IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CORNERSTONE CHRISTIAN SCHOOLS and SCOTT FARHART, SANDRA FARHART, and JARED FARHART,	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. SA-07-CA-139-FB
THE UNIVERSITY INTERSCHOLASTIC LEAGUE, WILLIAM FARNEY, and CHARLES BUTCHER,	§	
Defendants.	§	

ORDER CONCERNING DEFENDANTS' MOTION TO DISMISS AND DEFENDANTS' INITIAL MOTION FOR SUMMARY JUDGMENT

News media frequently tell stories of sports and religion, but seldom do the pulpit and the locker room merge in controversy. This case is one exception.

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"And the wolf shall dwell with the lamb..."

Isaiah 11:6

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Defendant University Interscholastic League (UIL), cast as the lamb, resists by legal motions plaintiff Cornerstone Christian Schools' attempt to enter its manger, fearing Cornerstone will convert the manger to its own den.

IRONIC BACKGROUND

Plaintiff Cornerstone Christian Schools for many years was a member of the Texas Association of Private and Parochial Schools (TAPPS), created in 1978 as a confederation of private

and parochial schools for music, sports and speech activities.[1]

Following allegations of athlete recruitment cheating against its Christian brothers and sisters, Cornerstone applied for membership for the 2006-2007 school year but the TAPPS board voted not to accept their contract which, in essence, terminated their membership in September of 2006. Indeed, some Cornerstone alumni include current professional athletes recruited from far outside the San Antonio area to attend and play for Cornerstone at a token cost of $100 per month. Similar subsidies apparently were not available for musicians or thespians. Mr. Edd Burleson, Director of TAPPS, testified he and apparently the TAPPS Board believed Cornerstone's conduct brought discredit to the integrity and good reputation of TAPPS.[2]

Cornerstone contends this non-readmission is distinguishable from the literal language of UIL Rule 12(d). Notwithstanding the spirit of the rule, it appears that Cornerstone's contention is semantically and ecclesiastically akin to how many angels fit on the head of a pin. See *Matthew* 23:1 ("Teachers of the law...[who] do not practice what they preach.")

The UIL was created in 1909 as a vehicle for the boys and girls of taxpayer funded Texas public schools to participate in music, speech and athletics.

Interestingly, the founder and leader of Cornerstone was once a beneficiary of the University Interscholastic League, both as an athlete in the public schools of Houston, Texas and as a coach in the Northeast Independent School District of San Antonio, Texas, enjoying the level playing field of not having to compete against recruits from far away places. One is reminded of the story

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[1] TAPPS was chartered in 1978 with 20 member schools and incorporated on June 8, 1992. Its purpose "is to organize, to stimulate, to encourage and to promote the academic, athletic and fine arts programs in an effort to foster a spirit of fair play, good fellowship, true sportsmanship and wholesome competition for boys and girls." TAPPS Purpose *available at* http://www.tapps.net.

[2] Section 90 of the TAPPS Bylaws provides: "the TAPPS Board reserves the right to deny membership to any school that it determines has brought discredit to the integrity of TAPPS or is a detriment to the good reputation of the TAPPS organization."

sometimes attributed to former Roman Catholic priest Martin Luther about "whose ox is being gored." [3]

Having successfully created a private athletic powerhouse no longer welcomed by other Christian schools, Cornerstone incongruously invokes the power of the federal government to have its earthly desires accomplished. A cynical believer in human hypocrisy could cite *Jeremiah* 3:5, *Matthew* 23:28, *Koran* 9:73 and *Third Nephi* 16:10 (Book of Mormon). A secular skeptic might recall the child who said: "But the emperor has no clothes!" [4]

Having not followed the proverb "Physician, heal yourself" nor having treated others as it would like to be treated, Cornerstone has reaped what it has sown. For the legal reasons stated below, defendant UIL's motions are granted. Just as it would be difficult for a camel to pass through the eye of a needle, Cornerstone's effort to enter the UIL is denied.

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Before the Court are: (1) Defendants' Motion to Dismiss with Brief (docket #6); (2) Plaintiffs' Response to Defendants' Motion to Dismiss (docket #10); (3) Defendants' Reply to Plaintiffs' Response to Defendants' Motion to Dismiss (docket #11); (4) Plaintiffs' Sur-Response to Defendants' Motion to Dismiss (docket #12), and (5) Defendants' Reply to Plaintiffs' Sur-Response to Defendants' Motion to Dismiss (docket #16). Based on one of the issues raised by the defendants' in their motion to dismiss regarding plaintiff Cornerstone's qualification or

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[3] A Farmer came to a neighboring Lawyer, expressing great concern for an accident which he said had just happened. One of your Oxen, continued he, has been gored by an unlucky Bull of mine, and I should be glad to know how I am to make you reparation. Thou art a very honest fellow, replied the Lawyer, and wilt not think it unreasonable that I expect one of thy Oxen in return. It is no more than justice quoth the Farmer, to be sure; but what did I say? – I mistake – It is your Bull that has killed one of my Oxen. Indeed says the Lawyer, that alters the case: I must inquire into the affair; and if – And if! said the Farmer – the business I find would have been concluded without an if, had you been as ready to do justice to others as to exact it from them.

[4] HANS CHRISTIAN ANDERSON, FAIRY TALES TOLD FOR CHILDREN: The Emperor's New Clothes (1837).

disqualification in relation to Section 12 of the University Interscholastic League's (UIL) Constitution and Contest Rules for 2006-2007, the Court advised it intended to convert the current motion to dismiss to an initial summary judgment proceeding (docket #22). In accordance with that order, the parties took the deposition of Edd Burleson, the Director for the Texas Association of Private and Parochial Schools (TAPPS). Thereafter, the Court has received: (1) Defendants' Initial Motion for Summary Judgment and Evidence (docket #26); (2) Plaintiffs' Summary Judgment Evidence (docket #27); (3) Factual Appendix to Plaintiffs' Summary Judgment Evidence (docket #28); (4) Defendants' Reply to Plaintiffs' Summary Judgment Evidence (docket #29), and Plaintiffs' Response to Defendants' Initial Motion for Summary Judgment and Evidence (docket #30). Defendants assert that in addition to their motion for summary judgment and evidence, their motion to dismiss for failure to state a claim previously filed is sufficient for this Court to dismiss this case without resort to the factual evidence provided with their summary judgment motion. Defendants base this assertion on three cases: Walsh v. Louisiana High School Athletic Assn., 616 F.2d 152 (5th Cir. 1980); Niles v. University Interscholastic League, 715 F.2d 1027 (5th Cir. 1983), and Jesuit College Preparatory School v. Judy, 231 F. Supp. 2d 520 (N.D. Tex. 2003).

Background

As set forth in the complaint, Cornerstone Christian Schools (hereinafter referred to as Cornerstone) is a Christ-centered college preparatory school located in San Antonio, Texas. Approximately 593 students attend Cornerstone in grades ranging from kindergarten through the twelfth grade. Plaintiffs Scott Farhart and Sandra Farhart are parents of Jared Farhart, a student who attends Cornerstone, and who has, in the past, participated in extracurricular activities including football, track, soccer, baseball, band, math competitions, and the science fair. Plaintiffs assert one of the reasons parents send their children to Cornerstone is "because of its emphasis on teaching in

an environment that emphasizes Christian values and teachings," i.e. "a matter of religious preference." Plaintiffs' Original Complaint, docket #1 at page 3. Cornerstone maintains it considers "its athletic programs an integral part of its effort to provide an education centered on Christian values and teachings. 'The main goal of Cornerstone Christian Schools [according to the school website] is to provide a Christ-centered, quality education, and athletics plays a very important role in achieving this goal.' Cornerstone Schools believes that '[e]very sport [it offers] helps teach true Christian character, exemplifying the testimony of Christ in each player and coach participation.'" Id. In the past, Cornerstone had been a member of the Texas Association of Private and Parochial Schools ("TAPPS"), which allowed Cornerstone students to participate in interscholastic academic competitions and sports.

Plaintiffs state TAPPS "declined to permit Cornerstone Schools to continue to participate in its interscholastic league" in 2006. Id. at page 4. Following this "declination," Cornerstone sought to apply for membership in the University Interscholastic League (UIL), but according to the plaintiffs, "the UIL refused to allow Cornerstone Schools even to submit an application for admission to the league." Id. at page 6. The UIL stated its reason for the refusal was due to Cornerstone's eligibility for admission in "'other organizations similar to the UIL.'" Id. Cornerstone disagrees with the UIL's assessment because it cannot participate in TAPPS and the other leagues are not similar to that of the UIL. As a result, the plaintiffs filed this suit asking that the defendants be enjoined from enforcing section 12 of the UIL's Constitution which excludes all private schools, except two, from membership, and that section 12 of the UIL's Constitution and the defendants' implementation thereof be found to violate plaintiffs' freedom of religion, equal protection, and due process rights.

The defendants maintain, in their answer, that Cornerstone's right to participate as a member of TAPPS was suspended or revoked for violating the rules or codes of that league, and therefore, their claims are unenforceable. Defendants base their assertion on section 12(d) of the UIL Constitution and Contest Rules for 2006-2007 which provides:

> PRIVATE SCHOOLS. Unless its right to participate has been suspended or revoked for violating rules or codes by another league similar to the UIL, a Texas non-public school may apply for UIL membership in the largest conference (currently 5A) provided the school meets all of the following conditions:
> 1. school is accredited by the Texas Private School Accreditation Commission;
> 2. school does not qualify for membership in any other organization similar to the League;
> 3. school fits the following definition of a high school:
> (A) A school that offers instruction in the ninth, tenth, eleventh or twelfth grades, or any combination thereof, whether all of the grades are offered instruction in the same building;
> (B) A school also fits the definition if it has:
> Only one ninth grade, one tenth grade, one eleventh grade, and one twelfth grade.
> One titled official, i.e., principal, headmaster, etc., is in charge of all four grades, whether assistant principals, etc. are in charge of separate grade levels.
> All grades have the same school colors, mascot, song and paper.
> School is on an established campus with permanent classrooms.

Defendants' Original Answer, docket #4 at pages 7-8.

Whether Cornerstone's right to participate in TAPPS was revoked or suspended is addressed by the parties in the motion for summary judgment. However, prior to Court requesting briefing on that issue, the defendants filed a motion to dismiss. Defendants believe the plaintiffs have failed to state a claim that would entitle them to relief because: (1) plaintiff Cornerstone lacks standing; (2) rule 12(d) does not burden the free exercise of religion by students and parents or their first amendment rights and does not violate the fundamental rights of parents to control the education of their children, and (3) rule 12(d) is not subject to strict scrutiny and bears a rational relationship to a legitimate government purpose and does not violate plaintiffs' right to equal protection. Plaintiffs,

on the other hand, believe the Farharts have a fundamental right to educate their son in a private, religion-centered school and burdening that right by forcing the Farharts to choose between religion and access to the UIL violates the Constitution.

Motion to Dismiss

The standard of review to be applied to motions to dismiss has recently been revisited by the Supreme Court. In Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964-65 (2007), the Court explained the standard as follows:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligations to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).
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> . . . . And of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and "that recovery is very remote and unlikely."

