

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 24-

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STATE OF WEST VIRGINIA, ex rel.  
WEST VIRGINIA SECONDARY SCHOOL ACTIVITIES COMMISSION,

Defendant Below, Petitioner

v.

THE HONORABLE JASON FRY,  
JUDGE OF THE CIRCUIT COURT OF WAYNE COUNTY, WEST VIRGINIA,  
AND TOMA GASAJ,

Plaintiffs Below, Respondents.

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*Civil Action No. CC-50-2023-P-111*

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VERIFIED PETITION FOR WRIT OF PROHIBITION

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Your petitioner, The West Virginia Secondary School Activities Commission (hereinafter “Petitioner” or “WVSSAC”), appearing specially, by counsel, Stephen F. Gandee and Lindsay M. Stollings, hereby respectfully petitions this Court for a Writ of Prohibition directed to The Honorable Jason Fry, Judge of the Circuit Court of Wayne County, West Virginia, prohibiting enforcement of an injunction issued by the said Judge preventing the Petitioner from enforcing the WVSSAC’s Rule 127-2-8.

**I. QUESTIONS PRESENTED**

- I. Did the Circuit Court of Wayne County, West Virginia exceed its legitimate power and therefore, commit error when it found that a Circuit Court may set aside the manner in which the WVSSAC promulgated and applied its rules;
- II. Did the Circuit Court of Wayne County, West Virginia exceed its legitimate power and, therefore, commit error when it issued a preliminary injunction in this matter against the WVSSAC in light of the applicable law and facts;
- III. Is a Writ of Prohibition appropriate in light of the facts and circumstances of this case?

## **II. STATEMENT OF THE CASE**

The West Virginia Secondary School Activities Commission's Petition for Writ of Prohibition arises from the "Order Granting Preliminary Injunction" entered by the Circuit Court of Wayne County, West Virginia on January 9, 2024. App. 4.

This matter involves an 18-year-old high school student Toma Gasaj who currently attends Spring Valley High School. Upon information and belief, Respondent, Toma Gasaj, was a student at Spring Valley High School to start the 2023-24 school year after he came to the United States from Croatia and, upon information and belief, enrolled in Spring Valley High School. The Respondent subsequently requested through the Spring Valley High School Athletic Director, Timothy George, to be eligible to participate in varsity basketball during the current 2023-24 basketball season.

Toma Gasaj was determined by the WVSSAC to be not eligible to participate in West Virginia Interscholastic Athletics pursuant to W. Va. C.S.R. § 127-2-8, (App. 3, Exhibit B) as upon information and belief, he does not live with one or both of his parents in the Spring Valley High School attendance zone in Wayne County, West Virginia, does not reside with a testamentary guardian, and was not placed by the WVDHHR at his current address. (See App. 3, Exhibit A). Therefore, he does not meet the requirements of the applicable WVSSAC Rules and Regulations which set forth:

W. Va. C.S.R. § 127-2-8. Adoption/Guardianship.

8.1. A student shall be eligible to participate in interscholastic athletics and activities only if: (1) residing with one or both of the parents; (2) residing with a testamentary guardian following the death of the parents; or (3) residing in a location where the student was placed by the WVDHHR pursuant to §127-2-7.1.c.

8.2. The residence of a testamentary guardian shall constitute the residence of the ward when, and only when: (1) the testamentary guardian has been duly appointed by the last will and testament of

the student's last surviving parent; (2) the testamentary guardian has duly qualified as such before the proper tribunal in West Virginia; and (3) the student is actually residing in the household of the testamentary guardian at the time of the student's sport participation.

8.3. Notwithstanding any other provision of the WVSSAC rules and regulations, any student residing with a guardian/custodian other than a testamentary guardian may not compete for a school in any sport on the varsity level but may compete at the junior varsity level. If a student elects to participate at the junior varsity level pursuant to this rule, the student may not participate at the varsity level even after being enrolled at the school for 365 days. However, if a student elects to participate at the junior varsity level pursuant to this rule, and then commences to reside with a custodial parent, the student may participate at the varsity level notwithstanding the fact that the student had previously participated at the junior varsity level pursuant to this rule.

