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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*

PETITIONER'S REPLY BRIEF

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III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requested oral argument in its Petition pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure. W. Va. R. App. P. 20(2) and (3). Upon review of the response, the petitioner again renews its request for oral argument.

This matter, on appeal from the Circuit Court of Ohio County, West Virginia, is not a moot issue, as it had and will have sufficient collateral consequences, has and will impact the general public, and is likely to repeat itself as is evidenced by this pending matter and additional cases before this Court.

By preventing the petitioner from enforcing its Non-school Participation Rule, the Circuit Court of Ohio County, West Virginia substituted its judgment for that of the participating member school rules through the WVSSC and exceeded its legitimate authority by allowing the respondent M.D. to participate in the 2020 soccer high school season during the same time as she participated on a non-school club soccer team. The substitution by the Circuit Court of its opinion for the rule of the WVSSAC member school and its administrative boards overseeing interscholastic activities jeopardize the stability of the WVSSAC members who have voluntarily agreed to participate and be governed for interscholastic activities pursuant to the authority of West Virginia Code § 18-2-25.

IV. ARGUMENT

Respondent asserts that the sole issue in this appeal is whether W. Va. C.S.R. § 127-2-10 Non-school Participation Rule is arbitrary and capricious as to respondent M.D. Respondent has argued that W. Va. C.S.R. § 127-2-10 treats team sports different from individual

sports which on its face results in W. Va. C.S.R. § 127-2-10 being arbitrary and capricious. The WVSSAC through its membership rule making authority has, however, determined that there is a legitimate difference in team and individual sports in its rules and specifically addressed such by W. Va. C.S.R § 127-2-10. Accordingly, the WVSSAC maintains its rule is rationally based and is not arbitrary and capricious as promulgated by its member schools who have identified appropriate competitive issues to regulate.

W. Va. C.S.R. § 127-2-10 was promulgated by the WVSSAC member schools and had been in effect in its current form for at least ten (10) years, prior to the Circuit Court of Ohio County's Order Granting Preliminary Injunction entered October 9, 2020 and Order Granting Plaintiffs' Motion for Summary Judgment, Issuing Permanent Injunction and Dismissing the Case entered April 18, 2022, and in various prior forms for many years. (See Appx. 133-137.) Further, following the filing of the below Motion for Preliminary Injunction and the Circuit Court's injunctive Order, the WVSSAC member schools, at a Board of Control Meeting in April 2021, considered a rule proposal which, if adopted, would have eliminated the rule and adopted the position of the Circuit Court. However, the WVSSAC Member Schools overwhelmingly rejected the proposal by a vote of 103 against and 21 for amending to allow same season participation. (See Appx. 608-612.)

Accordingly, the WVSSAC membership spoke as to the importance and rationale of its rule by its initial promulgation, use, and, later, its own review, even with knowledge of the Circuit Court of Ohio County's adverse ruling.

In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.

Rome v. Evans, 517 U.S. 620, 632 (1996).

Most recently in *State of West Virginia Ex Rel. West Virginia Secondary School Activities Commission v. The Honorable Jason A. Cuomo, et. al.* Appeal No. 22-0261 (November 1, 2022), this Court again looked at the WVSSAC and the rationale of its rules and regulations. This Court, citing *Payne v. Huntington Union Free Sch. Dist.*, 219 F. Supp. 2d 273, 284 (E. E. N. Y. 2004) noted that a plaintiff challenging a statute or rule under the rational basis test faces “a tremendous uphill battle.” Further, quoting *Maages Auditorium v. Prince George’s Cnty*, 4 F. Supp. 3d 752, 776 (D. Md. 2014) citation omitted), *aff’d* 681 F. App’x 256 (4th Cir. 2017) (per curium) it noted “there is a ‘strong presumption of validity’ when examining the validity of the legislative action to establish that the statute is unconstitutional.”

Reaffirming a prior decision, this Court also noted “To find that a rule or statute is unconstitutional, it must be shown that the rule or statute is unconstitutional beyond a reasonable doubt[.]” *Johnson v. Bd. of Stewards of Charleston Town Races*, 225 W. Va. 340, 342, 693 S. E. 2d 93, 95 (2010). Consequently, challenges to a statute or rule under rational basis review rarely succeed. See, e.g., *Massachusetts v. United States Dep’t of Health & Hum. Serv.*, 682 F. 3rd 1, 9 (1st Cir. 2012).

