distort competition between high school teams, and foster an environment in which athletics are prized more highly than academics."¹⁹⁵ Therefore, the Court concluded that the TSSAA could make rules to regulate recruiting and, as a member of the TSSAA, Brentwood would be obligated to follow said rules.¹⁹⁶ In short, this ten-year-long court battle signifies the seriousness with which both a private school and a state athletic association takes the charge of "recruiting" athletes. The June 2007 Supreme Court decision states in no uncertain terms that state athletic associations have the authority to regulate recruiting and to make rules designed to level the playing field for high school athletic competitions.

VIII. OBSERVATIONS & CONCLUSIONS

Nationwide, private schools have won a disproportionate number of state championships. In some instances, this disparity has led states to create enrollment multipliers and strict rules on athletic eligibility in an effort to curb this trend. In almost every state that has debated the multiplier or public/private separation, fierce opposition from the press and the state legislature has followed. Both of these groups have been very critical of any proposal that would count a public school student differently than a private school student. Empirical evidence from Missouri has indicated that the multiplier formula did not decrease the amount of state championships won by private schools, but Tennessee appears to support the opposite conclusion. Tempering that is the fact that two states (Georgia and Arkansas) have abandoned the multiplier format.

A central argument shared by those supporting a multiplier is that since private schools can pull students outside of geographic boundaries, public schools with fixed geographic boundaries are at a competitive disadvantage that must be balanced out with an

190. *Id.* at 430, 438.

191. *Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 127 S.Ct. 2489, 2496 (2007).

192. *Id.* at 2493.

193. *Id.*

194. *Id.* at 2494-95. ("In our view, however, the dangers of undue influence and overreaching that exist when a lawyer chases an ambulance are also present when a high school coach contacts an eighth grader." Stevens, J.).

195. *Id.* at 2495-96

196. *Id.* at 2496.

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enrollment multiplier. In addition to this argument, there are also charges that the successes of private schools are based on the ability to recruit athletes. As the *Brentwood* case illustrates, once an accusation that a private school “recruits” has been made, vast resources mobilize on both sides to bring the accusations to the judiciary. While such a lengthy court battle has not yet been waged in the area of the multiplier, the *Brentwood* decisions create additional arguments that both sides may use in the future. Specifically, a state athletic association must now abide by constitutional obligations of due process and equal protection as well as contractual obligations set forth in the organization’s by-laws. For state athletics associations, the *Brentwood* cases allow the associations to make rules to level the playing field of high school sports and rules designed to prevent “recruiting.” However, the *Brentwood* decisions will make it more difficult for states to enact multiplier legislation as they will now be required to show that it is narrowly tailored to accomplish a leveling of the playing field. Preliminary data suggests that multipliers may not always accomplish this objective. Therefore, as more and more states consider multipliers, the chances of constitutional challenges to the multiplier down the road increase.

Outside of a traditional multiplier to put a single-sex, non-boundaried school at the level of a co-educational boundaried school, it is not clear that an additional multiplier is crucial to competitive fairness or consistently effective in producing the same. If the true issue for a high school athletic association is recruiting, greater restrictions and penalties leveled against those found to be impermissibly recruiting, with more funding directed to enforcement may be the answer. Otherwise, additional multipliers may be overly broad expansions on existing rules that may offend fundamental notions of fairness. If the issue that high school athletic associations seek to address is one of achieving a numerical balance in wins and championships that is proportional to the enrollments of boundaried versus non-boundaried schools in a given state, to date, multipliers have not clearly demonstrated an ability to consistently produce such a result across the board.

Whether one attended or has children who attend a public or private, boundaried or non-boundaried high school will likely lead one to advocate for or against multipliers or similar measures enacted by their respective high school athletic associations. It is axiomatic that one would want to see their high school win a state championship as either a player, coach, parent, alum, or fan. It is undeniable that winning a state championship in a sport is the result of athletic talent and hard work. Multipliers and similar measures in high school sports seek to negate an additional advantage, perceived or real, that non-boundaried schools have over their boundaried brethren. It is not clear from existing research, including the research conducted for this article, that multipliers eliminate that perceived or real advantage. Further, it is not clear that the most frequently articulated goal of multiplier supporters, to create a system where state high school athletic wins and championships are in proportion to the percentage of students attending public and private schools, is even a legally laudable one.