CONTAINS CONFIDENTIAL MATERIALS

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-0390

WEST VIRGINIA SECONDARY SCHOOL ACTIVITIES COMMISSION,

Defendant Below, Petitioner

v.

DAVID D. and ELIZABETH D., parents and legal guardians of M.D.,

Plaintiffs Below, Respondents.

On appeal from the Circuit Court of Ohio County, Presiding Judge Jason A. Cuomo Civil Action No. 2020-C-195

PETITIONER'S BRIEF

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III. ASSIGNMENT OF ERROR

The Circuit Court erred and exceeded its legitimate power in setting aside the manner in which the WVSSAC promulgated and applied its rules in holding that its "Non-School Participation Rule" Rule 127-2-10 (the "Non-School Participation Rule") as written and/or applied to the respondent M.D. was arbitrary and capricious and that it was not reasonably related to the WVSSAC's stated purpose.

IV. STATEMENT OF CASE

This appeal asks whether a Circuit Court may substitute its position for the promulgation, interpretation, and application by the West Virginia Secondary School Activities Commission (WVSSAC) and its member school of their rules and regulations. This appeal results from an injunctive matter where the Circuit Court of Ohio County, West Virginia enjoined the WVSSAC from enforcing its "Non-school Participation Rule" Rule 127-2-10 by its Order Granting Plaintiffs' Request for Temporary Restraining Order of October 6, 2020 (*See* APP-12-APP-14), its Order Granting Preliminary Injunction of October 9, 2020 (*See* APP37-APP47), and subsequent Order Granting Plaintiffs' Motion for Summary Judgment, Issuing Permanent Injunction and Dismissing the Case of April 19, 2022 (*See* APP-473-APP-489).

The Circuit Court of Ohio County determined the rule which prevented M.D., the daughter of respondents, David D. and Elizabeth D., Parents and Legal Guardians, from playing for her high school soccer team and a travel/club team at the same time during the high school soccer season was arbitrary and capricious and not rationally related to the WVSSAC's stated purpose. The WVSSAC seeks to have the decision of the Circuit Court of Ohio County

reversed and the permanent injunction dissolved allowing it to enforce the said rule as originally determined.

A. Statement of Facts

Respondent M.D. was and is a student enrolled at Wheeling Park High School in Wheeling, West Virginia and has been a member of the Wheeling Park High School Girls Soccer Team. Wheeling Park High School is a public secondary school located in Ohio County, West Virginia and is, therefore, under the control of the Ohio County Board of Education. The Ohio County Board of Education, pursuant to W. Va. Code § 18-2-25,[1] delegated the control over all interscholastic events at the secondary schools located in Ohio County to the WVSSAC. Respondents' daughter also sought to play for her travel club soccer team during the fall season while she was also a member and playing for the Wheeling Park High School Girls Soccer Team. Such dual participation was in violation of the WVSSAC Non-school Participation Rule, which was considered and passed by a majority vote of the member schools Board of Control of the WVSSAC. Said rule was implemented after completing the required notice and comment period, and then subsequently filed in the State Code of Rules with final approval by the West Virginia State Board of Education. Pursuant to the Non-School Participation Rule:

> 10.1. During the academic year and while a member of a school team, a student shall neither participate, which includes, but is not limited to, fund-raising activities, team picture, tryouts, etc., on any formally organized non-school team in the same sport, nor shall the student compete as an individual unattached in non-school formally organized competition in the same sport. The following sports are exempted from the provisions of this rule: cross country, golf, swimming, tennis, track, and wrestling, provided that:

[1] The county board of education may delegate control, supervision and regulation of interscholastic athletic events and band activities to the West Virginia Secondary School Activities Commission.

> 10.1.a. participation is approved by the student's principal; and
> 10.1.b. the student misses no school-sponsored athletic contest involving a team in that sport.
>
> 10.2. A student may participate as a member of a national team (and the actual, direct tryouts thereof) which is defined as:
>
> > 10.2.a. one selected by the national governing body of the sport;
> > 10.2.b. while representing the National Federation in an International Schoolsport Federation;
> >
> > 10.2.c. as a representative of the United States in recognized national or international events; or
> >
> > 10.2.d. a qualifier for the West Virginia Golf Association's Amateur Championship or the United States Golf Association's United States Amateur Championship.
>
> 10.3. A student who has participated on a non-school team or as an individual unattached in nonschool formally organized competition after the beginning practice date of that sport will be ineligible for participation on that school team for that season in that particular sport except as provided by §127-2-10.1 and §127-2-10.2.

(Emphasis added) W. Va. C.S.R. § 127-2-10.