8.4. Notwithstanding any other provisions of WVSSAC rules and regulations, legal guardian/custodian may not be changed for athletic reasons. A transfer for athletic reasons is defined in §127-2-7.2.6.1-4.

Rather, upon information and belief, as set forth in the Petition for Injunction and Ordering Granting Preliminary Injunction, Toma Gasaj resides at 100 Paths End Ridge, Huntington, West Virginia, 25530 and resides with Terry and Melanie Adkins. On numerous occasions in the proceedings below and in the Petition, Terry and Melanie Adkins have been referred to as Toma Gasaj's "host family." However, since Terry and Melanie Adkins are not the parents of Toma Gasaj, Toma Gasaj did not reside with Terry and Melanie Adkins prior to sometime in the summer of 2023, Terry and Melanie Adkins have not adopted Toma Gasaj or in any other way been appointed or received legal status as to testamentary guardians of Toma Gasaj, and Toma Gasaj has not been placed by the WVDHHR pursuant to 127-2-7.1.c with Terry and Melanie Adkins, Toma Gasaj does not meet the eligibility requirements to participate in interscholastic athletics in West Virginia unless he obtains a waiver pursuant to W. Va. C.S.R. § 127-2-2, which states:

Waivers.



2.1 The West Virginia Secondary School Activities Commission's Board of Directors is authorized to grant a waiver where it determines the rule fails to accomplish the purpose for which it is intended or when the rule causes extreme and undue hardship upon the student.

2.2 Speculative loss of college scholarship is not considered a basis for granting a waiver; to these rules.

W. Va. C.S.R. § 127-2-2.

Toma Gasaj, pursuant to the WVSSAC Rules and Regulations, sought on two occasions, a waiver from the WVSSAC Board of Directors. On the first occasion, by hearing of November 16, 2023, the Board of Directors ruled that the initial determination by the Executive Director that Toma Gasaj was ineligible due to his international student status as a residence transfer was reversed as that rule did not meet the intended purpose for Toma Gasaj and would have resulted in eligibility under the specific applicable rule. (App. 3, Exhibit G (incorrectly dated October 23, 2023, but actually drafted and sent November 17, 2023).)

However, upon a review of the evidence presented by Toma Gasaj in support of the waiver from said ruling, it was determined that Toma Gasaj did not meet the residency requirements of W. Va. C.S.R. § 127-2-8 to participate in interscholastic athletics. Accordingly, the Respondent was notified of such ineligibility and provided an opportunity to seek a waiver pursuant to W. Va. C.S.R. § 127-2-8. (App. 3, Exhibit A.) A second hearing was held before the Board of Directors on December 20, 2023, and, by letter dated December 21, 2023 (see App. 3, Exhibit B), the same body which had granted a waiver with regard to his international student status, upon receiving facts from Toma Gasaj and reviewing the record as a whole, determined that W. Va. C.S.R. § 127-2-8 as applicable to Toma Gasaj met its intended purpose and denied a waiver of W. Va. C.S.R. § 127-2-8.

WVSSAC first became aware of Gasaj's eligibility concerns on August 10, 2023, when James George e-mailed WVSSAC Administrator Wayne Ryan about a possible new

student at Spring Valley High School wishing to play basketball coming from Croatia. It was noted in the e-mail the student had to get emancipated to qualify for health insurance. It was further noted that they understood “these things” would need to go before the WVSSAC Board of Directors and noted that the Respondent would be ineligible but could seek a waiver before such body. (See App. 3, Exhibit C.)

On August 11, 2023, Cindy Daniel responded to the August 10, 2023 e-mail. (See App. 3, Exhibit D.)

On September 14, 2023, another e-mail was sent to Wayne Ryan and others at the WVSSAC regarding the same student. It was acknowledged that they would likely need to come before the WVSSAC Board of Directors. (See App. 3, Exhibit E.)

Executive Director C. David Price reviewed the information provided to him and notified Spring Valley High School Toma Gasaj would be ineligible by letter dated October 9, 2023. (See App. 3, Exhibit F.)