In support of its rationale for its Non-school Participation Rule W. Va. C.S.R. § 127-2-10, the WVSSAC has articulated several reasons for its existence. Included are positions 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. Further loss of a key player in an injury may be the determining factor in a team competition and in contrast to individual sports such as cross country, golf, swimming, tennis, track and field, and wrestling in the individual participation sports the individual may become a state champion and outside participation does not affect a school team in the same way only a

team sport is affected. 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 member schools have also articulated the idea of playing on two separate competitive teams at one time; one, a school team, and, second, a non-school team will create conflict issues because an athlete is at the will of two different coaches or “two masters.” Serving two masters in a team sport is different than in an individual sport. As a team, a coach has to develop strategies that require all members working together with the same mission and goals. Having a student/athlete who is playing under strategies designed by an outside coach would conflict with a coach trying to have all team members on the same page. The inherent problems with this situation is further compounded if multiple student/athletes compete on multiple non-school club teams during the same season.

Other states have addressed the Non-school Participation Rule issue and 32 out of 50 states have a rule similar to West Virginia. (See Appx. 32.) Issues such as conflicts in schedules make student/athletes choose the school team or the non-school team and, in many states, such as Colorado,¹ they often see the students choose the alternative team. Further, students participating outside the WVSSAC member school are playing by separate rules that are not WVSSAC approved for keeping athletes safe by number of contests and rest periods. This is significantly an issue when competing in additional contests in the same limited season as regulated by the WVSSAC. This Court has constantly “... recognized that promoting academics over athletics is a legitimate state purpose.” Jones v. West Virginia State Bd. of Educ., 218 W. Va. 52, 59, 622 S.E. 2d 289, 296 (2005).

¹ 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>.

The WVSSAC rules are promulgated by the member schools when a problem is seen, and the majority of those member schools have seen the issue address it in a manner fair to its student/athletes and all other schools. All member schools participate in the rule making process. In this instance, the member schools numerous years ago saw an issue and promulgated a limiting rule which, for a short period of time, prevented a student/athlete from playing on both a school team and a non-school team in the same sport at the same time. A student/athlete is not prohibited to play on the non-school team outside of the school season or in place of school sports, just not at the same time.

Under the rational basis test, a court asks only if the challenged statute or rule “rationally furthers a legitimate state purpose or interest.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973). An equal protection challenge may not succeed under the rational basis test as long as the question of rational relationship is “at least debatable.” *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 674 (1981) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938)). Here, the rational relationship of W.Va. C.S.R. § 127-2-10 to preventing non-school participation during a school sport season is clear, if not at least debatable, and furthers the legitimate interest of the WVSSAC member schools and their student/athletes. Therefore, W. Va. C.S.R. § 127-2-10 is not arbitrary and capricious.

Accordingly, the Circuit Court of Ohio County, West Virginia exceeded its legitimate authority by its finding.

V. 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,

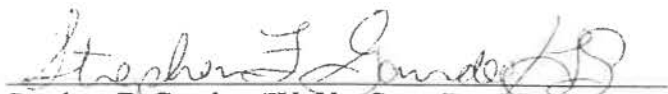
Issuing Permanent Injunction and Dismissing the Case, and finding that the respondents did not meet the requirements for such permanent injunctive relief and is, therefore, not eligible to participate in non-school soccer during the in-sport soccer season or to remand this case to the Circuit Court of 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 2nd day of November, 2022.

Respectfully submitted,

**WEST VIRGINIA SECONDARY SCHOOL
ACTIVITIES COMMISSION**

By Counsel

A handwritten signature in cursive script, appearing to read "Stephen F. Gandee", is written over a horizontal line.

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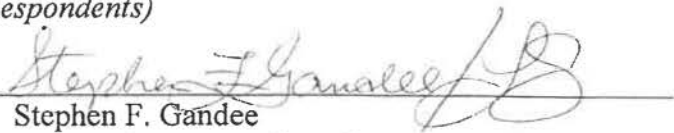
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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of November, 2022, I served the foregoing
Petitioner's Reply Brief upon the following counsel, by depositing a true copy thereof in the
United States mail, postage prepaid, in an envelope addressed to him as follows:

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