M.D. began participating on the Wheeling Park High School Girls Soccer Team when she entered the 9th grade at Wheeling Park High School, in the fall of 2020. M.D., at the time of the commencement of the action below, was also member of a club soccer team called "Century United" in Pittsburgh, Pennsylvania. Century United is a non-school formally organized competition team. Therefore, pursuant to WVSSAC rules as promulgated by the member schools, M.D. would not be permitted to participate in both her school soccer team and her club soccer team during the high school soccer season of 2020, and in the future.[2]

[2] The season is defined as "starting practice date through state tournament or end of season" W. Va. C.S.R. § 127-2-11.3. Pursuant to the WVSSAC Rule and Regulation Handbook, for girls and boys soccer, "[o]rganized team

In the fall of 2020, the respondents were aware that M.D.'s participation in a non-school team would be found to be in violation of the Non-School Participation Rule if she participated on the Century United team while also participating at the same time on the Wheeling Park High School Girls Soccer Team and an administrative appeal was initiated to said rule.

Therefore, on or about September 9, 2020, respondent David D. filed an appeal to the Board of Directors on behalf of M.D., requesting a waiver of the Non-School Participation Rule.

B. Procedural History

The respondents, being informed by an October 2, 2020 decision letter of a waiver denial of the Board of Directors from a September 16, 2020 hearing and of an additional administrative remedy in the form of a hearing before the Board of Review, ignored the available remedy of appeal to the Board of Review and filed "Plaintiff's [sic.] Verified Application for Injunction" with the Circuit Court of Ohio County, West Virginia on September 29, 2020 (*See* APP-1 -APP-5) and, subsequently, "Plaintiffs' Request for Temporary Restraining Order" on October 5, 2020. (*See* APP-6 - APP- 11). The next day, October 6, 2020, the Court entered "Order Granting Plaintiffs' Request for Temporary Restraining Order." (*See* APP-12 -APP-14).

In response to said order, the WVSSAC, by and through former counsel, William R. Wooton, filed its "Motion to Dissolve Temporary Restraining Order" on October 7, 2020. (*See* APP-15 - APP-18). Later that same day, October 7, 2020, plaintiffs filed "Plaintiffs' Brief in Opposition to Motion to Dissolve Temporary Restraining Order." (*See* APP-19 APP-22). On

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practice will begin on Monday of Week 5 and the first contest may be played on Friday of Week 7." W. Va. C.S.R. § 127-3-25.2. "Soccer (Boys and Girls)"

October 8, 2022, the WVSSAC filed its "Defendant WVSSAC's Reply to Plaintiffs' Brief in Opposition to Motion to Dissolve Temporary Restraining Order." (*See* APP-23 – APP-29).

The following day, October 9, 2020, a hearing regarding the preliminary injunction was held in Ohio County, West Virginia. (See APP-48 - APP-118). The respondents appeared in person and by counsel, Jeffrey A. Grove, and the petitioner, WVSSAC, appeared in person, by and through its Executive Director, Bernie Dolan, and through counsel, William Wooton. Later that same day on October 9, 2020, the Court, entered an "Order Granting Preliminary Injunction." (*See* APP-37 - APP-47).

Subsequent to the October 9, 2020, ruling of the Circuit Court of Ohio County, West Virginia, by agreement an Order Staying Civil Action and Modify Scheduling Order Deadlines If Necessary was entered by the Circuit Court of Ohio County, West Virginia on March 3, 2021 (*See* APP-205 – APP- 208) to allow consideration of a member school proposed an amendment to the Non-School Participation Rule be considered at the annual Board of Control meeting, which was to be held on March 30, 2021. The rule change proposal addressed the issue before this Court regarding non-school participation with proposed amending the language as follows:

> Students while participating on a high school sports team are permitted to participate on a non-school sports team. A student's in-season high school participation on a non-school team must meet the following criteria:
>
> 1. The student's non-school team participation may not conflict with the high school team practice and/or contest schedules. The contest schedule indicates regular season and post-season events.
> 2. A student who elects to participate on a non-school team and does not participate in their high school sport practices and/or contests will be ineligible for high school post-season competitions.
> 3. The post-season includes Section/Region/State competitions.

This proposed amendment was submitted to all the member schools for review and consideration prior to the annual meeting on March 30, 2021. The proposed rule was then presented at the Board of Control meeting where discussion was held and prepared for vote by all the members on the next day. The vote resulted in 103 of the 124 members of the Board of Control that were present, voting against the proposal. Therefore, the proposed amendment failed. The vote, while overwhelmingly against modification of the rule at issue, was consistent with half of similar rules within the other states.

Following the failure of the amendment to the rule, respondents filed Plaintiffs' Motion for Summary Judgment Against Defendant West Virginia Secondary School Activities Commission (*see* APP-214 – APP-254) to which the petitioners responded with Defendant's Response to Plaintiffs' Motion for Summary Judgment. (*See* APP-258 – APP-277). The respondents filed Plaintiffs' Reply Memorandum of Law to Defendant WVSSAC's Response to Plaintiff's Motion for Summary Judgment and proposed Order Granting Plaintiffs' Motion for Summary Judgment. (*See* APP-291 – APP-303).

Subsequently, the Circuit Court entered an Order Deferring Motion for Summary Judgment and Order Setting Bench Trial. (*See* APP-304 – APP-305 and APP-306).

Depositions of David D., Elizabeth D., and M.D. then occurred. (*See* APP-393 – APP-442, APP-316 – APP-351, and APP-352 – APP-392).