On November 17, 2023, the WVSSAC, sent a letter to his host family (incorrectly dated October 23, 2023) via email to taadkin@icloud.com advising that the same Board of Directors which granted the waiver request of Rule 127-2-7 (Residence Transfer), upon review of information, had been determined that Toma Gasaj was ineligible pursuant to 127-2-8 (Adoption/Guardianship Rule). (See App. 3, Exhibit G.)

The letters of November 17, 2023 were acknowledged to have been received by return e-mail of Juston Moore of November 27, 2023. (See App. 3, Exhibit H.)

On December 4, 2023, a second Petition for Appeal was filed with the WVSSAC. (See App. 3, Exhibit I.)

On December 20, 2023, the WVSSAC Board of Directors advised the Respondent the ruling of the WVSSAC Executive Director of October 23, 2023, was affirmed. (See App. 3, Exhibit B.)

On July 9, 2023, the Circuit Court of Wayne County, West Virginia enjoined the WVSSAC from enforcing its determination and the findings of the Board of Directors. (App. 4.)

### **SUMMARY OF THE ARGUMENT**

The law in West Virginia is well settled regarding the authority of a Circuit Court to overturn the decisions of the WVSSAC when it applies its rules and regulations, including its administrative boards. In this matter, the Circuit Court of Wayne County, West Virginia overstepped its jurisdiction and substituted its own decisions for that of the WVSSAC and its Board of Directors on the eligibility matter by applying its own judgment and acting in a clearly erroneous manner when it granted the Respondent relief in the form of an injunction prohibiting the WVSSAC from enforcing its member school's Rule 127-2-8, with the Respondent needing to meet his burden of proof that the WVSSAC rule failed to meet its intended purpose or was an extreme and undue hardship to him.

The Circuit Court of Wayne County, West Virginia in issuing its injunction further ignored and failed to properly balance the damages that will result to the Petitioner's member schools and, therefore, the public by allowing the subject student eligibility in the 2023-24 basketball season. Such ruling by the Circuit Court effectively prevents the WVSSAC from providing a fair playing field to all its student athletes, remaining member schools, and enforcing the rules promulgated by the member schools as allowed by law.

The WVSSAC is the governing body for high school athletics in West Virginia. It has been voluntarily “delegate[d] the control, supervision and regulation of interscholastic athletic events and band activities” of all the public schools and many of the private and parochial schools located within the state of West Virginia. W. Va. Code § 18-2-25. The schools over which the WVSSAC has been delegated authority are known as its “member schools.” The Wayne County Board of Education has delegated such authority to the WVSSAC for its schools, including Spring Valley High School, and the WVSSAC in its review has determined Toma Gasaj ineligible.

### **III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Petitioner does not request oral argument in this case. The WVSSAC submits that the facts and legal arguments to determine the issues brought before this Court by the Writ of Prohibition are adequately presented in the briefs and records submitted herein and the law is well settled. However, should the Court desire oral argument, the WVSSAC would be pleased to present.

### **IV. ARGUMENT**

#### **A. Relief in prohibition is appropriate.**

Pursuant to West Virginia Code, “[t]he writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.” W. Va. Code § 53-1-1. “The Supreme Court of Appeals shall have original jurisdiction in cases of habeas corpus, mandamus and prohibition.” W. Va. Code § 51-1-3.

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: ( 1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

*State ex rel. State v. Wilson*, 239 W. Va. 802, 805, 806 S.E.2d 458,461 (2017) (internal quotation omitted) (quoting Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12,483 S.E.2d 12 (1996)).

**(1) The WVSSAC has no other adequate means, such as direct appeal, to obtain the desired relief.**

The decision of the Circuit Court to grant a preliminary injunction is effectively a final decision on the issues by way of its impact in the present matters and any final hearing or appeal will be moot prior to the end of the 2023-24 basketball season. The Petitioner simply seeks to enforce its member school rules, which requires that it prevent the Respondent, Toma Gasaj, from participation in basketball for the 2023-24 season, as he does not meet the rules for residence with his parents, namely the aforesaid Adoption/Guardianship Rule. Before discovery and a final hearing and/or appeal, the Circuit Court of Wayne County, West Virginia has substituted own opinions for that of the WVSSAC and its Board of Directors and failed to require the Respondent to exhaust his administrative remedies. By the time this matter could

conceivably be litigated, the 2023-24 West Virginia High School Basketball Season, including sectional, regional, and state tournaments, will have concluded.