(Citations omitted). The Court continued its explanation of this standard with reference to the often cited Conley v. Gibson opinion:

> Justice Black's opinion for the Court in Conley v. Gibson, spoke not only of the need for fair notice of the grounds for entitlement to relief but of "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove not set of facts in support of his claim which would entitle him to relief." This "no set of facts" language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings; and the Court of Appeals appears to have read Conley in some such way when formulating its understanding of the proper pleading standard.
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> On such a focused and literal reading of Conley's "no set of facts," a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some "set of [undisclosed] facts" to support recovery. So here, the Court of Appeals specifically found the prospect of unearthing direct evidence of conspiracy sufficient to preclude dismissal, even though the complaint does not set forth a single fact in a context that

> suggests an agreement. It seems fair to say that this approach of pleading would dispense with any showing of a "'reasonably founded hope'" that a plaintiff would be able to make a case. . . .
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> Seeing this, a good many judges and commentators have balked at taking the literal terms of the Conley passage as a pleading standard, and [i]n practice, a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory. . . ."
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> We could go on, but there is no need to pile up further citations to show that Conley's "no set of facts" language has been questioned, criticized, and explained away long enough. To be fair to the Conley Court, the passage should be understood in light of the opinion's preceding summary of the complaint's concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief. But the passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete negative gloss on an accepted pleading standard: ***once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.***

Id. at 1968-69 (citations omitted, italic emphasis in original; bold and italic emphasis added). In addition to this standard, this Court, generally, may not consider matters outside of the pleadings in deciding a motion to dismiss for failure to state a claim, and if those matters are considered, the motion should be treated as a motion for summary judgment. In re Katrina Canal Breaches Litigation, 495 F.3d 191, 205 (5th Cir. 2007). However, documents attached to the motion may be considered if they are central to the claim and referred to in the complaint. Id.

Does Cornerstone Lack Standing?

Defendants contend in their motion to dismiss Cornerstone lacks standing in this case because the free exercise of religion and equal protection rights asserted by the plaintiffs belong to the students and parents of Cornerstone and not to Cornerstone. Plaintiffs respond the defendants are wrong because "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interest it seeks to

protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Plaintiffs' Response to Defendants' Motion to Dismiss, docket # 10 at page 2, quoting Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977). Although the parties agree the associational standing elements set forth above in Hunt v. Washington are applicable to this case, they disagree as to their application. The defendants believe standing is lacking based upon the Supreme Court's decision Harris v. McRae while the plaintiffs find the opinion by the Eighth Circuit Court of Appeals in Heartland Acad. Cmty. Church v. Waddle supports standing.

In Harris v. McRae, 448 U.S. 297, 320 (1980), the Court found all of the appellees[5] lacked "standing to raise a free exercise challenge to the Hyde Amendment." Despite the argument in support of standing asserted by the Women's Division of the Board of Global Ministries of the United Methodist Church (Women's Division) that its membership included "'pregnant Medicaid eligible women, who as a matter of religious practice and in accordance with their conscientious beliefs, would choose but are precluded or discouraged from obtaining abortions reimbursed by Medicaid because of the Hyde Amendment,'" the Court found the Women's Division did not "satisfy the standing requirements for an organization to assert the rights of its membership." Id. at 320-21. In particular, the Court focused on the requirement "'that neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" The Court explained:

> Since "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion, the claim asserted here is one that ordinarily requires individual participation. In the present case, the

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[5] The appellees were: "(1) the indigent pregnant women who sued on behalf of other women similarly situated; (2) the two officers of the Women's Division and (3) the Women's Division [of the Board of Global Ministries of the United Methodist Church] itself." Harris v. McRae, 448 U.S. 297, 320 (1980).

> Women's Division concedes that "the permissibility, advisability and/or necessity of abortion according to circumstances is a matter about which there is diversity of view within . . . our membership, and is a determination which must be ultimately and absolutely entrusted to the conscience of the individual before God." It is thus clear that the participation of individual members of the Women's Division is essential to a proper understanding and resolution of their free exercise claims. Accordingly, we conclude that the Women's Division, along with the other named appellees, lack standing to challenge the Hyde Amendment under the Free Exercise Clause.

Id. at 321 (citations omitted). Defendants likewise contend the participation of individual parents and students is essential to a proper understanding of the effect of the challenged UIL policy on the rights asserted and therefore, Cornerstone lacks standing to challenge that policy.

In Heartland Academy Cmty. Church v. Waddle, 427 F.3d 525 (8th Cir. 2005), a § 1983 cause of action was asserted by a private boarding school, the affiliated church, and parents of students attending the school for declaratory and injunctive relief based on state juvenile officers removing students from the school based on allegations of abuse and mistreatment. Mr. Waddle challenged the district court's finding that Heartland had organizational standing to bring a § 1983 action concerning Fourth Amendment violations. Although the court in a criminal case had stated "'Fourth Amendment rights are personal [and] . . . may not be vicariously asserted,'" the court noted that statement was not controlling in this case because it was made in the context of applying the exclusionary rule in a criminal case which rule is not applicable in civil cases. Id. at 532. The court added, "[t]he Supreme Court has never held (and neither have we) that associational standing is not available to § 1983 plaintiffs alleging Fourth Amendment violations." Id. Without further explanation, the court concluded associational standing was "legally available to Heartland on its Fourth Amendment claim, but we still must determine if the facts of this case qualify Heartland to assert the Fourth Amendment rights of its students." Id. The court then applied the three-part test set forth in Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977):

> First, it is clear that the individuals in question, the removed children, "have standing to sue in their own right." Next, the interest [Heartland] seeks to protect are germane to the organization's purpose." Indeed, the school's very survival could depend upon its success in getting the injunction it seeks. As we noted in Heartland I, "On the face of the complaint, the corporate plaintiffs allege injury to themselves (the imminent shutdown of HCA) as a result of Waddle's conduct." Additional mass roundups of students such as the one that took place in October 2001 could well result in a significant loss of students. Without students, there is no school. This Court is satisfied that Heartland has "a stake in the resolution of the dispute, and thus [is] in a position to serve as [Waddle's] natural adversary." Finally, because Heartland seeks only declaratory and prospective injunctive relief, the participation of individual students who were affected by the mass removal of students in 2001 is not required. "[N]either the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

Id. at 532-33 (citations omitted). Applying this holding to the instant case, the plaintiffs assert the Farhart plaintiffs as well as other Cornerstone families unquestionably have standing to sue. In addition, Cornerstone seeks to protect the fundamental right of parents to choose a private, religion-centered education for their children, which is germane to its own purpose of operating a school to fulfill that purpose. Because Cornerstone believes the denial of UIL membership will not only adversely affect its students but Cornerstone as well, it too is in a position to serve as the natural adversary to the UIL as Heartland was found to be Waddle's adversary. Cornerstone concludes the claim asserted and the relief requested do not require the participation of all parents because only declaratory and prospective injunctive relief is being sought.

The plaintiffs in this case bear the burden of establishing standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). Before assessing association standing, a court must also look at "whether the individual members of the association have standing." The Committee for Reasonable Regulation of Lake Tahoe v. Tahoe Regional Planning Agency, 365 F. Supp. 2d 1146, 1161-62 (citing Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977)). Three elements must be met in order for an individual to have standing under Article III: "(1) a

concrete and particularized 'injury in fact' that is actual or imminent; (2) a causal connection between the injury and the challenged conduct such that the injury is 'fairly traceable' to defendant's conduct; and (3) a likelihood that the injury will be redressed by a favorable decision." Id. at 1162 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). Because standing is an "indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." Lujan, 504 U.S. at 561; Doe v. Tangipahoa Parish School Bd., 494 F.3d 223, 498 (5th Cir. 2007).

Although the Court finds the language in Heartland persuasive to a finding of associational standing by Cornerstone in this case, the Court is reticent to apply Heartland because Heartland did not involve, as is the case here, a Free Exercise Claim. As stated in Harris v. McRae, 448 U.S. 297, 321 (1980), the "participation of individual members of the Women's Division [was] essential to a proper understanding and resolution of their free exercise claims," and thus the Court concluded that the Women's Division lacked associational standing to "challenge the Hyde Amendment under the Free Exercise Clause." Id. Other cases have also found that standing in Free Exercise cases requires a plaintiff to allege "his or her own 'particular religious freedoms are infringed.'" Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 292 n. 25 (5th Cir. 2001); see School District of Abington Township, v. Schempp, 374 U.S. 203, 224 n.9 (1963) (noting requirement for standing in Free Exercise Clause "requires proof that particular religious freedoms are infringed"). In discussing the purpose of the Free Exercise Clause, the Court in Schempp also explained the individualized nature of that right as follows:

> The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting

> any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment **as it operates against him in the practice of his religion**. The distinction between the two clauses is apparent-a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.

Id. at 222-23 (emphasis added); see Parker v. Hurley, 514 F.3d 87, 103 (1st Cir. 2008) (discussing the limited reach of Free Exercise Clause and recognizing cases in which free exercise claim not stated even though challenged action "would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs," and that the First Amendment does not require the government to "behave in ways that the individual believes will further his or her spiritual development or that of his or her family"; the court quoted Schempp: "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion."). Thus, it would appear that the Free Exercise claims in this case must be asserted by the individuals whose religion is being infringed.

Although not cited by the parties, this Court is aware of the decision in Church of Scientology v. Cazares, 638 F.2d 1272 (5th Cir. 1981), in which the Harris v. McRae decision was distinguished. The court noted that in McRae:

> only an undetermined percentage of the membership had a personal stake in the controversy, i.e., it was not alleged how many members (1) were eligible to receive Medicaid; (2) were or expected to be pregnant; and (3) as a matter of religious belief would choose to terminate pregnancy by abortion.
>
> The present case differs from McRae in a significant respect; the conduct challenged in the complaint uniformly affected the entire membership of the Church of Scientology in Clearwater. The complaint does not allege that the defendant harassed only certain members of the Church; the allegations refer to "the Church, its ministers and adherents." Moreover, the complaint alleges that defendant chilled, deterred, prevented, and inhibited plaintiff in the free exercise of religion, "including use of its property for that purpose." Thus, because the religious activity of the members was inherently intertwined with the services and facilities of the Church, the actions complained of affected every member of the Church in Clearwater. Accordingly, the claims could properly be presented by the Church on behalf of its members.

Church of Scientology v. Cazares, 638 F.2d 1272, 1280 (5th Cir. 1981). Here too, as in McRae, there is no allegation of how many parents and/or students have a personal stake in interscholastic competition. There is no assertion of how many of Cornerstone students are eligible to participate and in fact would participate in UIL activities if offered and/or how many parents/students would forego a religious education because of the denial of UIL status. In addition, there is no allegation or assertion of facts to support the finding as in Cazares that "the actions complained of affected every member of the Church of Clearwater." Specifically, the facts alleged simply state that plaintiffs Scott Farhart and Sandra Farhart are the parents of a student, Jared Farhart, who attends Cornerstone School, and Jared "has in the past participated in extracurricular activities, including football, track, soccer, baseball, band, the science fair, and math competitions." Original Complaint, docket #1 at page 3. Although there is no specific allegation that Jared seeks to continue his past extracurricular activities, the Court assumes Jared is no longer able to participate in the extracurricular activities mentioned because of Cornerstone's exclusion from TAPPS and the denial of admission by the UIL. The complaint also alleges, without reference to Scott and Sandra Farhart, the UIL's refusal to allow Cornerstone to apply for membership in the UIL burdens the parents who choose to send their children to Cornerstone, or any other religion-centered school because of their religious education choice. Cornerstone also contends that without membership in the UIL, it cannot provide its students with the level of interscholastic competition, both academic and athletic, as provided to UIL member schools, and it forces Cornerstone to find other schools to compete with outside of the UIL which is "expensive, and does not yield predictable schedules or the opportunity for Cornerstone Schools' teams to compete for meaningful rankings or championships. It also forces students to engage in more travel, thereby taking away from class and study time." Original Complaint at page 9. Cornerstone alleges its reputation and attractiveness as a school are injured

because it cannot provide its students "the same extracurricular experience that all public schools, and two select private schools, can offer." Id. The complaint concludes with the assertion that "[d]ue to the exclusion of Cornerstone School from the UIL, the Farharts' child is denied the opportunity to compete in UIL interscholastic competitions. This denies Jared Farhart the opportunity to enjoy the academic and athletic enrichment from which he otherwise would benefit and burdens the Farhart family for its decision to pursue a religion-centered education for Jared Farhart." Id. at 10.