Following the filing of Defendant West Virginia Secondary School Activities Commission's Supplemental Response to Plaintiffs' Motion for Summary Judgment Against Defendant West Virginia Secondary School Activities Commission on March 14, 2022 (*see* APP-443 – APP-616), respondents filed Plaintiff's Supplemental Reply Memorandum of Law to Defendant WVSSAC's Supplemental Response to Plaintiff's Motion for Summary Judgment.

(*See* APP-617 – APP-620). The Circuit Court of Ohio County then entered its Order Granting Plaintiffs' Motion for Summary Judgement, Issuing Permanent Injunction and Dismissing the Case (*See* APP-626 – APP-643) to which this appeal followed.

V. SUMMARY OF ARGUMENT

The Circuit Court erred and exceeded its legitimate power in setting aside the manner in which the WVSSAC promulgated and applied its rules in holding that its "Non-School Participation Rule" Rule 127-2-10 (the "Non-School Participation Rule") as written and/or applied to the respondent M.D. was arbitrary and capricious and that it was not reasonably related to the WVSSAC's stated purpose.

In so holding, the Circuit Court failed to follow the authority of longstanding W. Va. Code § 18-2-25, the promulgated WVSSAC Rules and Regulations, and prior holdings of this Court which allowed the WVSSAC to determine eligibility of member school student athletes and conduct its business without Court interference.

Despite the clear and promulgated applicable regulation, a decision by the Board of Directors of the Member Schools of the WVSSAC and a subsequent review and vote by the Member Schools' Board of Control, the Circuit Court of Ohio County concluded and applied its analysis of the subject rule as to M.D. and overruled the existing rules and application prohibiting non-school athletic participation during the same time period at a school sponsored varsity sport.

It is the position of the WVSSAC that the Board of Control has spoken not only by its initial promulgation of the rule which prohibited member schools thought its student athletes such as M.D. from competing on both a school sponsored team and a non-school team at

the same time but also by rejecting an amendment to change its rule similar to what the Circuit Court of Ohio County did and allow such.

The WVSSAC has been delegated the duty to "control, supervis[e], and regulate" the interscholastic athletic events and band activities of many of the secondary schools in West Virginia. Pursuant to W. Va. Code § 18-2-25, these duties require the WVSSAC to promulgate and enforce the rules, which are proposed and accepted by a majority vote of the representatives of the member schools, for the purposes of carrying out these interscholastic activities between its member schools. Bernie Dolan, in his role as the Executive Director of the WVSSAC, has been given the authority to investigate and make initial decisions regarding application of these rules and regulations. W. Va. Code § 18-2-25 provides that the WVSSAC must also promulgate a review procedure within these rules. If an aggrieved party feels that the decision of the Executive Director is incorrect, then the party may then appeal the Executive Director's decision to the Board of Directors. If the party fails to meet its' burden of proof before the Board of Directors, that party may then appeal to the Review Board.

Pursuant to Rule 56 of the W. Va. R. Civ. P., "[t]he judgment sought shall be rendered forthwith if 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." A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." *Conley v. Stollings*, 223 W. Va. 762, 764, 679 S.E.2d 594, 596 (2009) (citing Syl. Pt. 3, *Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963)).

Summary judgment is only appropriate when the record, when taken as a whole, could not lead a trier of fact to find for the non-moving party. *Painter v. Peavy*, 192 W. Va. 189, 193, 451 S.E.2d. 755, 759 (1994). "Under W. Va. R. Civ. P. 56(c), the facts are to be construed in a light most favorable to the non-moving party." *Travis v. Alcon Lab., Inc.*, 202 W. Va. 369, 372, 504 S.E.2d 419, 422 (1998).

In the instant matter construing the facts in a light most favorable to the WVSSAC, summary judgment without a bench trial and an opportunity to produce evidence by the WVSSAC was error.

Here, the plaintiffs sought a permanent injunction. However, "[i]njunctive relief, like other equitable or extraordinary relief, is inappropriate when there is an adequate remedy at law." *Hechler v. Casey*, 175 W. Va. 434, 440, 333 S.E.2d 799, 805 (1985). Furthermore, "[u]nder the balance of hardship test the [lower] court must consider, in 'flexible interplay,' the following four factors in determining whether to issue a preliminary injunction: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest." *Id.*

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure. W. Va. R. App. P. 20(2) and (3). The Circuit Court of Ohio County, West Virginia erred when it granted the respondents injunctive relief and Summary Judgment against the petitioner. Furthermore, this matter impacts the general public because the Circuit Court of Ohio County, West Virginia, by enjoining the petitioner from enforcing the WVSSAC

and its member schools administrative rules as to eligibility issues of student athletes at its member schools rules, oversteps it authority.

VII. ARGUMENT

This Court first heard and determined the legitimate powers of the Circuit Courts of West Virginia allow when presented with actions from student/athletes challenging the authority of the WVSSAC and its member schools to promulgate and administer rules for athletic competition among themselves in 1968. "As a general rule courts should not interfere with the internal affairs of school activities commissions or associations." *State ex rel. W. Va. Secondary Sch. Activities Comm'n v. Oakley*, 152 W. Va. 533, 164 S.E.2d 775 (1968).