**(2) The WVSSAC member schools will be damaged or prejudiced in a way that is not correctable on appeal.**

The WVSSAC member schools will be damaged or prejudiced in a way that is not correctable on appeal. As stated directly above, the basketball season will be over before a final determination by the Circuit Court and an appeal could possibly be had and the participation by Toma Gasaj cannot be undone. The only way in which the WVSSAC may correct such is by taking away the record and entering a forfeit for all games Toma Gasaj participates in. However, this does not take away the injury to his teammates; other member schools and their players losing the opportunity to participate in regular season and tournament competition as a team in a sectional, regional, or championship game may forever be deprived of that opportunity through defeat by the participation of Toma Gasaj with Spring Valley High School, although earlier resolution would have permitted such.

**(3) The Circuit Court of Wayne County, West Virginia's order exceeds its legitimate powers and is clearly erroneous as a matter of law.**

The "Order Granting Preliminary Injunction" entered by the Circuit Court of Wayne County, West Virginia on January 9, 2024, exceeded its legitimate powers and is clearly erroneous as a matter of law. The acts such as those of the Circuit Court's in the instant matter is an often repeated error and manifests persistent disregard to the WVSSAC's discretion in administering its rules and regulations.

The Supreme Court of Appeals of West Virginia first heard and determined what 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. “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 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*, a [WVSSAC] 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 that a trial court may question the manner in which a WVSSAC rule is applied. This mistake was made by the Circuit Court of Wayne County, West Virginia but was reversed 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. *Webster*, 228 W. Va. at 80, 717 S.E.2d at 864. 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.” *Id.*

Further, as 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 [WVSSAC] does not exceed its constitutional or statutory authority, circuit courts must stay out of the [WVSSAC’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 Wayne County, West Virginia exceeded its legitimate authority by substituting its judgment for that of the WVSSAC and its review boards.

- (4) **The Circuit Court of Wayne County, West Virginia’s Order is an often repeated error or manifests persistent disregard for either procedural or substantive law.**



The WVSSAC has recently experienced an onslaught of efforts by student athletes to disregard and circumvent the rulings of the WVSSAC with the aid of the Circuit Courts of West Virginia. Accordingly, this Court heard and ruled in Appeal Number 21-0836, *W. Va. Secondary Sch. Activities Comm'n v. J.G.*, that the Circuit Court of Wayne County exceeded its authority when it found that it could enjoin the WVSSAC from applying its own rules prior to a student receiving an administrative appeal. *W. Va. Secondary Sch. Activities Comm'n v. J.G.*, No. 21-0836, 2023 W. Va. LEXIS 391 (Oct. 18, 2023). Additionally, *State ex rel. W. Va. Secondary Sch. Activities Comm'n v. Cuomo* and *State ex rel. W. Va. Secondary Sch. Activities Comm'n v. Sweeney* had previously been before the Court where similar rulings were made granting an injunction to participate after decisions by the WVSSAC and its review boards. *State ex rel. W. Va. Secondary Sch. Activities Comm'n v. Cuomo*, 247 W. Va. 324, 880 S.E.2d 46 (2022) and *State ex rel. W. Va. Secondary Sch. Activities Comm'n v. Sweeney*, No. 22-0268, 2022 W. Va. LEXIS 698 (Nov. 17, 2022). This Court reaffirmed its prior holdings regarding the legitimate powers of the Circuit Court and granted such relief similarly as requested herein determining the injunction as issued exceeded the Circuit Court's legitimate powers in each matter. Accordingly, the inability of the WVSSAC to reasonably enforce its rules will be permanently damaged if the subject injunction is allowed to stand.

**(5) Whether the Circuit Court's Order raises new and important issues of law of first impression.**

The law with regard to the legitimate powers of Circuit Courts in this matter is well settled.