The plaintiffs also argue, in support of associational standing, that because Cornerstone seeks only declaratory and prospective injunctive relief, "neither the claim asserted nor the requested relief requires the participation of all parents." However, that fact alone was found not to per se overcome the third prong of association standing. Committee for Reasonable Regulation of Lake Tahoe v. Tahoe Regional Planning Agency, 386 F. Supp. 2d 1146, 1163 (D. Nev. 2005) (despite argument to the contrary, "seek equitable relief does not *per se* overcome the prudential [or third] prong of associational standing"; noting while the party may be correct "that the equitable *relief* it requested does not require the participation of its members, it must also demonstrate that the *claim* itself does not require the participation of its members"); see Rent Stabilization Ass'n v. Dinkins, 5 F.3d 591, 596 (2nd Cir. 1993) (rejecting argument that third prong satisfied because only declaratory and injunctive relief sought - "The *Hunt* test is not satisfied unless "*neither the claim asserted* nor the relief requested requires the participation of individual members in the lawsuit." quoting Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977)); International Brotherhood of Teamsters v. America West Airlines, Inc., No. CIV-95-2924-PHX-RGS, 1997 WL 809760 at *4 (D. Arizona, Sept. 25, 1997) ("Then, in *Harris v. McRae*. 448 U.S. 297 (1980), the Supreme Court explained that associational standing is not automatically appropriate simply because an association is seeking injunctive or prospective relief on behalf of its members."). Likewise, because this Court

has determined that the Free Exercise claim in this case requires the individual participation of the parents/students, Defendants' Motion to Dismiss on that issue is GRANTED.

Does Rule 12(d) Burden the Exercise of Religion, Violate the Free Exercise Provisions of the First Amendment, or Violate the Fundamental Rights of Parents to Control the Education of Their Children?

The defendants maintain rule 12(d) does not burden the exercise of religion, does not violate the First Amendment, and does not violate the fundamental right of Cornerstone parents to control the education of their children. While the defendants believe plaintiffs' case is all about the right to participate in interscholastic sports and not the free exercise of religion or the right of parents to control the education of their children, plaintiffs assert to the contrary that this case "is about whether parents and students who choose a religion-centered private school education can be denied access to the state-created University Scholastic League ("UIL") for making that choice." Plaintiffs contend the UIL rule forces the Farhart plaintiffs "to choose between a private, religion-centered education and access to the state created UIL. If the Farharts exercise their right to educate Jared in a private religious school, they must forego access to the state-provided UIL. This [plaintiffs claim] violates the Constitution." Plaintiffs' Response to Defendants' Motion to Dismiss, docket #10 at page 2.

The parameters of the Free Exercise Clause has been explained by the Supreme Court as follows:

> The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*. . . ." U.S. Const., Amdt. 1 (emphasis added.) The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious *beliefs* as such." The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.

> But the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.

Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 876-78 (1990) (citations omitted); Jesuit College Preparatory Sch. v. Judy, 231 F. Supp. 2d 520, 534-35 (N.D. Tex. 2002) (quoting Smith for the parameters to be used in determining the meaning of the Free Exercise Clause), judgment vacated and appeal dismissed, No. 02-10174, 2003 WL 23323003 (5th Cir. Feb 26,2003) (because UIL modified rules to permit Jesuit College to participate, "the litigation is settled and the appeal is moot"; the motion of appellants to vacate the district court's judgment and remand to the district court with instructions to dismiss without prejudice was granted). Here, plaintiffs do not allege their religious beliefs, professions or performance of any physical acts are being regulated or punished. Instead, plaintiffs assert their right to religious exercise and their right to guide their children's education are being "burdened."

As set forth in Plaintiffs' Original Complaint, the parents who send their children to Cornerstone do so "in large part" because of the emphasis on Christian values and teachings, i.e. as "a matter of religious preference." More telling is the fact that "Cornerstone Schools considers its athletic programs an integral part of its effort to provide an education centered on Christian values and teachings," and that "[t]he main goal of Cornerstone Christian Schools is to provide a Christ-centered, quality education, and **athletics plays a very important role in achieving this goal**." Plaintiffs' Original Complaint, docket #1 at page 3 (emphasis added). This goal along with the

belief that "'[e]very sport [it offers] helps teach true Christian character, exemplifying the testimony of Christ in each player and coach participation" are posted on Cornerstone's website. Cornerstone acknowledges that in the past, it was a member of the Texas Association of Private and Parochial Schools (TAPPS), and this membership permitted Cornerstone's students to participate in interscholastic academic competitions and sports, including football and basketball. Cornerstone also acknowledges that in 2006, TAPPS declined to permit Cornerstone to participate in its interscholastic league which prompted Cornerstone to seek membership in the UIL. The UIL refused to allow Cornerstone to apply for membership claiming Cornerstone is eligible for admission to other organizations similar to the UIL. Cornerstone denies that eligibility.

Cornerstone contends that because it was excluded from membership in TAPPS and because the other interscholastic leagues referred to by the UIL are not similar, Cornerstone should be allowed to participate in the UIL. Cornerstone maintains the "other interscholastic leagues" are "much smaller than the UIL, and do not offer the same level of academic or athletic competition. Further, the Southwest Preparatory Conference has widely dispersed member schools, including schools in Oklahoma, and competition in it would require extensive travel, both within and without Texas, thus burdening student competitors and driving up the cost of competition." Id. at page 7. Cornerstone admits it "wants to afford its students the opportunity to experience the variety and level of competition that, in Texas, only the UIL can offer." Id. Cornerstone alleges the refusal by the UIL to allow it to apply for membership "burdens the parents who choose to send their children to Cornerstone Schools, or any other religion-centered school, for their choice of a religious school for their children." Id. at page 8. As a result, parents "must either select a public school or choose a private religious school and accept an extracurricular program that does not match that of the UIL." Id. at page 9. Cornerstone concedes the need for UIL admission as follows:

> Without membership in the UIL, Cornerstone Schools cannot provide its students with the level of interscholastic competition, both academic and athletic, that can be provided by UIL member schools. Not being a UIL member, Cornerstone Schools is forced to attempt to find other schools that will consent to compete with it outside of UIL participation. Doing so is expensive, and does not yield predictable schedules or the opportunity for Cornerstone Schools' teams to compete for meaningful rankings or championships. It forces students to engage in more travel, thereby taking away from class and study time.
>
> Given the unique quality and scope of the activities offered by the UIL, Cornerstone Schools cannot provide its students the same extracurricular experience that all public schools, and two select private schools, can offer. As a result Cornerstone Schools' reputation and attractiveness as a school are injured.

Id. Further, the plaintiffs maintain the exclusion of Cornerstone from the UIL, denies Jared Farhart "the opportunity to enjoy the academic and athletic enrichment from which he otherwise would benefit and burdens the Farhart family for its decision to pursue a religion-centered education for Jared Farhart."

The Free Exercise Clause is limited to "protecting the *free exercise* of religion," and is not the general protector of religion or religious beliefs. Parker v. Hurley, 514 F.3d 87, 103 (1st Cir. 2008) (emphasis in original). In recognition of its limited scope, the Parker court discussed several Supreme Court decisions:

> In Lyng, the Court noted that there and in Bowen v. Roy, 476 U.S. 693 (1986), no free exercise claim was stated even though "the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs." 485 U.S. at 449. There was no free exercise problem in those cases because "[i]n neither case . . . would the affected individuals be coerced by the Government's action into violating their religious beliefs." Id. As the Court said in Roy, "[n]ever to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development of that of his or her family. 476 U.S. at 699; see also Sherbert, 374 U.S. at 412 (Douglas, J., concurring) ("The Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."). Specifically, "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." Schempp, 374 U.S. at 223.

Id. (emphasis on original; citations to Supreme Court Reporter and Lawyer's Edition omitted); see Littlefield v. Forney Ind. School Dist., 108 F. Supp. 2d 681, 703-04 (N.D. Tex. 2000) ("The free exercise of religion clause of the First Amendment affords absolute protection to religious beliefs. The cause also extends, to a limited extent, to conduct based upon religious beliefs. The Supreme Court observed, 'Our cases have long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute.' In defining the limits of protection afforded by that constitutional provision, the Supreme Court explained that the free exercise clause 'holds an important place in our scheme of ordered liberty, but the Court has steadfastly maintained that claims of religious conviction do not automatically entitle a person to fix unilaterally the conditions and terms of dealings with the Government. Not all burdens on religion are unconstitutional.'") (quoting Bowen v. Roy, 476 U.S. 693, 699 (1986)), aff'd, 268 F.3d 275 (5th Cir. 2001). The Parker court noted a distinction between the burden placed on the parents' free exercise rights and burden placed on the children's. Parker, 514 F.3d at 103. Specifically, "[t]he right of parents 'to direct the religious upbringing of their children is distinct from (although related to) any right their children might have regarding the content of their school curriculum." Id. This distinction is not new law and was explained in Prince v. Massachusetts, 321 U.S. 158 (1944), as two separate liberties. Parker, 514 F.3d at 104. "One is the parent's, to bring up the child in the way [the parent desires], which for appellant means to teach him the tenets and the practices of their faith. The other freedom is the child's, to observe these [tenets and practices]". There is no indication that either of these liberties are being infringed in this case, and therefore, no violation of plaintiffs' Free Exercise Rights.

Plaintiffs contend their fundamental right to control the education of their children is being burdened because parents seeking "Christ-centered education must deny their children access to quality extracurricular activities that are a central part of education." Plaintiffs claim a state cannot require a citizen to abandon a fundamental constitutional right in order to receive a state-created benefit, which is what the UIL is doing in this case. Because the Farhart plaintiffs have exercised their fundamental right to educate their child in a private, religion-centered school, they are denied the benefit the state provides through the UIL. Plaintiffs state this case is distinguishable from the decision in Walsh v. Louisiana High Sch. Athletic Ass'n, 616 F.2d 152 (5th Cir. 1980), because in Walsh the denial of UIL access was for only one year as compared to a total deprivation of UIL access here. Plaintiffs assert "[t]hey can only receive the state created benefit of UIL participation if they totally forego the fundamental right to seek a private religious education," because the rule here "flatly bars all participation in UIL activities by students whose parents send them to private religious schools." The record as presented, does not support that claim. In fact, a review of the admission rule itself shows no distinction as to whether the private school seeking admission is religious or secular,[6] and the two private schools which have been admitted to the UIL thus far are

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[6] PRIVATE SCHOOLS. Unless its right to participate has been suspended or revoked for violating rules or codes by another league similar to the UIL, a Texas non-public school may apply for UIL membership in the largest conference (currently 5A) provided the school meets all of the following conditions:

1. school is accredited by the Texas Private School Accreditation Commission;
2. school does not qualify for membership in any other organization similar to the League;
3. school fits the following definition of a high school:
   (A) A school that offers instruction in the ninth, tenth, eleventh or twelfth grades, or any combination thereof, whether all of the grades are offered instruction in the same building;
   (B) A school also fits the definition if it has:
   Only one ninth grade, one tenth grade, one eleventh grade, and one twelfth grade.
   One titled official, i.e., principal, headmaster, etc., is in charge of all four grades, whether assistant principals, etc. are in charge of separate grade levels.
   All grades have the same school colors, mascot, song and paper. School is on an established campus with permanent classrooms.

religious-centered schools. Jesuit College Preparatory Sch. v. Butler, 231 F. Supp. 2d 520, 524 (N.D. Tex. 2002) ("Plaintiff Jesuit is a Texas not-for-profit corporation that owns and operates an all male, private, college-preparatory school"; "The Society of Jesus, or the Jesuit Order, owns the school. The Society of Jesus is a religious order of the Roman Catholic Church."), judgment vacated and appeal dismissed, No. 02-10174, 2003 WL 23323003 (5th Cir. Feb. 26, 2003) (because UIL modified rules to permit Jesuit College to participate, "the litigation is settled and the appeal is moot"). In fact, as the defendants assert in their motion, the arguments and causes of action asserted by Jesuit College in their suit against the UIL are very similar and are almost on all fours with what the plaintiffs are contending here. The plaintiffs in Jesuit College made claims similar to those being advanced by the plaintiffs herein as follows:

> The UIL's refusal to admit Jesuit burdens Jesuit and the parents who send their children to Jesuit. Without membership in the UIL, Jesuit is not able to provide its students with the type of education and extracurricular programs (such as athletics, music, speech, debate, and drama) offered by all other schools in Texas, public and private. Jesuit is forced to try to build competition schedules in extracurricular activities with other schools who will voluntarily agree to compete with Jesuit on non-UIL time. Those efforts are costly and do not produce consistent schedules or ones that include competing for a meaningful ranking or championship. Jesuit's patchwork schedule also typically requires extra travel time and expense compared with a schedule in the UIL. Only the UIL provides the range of activities, level and quality of competition, and structured contests necessary for a private school of Jesuit's size. Because the school is unable to provide the same educational experience that exists for all other schools in Texas, Jesuit's reputation and attractiveness as an institution are harmed. The UIL's private-school ban also interferes with the rights of parents to choose the school they want their children to attend, by requiring them to accept for their child a less-than-complete extracurricular program if they wish to select Jesuit.