In 2011, this Court further stated "[n]othing in the jurisprudence of this Court supports the trial court's foundational premise that courts are permitted to second guess the manner in which the SSAC applies its rules." *State ex rel. W. Va. Secondary Sch. Activities Comm'n v. Webster*, 228 W. Va. 75, 80, 717 S.E.2d 859, 864 (2011).

Earlier, in *Mayo*, this Court noted that "[u]nder the law that has been developed since *Oakley* and *Hamilton,* an SSAC rule is subject to challenge, like all properly promulgated legislative rules, on grounds that it exceeds constitutional or statutory authority and for being arbitrary or capricious." *Mayo v. W. Va. Secondary Sch. Activities Comm'n,* 223 W. Va. at 95 n. 17, 672 S.E.2d at 231 n. 17 (citing *Oakley,* 152 W.Va. 533, 164 S.E.2d 775 and *Hamilton v. W. Va. Secondary Sch. Activities Comm'n*, 182 W. Va. 158, 160, 386 S.E.2d 656, 658 (1989)).

However, this is not to be confused with the mistaken premise relied upon by the Circuit Court of Ohio County, West Virginia, that a trial court may question the manner in which a SSAC rule is applied. This mistake was also made by the Circuit Court of Kanawha County,

West Virginia but was reversed by this Court in *Webster*. This Court explained in its decision in *Webster*, "[c]ritically, the trial court's conclusion—that courts are entitled to examine the SSAC's application of its rules—does not follow from our recognition in *Mayo* of the three grounds for challenging a properly promulgated legislative rule. *Id.* Nothing in the jurisprudence of this Court supports the trial court's foundational premise that courts are permitted to second guess the manner in which the SSAC applies its rules." *Webster*, 228 W. Va. at 80, 717 S.E.2d at 864.

Further, as again later stated by this Court, it is the "general rule" that "courts should not interfere with the internal affairs of school activities commissions or associations." Syl. Pt. 3, *State ex rel. W. Va. Secondary Sch. Activities Comm'n v. Hummel,* 234 W. Va. 731, 769 S.E.2d 881 (2015) (quoting Syl. Pt. 2, *Oakley,* 152 W.Va. 533, 164 S.E.2d 775). Accordingly, this Court has "made clear that *if* the SSAC does not exceed its constitutional or statutory authority, circuit courts must stay out of the SSAC's internal affairs." *Id.* at 736, 886.

In the Court's opinion in *Hummel*, the Court noted its previous holdings when it reiterated the fact that "there is no fundamental or constitutional right to participate in nonacademic extracurricular activities in the 'liberty' or 'property' interest sense for purposes of due process analysis." *Id.* Such holding was consistent with a prior holding in 1984, when this Court stated "[b]ecause participation in interscholastic athletics or other nonacademic extracurricular activities does not rise to the level of a constitutionally protected 'property' or 'liberty' interest, the appellant does not meet the threshold requirement under *Clarke, supra*, and therefore is not entitled to any procedural due process protections." *Bailey v. Truby,* 174 W. Va. 8, 21, 321 S.E.2d 302, 315-16 (1984) (citing *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 709, 279 S.E.2d 169, 175 (1981)). Accordingly, the Circuit Court of Ohio County, West

Virginia exceeded its legitimate authority by substituting its judgment for that of the WVSSAC and its Board of Directors leaving aside there was no appeal by the respondents to the Review Board.

The West Virginia Legislature established that the WVSSAC is to promulgate reasonable rules for carrying out its authority. W. Va. Code § 18-2-25. The WVSSAC rules are promulgated by the proposal of any such rules or amendments thereto by its member schools to address a present issue identified by any member school or schools, to protect a level playing field, and then a subsequent majority vote of such proposals by the representatives of each of its member schools, collectively known as the "Board of Control," during an annual meeting. The rules which pass by a majority vote then complete the normal state rulemaking process and are subject to final approval by the State Board of Education. W. Va. Code § 18-2-25.

Accordingly, the WVSSAC's office does not promulgate such rules, but oversees the interscholastic athletic events and band activities of the member schools who have promulgated the rules and voluntarily agreed to participate under such, investigates violations of the rules, and, when necessary, applies the provisions of such rules in a manner consistent with the purpose of such rules as understood and approved by the member schools when the rules were enacted.

The West Virginia Legislature had established that the WVSSAC rules procedure includes a proper review procedure following a decision by the WVSSAC office and such are codified in W. Va. C.S.R. §§ 127-6-1 through 6-6.14. The WVSSAC rules and regulations grant authority to an individual school to first interpret the rules and then be referred to the Executive Director, should he "have reason to believe that any member of the WVSSAC has or is violating the rules of the Commission," to "make such investigation as he deems necessary to determine

the innocence or guilt." W. Va. C.S.R. § 127-6-4.1. Then, if an aggrieved party feels that the decision of the Executive Director is incorrect, the party may appeal the Executive Director's decision to the Board of Directors "by filing a verified petition." W. Va. C.S.R. §§ 127-6-5.1-5.4.