**B. The issuance of an injunction by the Circuit Court of Wayne County, West Virginia prohibiting the enforcement of Rule 127-2-8 by the WVSSAC improperly applied facts to the existing law which failed to establish (1) that Toma Gasaj has exhausted his administrative remedies; (2) that Toma Gasaj is likely to suffer irreparable harm in the absence of the sought after injunction; (3) that, in a**

**balancing of equities, the scale is not clearly tipped in his favor; (4) that Toma Gasaj is likely to succeed on the merits of his claim; and (5) that the preliminary injunction issued below is in the public interest.**

(1) **Failure to Exhaust Administrative Remedies.** Respondent’s petition should further be dismissed on the basis that Respondent has failed to exhaust all available administrative remedies. In West Virginia, “[t]he general rule is that where an administrative remedy is provided by statute or by rule and regulation 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.” Syl. Pt. 1, *Kincell v. Superintendent of Marion County Schools*, 201 W. Va. 640, 499 S.E.2d 862 (1997) (per curiam); *Daurette v. Traders Fed. Savings & Loan Assoc.*, 143 W. Va. 674, 681, 104 S.E.2d 320, 326 (1958). W. Va. Code § 18-2-5 provides the WVSSAC “control, supervision and regulation of interscholastic athletic events.” As part of its oversight, an administrative review process was established in W. Va. C.S.R. § 127-2-6.

In the instant matter, on or about December 20, 2023, Respondent was informed that the WVSSAC had determined that the Respondent was ineligible due to W. Va. C.S.R. § 127-2-8. Instead of filing an appeal with the State Board of Education to appear before the Board of Review, as set forth in the Rules and Regulations of the West Virginia Secondary School Activities Commission and as notified by letter of December 21, 2023 (see App. 3, Exhibit A), the Respondent filed this Petition for Injunctive Relief against the WVSSAC on December 26, 2023.

The Respondent has, accordingly, failed to complete his administrative remedies as provided by W. Va. C.S.R. § 127-6-1, *et seq.* and exhaust his administrative remedies.

If Respondent was aggrieved by the above finding by the Executive Director, then Respondent was required by the rules after filing an appeal with the Board of Directors to

complete his appeal process pursuant to W. Va. C.S.R. §§ 127-6-3, 127-6-4, and 12-6-5, not the Circuit Court of Wayne County, West Virginia.

The WVSSAC Board of Directors that affirmed the Executive Director's decision is comprised of five (5) elected officer-members, each of whom shall be a principal of a member secondary school in West Virginia. Also, serving as appointed members of the Board of Directors are the State Superintendent or representative designee, a representative from the West Virginia Board of Education, a representative selected from 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. The said members of the Board of Directors are not only set out by regulation to do so but are well qualified to administer the intent of the rules and regulations of the WVSSAC having intimate knowledge of the member school promulgated rules.

If a party remains aggrieved by the Board of Directors finding, as apparently in the case of the Respondent herein, then an appeal of the Board of Directors can further be made pursuant to W. Va. C.S.R. § 127-6-6, to the Board of Review. This appeal can be made by filing such appeal with Michele Blatt, Ed. D at the West Virginia Department of Education as notified by letter to the Respondent. (See App. 3, Exhibit B.)

The Board of Review, to which the Respondent can appeal a decision of the Board of Directors, pursuant to the Rules and Regulations of the WVSSAC, consists of seven (7) members appointed by the West Virginia Board of Education upon recommendation of the State Superintendent, which members shall be from the West Virginia Bar Association, West Virginia Association of School Administrators, West Virginia State Medical Association, West Virginia State Sportswriter Association, West Virginia Athletic Directors Association, and West Virginia

Association of Retired School Employees. Said Board of Review consists of highly qualified persons with significant education, background, and training regarding the issues raised by appellants.

The Respondent having failed to exhaust his administrative remedies should have been denied his Petition for Injunctive Relief and required to completely exhaust all administrative remedies available to him regarding this matter. The purposes of the exhaustion requirement 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.*, 223 W. Va. 277, 282, 672 S.E.2d 606, 611 (2008). Importantly, the referenced regulations also establish an appeal process for aggrieved parties to a WVSSAC decision by way of a Board of Directors who shall have authority to administer the regulations of the WVSSAC as set forth in W. Va. C.S.R. § 127-6.

