AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

To: **Interested Persons**
Date: **October 2025**
From: **A. Eric Johnston**
RE: **The Alabama High School Athletic Association Discriminates Again**

The Alabama High School Athletic Association ("AHSAA") recently adopted a rule that any student who takes CHOOSE Act funds will be disqualified from participating in high school sports for a period of one year. The CHOOSE Act provides up to $7,000 per year to families to pay tuition and related costs at nonpublic schools. These are not scholarship funds but are meant to provide financial support to families to choose nonpublic education, which they might not ordinarily afford.

The AHSAA has policies that forbid athletic scholarships. High school sports do not need "name, image and likeness" (NIL) values now in college sports or scholarships to entice good athletes. The CHOOSE Act funds have nothing to do with that. In fact, Othni Lathram, director of the Legislative Services Agency, who advises legislators, stated "the intent [of the statute that created the CHOOSE Act] is clear: a student's eligibility to participate in school sports shall not be impacted by a transfer via the CHOOSE Act." The AHSAA ruled offended legislators because it was clearly a violation of the statute.

Lieutenant Governor Will Ainsworth said "I will offer legislation to strip AHSAA of its power and give it to an entity that will follow the law." Senator Arthur Orr said, "this may be the straw that breaks the camel's back because there's been tension before…." Further, "the school is not awarding some scholarship to get some primo athlete." These Legislators are entirely correct in their statements. Governor Kay Ivy and House Speaker Nathaniel Ledbetter filed a lawsuit in their official capacities against the AHSAA for violation of the statute, which resulted in the court issuing an order enjoining the operation of the AHSAA policy. It is likely that injunction will be upheld.

This is not the first time the AHSAA has abused students' and parents' rights. What is the "tension" to which Senator Orr referred? While there may have been other issues, one significant and ongoing issue has been the unfair treatment by the AHSAA of nonpublic school athletes. In 1999, the AHSAA adopted what it called the "Competitive Balance Factor" that states "a 1.35 multiplier will be calculated on all private schools to determine play classification." Classification of high school sports teams is based on a school's population. When the AHSAA permitted nonpublic schools to participate with public schools, it found the nonpublic schools performed better. This multiplier was based on the idea that there was approximately 30% higher participation in nonpublic schools. In other words, public schools sought to punish nonpublic schools for better participation. Most had to play larger schools. This infringed on the rights of parents to choose nonpublic education and the opportunity for students to have, in particular, religious based education permitted by the Alabama church school law.

A similar situation existed in the state of Tennessee. Brentwood Academy, a Tennessee nonpublic school, filed a lawsuit against the Tennessee Secondary School Athletic Association ("TSSAA") claiming it was a state entity and therefore subject to constitutional constraints against discrimination. The question presented for review to the U.S. Supreme Court was:

> "Whether the regulatory conduct of a nominally private secondary school athletic association which 'establishes and enforces all the rules by which high school teams and players, at both public and private schools, compete throughout the state of Tennessee,'… and whose 'membership consist [s] entirely of institutions located within the same State, many of them public institutions, created by the same sovereign,'… constitutes state action under the 14th Amendment and under 42 U.S.C. §1983."

The Southeast Law Institute refined the question for review:

> "When such an association is controlled by state authorities who discriminate against nonpublic education, specifically religious based education, does that constitute state action and burden parental choice of education?"

The question is whether TSSAA is a state entity subject to the requirements of the U.S. Constitution, specifically, the 14th Amendment which protects all of our individual rights and liberties which can be enforced by a federal statute, 42 USC §1983? Or, was the TSSAA a private entity that is not subject to constitutional constraints, meaning all members are subject to its rules, no matter how arbitrary or burdensome.

Virtually the same situation existed in Alabama at that time and continues now. The AHSAA holds itself out as a private entity. Yet, both in 1999 and now, its governing bodies, the Central Board of Control and the Legislative Counsel are almost entirely public-school officials. These public officials run the AHSAA in favor of public schools to the detriment of nonpublic schools.

The Southeast Law Institute filed an *Amicus Curiae* brief in the Brentwood case on behalf of Alabama nonpublic schools explaining to SCOTUS the same discrimination exists in Alabama, particularly as to church schools. The following paragraphs are summaries or bits and pieces of the arguments we presented to the court.

"The Sixth Circuit Court of Appeals determination that the …. TSSAA … is a private entity, burdens without meaningful recourse the parents' constitutional rights to choose the method of educational instruction for their children. SLI explained that "the right of parents to control the education of their children was first explicitly stated in *Meyer v. Nebraska* and followed by *Pierce v. Society of Sisters*…." This right includes choices of religious based education, which are permitted in Alabama as an educational choice in §16-28-1, Code of Alabama. "Other private forms of education are permitted… *Id* §16-46-5."

"The state athletic associations are entities to which the state has delegated its authority to organize all public secondary athletic activities in the state." "The governance of the AHSAA and its Constitution, Bylaws, and other regulatory provisions indicate its symbiotic familial relationship with state public school and education agencies and employees… It is not statutes or regulations that make the associations state actors. It is the authority the states have delegated to them and their conduct which is state action and therefore, makes them persons subject to 42 USC Section 1983 and other process."

The TSSAA suggested in its brief that Brentwood Academy could withdraw from the TSSAA. This means nonpublic schools would not have the opportunity to participate in statewide athletic activities. Nonpublic school student athletes would not have the same possibility for advancing their athletic careers in college or professional sports. Some even suggested that states would just do away with interscholastic athletics if there were no private associations. "Clearly, athletics is a integral part of the education process. While it is alleged the TSSAA bars independent schools from contacting students and therefore denies their speech rights, the AHSAA prescribes unequal rules unconstitutionally burdening parental choice of educational method which is particularly egregious when the choice is based on a religious belief or compulsion. Both are intended to diminish nonpublic competition, but without constitutional scrutiny."

SCOTUS ruled the TSSAA was a state entity and therefore subject to constitutional constraints against invidious discrimination against nonpublic schools. Following that decision, the question arose of whether Alabama nonpublic schools would file a lawsuit to hold the AHSAA similarly accountable. It was well known that in Tennessee there was a great amount of friction and continuing relational problems between public and nonpublic schools. There was thought at the time Alabama schools would cooperate within the system and avoid relational problems. However, after all these years, the AHSAA continues to intentionally and purposely discriminate against nonpublic education, including its most recent action to forbid nonpublic athletes who take CHOOSE Act assistance from participating in sports.

The AHSAA has again maliciously and intentionally discriminated against students' and parents' rights. It not only violates the CHOOSE Act statutory provisions, but it denies students and their parents their 14th Amendment rights. We trust the Legislature will provide adequate remedies to keep this and other possibilities of AHSAA discrimination from happening. Otherwise, a lawsuit to hold the AHSAA accountable under the Brentwood authority may be the option.

As long as the AHSAA is a private entity, it can seemingly discriminate with impunity. The CHOOSE Act restriction was the Alabama statutory violation. The larger violation was that of the students' and parents' constitutional rights. If the AHSAA does not agree to treat all students and their families equally and fairly, the continuing "tension" must be addressed.