

NO. 22-0390

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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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.

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

BRIEF OF RESPONDENT


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(3) ASSIGNMENTS OF ERROR

Petitioner asserts as its single assignment of error that the Circuit Court erred in granting summary judgment to the respondents, finding that the WVSSAC's Rule 127-2-10 ("Non-School Participation Rule") was arbitrary and capricious, and granting a permanent injunction to the respondents.

(4) STATEMENT OF THE CASE

Petitioner WVSSAC in this appeal seeks to reverse the Circuit Court's granting of summary judgment in favor of the respondents. The respondents sought to enjoin the petitioner from enforcing its Non-School Participation Rule against their daughter, M.D., because the rule was arbitrary and capricious in light of the exceptions provided to other athletes and sports but not soccer. The order at issue is the Circuit Court's Order Granting Plaintiff's Motion for Summary Judgments, issuing Permanent Injunction and Dismissing the Case of April 19, 2022 (APP-473-APP-489).

The basic facts of this case can be gleaned from the Plaintiff's Verified Application for Injunction (APP-1 - APP-5). M.D. attends Wheeling Park High School in Ohio County, West Virginia where she is currently a junior. M.D. is a member of the school's girls soccer team. M.D. also plays club soccer in Pittsburgh, Pennsylvania for the Century United soccer club. M.D.'s Century United team plays some of its games during the West Virginia girls high school season. The Century United team competes in the Mid-American Conference of the Girls Academy League with teams from Missouri, Ohio, Pennsylvania, Indiana, Illinois, Wisconsin and Minnesota. The Girls Academy League is the highest level of competition in the United States for girls club soccer.¹

¹ M.D. also has been named as a first team All-State soccer player by the West Virginia

The WVSSAC has adopted a rule entitled 127-2-10 “Non-school Participation” which provides, in full:

§127-2-10. Non-school Participation.

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:

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.

Rule 127-2-210 does not permit M.D. to play for her club soccer team during the West Virginia high school season but would provide an automatic exemption to her if she played the sports of cross-country, golf, swimming, tennis, track & field, or wrestling. Rule 127-2-210 does not permit a West Virginia high school athlete to play the same non-exempted sport on a non-school team during the high school season but does permit a West Virginia high school athlete to play a different sport on a non-school team during a non-exempted sport high school season. For example, M.D. could play basketball on a non-school team while she plays soccer on her high school team during the West Virginia girls high school soccer season.

The circuit court issued a preliminary injunction dated October 9, 2020 which permitted M.D. to play for her Century United team during the West Virginia girls high school season. (App-37 - App-47). M.D. was able to participate in this manner on her Century United team during her freshman and sophomore high school seasons. It was anticipated that this same

High School Soccer Coaches Association after both her Freshman and Sophomore high school seasons and was named the girls soccer player of the year by the West Virginia Sports Writers Association in 2022.

circumstance would exist for her junior and senior seasons, and a permanent injunction was requested.²

At issue in this appeal is what reason or justification does the WVSSAC have for treating soccer players, like M.D., differently from golfers, swimmers, etc. The WVSSAC filed an Answer in this case which attempted to provide some explanation for Rule 127-2-10. (App-30 - App-33). In paragraph 11 of the Answer the WVSSAC wants to differentiate from so-called “team” sports and individual state championship winners. (App-31). The WVSSAC also asserts in its Answer at Affirmative Defense No. 3 that Rule 127-2-10 is meant to prevent injuries to “key players” on “team” sports. (App-32).

As documented in the Circuit Court’s Order Granting Preliminary Injunction, the WVSSAC also argued as an explanation for Rule 127-2-10 at the October 9, 2020 hearing that the rule further was written to prevent athletes from “serving two masters.” (App-46). In other words, the rule was meant to prevent a West Virginia high school athlete in certain sports from receiving conflicting coaching from a high school coach and a non-school team coach. However, this explanation would not apply to the exempted non-“team” sports nor a student-athlete who hires a private coach not associated with a non-school team.

The justifications for Rule 127-2-10 which the WVSSAC asserted in its Answer and at the October 9, 2020 hearing remain the only “stated purposes” by the WVSSAC in the record for the Non-School Participation Rule.

(5) SUMMARY OF ARGUMENT

² M.D.’s Century United team has since changed conference affiliations in the Girls Academy League and there is no overlap between club soccer and high school soccer for M.D.’s junior year.

The Circuit Court of Ohio County properly granted the Respondents' Motion for Summary Judgment and issued a permanent injunction to M.D. It is well settled West Virginia law that a Circuit Court may entertain challenges to a WVSSAC rule on the grounds that the rule is arbitrary or capricious. The Circuit Court correctly determined the Non-School Participation Rule to be arbitrary and capricious because the WVSSAC could offer no rational explanation as to why M.D. could not participate in club soccer during the high school season, but the WVSSAC allowed numerous other athletes in numerous other sports to do what M.D. could not. The WVSSAC also had no rational explanation as to why the Non-School Participation Rule prohibited M.D. from playing non-school soccer during the high school soccer season but could play any other non-school sport or participate in any other non-school activity.

(6) STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent requests oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure. Counsel for the Respondent asserts that this appeal appears to provide an issue of first impression with regard to the Non-School Participation Rule and involves a case of fundamental public importance.