**(2) Respondent has no likelihood of irreparable harm.**

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 Respondent without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the Respondent’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). Also see *Northeast Nat. Energy LLC v. Pachira Energy LLC*, 243 W. Va. 362, 844 S.E.2d 133 (2020).

While the Circuit Court's position that Toma Gasaj will never be able to make up a missed basketball game, WVSSAC Rule 127-2-8 prevented Toma Gasaj from being able to participate in all sports, including basketball during the 2023-24 school year, 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 Toma Gasaj's living situation made him ineligible by rule. The facts were simple and he was not entitled to participation by the applicable WVSSAC rules. Accordingly, he could not suffer irreparable harm by losing the ability to compete in something he was not eligible for pending a full fact finding in this matter and determination of error by the WVSSAC.

**(3) Likelihood of harm to the defendant.**

The Circuit Court of Wayne 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. 434, 440, 333 S.E.2d 799, 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 Toma Gasaj has been allowed to participate on by the injunction will be deprived of playing time.

**(4) Respondent 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 Toma Gasaj’s Petition for Injunctive Relief, Respondent alleged that WVSSAC’s rules are arbitrary and capricious and the Circuit Court, when deciding to issue a preliminary injunction, ruled that the WVSSAC’s authority was arbitrary and capricious; however, the trial court improperly made the finding that W. Va. C.S.R. § 127-2-8 is arbitrary and capricious without articulating the facts and conclusions of law supporting such determination. This finding is not supported by the WVSSAC rules or the consistent application thereof by the WVSSAC. See *Reilley v. Bd. of Educ.*, 246 W. Va. 531, 874 S.E.2d 333 (2022).

The WVSSAC Adoption/Guardianship Rule has been promulgated to address specific issues that prioritize fair playing fields for all interscholastic activities of its member schools. As the WVSSAC only exercises authority over the interscholastic events for its member schools, its restrictions on residency of participation are only present to the extent they involve the specific student of a member school, whether it be a public secondary, private, or parochial school. The WVSSAC by enforcing the Adoption/Guardianship Rule ensures fairness amongst member schools.

**(5) Public Interest.**

The granting of the injunction allows students to participate without regard to other students at member schools is in violation of the public interest. Any lack of residency as required 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 damage to the public was not properly considered by the "Order Granting Preliminary Injunction" in this matter.

## **VI. CONCLUSION**

**WHEREFORE**, your Petitioner, showing that the Circuit Court of Wayne County, West Virginia erred in issuing a preliminary injunction in the matter below, prays that this petition be filed; that a rule do issue, directed to the Respondents, requiring them to show cause, if any they can, why a preemptory Writ of Prohibition should not issue against them prohibiting enforcement of the "Order Granting Preliminary Injunction;" that this matter be set down for hearing in this Honorable Court, if necessary, as the parties might be reasonably accommodated; and for such other relief as to this Honorable Court deems appropriate and just, and as the nature of the case may require.

Dated this 19th day of January, 2024.

Respectfully submitted,

**WEST VIRGINIA SECONDARY SCHOOL  
ACTIVITIES COMMISSION**

By Counsel

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 24-

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STATE OF WEST VIRGINIA, ex rel.  
WEST VIRGINIA SECONDARY SCHOOL ACTIVITIES COMMISSION,

Defendant Below, Petitioner

v.

THE HONORABLE JASON FRY,  
JUDGE OF THE CIRCUIT COURT OF WAYNE COUNTY, WEST VIRGINIA,  
AND TOMA GASAJ,

Plaintiffs Below, Respondents.

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*Civil Action No. CC-50-2023-P-111*

**CERTIFICATE OF SERVICE**

I, Stephen F. Gandee, counsel for petitioner, West Virginia Secondary School Activities Commission, do hereby certify that on this 19<sup>th</sup> day of January 2024, a true and correct copy of the foregoing Verified Petition for Writ of Prohibition was served upon the following counsel of record via File & ServeXpress:

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/s/ Stephen F. Gandee  
(W. Va. State Bar I.D.: 5204)