Id. at 526.[7] In addressing the plaintiffs' fundamental right to direct the education of their children claim, the court wrote:

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[7] The league to which Jesuit belonged ceased its existence at the end of the 1999-2000 school year. Jesuit, 231 F. Supp. 2d at 526. Jesuit applied to TAPPS and the Southwestern Preparatory Conference (SPC) but was denied membership because Jesuit had almost "twice the number of students of any TAPPS school and almost three times as many students as the largest SPC school." Id. Jesuit claimed there was no other league it could try to join.

> The assertion of this right is based upon the concept that parents have a recognized fundamental right to direct the upbringing and education of their children. A substantive due process analysis must commence with a careful description of the right asserted by Plaintiffs. To determine the nature of the right asserted by the Plaintiffs, the court must carefully examine the allegations of Plaintiffs' Complaint. Although couched in terms of a parent's right to educate his or her child privately, the real "right" being asserted is the "right of students" at private school to participate in extracurricular activities with public schools. Indeed, the reason that this lawsuit exists is because the students of Jesuit cannot join the UIL and thereby participate in extracurricular activities. Jesuit desires to become a member of the UIL for this express purpose. That technical buzzwords or phrases or legal legerdemain is used does nothing to transform or elevate a desire or want of parents and students to the status of a fundamental right. Review of Plaintiffs' Complaint reveals that indeed no student has been deprived of the right to be educated at a private school. What it does reveal is that students at private schools cannot participate in UIL activities because a UIL ban excludes their participation.

Id. at 529-30. The court continued its analysis by recognizing and accepting the premise "that a parent has a general fundamental right to direct and control the education and upbringing of his or her child," while at the same time acknowledging that that right "falls short of being constitutionally absolute." Id. at 530. Continuing in its analysis, the court explained:

> By asserting that extracurricular activities are part of the educational process, Plaintiffs contend that this denies a parent of the fundamental right to educate his or her child privately if that parent decides to choose Jesuit, because the ban "requires Jesuit parents to accept for their child a less-than-complete extracurricular program if they wish to select Jesuit." Plaintiffs' Complaint at ¶ 18. While a parent has a fundamental right to educate his or her child private, this right applies to the educational process as a whole, not to some separate component or part of the process, such as participation in interscholastic activities. A student's interest in participating in interscholastic athletics or any other extracurricular activities "amounts to a mere expectation rather than a constitutionally protected claim of entitlement."
>
> That a parent has a fundamental right to direct the upbringing and education of his or her child allows the parent the freedom of choice to educate the child at a private school. Living in society is all about making choices and decisions. All choices have consequences, but before making any choice or decision, one has the opportunity to consider and weigh those consequences. This is precisely what happens when one makes a conscious choice to educate his or her child in private school rather than public school, or vice versa. To some parents, private schools

> have distinct advantages over public schools. For those reasons, they go the private route. On the other hand, to some parents, public schools have distinct advantages. Indeed, for their own reasons, some persons elect to home school their children rather than attend public or private schools. Stated another way, because of what public schools offer as part of the educational process, including extracurricular activities, they may seem less attractive to some parents. Likewise, some parents may consider private schools less attractive because of what they offer as part of the educational process, including extracurricular activities. Whatever decision a parent makes necessarily involves tradeoffs, and these trade-offs should be weighed before these kinds of choices are made. That a private school may be considered a less attractive alternative because of state action does not mean that the state action runs afoul of the United States Constitution when no fundamental right of Plaintiffs is interfered with, struck at, or affected. The ban does not strike at, interfere with, or affect any of Plaintiffs' fundamental rights. The liberty interest protected is the right to make a fundamental decision to choose between private or public school, not to dictate, control or direct every component of the educational process.
>
> Plaintiffs cannot carve out a component of the educational process, cloak it with the trapping of a fundamental right and then elevate that component to the status of a fundamental right. The fundamental right to educate one's children privately simply does not carry with it the right to control or direct every component of the educational process.

Id. at 530-31. The court concluded that no fundamental right existed for "parents to direct and control each component or decision relating to the educational process, or to require that students at private schools be permitted to participate in UIL activities." Id. at 532. As a result, the court found dismissal of the claim was appropriate "because no fundamental right of Jesuit, any parent, or student [was] affected." Id.

Similarly, in Gary S. v. Manchester School Dist., 374 F.3d 15, 17 (1st Cir. 2004), parents of a disabled child attending Catholic elementary school alleged the Individuals with Disabilities Education Act was unconstitutional as applied to their son because he was not entitled "to the panoply of services available to disabled public school students." This unequal treatment was alleged to violate the Free Exercise Clause. The court found it would be "unreasonable and inconsistent to premise a free exercise violation upon Congress's mere failure to provide to disabled

children attending private religious schools the identical financial and other benefits it confers upon those attending public schools." Id. at 20. The court distinguished these benefits from other types of benefits as follows:

> Unlike unemployment benefits that are equally available to all, private school parents can have no legitimate expectancy that they or their children's schools will receive the same federal or state financial benefits provided to public schools. Thus, the non-receipt of equal funding **and programmatic benefits** cannot be said to impose any cognizable "burden" upon the religion of those choosing to attend such schools. Persons opting to attend private schools, religious or otherwise, must accept the disadvantages as well as any benefits offered by those schools. They cannot insist, as a matter of constitutional right, that the disadvantages be cured by the provision of public funding. It follows that denying the benefits here, to which appellants have no cognizable entitlement, do not burden their free exercise rights.

Id. (emphasis added). The court further explained:

> Indeed, if we were to find a burden here on appellants' right of free exercise, it would follow logically that we should find free exercise violations whenever a state, city or town refuses to fund programs of other types at religious schools, at least insofar as the absence of funding adversely affects students with parents who believe their faith requires attendance at a religious school. Yet as noted *supra*, it is clear there is no federal constitutional requirement that private schools be permitted to share with public schools in state largesse on an equal basis.
>
> Accordingly, we see no basis for hold that the federal government violates appellants' free exercise rights under the First Amendment by favoring disabled public school attendees in respect to IDEA's programs and benefits. In so doing, the federal government does no more than state and local governments do everyday by funding public school programs while providing lesser or, more likely, no funding to private schools, religious or otherwise. This methodology leaves all parents with ultimate recourse to the public schools whenever the balance of services associated with attendance at a private school appears to them to be unsatisfactory; but the option thus available can necessitate their having to choose, as here, between alternatives each of which may seem imperfect. In any event, we cannot say that the federal government's structuring of benefits here violates appellants' free exercise rights.

Id. at 20-21.

Other courts have also recognized the parental right to educate their children and its limitations. Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 699 (10th Cir. 1998) (no quarrel with assertion that parents have constitutional right to direct child's education "up to a point," including the right to send a child to "a private school, whether that school is religious or secular"; citing numerous cases indicating "it is clear" the constitutional right is "limited in scope"). "The case law in this area establishes that parents simply do not have a constitutional right to control each and every aspect of their children's education and oust the state's authority over that subject." Id.; see Valencia v. Blue Hen Conference, 476 F. Supp. 809, 820-24 (D. Delaware 1979) (plaintiffs argued the "preclusion of St. Mark's from membership in the Blue Hen Conference (an unincorporated association of public high schools in New Castle County) ha[d] the effect of making it more difficult and dangerous for their children, relative to public school children, to participate in interscholastic athletics. This, plaintiffs conclude[d], penalizes or exacts a price for exercise of their constitutional right to send their children to Catholic schools"; court recognized it is "clear that while the State May, without violating the Establishment Clause, provide some secular benefits which incidentally relieve the burdens assumed by parents who choose to send their children to parochial schools, it is not required to do so by the Free Exercise Clause"; court also noted nothing in the record to indicate any of the plaintiffs had "seriously considered removing his child from St. Mark's because of the distance they must travel to compete in interscholastic athletic events. Nor had Mr. Russo ever heard of a student's withdrawing from St. Mark's for that reason."; despite contention their religion required their children to attend Catholic schools when possible and "to attempt to imbue all aspects of their development, physical as well as mental, with the teachings of their faith. There has been no showing, however, that interscholastic athletics represents the only

means for fulfilling the latter duty. Intramural athletics and other forms of extracurricular activities could serve the same ends."; "The gist of the plaintiffs' First Amendment argument is that the defendants, having decided to extend to interested public schools the benefits of Conference membership, Must extend that benefit to parochial and private schools as well. For present purposes the Court will assume that it would have been constitutionally permissible for the defendants to admit St. Mark's to the BHC, the question here, however, is whether the Constitution mandates admission of St. Mark's. The pertinent caselaw clearly indicates that it does not."); see also Fields v. Palmdale School Dist., 427 F.3d 1197, 1206 (9th Cir. 2005) ("As the First Circuit made clear in Brown, once parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished."); Blau v. Fort Thomas Public School Dist., 401 F.3d 381, 395 (6th Cir. 2005) ("The critical point is this: While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child. Whether it is the school curriculum, the hours of the school day . . . the extracurricular activities offered at the school or, as here, a dress code, these issues of public education are generally 'committed to the control of state and local authorities.'") (Emphasis in original); Ross v. Pittinger, No. 06CV0018CVESAJ, 2006 WL 475269 at *1-2 (N.D. Okla. Feb. 27, 2006) (recognizing right of parent to control upbringing of children not without limitation; "The Meyer-Pierce right is focused on the principle that the state does not have the right to interfere with parents' choice of 'a specific educational program-whether it be religious instruction at a private school or instruction in a foreign language.' In other words, Meyer and Pierce established a parental right to decide where to educate their children. This right applies to the educational process as a whole and not to separate

components of the process, such as participation in extracurricular activities."); Hubbard By and Through Hubbard v. Buffalo Indep. School Dist., 20 F. Supp. 2d 1012, 1015 (W.D. Tex. 1998) ("That parents have the primary right and obligation to control the education and upbringing of their children cannot be argued; but that right must have limits-otherwise a truant's parent could plausibly proclaim that he or she was exercising his or her rights while 'home-schooling' a child to be a safecracker or a prostitute. Actually the example fails, because absent limits there could be no compulsory public education laws at all.").

In Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 696 (10th Cir. 1998), Annie had been home-schooled by her parents for religious reasons. Her parents decided, when Annie reached the seventh grade level, Annie would benefit from taking a few classes, such as foreign language, vocal music, and science, at the public school, because the public school's ability to teach these classes "was superior to their instructional capability in those areas, and that attending some classes at the public school would better prepare Annie for college." Id. Annie was allowed part-time status during her seventh grade year, but by the next year, a new superintendent was hired, and he refused to let Annie attend on a part-time basis without permission from the school board. Id. The school board decided that all students must attend on a full-time basis, and a lawsuit resulted.