(7) ARGUMENT

Unless an absolute right to injunctive relief is conferred by statute, the power to grant a permanent injunction lies within the sound discretion of the trial court, according to the facts and circumstances of the particular case. Syl. pt. 1, *Baisden v. W. Va. Secondary Schs. Activities Comm'n*, 211 W.Va. 725, 568 S.E.2d 32 (2002). To convert a preliminary injunction to a permanent injunction a plaintiff must generally show that it will suffer irreparable injury, that remedies available at law are inadequate, that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted, and that the public interest would not be

disserved by a permanent injunction. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010).

The Respondents in this case asked the circuit court to issue a permanent injunction in favor of M.D. declaring that the WVSSAC exceeded its constitutional or statutory authority in enacting Rule 127-2-10. A circuit court may properly entertain challenges to WVSSAC rules when said rule exceeds constitutional or statutory authority or is arbitrary or capricious. *Mayo v. W. Va. Secondary Schs. Activities Comm'n*, 223 W.Va. 88, 95 n. 17, 672 S.E.2d 224, 231 n. 17 (2008). The respondents' motion for summary judgment only addressed whether Rule 127-2-10 was arbitrary and capricious. Under this standard Rule 127-2-10 need only be rationally related to a legitimate purpose, *Bailey v. Truby*, 174 W.Va. 8, 23, 321 S.E.2d 302, 318 (1984); however, equal protection does require that similarly situated classes, like student athletes competing in different sports, be treated alike unless some rational basis to distinguish the groups. *Janasiewicz v. Board of Educ. Of Kanawha County*, 171 W.Va. 423, 426, 299 S.E.2d 34, 37 (1982).

The Non-School Participation Rule fails on all counts and is clearly arbitrary and capricious. The first explanation offered by the WVSSAC to the rule is that there is a distinction between student-athletes who play on "team" sports and those who compete in so-called individual sports due to the prospect of injuries. However, the exempted sports of cross-country, golf, swimming, tennis, track and wrestling are all team sports in West Virginia, and team championships are awarded in each one. Moreover, each athlete in these exempted sports contributes points to a team competition depending on their performance, so the loss of any player to injury in these exempted sports can be as much or more harmful than an injury to a player in what the WVSSAC calls a "team" sport. Swimming and track also have relays which

require its participants to operate in cooperation as a team like the non-exempted sports. Likewise, tennis has doubles competitions where the loss of a doubles partner to injury is more devastating than an injury to a teammate in any other sport since the loss of a doubles partner constitutes a loss of fifty percent of the starting lineup. The WVSSAC's distinction between the exempted and non-exempted from an injury perspective is not rationally related to any legitimate purpose.³

Moreover, the WVSSAC seems to limit its injury concerns to "key players." No reason exists why the WVSSAC would discriminate against only "key players" and not seek to promulgate rules designed to minimize injuries to all players on all teams. Likewise, this risk of injury justification loses further credibility when viewed in its application. M.D., for example, under Rule 127-2-10 cannot play high school soccer and club soccer during the high school season but could do high school soccer and non-school mixed martial arts fighting or run a marathon every day if she chose during the high school season, or any other sport but soccer for that matter. Rule 127-2-10 cannot be said to be rationally related to the prevention of injury when only one non-school sport is banned during the season, but every other non-school sport or physical activity is permitted.

The other explanation offered by the WVSSAC for Rule 127-2-10 was that it was written to prevent student-athletes from "serving two masters." The WVSSAC expressed concern at the October 9, 2020 hearing that the WVSSAC had a legitimate concern about exposing student-athletes to potentially two different coaching styles, techniques, etc. during the high school

³ The WVSSAC never addressed the nonsensical provision of 127-2-10 that a student-athlete of a non-exempt sport also could not participate in fund-raising activities or a team picture of a non-school sport. It is unclear how this provision of 127-2-10 fosters injury prevention or runs afoul of serving two masters. This provision is the very definition of arbitrary and capricious.

season. Again, this concern would not appear to apply to the exempted sports for some unknown reason. No explanation is offered by the WVSSAC as to why a school wrestler or track and field athlete, for example, can be exposed to conflicting non-school coaching styles or training regimens or techniques during the high school season but a soccer player cannot.

The simple fact is that the exemptions to Rule 127-2-10 have no rational relationship to a legitimate purpose and makes Rule 127-2-10, as applied to M.D., arbitrary and capricious. The WVSSAC has offered no legitimate explanation as to why the exempted sports permit non-school play, but M.D. cannot engage in non-school soccer. The circuit court's granting of a permanent injunction to M.D. withstands legal scrutiny under any sort of analysis.

The petitioner gets the idea of irreparable harm completely wrong. M.D. without the injunction would forever lose playing opportunities that other exempted athletes under the Non-School Participation Rule would have. M.D. under the rule has to choose high school soccer or non high school soccer, a choice other high school athletes in West Virginia do not have to make. This is irreparable harm.

As to harm to the petitioner, the WVSSAC never presented any evidence of any harm it would experience by the granting of the injunction.

(8) CONCLUSION

For the reasons stated herein this Court should affirm the decision of the lower court granting the Respondent's Motion for Summary Judgment and issuing the permanent injunction.

Dated this 11 day of October, 2022


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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF RESPONSES** was served upon the following parties by email and U.S. Mail on this 13th day of February, 2022:

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