"The Board of Directors" is authorized to grant a waiver to certain rules "when it feels the rule fails to accomplish the purpose for which it is intended and when the rule causes extreme and undue hardship upon the student." W. Va. C.S.R. § 127-6-5.7. The Executive Director does not have the authority to grant such a waiver. Once a decision regarding the eligibility of an aggrieved party has been made by the Executive Director, the burden is upon the aggrieved party to file a timely appeal and make a showing that a waiver should be granted in the party's case during a hearing before the Board of Directors.

The Board of Directors by rule consists of "five elected officer-members of the WVSSAC, each of whom shall be a principal of a secondary school in West Virginia" and additional appointed members, including the "State Superintendent or representative designee, a representative from the West Virginia Board of Education (WVBE), a representative selected by the West Virginia School Boards Association, a representative selected by the West Virginia School Administrators Association, and a representative selected by the West Virginia Athletic Directors Association." W. Va. C.S.R. § 127-1-6.1; W. Va. C.S.R. § 127-1-8.1.

Where a party fails to meet the burden of proof before the Board of Directors, "[a]ny decision of the Board of Directors involving penalty, protest or interpretation of the rules and regulations of this Commission may be appealed to the Review Board." W. Va. C.S.R. § 127-6-6.1.

The Review Board is an independent group from the WVSSAC, said Board being made up of "seven members to be appointed by the WVBE upon recommendation by the State Superintendent" and such appointees must be from the "West Virginia Bar Association; West Virginia Association of School Administrators; West Virginia State Medical Association; West Virginia Sportswriter Association; West Virginia Athletic Directors Association; and West Virginia Association of Retired School Employees." W. Va. C.S.R. § 127-1-13.1; W. Va. C.S.R. §§ 127-1-13.1.b.1.-13.b.6; W. Va. § 18-2-25.

Accordingly, the review process afforded a complainant includes an appeal which is heard by individuals with knowledge and experience in the fields of education and extracurricular activities. Finally, if an aggrieved party has not received such a waiver after exhausting their administrative remedies, and that party feels that the rule is invalid, then such a party may file a complaint with a circuit court of this state. However, "[a] circuit court will only have the authority to review a WVSSAC rule decision on the grounds that it "exceeds constitutional or statutory authority and for being arbitrary or capricious." *Webster*, 228 W. Va. at 80, 717 S.E.2d at 864 (2011).

1. THE CIRCUIT COURT ERRED IN GRANTING THE PETITIONER A PRELIMINARY AND SUMMARY JUDGMENT GRANTING A PERMANENT INJUNCTION AS THE RESPONDENTS DID NOT SHOW SUFFICIENT HARM TO RECEIVE THE TYPE OF RELIEF SOUGHT.

The customary standard applied in West Virginia for issuing a preliminary injunction is that a party seeking the temporary relief must demonstrate by a clear showing of a reasonable likelihood of the presence of irreparable harm; the absence of any other appropriate remedy at law; and the necessity of a balancing of hardship test including: "(1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the

defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest." *See Jefferson County Bd. Of Educ. v. Jefferson County Educ. Ass'n*, 183 W. Va 15, 24, 393 S.E.2d 653, 662 (1990).

(1) Plaintiff has no likelihood of irreparable harm.

While the Court's position that M.D. will never be able to make up a missed club sport soccer match WVSSAC Rule 127-2-510 only prevented M.D. from being able to participate in such during the school sport season. As "there is no fundamental or constitutional right to participate in nonacademic extracurricular activities in the 'liberty' or 'property' interest sense for purposes of due process analysis. Student-athletes have no constitutionally protected due process interest in playing sports." *Truby*, 174 W.Va. at 21, 321 S.E.2d at 316. Such finding in contravention of the rule is self-serving. The subject rule applied to M.D would not suffer irreparable harm by losing the ability to compete in something she was not eligible for pending a full fact finding in this matter and determination of error by the WVSSAC.

(2) Likelihood of harm to the defendant.

The Circuit Court of Ohio County, West Virginia erred when it failed to consider the "the likelihood of harm to the defendant with an injunction." *Hechler v. Casey*, 175 W. Va. at 440, 333 S.E.2d at 805 (1985). The standard in evaluating whether or not a court should grant such relief is a balancing test. Granting such "extraordinary relief" is inappropriate without considering such harm. In the present matter, given the injunction, competing WVSSAC member schools will be participating in competition with member schools that do not meet the applicable rules as promulgated by the member schools for fair competition. Further, applicable to the general public, student athletes who previously met the rules for eligibility and participated

on the same school team as M.D..has been allowed to participate on by the injunction will be deprived of playing time.

(3) Plaintiff is unlikely to succeed on the merits.