The court acknowledged the question presented was "the validity of the rule or regulation enacted by the school board, as it impacts on Plaintiffs' right to the free exercise of their religion." Id. at 697. Plaintiffs argued the part-time attendance policy is an indirect burden on "the full and free exercise of their religious beliefs concerning the way in which children should be raised and educated." Accordingly, plaintiffs argued the policy should be subjected to a strict scrutiny review while defendants argued the policy is a neutral policy of general applicability not subject to such a review. The court explained:

> As a general proposition, a law (or policy) that is neutral and of general applicability need not be justified by a compelling governmental interest even if that law incidentally burdens a particular religious practice or belief. On its face, the policy enacted by the school board in this case is neutral and of general application-it applies to all persons who might wish to attend public school on a part-time basis, and prohibits such part-time attendance (with certain specific exceptions, such as fifth-year seniors and special-education students). It applies to students who are homeschooled for secular reasons as well as those home-schooled for religious reasons, and it applies to students attending private schools whether or not those private schools are religious or secular in orientation.

Id. at 697-98 (citations omitted).

* * * *

> We are therefore left with the fact that the board's policy is a neutral policy of general applicability. Plaintiffs do not attempt to argue that the policy directly burdens their right to free expression, nor could they. The policy does not prohibit them from home-schooling Annie in accordance with their religious beliefs, and does not force them to do anything that is contrary to those beliefs. The board's policy therefore does not violate traditional free-exercise.

Id. at 698-99 (citations omitted).

* * * *

> We have no quarrel with Plaintiffs' assertion that Annie's parents have a constitutional right to direct her education, up to a point. For example, they have a right to send her to a private school, whether that school is religious or secular. Numerous cases, however, have made it clear that this constitutional right is limited in scope. Federal courts addressing the issue have held that parents have no right to exempt their children from certain reading programs the parents found objectionable, or from a schools' community-service requirement or from an assembly program that included sexually explicit topics. Other courts have determined that home-schooled children may be subjected to standardized testing to assess the quality of education the children are receiving, even over the parents' objections. In addition, states may constitutionally require that teachers at religiously-oriented private schools be certified by the state. The case law in this area establishes that parents simply do not have a constitutional right to control each and every aspect of their children's education and oust the state's authority over that subject.

Id. at 699 (citations omitted). Following this discussion, the court then considered plaintiffs' reliance on Supreme Court cases in the unemployment context in support of their claim, much like the one

asserted herein, that they are entitled to a benefit conferred by the state. Id. at 701. Specifically, the plaintiffs argued: "(1) they have been denied a benefit that has been conferred on other students who are allowed to attend public school part-time; (2) they have been denied that benefit because their religious beliefs require that Annie be educated at home part-time; and (3) therefore, an exception must be made to accommodate their beliefs and allow Annie to attend part-time." Id. Plaintiffs contend the part-time attendance "is a benefit conferred by the government, and that they may not be disqualified from receiving that benefit if they have a religious motivation for taking certain actions (here refusing to send Annie to public school full time) that would otherwise disqualify them from receiving the benefit." Id. Stated another way, "if a governmental entity offers a benefit such as part-time attendance under limited qualifying conditions, and a claimant's religious beliefs or practices prevent him or her from meeting those conditions, the benefit must be awarded to the claimant despite the failure to meet the conditions." Id. The court explained the difficulty it found with this argument as follows:

> it would elevate Plaintiffs to a higher status than other home-schoolers who educate their children at home (or, for that matter, in a private school) for secular rather than religious reasons. That is, the part-time attendance policy, which at present precludes Annie and all other home-schooled or private-schooled children from taking a few selected classes from the public school, would be rendered inapplicable to religious home-schooling families but not to secular home-schooling or private-schooling families. The Free Exercise Clause does not extend so far. It is designed to prevent the government from impermissibly burdening an individual's free exercise of religion, not to allow an individual to exact special treatment from the government. Despite Plaintiffs' arguments to the contrary, what they seek in this case is special treatment not accorded other home-schooled or private-schooled students. They seek an added exception to the part-time attendance policy, that would accommodate people who home-school for religious reasons. Nothing in the Free Exercise Clause requires that such special treatment be provided.

Id. at 701-02 (citations omitted). Here too, the plaintiffs seek special treatment based on religious reasons. Conversely, a secular private school whose continued participation in TAPPS is declined

would not be able to exact such treatment. Based on the decisions in Jesuit, Gary S., and Swanson, no Free Exercise Clause or right to control the education of one's children is burdened.

The Court is mindful of the Walsh v. Louisiana High School Athletic Ass'n decision cited by both sides but for different propositions. While the plaintiffs believe this decision supports their position that the UIL rule impermissibly burdens their rights, the defendants contend "[t]he most important holding of Walsh . . . is that a student's interest in participating in interscholastic athletics is a mere expectation rather than a constitutionally protected claim of entitlement and falls outside the protection of due process." Defendants' Reply to Plaintiffs' Response to Defendants' Motion to Dismiss, docket #11 at page 2.

The challenge in the Walsh case concerned the application of a student transfer rule. Walsh v. Louisiana High Sch. Athletic Ass'n, 616 F.2d 152 (5th Cir. 1980). The plaintiffs alleged the student transfer rule of the Louisiana High School Athletic Association "unduly burdened their first amendment right to the free exercise of religion an deprived them of their fourteenth amendment right of equal protection." Id. at 154. The Louisiana High School Athletic Association (LHSSA) "is a voluntary association of public, private, and parochial high schools in the State of Louisiana." Id. The rule at issue provided that "upon the completion of elementary or junior high school, a student is eligible to participate immediately in interscholastic athletic competition only at a high school within his home district." Id. A student who matriculates at a high school outside of his home district is ineligible to participate in interscholastic athletic competition for a one year. Id. Because the only Lutheran High School in the area was outside of the home district of the seven Lutheran-affiliated elementary or junior high schools, any student who enrolled at the Lutheran High School was ineligible to compete in interscholastic athletic competition for one year. Id. at 155. In finding the transfer rule did not violate the first amendment, the court wrote:

> A regulation that is neutral on its face and is motivated by legitimate secular concerns may, in its application, offend the first amendment requirement of governmental neutrality if it unduly burdens the free exercise of religion. To pass constitutional muster, the application of such a regulation either (1) must not interfere with, burden, or deny the free exercise of a legitimate religious belief or (2) must be justified by a state interest of sufficient magnitude to override the interest claiming protection under the free exercise clause.
>
> It cannot be denied that, by imposing a cost on a parent's decision to enroll his children in Lutheran High School upon graduation from any of the seven Lutheran elementary schools in the metropolitan New Orleans area, the transfer rule places an indirect and incidental burden on the free exercise of the religious beliefs of these parents. The decisive issue is whether this indirect and incidental burden is an impermissible price to exact from these parents for the free exercise of their religious beliefs. We believe it is not.
>
> The encroachment of the transfer rule on the free exercise of religion is both limited in scope and insignificant in magnitude. The transfer rule does not deny these parents or children the right to actively practice the Lutheran faith. Similarly, it neither prohibits a parent from enrolling his child in Lutheran High School nor interferes with the ability of such a child to obtain the religious education provided by that school. The rule merely prevents a child from participating in interscholastic athletic competition during his ninth grade year. Even so, the ambit of the rule is limited. It does not forbid a student from participating in all athletic activities. The transfer rule does not prevent ninth graders at Lutheran High School from participating in intramural athletic competition. Neither does the rule prohibit such students from trying out for or from practicing with the Lutheran High School varsity athletic teams. It simply prevents a child from representing Lutheran High School in an interscholastic athletic contest for a period of one year. The burden placed on the free exercise of religion is de minimis.

Id. at 157-58 (citations omitted). Here, too, rule 12(d) of the University Interscholastic League Constitutional and Contest Rules for 2006-2007 does not deny Jared or his parents the right to actively practice their faith, it does not prohibit the Farharts from enrolling Jared in Cornerstone, and it does not prohibit Jared from obtaining the religious education provided by Cornerstone. The rule also does not forbid Jared from participating in all athletic activities, intramural athletic competitions, practicing with UIL participants, or even competing in interscholastic activities in TAPPS or similar leagues. In fact, the rule only prohibits Texas non-public schools, unlike the

transfer rule which applied specifically to students, from applying for UIL membership if its right to participate has "been suspended or revoked for violating rules or codes by another league similar to the UIL," or if that school qualifies for membership in another organization similar to the League. It would appear, therefore, that it may be the actions of Cornerstone and not the UIL which is burdening the rights of the Farhart plaintiffs.

In addition to finding the burden placed on the Walsh plaintiffs' free exercise of religion de minimis, the court also found the transfer rule along with its "incidental burden on the free exercise of religion" constitutionally justified based on the "magnitude of the state's interest in the regulation and the lack of an equally effective and workable alternative." The court explained:

> The state's interest in the regulation is compelling. Its interest in regulating interscholastic athletic competition is not disputed by the parties to this litigation. Indeed, all parties recognize that the recruiting of promising young athletes properly may be the focus of LHSAA regulations because of the unwholesome and harmful impact such recruiting has both on interscholastic athletic competition and on the individual student athletes. The LHSAA promulgated the transfer rule to lessen or remove that harmful impact.

Id. at 158. The court then considered and rejected plaintiffs' fourteenth amendment right of due process argument as follows:

> The due process clause of the fourteenth amendment extends constitutional protection to those fundamental aspects of life, liberty, and property that rise to the level of a "legitimate claim of entitlement" but does not protect lesser interests or "mere expectations." A student's interest in participating in a single year of interscholastic athletics amounts to a mere expectation rather than a constitutionally protected claim of entitlement.

Id. 159 (citations omitted). Despite plaintiffs' assertions to the contrary, the Court does not find rule 12(d) to be more than a de minimis burden on the Farharts' rights to educate their child and to their free exercise of religion.

Is Rule 12(d) Subject to Strict Scrutiny, Does it Bear a Rational Relationship to Legitimate Governmental Purpose, and Does it Violate Plaintiffs' Rights to Equal Protection?

Defendants contend rule 12(d) does not implicate a fundamental right or a suspect class because interscholastic participation is a mere expectation, and because no fundamental right is implicated, rational basis is the standard to be used to evaluate plaintiffs' equal protection claim. Plaintiffs, on the other hand, state the fundamental rights being implicated are their right to educate their child and their right to free exercise of religion. Consequently, strict scrutiny is the standard to be applied. However, in Plaintiffs' Sur-Response to Defendants' Motion to Dismiss, docket #12 at page 3, plaintiffs seem to concede rational basis is the standard to be applied to their equal protection claim as they state, "Plaintiffs are entitled to develop evidence to demonstrate that there is no rational basis for the two distinctions they challenge," i.e. (1) "public and private schools;" and (2) "two large private schools and all other private schools."

Rational basis is the standard to be applied in an equal protection analysis where the classification being challenged "neither trammels fundamental rights or interests nor burdens an inherently suspect class." Walsh, 616 F.2d 160. As discussed above, this Court has not found plaintiffs' fundamental rights to have been trammeled or burdened nor have plaintiffs argued they are part of an inherently suspect class. Therefore, a rational-basis standard will be applied. Jesuit College Preparatory Sch. v. Judy, 231 F. Supp. 2d 520, 534-35 (N.D. Tex. 2002) (where no fundamental right implicated, "the rational-basis standard of review" applies to "Plaintiffs' equal protection claim), judgment vacated and appeal dismissed, No. 02-10174, 2003 WL 23323003 (5th Cir. Feb. 26, 2003).

In performing a rational-basis analysis, the following guidelines have been provided:

> Under the rational-basis analysis, the legislation or official action "is presumed to be valid and will be sustained if the classification drawn by the statute [or official action] is rationally related to a legitimate state interest." Under the rational basis test, the legislative body or official decisionmaker that establishes the classification or category need not "actually articulate at any time the purpose or rationale supporting its classification." "Instead, a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." The state has no obligation "to produce evidence to sustain the rationality of a statutory classification." A rule or statute which sets up a classification "is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." Under rational-basis review, a court is required to 'accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." In sum, a classification will be upheld if there is a rational relationship for the difference of treatment between the groups, and some legitimate state interest is served.

Id. at 529; see Angstadt v. Midd-West Sch. Dist., 377 F.3d 338, 345 (3rd Cir. 2004) ("'Under rational-basis review, the challenged classification must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."'").

As in Jesuit, defendants here contend a number of rational bases exist to support rule 12(d). In their motion, defendants assert:

> The UIL's purpose in its rules, as demonstrated in all of the previously cited cases concerning the UIL and other state interscholastic associations, is to equalize competition, restrict recruitment, and protect the student participants from undue pressure or exploitation. A very good discussion can be found in Jesuit, 231 F. Supp. 2d at 532-534.
>
> The rule, Section 12(d), recognizes the differences between public and private schools and is designed to equalize or eliminate the inherent competitive advantages that private schools have over public schools. A public school does not have the freedom to select the students who will attend it, rather is required by law to accept all persons aged 5 to 21 within its boundaries, including children with disabilities. Texas Education Code §§ 25.001 *et seq.* and §§ 29.001 *et seq.* It is also limited to the student competitors in its attendance zone. It cannot expand or contract its student body size at will to fit competition classifications.

> In contrast, a private school has no such limitations. It can recruit as students, interscholastic participants from across a metropolitan area, the entire state, the nation, or even the world. A private school can offer tuition breaks and scholarships. The selectivity of students by private schools allows them to cherry pick individual students based upon special skills and to manipulate their student-body-size classification for level of competition purposes. By manipulating its size, a private school could drop its classification level to enhance its competitive advantage.
>
> Additionally, although the UIL is generally thought of as providing athletic competitions, it must be remembered that the UIL provides academic competitions as well. Private schools can impose academic admission standards on its students, which would given them an unfair advantage in the UIL's academic competitions over a public school of the same size that must take all students within its boundaries.
>
> Rule 12(d) puts any eligible private school in the largest classification in an attempt to equalize the competitive filed [sic]. It does so by requiring private school[s] to compete in the category with the largest public schools that have the largest population. The rule therefore prevents the lower-classification-sized UIL member from being dominated by select teams fielded by private schools. It should be noted that the two private schools admitted to the UIL under Rule 12(d) have little more than half the minimum enrollment of 5A schools, the largest classification.
>
> In addition to requiring private schools to play in the largest classification, another important aspect of Rule 12(d) is that it denies membership to a private school that qualifies for another similar scholastic league. This aspect of the rule has a rational basis in that it prevents the UIL from becoming a haven for private schools that violate the rules of other leagues. As long as the school qualifies for another league, it cannot violate the rules of that league knowing that if it is caught, it can simply join the UIL. Without this aspect of Rule 12(d), the UIL could become a dumping ground for private schools that have chosen not to abide by the rules of the league in which they now compete.

Defendants' Motion to Dismiss with Brief, docket #6 at pages 9-11. Based on the foregoing, the Court finds rule 12(d) bears a rational relationship to the state's interest of reducing unfair or unequal competition in extracurricular activities and prevents the UIL from becoming a dumping ground for those private schools eligible or qualified to compete in TAPPS or similar organizations but violate rules to be precluded from those organizations in order to join the UIL.[8]

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[8] Despite plaintiffs' assertions to the contrary, it is no secret that Cornerstone has "a history of bending the rules to field elite athletic teams." Jim Vertuno, Texas Megachurch Backing Bill to OK Public, Private School Competition, Christian Post, May 4, 2007, available at http://www.christianpost.com/pages/print.htm?aid=27242. As the article notes, the politically powerful megachurch in San Antonio was pushing Texas lawmakers to let its small Christian school [Cornerstone] join the UIL. The article provides additional insight into the Cornerstone

program:

> The Cornerstone Christian school has been in trouble several times in recent years with the Texas Association of Private and Parochial Schools over concerns about how it put together basketball squads that included several out-of-state and international players.
>
> * * * *
>
> Texas is one of only one of three states with separate athletic championships for public and private schools. TAPPS has about 250 member schools. The UIL has about 1,300.
>
> Public school officials and state lawmakers have long fought to keep private schools out of the UIL, fearing the private schools could recruit athletes and bend rules.
>
> The state made two exceptions in 2003, allowing Jesuit schools in Dallas and Houston to join after TAPPS determined they were too big to compete in a league comprised mostly of small schools.
>
> Essentially banned from TAPPS in September 2006, Cornerstone applied for entry to the UIL and was denied. The school then filed a federal religious discrimination lawsuit to force its way in.
>
> "Our school is going to be the very best we can make it and no one is going to prevent us from achieving excellence in any area," [John] Hagee told his congregation when he announced the lawsuit in February.
>
> But a lawsuit could drag on for years and the school hopes lawmakers will crack open the doors to the UIL before the legislative session ends May 28.
>
> * * * *
>
> UIL Athletic Director Charles Breithaupt said public schools are happy to play regular season games against private schools, but don't want them competing for the same championships.
>
> "Private schools have to recruit. That's their nature," Breithaupt said. "They have to open their doors and invite people to come in. They can be as big or small as they want to be."
>
> The church school has played hardball in athletics and has gotten in trouble for it.
>
> It first ran into trouble with TAPPS when it recruited five Mexican players, including future NBA player Eduardo Najera, for the 1994-95 season. Cornerstone sued for reinstatement and was readmitted in 2000.
>
> It wasn't long before more troubles cropped up.
>
> In December 2005, Cornerstone was kicked out of TAPPS postseason competition for the school year, although most of teams were later reinstated. TAPPS did rule 11 basketball players were ineligible because they received improper room-and-board inducements and the team was placed on probation.
>
> TAPPS refused to renew Cornerstone's membership last year but Cornerstone officials insist the school wasn't officially sanctioned for rules violations.
>
> "They did not renew our contract because it was not in their best interest," Hulme said.
>
> Hulme said Cornerstone wanted out of TAPPS, but acknowledged the school applied to renew its membership.

Does Rule 12(d) Violate Chapter 110 of the Texas Civil Practice & Remedies Code Entitled "Religious Freedom?"

In Plaintiffs' Response to Defendants' Motion to Dismiss, plaintiffs contend the defendants have not addressed this state law claim. Defendants again rely on the Jesuit decision as dispositive of this claim. In finding defendants entitled to dismissal of this claim in that case, the court in Jesuit looked to federal law for guidance and explained:

> The appropriate start[ing] . . . point in the analysis of this claim is to determine the meaning of the phrase "a person's free exercise of religion." In setting the parameters for the free exercise of religion, the Supreme Court has stated:
>
> > The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious beliefs as such." The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the

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"TAPPS was no longer the route we wanted to go," Hulme said. "We submitted our contract. They voted not to accept."

UIL officials say league rules prohibit private schools that are eligible to play in another league to join UIL. They can also deny schools banished from another league for rules violations.

"This is simply something that is not fair," Hagee told Senators, calling the exclusion discrimination.

* * * *

Hagee pledged to lawmakers that Cornerstone would abide by UIL rules if allowed to play. The school announced in early April it was dropping its elite-level basketball program in favor of a team made up of local players.

Sen. Leticia Van de Putte, D-San Antonio, praised the Cornerstone Church as an outstanding member of the San Antonio community. But knowing the school's history of troubles in TAPPS, she voted against the bill in committee and again on the Senate floor.

"All I know is they were in a league and they were kicked out," Van de Putte said. "In all good conscience, I couldn't do it. I just couldn't affirm the violations."

> basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.
>
> [T]he "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation.
>
> A thorough review of Plaintiffs' Complaint necessarily establishes that none of the aforementioned concerns is implicated. The Complaint contains no allegations that the ban interferes with Plaintiffs' right to believe or profess whatever religious doctrine they desire, compels or causes affirmation of a particular religious belief, punishes the expression of religious doctrines Defendant believe to be false, imposes special disabilities on the basis of religious view or religious status, or lends the state's power to one side in a controversy over religious authority or doctrine. Moreover, no allegations assert that the ban prohibits Plaintiffs from performing *any* act associated with the practice of their religious beliefs, or requires them to perform an act repugnant to their religious beliefs. Additionally, no allegations assert that a private school cannot participate in UIL activities because of the religious belief the school espouses. From the record, the ban applies to *all* private schools, regardless of religious affiliation or philosophy. For these reasons, Plaintiffs have set forth no substantial burden or restriction on the exercise of their religion. If *any* burden exists, which the court serious doubts, it is no more than *de minimus*. Even if there is a *de minimus* burden on the exercise of Plaintiffs' religion, Plaintiffs' claim fails as a matter of law because the plain and unequivocal language of the statute necessarily requires the government action to be a *substantial* burden on the exercise of a person's religion. Plaintiffs have articulated no set of facts to establish that they would be entitled to relief under this claim.

Jesuit, 231 F. Supp. 2d at 534-35 (citations omitted, emphasis in original). Likewise here, rule 12(d) applies to all private schools regardless of religious affiliation, if any. Moreover, this Court's prior discussion of the case in terms of the Free Exercise Clause found the rule did not interfere with the plaintiffs' right to believe and profess their religious doctrine, punish their religious expression, impose special disabilities on the basis of plaintiffs' religious views, or substantially burden the exercise of their religion.

In addition, defendants assert the plaintiffs may not assert a claim under this chapter because they failed to give them written notice by certified mail, return receipt requested as required by §

110.006(a) of the Texas Civil Practice and Remedies Code. Plaintiffs have not denied or responded to this claim. Section 110.006(a) provides:

> (a) A person may not bring an action to assert a claim under this chapter unless, 60 days before bringing the action, the person gives written notice to the government agency by certified mail, return receipt requested:
>
> (1) that the person's free exercise of religion is substantially burdened by an exercise of the government agency's governmental authority;
>
> (2) of the particular act or refusal to act that is burdened; and
>
> (3) of the manner in which the exercise of governmental authority burdens the act or refusal to act.

Tex. Civ. Prac. & Rem. Code Ann. § 110.006(a). Based on the foregoing, the Court finds plaintiffs' state law claim should also be dismissed. Having considered all the issues raised in the motion to dismiss, the Court finds the motion has merit and should be granted. Accordingly, IT IS HEREBY ORDERED that Defendants' Motion to Dismiss with Brief (docket #6) is GRANTED.

Defendants' Initial Motion for Summary Judgment and Evidence

In response to this Court's order of August 27, 2007 (docket #22), the parties have submitted their summary judgment evidence concerning Cornerstone's threshold qualification or disqualification in relation to the initial requirement of rule 12(d) of the University Interscholastic League's Constitution and Contest rules for 2006-2007. The Court stated that kind of fact question could be better addressed in a motion for summary judgment and required the parties to file appropriate summary judgment evidence including affidavits, admissions or denials of Cornerstone's ability to comply with rule 12(d). As the Court noted in its order, "[i]n this search for the truth of why Cornerstone has brought this lawsuit, it would be most helpful to review minutes, correspondence, and other records from the Texas Association of Private and Parochial Schools

(TAPPS) in appropriate summary judgment form." That evidence has been submitted and will be considered accordingly.

Summary Judgment Standard

A motion for summary judgment should be granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. FED. R. CIV. P. 56(c). A dispute concerning a material fact is considered "genuine" if the evidence "is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). It is not the Court's function to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 249. The Court must determine if there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Id. Of course, in ruling on a motion for summary judgment, all inferences drawn from the factual record are viewed in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986).