A circuit court only has the authority to review a WVSSAC rule on the grounds that it "exceeds constitutional or statutory authority and for being arbitrary or capricious." *Mayo*, 223 W. Va. 95 n. 17, 672 S.E.2d 231 n. 17. A circuit court does not have the authority to review the application of the rule by the WVSSAC. Accordingly, absent a finding, the rule itself is arbitrary and capricious the respondent's claims fail.

In the Court's ruling that W. Va. C.S.R. § 127-2-10 "is arbitrary and capricious" based on the facts as developed and rules applied by the WVSSAC, such rule is reasonably related to its legitimate purpose and interests to provide a fair playing field to the member schools who promogulated the rule and, as the respondent did not show the rule was arbitrary and capricious in the way it is written, it is clear that the respondent was not likely to succeed on the merits of her claim.

(4) Public Interest.

The granting of the injunction allows students to participate in violation of the rules without regard to other students at member schools is in violation of the public interest. Any extra eligibility to participate in athletics results in displacement of an existing student athlete participation who has followed the WVSSAC member schools requirements for eligibility. Participation will always be limiting in that regard and must be considered when

issuing an injunction. Such was not considered by the Circuit Court in response to the Motion for Preliminary Injunction.

The respondents failed to state any clear reasons that the decision of the WVSSAC or its Board of Directors was incorrect. Furthermore, based upon the balancing of the facts, respondents fail to show that the application of such rule against M.D. outweighs the interests of all the other girl soccer players in West Virginia to participate or the member schools rights to maintain a level playing field. Further, facts that were available and would have been put forth during a Bench trial which were not heard by the WVSSAC are more than sufficient to show that the harm claimed by the respondents are merely trifling; respondents' claims involve an impact on no property interest;[3] the public interest greatly outweighs any number of club games to be played during a high school season when such player would receive no punishment.

2. THE WVSSAC RULE DOES NOT EXCEED CONSTITUTIONAL OR STATUTORY AUTHORITY AND IS NOT ARBITRARY OR CAPRICIOUS.

A Circuit Court may only consider a WVSSAC rule on the grounds that it "exceeds constitutional or statutory authority and for being arbitrary or capricious." *State ex rel W. Va. Secondary Sch. Activity Com'n v. Webster*, 717 S.E.2d 859, 864 (W. Va. 2011). "In the absence of legislative direction as to what elements are to be considered in promulgating a rule, the presumption is that the legislature is entrusting the decision as to what to consider to the hands of the agency in deference to the agency's expertise." *Jones v. W. Va. State Bd. of Educ.*, 218 W. Va. 52, 54, 622 S.E.2d 289, 291 (2005).

[3] There is no fundamental or constitutional right to participate in nonacademic extracurricular activities." *State ex rel. W. Va. Secondary Sch. Activities Comm'n v. Hummel,* 234 W. Va. 731, 732, 769 S.E.2d 881, 882 (2015). Therefore, "procedural due process protections" do not apply. *Truby*, 174 W.Va. at 21, 321 S.E.2d at 316.

"The legislature empowered the West Virginia Secondary Schools Activities Commission (WVSSAC) to exercise control, supervision, and regulation of interscholastic athletic events. W. Va. Code § 18-2-25 (2003). Primary to exercising such authority over 'athletic events' is determining who is eligible to participate in such events. Therefore, the WVSSAC does not exceed its statutory authority when it promulgates a rule pertaining to the eligibility requirements for participating in interscholastic athletics." *Jones v. W. Va. State Bd. of Educ.*, 218 W. Va. at 54, 622 S.E.2d at 291 (2005).

Furthermore, the Supreme Court of West Virginia has already found that "[p]articipation in interscholastic athletics or other extracurricular activities does not rise to the level of a constitutionally protected 'property' or 'liberty' interest." *Bailey,* 174 W.Va. at 21, 321 S.E.2d at 316 (1984) (quoting *Clarke v. Board of Regents*, 166 W.Va. 702, 279, S.E.2d 169 (1975)). "There is no fundamental or constitutional right to participate in nonacademic extracurricular activities." *Hummel,* 234 W. Va. at 732, 769 S.E.2d at 882 (2015). Therefore, "procedural due process protections" do not apply. *Truby*, 174 W.Va. at 21, 321 S.E.2d at 316.

"Equal protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner." *Israel by Israel v. W. Va. Secondary Sch. Activities Comm'n*, 182 W. Va. 454, 455, 388 S.E.2d 480, 481 (1989). However, if two groups are similarly situated, "'[w]hen there is a rational basis to distinguish between groups of individuals, not based on invidious discrimination, then different treatment does not offend equal protection provisions" (internal citations omitted)'." *Jones*, 218 W. Va. at 58, 622 S.E.2d at 295 (2005). "Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous." *Id.* at 54, 291 (2005). "'[I]t is only where an administrative rule or regulation is completely without a rational basis, or where it is wholly, clearly, or

palpably arbitrary, that the court will say that it is invalid'" (internal citations omitted). *Appalachian Power Co. v. State Tax Dep't of W. Va.*, 195 W. Va. 573, 589, 466 S.E.2d 424, 440 (1995).

a. Athletes of two separate school sports and their participation in non-school funded organized athletic teams are not similarly situated:

In *Israel by Israel v. W. Va. Secondary Sch. Activities Comm'n*, the Court held "the games of baseball and softball are not substantially equivalent." The Court explained:

> "[t]here is, of course, a superficial similarity between the games because both utilize a similar format. However, when the rules are analyzed, there is a substantial disparity in the equipment used and in the skill level required. The difference begins with the size of the ball and its delivery, and differences continue throughout. The softball is larger and must be thrown underhand, which forecloses the different types of pitching that can be accomplished in the overhand throw of a baseball. There are ten players on the softball team and nine on a baseball team. The distance between the bases in softball is sixty feet, while in baseball it is ninety feet. The pitcher's mound is elevated in baseball and is not in softball. The distance from the pitcher's mound to home plate is sixty feet in baseball and only forty feet in softball. In baseball, a bat of forty-two inches is permitted, while in softball the maximum length is thirty-four inches. Moreover, the skill level is much more demanding in baseball because the game is played at a more vigorous pace. There are more intangible rewards available if one can make the baseball team. For a skilled player, such as the record demonstrates Ms. Israel to be, it would be deeply frustrating to be told she could not try out for the baseball team, not because she did not possess the necessary skills, but only because she was female. The entire thrust of the equal protection doctrine is to avoid this type of artificial distinction based solely on gender.

Israel by Israel, 182 W. Va. at 459, 388 S.E.2d at 485.

Here, the WVSSAC did not differentiate between genders. It uniformly applies a rule to specific sports and not to others. The application of rules differently between multiple sports in not a violation of equal protection because they are not similarly situated. Girls soccer

is not required to be treated exactly the same as the sports of cross country, golf, swimming, tennis, track and field, and wrestling.

Furthermore, in *Janasiewicz v. Board of Educ. of Kanawha County*, the Court held "public and parochial school children may rationally be treated differently because they are not similarly situated. All children under sixteen years old are required to attend approved schools; but a parochial school student has chosen to reject a free public school education in favor of a privately paid education emphasizing religious beliefs and principles. " 171 W. Va. 423, 426, 299 S.E.2d 34, 37-38 (1982). The *Janasiewicz* Court went on to hold: "The Equal Protection Clause of the Fourteenth Amendment is not violated by treating public and nonpublic school children differently." *Id.*

The WVSSAC does not preclude students at member schools from participating in school athletic teams, and a student may voluntarily choose to participate in a club team of the sport of their choosing in place of their school athletic team during the high school season but not both. It has been and clearly remains the desire of the member schools that such restriction be enforced.

b. The rule is rationally related to WVSSAC's stated purpose.

Respondent has argued that she is treated different from other student athletes participating in sports sponsored by the WVSSAC. However, the WVSSAC has taken a position that "if a member of a team sport – such as soccer or baseball - suffers a debilitating injury while participating on a non-school team, that injury impacts the prospect of the school team and its members. Loss of a key player in an injury may be the determining factor in a state championship. In contrast, the sports of cross country, golf, swimming, tennis, track and field,

and wrestling are individual participation sports – that is an individual participation in each of these sports may become a state champion. Admittedly, team points are computed in each of the individual sports: the effect of the compilation of 'team points' is to determine which school had the most individual winners. The loss of a participant in each of these individual sports to an injury in no way inhibits the remaining team member in their quest for state championships." The WVSSAC also articulated the idea of playing on two teams at one time is an issue because an athlete is at the will of "two masters." This relates to the same issues. First, conflicts in schedules making students choose one team or another and in many states, such as Colorado,[4] they often see the students choose the alternative team. Second, the students outside the member schools are playing by rules that are not WVSSAC approved for keeping athletes safe. This is an issue when the sports are conducted in a more dangerous manner and the injury of a student would impact an entire teams ability to go to a championship, as opposed in the exempt sports (cross country, golf, swimming, tennis, track, and wrestling), where an individual student that is not injured and plays for the same "team" may go on to compete for a state title, despite the loss of key player on their team by injury.

The WVSSAC rules are created by the member schools when a problem is seen, and the majority of those member schools want to address it in a manner fair to all other schools. All member schools participate in the rule making process. In this instance, a student is permitted to play on the non-school team outside of season or in place of school sports. Such, the students are not precluded from playing club sports, just not during the school season.

This issue was, subsequent to the initial promulgation of the rule which resulted in this action again brought before the member schools of the WVSSAC in 2021, and again

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[4] Ollie Hill, *Can They Coexist With High School Sports?*, Colorado High School Activities Commission, May 17, 2020, at 11, https://www.presentica.com/doc/11595360/high-school-sports-pdf-document

determined to be a sufficient enough issue for the 103 of the 124 members to vote against changing the rule as at issue by the respondents herein. Accordingly, the Non-School Participation Rule is rationally related to the intended purpose of the WVSSAC and its member schools in fairly administering interscholastic sports. Accordingly, when applying its effort as authorized by statute to the facts to the applicable law, said orders of the Circuit Court of Ohio County, West Virginia granting preliminary injunctive relief and summary judgment and a permanent injunction should be reversed.