If the party moving for summary judgment carries its burden of producing evidence which tends to show there is "no genuine issue of material fact, the nonmovant must then direct the court's attention to evidence in the record sufficient to establish the existence of a genuine issue of material fact for trial." Eason v. Thaler, 73 F.3d 1322, 1325 (5th Cir. 1996). The nonmoving party may not rely upon mere conclusory allegations to defeat a motion because allegations of that type are not competent summary judgment evidence and are insufficient to defeat a proper motion. Id. In fact, if the "nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation," a motion for summary judgment may be granted even in cases "where

elusive concepts such as motive or intent are at issue." Forsyth v. Barr, 19 F.3d 1527, 1533 (5th Cir.), cert. denied, 513 U.S. 871 (1994).

The party opposing the motion also may not rest on the allegations contained in the pleadings but "must set forth and support by summary judgment evidence specific facts showing the existence of a genuine issue for trial." Ragas v. Tennessee Gas Pipeline Co., 136 F.3d 455, 458 (5th Cir. 1998). In meeting this requirement, the party must "identify specific evidence in the record" and "articulate the precise manner in which that evidence supports his or her claim." Id. Rule 56 of the Federal Rules of Civil Procedure does not impose upon this Court the "duty to sift through the record in search of evidence to support a party's opposition to summary judgment." Id. (quoting Skotak v. Tenneco Resins, Inc., 953 F.2d 909. 915-16 & n.7 (5th Cir.), cert. denied, 506 U.S. 832 (1992)). A summary judgment will only be precluded by disputed facts which are material, i.e. "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Factual disputes which are irrelevant or unnecessary to the issue will not preclude summary judgment. Id.

Rule 12(d) of the University Interscholastic League Constitutional and Contest Rules for 2006-2007

Although the language contained in rule 12(d) of the University Interscholastic League Constitutional and Contest Rules for 2006-2007 (hereinafter rule 12(d)) is an uncontroverted fact, the interpretation of the rule by the parties does not share the same fate. As previously set forth above, rule 12(d) provides, in part, as follows:

> PRIVATE SCHOOLS. Unless its right to participate has been suspended or revoked for violating rules or codes by another league similar to the UIL, a Texas non-public school may apply for UIL membership in the largest conference (currently 5A) provided the school meets all of the following conditions:

1. school is accredited by the Texas Private School Accreditation Commission;
2. school does not qualify for membership in any other organization similar to the League;
3. school fits the following definition of a high school. . . .

Defendants contend Cornerstone does not meet the criteria for participating in the UIL because its right to participate in another league similar to the UIL "has been suspended or revoked for violating rules of codes." In an alternative argument, the defendants maintain Cornerstone is also disqualified by the fact Cornerstone is eligible for membership in another organization similar to the UIL. In response, Cornerstone states its membership in TAPPS was not suspended or revoked but rather it was not renewed. Cornerstone also states it is "eligible for TAPPS membership in the same sense that the undersigned counsel is 'eligible' for membership in the San Antonio Country Club." Because Cornerstone's application will not even be considered by TAPPS, its alleged eligibility is non-existent. In support of their respective positions, both parties rely on the deposition testimony of Edd Burleson, the current director of TAPPS, and exhibits consisting of: 2007-2008 TAPPS Manual; TAPPS Executive Board Meeting Minutes; 2005 Ineligibility Materials; correspondence between Cornerstone and TAPPS; Materials leading up to the Board's decision to not accept Cornerstone's Contract in the fall of 2006, and a Probations and Sanctions printout from TAPPS website.

Deposition Testimony

Mr. Burleson testified that since 1995, he has been and currently is the director of TAPPS, and his job calls for the day-to-day operations of that organization. The final authority of TAPPS is governed by a nine-person board, but Mr. Burleson and his staff carry on the daily operations and purpose of TAPPS which is "to coordinate the extracurricular activities for our member private

schools," a function analogous to that of the UIL. TAPPS membership is made up of approximately 237 private and parochial schools in Texas. The size of these schools range from 10 to 1,000 high school students. Similar to the UIL, TAPPS also divides the schools by size into six classifications, 1A through 6A, for competitions. Although TAPPS offers competition in both athletics and academics as does the UIL, TAPPS holds a duet and solo acting competition instead of the one-act play competition of the UIL, and offers an art competition which the UIL does not offer at the high school level. TAPPS, as the UIL, is governed by a constitution in place since 1978, and bylaws generally drafted by the TAPPS executive board.

With respect to Cornerstone, Mr. Burleson stated they joined TAPPS in approximately 1990 until 1995, left TAPPS for a period of time, and returned to TAPPS in 1998 until 2006. Mr. Burleson responded to questioning concerning their membership as follows:

Q: Do you know why they're not members of TAPPS now?

A: The board voted not to accept their contract when they met in September of 2006.

Q: Do you know why the board did that?

A: Yes, sir. It was an ongoing situation with students that were being brought in.

Q: Students being brought in to Cornerstone School?

A: Yes, sir.

Q: Did TAPPS believe for some reason that the way Cornerstone brought the students in was inappropriate?

A: Yes, sir.

Q: Did TAPPS have an opinion, as far as you know, whether or not TAPPS was involved in violations of the rules of the organization?

A: Yes, sir. TAPPS – TAPPS felt that Cornerstone was in violation. (Answer was objected to as nonresponsive.)

Q: Did TAPPS have any problems prior to 2006 with eligibility issues with TAPPS?

A: Back in the early '90s, yes, sir.

Q: What were those problems?

A: They had to do with bringing in foreign students. TAPPS considered that illegal recruiting.

Mr. Burleson then discussed a letter dated May 19, 2004, written to Alan Hulme, the administrator at Cornerstone, concerning some allegations being made by other schools in Cornerstone's district. Specifically, the letter provided:

> For several years, Cornerstone Christian School has been very successful in a number of TAPPS extra-curricular activities. In most instances, the success of your school has had a positive effect on our association and its perception by the public and the media. However, along with your success, there have been questions and allegations by coaches, players and parents in regard to your athletic program. Some of these allegations have involved inducements to athletes, and the manner by which these athletes were contacted by the school[.]
>
> These allegations reflect poorly on TAPPS and Cornerstone Christian School[.]
>
> The TAPPS Executive Board is as eager as you and your staff to stop these allegations and remove any blemish to the reputation of your school.
>
> In order to accomplish this, the TAPPS Executive Board has scheduled a meeting to allow you and your staff to answer questions concerning allegations of inducement of athletes by members of your staff or individuals connected to your school.

The letter requested Cornerstone to bring various items with it to the meeting and concluded as follows:

> The Board is also interested in the extent to which Reverend Hagee is involved in the interview process for potential students.
>
> It is the Board's desire that after reviewing this documentation and hearing from you and your staff, it can issue an official statement that your program has been reviewed and that:
> 1) no evidence of inducement has been found;
> 2) all coaches are aware of the rules and that they have agreed to abide by them

Mr. Burleson acknowledged he found no violations at that time. He then went on to discuss events at the September 2006 board meeting and explained what happened with Cornerstone as follows:

> Q: . . . . And what happened at that board meeting which involved Cornerstone?
>
> A: Okay. The standard procedure at these meetings is to review all contracts that come in annually and give the board an opportunity to accept or deny them. And the motion was made to accept all the 5A contracts with the exception of Grace Prep and Cornerstone until further discussion.
>
> And following that motion, at a little later point in time, Cornerstone representatives Alan Hulme and Walter Webb appeared before the board to state the intentions regarding TAPPS participation.
>
> Q: And did the board take any action?
>
> A: At that time, Marty made the motion to deny the Cornerstone Christian membership because it was not in the best interest of TAPPS at that time to have Cornerstone as a member of TAPPS.
>
> That motion was seconded and voted, one opposed and one abstained. So there were seven votes in favor.
>
> Q: So they were suspended or their application was not –
>
> A: Their contract was simply - - [an objection to form was made]
>
> A: . . . . Their contract was simply not accepted.

Mr. Burleson then explained the next mention of Cornerstone in the minutes exhibit concerned an appeal of a baseball game postponed because of darkness. Discussion was then held concerning a January 18, 2006 board meeting:

> Q: What happened at that board meeting involving Cornerstone?
>
> A: This is – this is the one – and actually, these are out of order, and I apologize.

This was the meeting at which time Cornerstone met with the board to explain the boarding students. Cornerstone had been invited to a meeting on November 4th, and they chose not to come. And as a result of them not coming to the meeting, all of their programs were placed on probation or sanctioned. They were not eligible to compete in competition.

Once the representatives from Cornerstone met on this date, then the very first item of business was to lift all sanctions for all activities except the boys basketball, pending further consideration. Because they had met – they had met the requirements of the board at the meeting once they did that.

And then following that interview, the motion was made that the 11 players – and those are listed in the documents; we don't mention those kids by name, but they're in the supporting documentation – "ineligible due to inducement, after taking a survey of current TAPPS schools that are boarding schools," they found that the average room and board does not compare with the others in TAPPS.

Q: Other member schools, you mean?

A: Of the member schools in TAPPS that have been boarding schools for a number of years.

Q: What was – what were the examples that the board considered?

A: Marine Military Academy, for example, their room board and tuition was 22 – in excess of 22,000 a year. Bryan Allen Academy was 27 for room, board and tuition. San Marcos Baptist Academy, 22,000, room, board and tuition. And the Allen Academy did break it out and show that their room and board is 20,000 a year. San Marcos, room and board is 8,000 a year.

Cornerstone Christian's room and board is $100 a month. And the fact that only basketball players were living in the boarding facility at that extremely low room and board fee indicated to the board that this was inducement.

Q: Does TAPPS have any rules regarding inducement?

A: Yes, sir. Those are spelled out in the bylaws.

Q: Why do you have rules like that?

A: It's to prevent – prevent schools from getting an unfair advantage by inducing players to come to their schools for athletic purposes.

Mr. Burleson clarified that the room and board fees discussed were for a nine-month period. He then moved on to the next set of board minutes dated January 26, 2006, wherein Cornerstone was referenced:

A: This – this was noted in the – in the minutes that the board would discuss procedure on how will ineligible players be able to regain their eligibility, dealing with Cornerstone and another school that was sanctioned at the same time.

Q: Did those ineligible players playing at Cornerstone at that time ever regain their eligibility?

A: No sir.

Q: Do you know where those students were from?

* * * *

A: Some were from the East Coast and some were from – one was from Cameroon, I believe France, Israel

Q: Well, I looked at the documents. Do you recall that about four were from the East Coast? Is that right?

A: I think that's about right.

Q: And the remainder, so that would be about seven or eight or nine, were from different countries?

A: Yes, sir.

Q: Like Cameroon and Israel?

A: Yes, sir.

Q: Okay. How long was Cornerstone prohibited from playing basketball in TAPPS because of that?

A: They were suspended for – those students were ruled ineligible for that season. And the basketball program, once those players were –

> were ruled ineligible and forfeited the games in which they played, they were allowed to continue their season. In fact, they were able to make the playoffs without those ineligible players they lost in the first round.

Mr. Burleson stated Cornerstone basketball was placed on probation for three years, i.e., the remainder of 2006, and for the 2006-07 and 2007-08 school years. He also stated probation, unless other sanctions are specified in the probation, "simply means we're watching you very closely to make sure you abide by the rules." He continued by noting that TAPPS continued to watch Cornerstone until September 10, 2006, the day the board decided not to accept Cornerstone's contract.

Mr. Burleson was then engaged in discussion concerning the documentation he had which led to the board's denial of Cornerstone's contract. Mr. Burleson referenced several exhibits containing correspondence between the TAPPS office and Cornerstone concerning the ineligibility of the boarding students, the information on the boarding students, and information on eligibility issues. Mr. Burleson stated he was personally concerned with the direction Cornerstone was taking so he wrote a letter to Mr. Hulme dated August 24, 2006, sharing these concerns. He indicated these concerns were also shared with the TAPPS board, but the board did not direct him to write this letter. The letter provided:

> I trust that you will receive this letter in the same spirit in which it is written. During the past year, it has become apparent that Cornerstone Christian School and TAPPS are growing farther apart in regard to their mission and ministry.[9]

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[9] The explanation for this statement was as follows:

> [W]hen the 11 boarding students were declared ineligible, Cornerstone simply formed what they called a traveling team or a church team. They – they wore different uniforms, they were identified as the Cornerstone Church Team, even though these were still students living in the boarding facility and attending Cornerstone School.

From information gathered from news articles in the San Antonio Express; from a number of sports web sites, including rivals.com, texasroundball.com and txprivatesports.com, as well as a private website developed and maintained by a group of parents, Cornerstone is described as a "prep" school which accepts 5th year players and students who are over age for high school sports.

According to persons who identified themselves as members of Cornerstone Church, an appeal was recently made at the church asking for church members who were willing to take into their homes, foreign students and students from across the U.S. who desired to have a "good" education at Cornerstone Christian School. According to reports the contact phone number was a church number, but Coach Walter Webb had all the details about the needs of these students. It was reported that there were 16 to 19 of these students, all boys and all "obviously" athletes.

All indications are that these students will play for the Cornerstone Church team, while they attend Cornerstone School. While this is not a violation, the practice breeds distrust among the TAPPS schools that are aware of the situation.

It is my understanding that the forming of the Cornerstone Church team was a result of actions taken by the TAPPS Executive Board in January of this year, when several student athletes were ruled ineligible for TAPPS participation due to violation of the inducement rule. While this was an immediate solution for the ineligible students who had made a commitment to Cornerstone, and for Cornerstone which had made a commitment to these young men, it was not intended to become a common practice for schools and churches that have as strong ties as does Cornerstone Church/School.

Providing a "prep" school for 5th year high school students and for over age students is a worth while ministry. Seeking host families for student-athletes who desire a Christian education is a worthy ministry. Having the goal of being recognized as one of the top basketball programs nationwide is a lofty goal. However, these practices do not fit the mission of TAPPS nor the parameters of TAPPS competition.[10]

If Cornerstone is committed to these goals and ministries, it will be better for both Cornerstone and TAPPS to go separate ways in accomplishing their respective ministries.

* * * *

The board and I discussed this. That in itself is not a violation, but it appeared to be – appeared to be a way to circumvent the rules.

[10] Mr. Burleson states this was simply his way of saying – "emphasizing that it appeared that Cornerstone's ministry was taking it in a different direction from what TAPPS expects of its schools."

> If Cornerstone Christian School would like to continue its membership in TAPPs, representatives from the school should meet with the Board and convince the Board that Cornerstone Christian School will follow not only the letter of the rules, but the spirit of the rules as well. Unless representatives can meet with the Board and convince them of their good intentions, it is very unlikely that the Board will vote to renew Cornerstone's contract.
>
> If Cornerstone School is fully committed to the direction it is now moving, it might be in your best interest to announce your school's withdrawal from TAPPS in order to pursue a ministry that is quite good, but is simply not in accord with TAPPS guidelines.

In response to questions of what direction Mr. Burleson thought Cornerstone was taking, he responded:

> A: According to statements made by their coach, they wanted – they wanted their basketball team to be nationally recognized, they wanted to be a – a national powerful private school scene. . . . One of the first letters that we wrote, again, that it was our concern that, could Coach Webb, who has these lofty goals and who had worked in some – some programs on the East Coast that – that had been brought to discussion in the media, our concern was, could Coach Webb work within the parameters of TAPPS.
>
> We do not allow our schools to go to national tournaments after our season is over.
>
> Q: Why not?
>
> A: We feel like a state championship for the state of Texas for a school in TAPPS should be the ultimate goal. It should not be a step toward a national championship. It is not secondary. Our state championship is not secondary to anything. And if the goal of the coaching staff at Cornerstone was for national recognition, we did not understand how he could work within our parameters and reach his goal.

Mr. Burleson then acknowledged Cornerstone applied for membership for 2006-07 in TAPPS. He stated that after discussion the "board voted to not accept their contract, which, in essence, terminated their membership." He stated a letter to that effect was sent to Cornerstone, and

Cornerstone did not appeal that decision even though that option was available. The questioning then turned to the following:

Q: Was Cornerstone's membership in TAPPS ever revoked?

A: Yes.

Q: When was that revocation?

A: That was back in '94, '95.

Q: Has it been revoked since that time?

A: No, sir.

Q: Has Cornerstone's whole program ever been put on suspension?

A: Yes.

Q: When was that suspension?

A: That suspension was put in place November of 2005

Q: How long did that suspension last?

A: Until January of 2006.

Q: And that suspension was based upon?

A: Their failure to attend the meeting and describe to the board their basketball program.

Q: Is that when you let the other programs, after they came to the meeting, proceed but put the basketball program on probation?

A: Yes, sir.

Q: Do you believe that TAPPS is eligible for membership – I mean, Cornerstone is eligible for membership in TAPPS now?

A: If they meet the criteria spelled out in the constitution.

Q: What criteria are you talking about?

A: That in order for membership, a school must be a private or parochial school, and then those two are defined.

* * * *

Q: Can Cornerstone apply this year to be a member of TAPPS?

A: They can apply.

Q: What considerations would the board make in reviewing their application?

A: We're assuming that they would review their application.

Q: You don't know that they would?

A: No, sir.

Q: Can the board determine that it doesn't want to review an application?

A: Yes, sir.

Mr. Burleson also stated that "most schools in question choose not to even submit an application." When asked to explained what "in question" meant, he responded he meant someone that had has had some trouble with eligibility issues. He also acknowledged he believed the Cornerstone basketball program brought discredit to the integrity to TAPPS and was a detriment to the good reputation of TAPPS.

The issue of whether Cornerstone's contract was cancelled or revoked was revisited with Mr. Burleson during cross examination as follows:

Q: So in Cornerstone's case in 2006, the board met and voted not to renew the contract?

A: Yes, sir.

Q: Okay. They didn't cancel it or revoke it, did they?

A: They just did not accept it.

Q: And that's different from cancelling it or revoking it?

A: I believe it is, in my terminology.

Following a discussion as to what appears on the TAPPS website concerning probations and suspensions, Mr. Burleson was again questioned:

Q: So Cornerstone's membership was not suspended in January of 2006 at this meeting, was it?

A: No, sir.

Q: Its membership wasn't revoked, was it?

A: No, sir.

* * * *

Q: Are you aware of anything in the minutes or the web site from TAPPS that says Cornerstone's basketball program — where its membership in TAPPS has been suspended?

A: No, sir.

Q: Are you aware of anything on the web site or in the minutes of TAPPS' board that says Cornerstone's membership in TAPPS has been revoked?

A: No, sir.

* * * *

Q: Do you think that there's any chance Cornerstone would be accepted for membership in TAPPS today?

A: You're asking me what I think?

Q: Yes, sir.

A: I don't think so.

Q: As the executive director of TAPPS, in all fairness, you don't believe Cornerstone would be readmitted to the organization?

A: My personal opinion, I don't think so.

Q: And I believe you've been very careful to accurately say that what happened in the fall of 2006 with Cornerstone was that the board simply made a decision not to accept its contract. Correct?

A: That's correct.

Q: And that was because the board and, presumably, you felt that the Cornerstone's mission was going a different direction from that of TAPPS. Correct?

A: Yes, sir.

Q: Given what's gone on in the past, as we sit here today, in your judgment, does Cornerstone qualify for membership in TAPPS?

A: They meet the criteria listed in the constitution.

Q: But they won't be admitted. Right?

A: I don't know.

Q: Well, your judgment is that they wouldn't be admitted, in all fairness?

A: In my opinion.

The deposition then concluded with one final question by counsel for the defendants:

Q: Briefly, Mr. Burleson, when you said that you believed Cornerstone and TAPPS were going in different directions, were you implying or saying, essentially, that you did not think Cornerstone was willing to play by the rules?

A: (Following an objection as to form.) Based on – based on the history of Cornerstone, they have played very loose with the rules as far as inducement and recruiting is concerned.

Is the Game of Semantics Being Played Sufficient to Preclude Summary Judgment or Is It Merely a Distinction Without a Difference?

Plaintiffs steadfastly cling, as they must, to their argument that because TAPPS refused to renew their membership, they qualify for membership in the UIL because their right to participate has not been "suspended or revoked for violating rules or codes by another league similar to the UIL." The rule states a non-public school meeting the foregoing criteria "may" apply for UIL membership provided the school meets all of the following conditions one of which is the "school does not qualify for membership in any other organization." While plaintiffs argue their membership was not revoked or suspended in the technical sense because it simply was not renewed, and because after all "[w]ords mean what they mean, not what the UIL would like them to mean to suit its current needs," that very same argument is rejected when the UIL claims Cornerstone qualifies for TAPPS. With respect to that argument, Cornerstone claims that even if it technically meets the membership criteria, "[a] school whose application will not be considered by TAPPS' board, and which will not be admitted to membership in TAPPS, certainly enjoys a curious sort of 'eligibility.'" Plaintiffs' Response to Defendants' Initial Motion for Summary Judgment and Evidence, docket #30 at page 6. If words means what they mean, as plaintiffs assert, that same rationale should be applied regardless of "whose ox is being gored." Thus, if Cornerstone qualifies for membership in TAPPS in the technical sense, it would appear defendants' motion for summary judgment should be granted.[11]

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[11] Interestingly, Section 8 of the Bylaws is entitled School's Eligibility to Participate. Similar language is found here as in the UIL's Constitution, as the Bylaws provide:

> Unless its right to participate has been suspended or revoked by the TAPPS Executive Board, a school that is a member of TAPPS and has paid the annual TAPPS membership dues and event fees for the particular activity is eligible for competition.

If as plaintiffs claim, their right to participate has not been suspended or revoked, they are also eligible to participate in

According to Article III of the Texas Association of Private and Parochial Schools Constitution, contained in the 2007-2008 TAPPS Manual, membership in TAPPS is:

> limited to private and parochial schools in the state of Texas, with students enrolled in grades 9-12.
> a. Private schools are defined as those schools that are established, conducted and primarily supported by a non-government agency -or- primarily supported by student tuition.
> b. Parochial schools are defined as those schools that are controlled by, supported by, or within the jurisdiction of a church parish.

From a technical reading of this Article, it appears Cornerstone is "qualified for membership in any other organization similar to the League." However, as Cornerstone argues in its briefs, Mr. Burleson indicates their application will not be considered so in reality they are not qualified or eligible. If the Court accepts plaintiffs' argument here, it must also accept the defendants' contention Cornerstone's membership was terminated for rules violations which is the same as a suspension or revocation for violating rules and codes under rule 12(d).

Section 90 of the TAPPS Bylaws provides: "the TAPPS Board reserves the right to deny membership to any school that it determines has brought discredit to the integrity of TAPPS or is a detriment to the good reputation of the TAPPS organization." Mr. Burleson testified he believed the Cornerstone basketball program had done just that. Accordingly, the Court finds the failure to renew Cornerstone's membership had the same effect, for rule 12(d) purposes, as a suspension or revocation. Therefore, regardless of the interpretation to be applied to rule 12(d), whether a letter of the law: the words means what the words mean, or a spirit of the law: the intent and purpose of the rule, defendants' motion for summary judgment has merit and should be granted.

TAPPS.

Based on the foregoing discussion, IT IS HEREBY ORDERED that Defendants' Motion to Dismiss (docket #6) and Defendants' Initial Motion for Summary Judgment (docket #26) are GRANTED and this case is DISMISSED. Motions pending, if any, are also DISMISSED.

It is so ORDERED.

SIGNED this 1st day of April, 2008.

FRED BIERY
UNITED STATES DISTRICT JUDGE