3. ADMINISTRATIVE REMEDIES WERE AVAILABLE TO THE RESPONDENT AND NOT EXHAUSTED WHEN THE COURT GRANTED INJUNCTIVE RELIEF.

The purpose of the requiring the exhaustion of administrative remedies are:

> (1) permitting the exercise of agency discretion and expertise on issues requiring these characteristics; (2) allowing the full development of technical issues and a factual record prior to court review; (3) preventing deliberate disregard and circumvention of agency procedures established by Congress [or the Legislature]; and (4) avoiding unnecessary judicial decision by giving the agency the first opportunity to correct any error.

Sturm v. Board of Educ. of Kanawha County, 223 W. Va. 277, 282 672 S.E.2d 606, 611 (2008).

In Justice Thornton Berry's opinion of this Court in *Bank of Wheeling,* he discussed the long and persuasive history of why Judge Butcher's finding, that a court may intervene prior to the exhaustion of a party's administrative remedies if the relief is injunctive in nature, is clearly erroneous. *Bank of Wheeling v. Morris Plan Bank & Trust Co.*, 155 W. Va. 245, 183 S.E.2d 692 (1971). Justice Berry's opinion recognized:

> It has been held by this Court that the general rule in such cases is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and that such remedy must be exhausted before the courts

> will take jurisdiction [citations omitted]. This rule is succinctly stated in point 1 of the syllabus of the *Dau-relle, supra,* case, and also quoted from that case as point 1 of the syllabus of the case of *State ex rel. Burchett* v. *Taylor, supra,* as follows: 'The general rule is that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act.' This principle applies alike to relief at law and relief in equity.

Id. at 248, 695 (emphasis added).

Continuing in the analysis of the general rule, "that all administrative remedies must be exhausted before an action may be instituted in a court," Justice Berry noted that it was the Supreme Court of the United States that first established this rule in *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*[1] *Id.* (citing *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907)).

In *Texas & Pacific R. Co.,* the Supreme Court of the United States established "primary jurisdictional doctrine," which provides that:

> when the legislature provides for an administrative agency to regulate some particular field of endeavor, the courts are without jurisdiction to grant relief to any litigant complaining of any act done or omitted to have been done if such act or omitted act is within the rules and regulations of the administrative agency involved until such time as the complaining party has exhausted such remedies before the administrative body.

Id.

Therefore, this Court ultimately held, "[i]njunctive relief will not be granted by courts prior to a decision of an administrative agency." *Id.* "[T]he extraordinary relief of injunction should not be instituted until the appropriate administrative agency has been given the opportunity to pass on the issue."

Id.

Here, similarly to the matter in *Bank of Wheeling*, there is no question that there was an administrative remedy provided for in the matter involved in the instant case. The respondents had acknowledged that M.D. would be in violation of the Non-School Participation should M.D. participate on her club soccer team during the 2020-2021 school soccer season. Respondents were further aware of their right to appeal to the Board of Review and failed to exercise such. Therefore, the determination by the Circuit Court of Ohio County, West Virginia was premature.

4. THE INJUNCTION AGAINST THE PETITIONER WAS NOT IN THE PUBLIC INTEREST.

In balancing these interests, the damage to the WVSSAC, its members, and the public greatly outweigh the respondents' interests in participating in outside club games during a school sport season.

VIII. CONCLUSION

For the reasons set forth above, petitioner, the West Virginia Secondary School Activities Commission, respectfully requests that this Honorable Court, reverse the Circuit Court of Ohio County, West Virginia's Order Granting Plaintiffs' Motion for Summary Judgment, Issuing Permanent Injunction and Dismissing the Case, and finding that the respondents did not meet the requirements for such permanent injunctive relief and is, therefore, not eligible to participate in non-school soccer during the in-sport season or to remand this case to the Circuit Court of Ohio County, West Virginia, for further proceedings consistent herein, including, but not limited to, a Bench Trial on all issues, with such additional relief as this Court deems appropriate.

Dated this 26th day of August, 2022.

Respectfully submitted,

WEST VIRGINIA SECONDARY SCHOOL ACTIVITIES COMMISSION

By Counsel

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-0390

WEST VIRGINIA SECONDARY SCHOOL ACTIVITIES COMMISSION,

Defendant Below, Petitioner

v.

DAVID D. and ELIZABETH D., parents and legal guardians of M.D.,

Plaintiffs Below, Respondents.

On appeal from the Circuit Court of Ohio County, Presiding Judge Jason A. Cuomo Civil Action No. 2020-C-195

CERTIFICATE OF SERVICE

I, Stephen F. Gandee, counsel for the Petitioners, hereby certify that on this 26th day of August, 2022, I served copies of the attached **Petitioner's Brief** upon Jeffrey A. Grove and David L. Delk, Jr., counsel for the Respondents, via U. S. Mail, postage prepaid, in an envelope addressed to them at Grove, Holmstrand & Delk, PLLC, 44-1/2 15th Street, Wheeling, West Virginia, 26003.

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