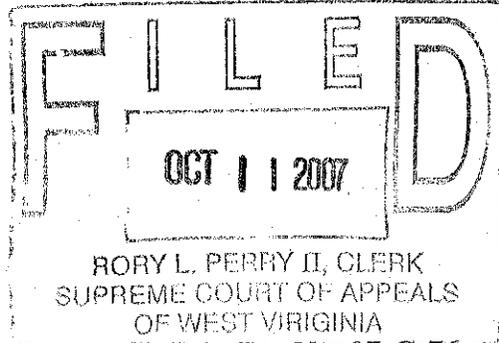


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**at Charleston**

**No. 072942**



**O. J. MAYO,**

Plaintiff/Respondent

v.

**Cabell County Civil Action No. 07-C-76  
The Honorable Dan P. O'Hanlon**

**WEST VIRGINIA SECONDARY  
SCHOOLS ACTIVITIES COMMISSION,**

Defendant/Petitioner

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**BRIEF OF CHARLESTON CATHOLIC HIGH SCHOOL  
AS *AMICUS CURIAE* IN SUPPORT OF WEST VIRGINIA SECONDARY SCHOOL  
ACTIVITIES COMMISSION'S PETITION FOR APPEAL**

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***I. Introduction***

Charleston Catholic High School, founded in 1923, is a private secondary school under the sponsorship of the Diocese of Wheeling-Charleston. In 1977, CCHS joined the West Virginia Secondary Schools Activities Commission (the "SSAC") and has been an active member since that time. In its last academic year, 90 percent of the CCHS student body of nearly 200 in grades 10 through 12 participated in at least one sport or activity that the SSAC regulates. CCHS draws much and gives much as a member of the SSAC.

It is thus with exceeding interest that CCHS appears as a friend of the Court in support of the SSAC's Petition for Appeal to correct errors that the Cabell County Circuit Court committed

in its final order. While CCHS speaks only for itself, it certainly is not alone in its fears of the ill effects of the case if they are left unchecked. CCHS is reassured that it is among many that have grave concerns about the lower court's holdings and their vast potential to wreak havoc on the capacity of the SSAC and its member schools both public and private to sanction their students for the greater order of discipline. CCHS does not lightly decide to enter this fray; it does so only to seek equanimity and to present a private school view.<sup>1</sup>

CCHS urges the Court to focus on two points. First, the circuit court incorrectly elevates the privilege of participating in inter-scholastic sports to a right subject to due process protections and judicial review when this Court definitively holds to the contrary. Second, the circuit court incorrectly characterizes the SSAC as a public agency when this Court has adjudicated the organization to be a quasi-public one.

These misapprehensions lead the circuit court down the wrong path to the wrong conclusions and the wrong results. The implications of the rulings for private schools that are members of the SSAC are not inconsequential. The rulings threaten their ability to operate without undue state interference.

## ***II. Note of Argument***

### **A. Participation in interscholastic athletics is not a right**

Judge O'Hanlon is wholly incorrect when he essentially rules that participation in interscholastic activities is a right subject to due process protections and judicial review. See the Amended Order at ¶¶ 13-16, 18, 22 and 26. He is incorrect because this Court holds to the contrary:

The threshold question in any inquiry into a claim that an individual has been

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<sup>1</sup> "Man always travels along precipices. His truest obligation is to keep his balance." John Paul II

denied procedural due process is whether the interest asserted by the individual rises to the level of a 'property' or 'liberty' interest protected by Article III, Section 10 of our constitution. When confronted with this precise issue, the overwhelming majority of courts have held that participation in interscholastic athletics or other extracurricular activities is not a constitutionally protected liberty or property interest. Because 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[s] [], and therefore is not entitled to any procedural due process protections.

*Bailey v. Board of Education of Kanawha County*, 174 W. Va. 8, 33 321 S.E.2d 302 (W. Va. 1984) (citing *Clarke v. West Virginia Board of Regents*, 166 W.Va. 702, 279 S.E.2d 169, 175 (W. Va. 1981).)

Judge O'Hanlon failed to make the threshold question whether participating in high schools rises to the level or a property or liberty interest. Had he done so, CCHS asserts, the outcomes of the case would have been entirely different. Instead, the circuit court's rulings simply presume the existence of a property or liberty interest when the jurisprudence of this Court contradicts it. CCHS urges this Court to grant the Petition to correct the mistaken results.

**B. Whether the SSAC is a public agency is irrelevant to the controversy**

CCHS rejects Judge O'Hanlon's conclusion that the SSAC is a state administrative agency and a "statutorily-created [sic] agency or instrumentality of West Virginia state government." See the Amended Order at ¶¶ 6, 30-34. More important, the issue is irrelevant to the core concern. Yet, the effect of the circuit court's incorrect declarations is to touch off a series of ill-formed rulings results based on them. For instance, the circuit court reviews the SSAC's regulations invoked against Mr. Mayo under an arbitrary and capricious standard (see the Amended Order at ¶ 8) and concludes that they denied Mr. Mayo sufficient due process

(Amended Order ¶ 14).<sup>2</sup>

The lower court devotes much of its order to its conclusion. But it is a needless diversion from the crux: No student under the SSAC's purview is entitled to due process, particularly in a judicial forum, because the privilege of participating in interscholastic athletics does not rise to a property or liberty interest. Absent a protected interest there is no constitutional imperative to afford students due process or judicial review to vindicate them. This is true irrespective that the SSAC is a public agency.

**C. The lower court's rulings threaten undue state entanglement with private and religious schools' internal affairs**

The lower court's rulings, because they so overreach, threaten undue state entanglement with the internal affairs of private and religious schools. CCHS asks the Court to grant the Petition if only to examine and mitigate the potential effects of the lower court's rulings on the relationship between church and state. CCHS largely fears that the rulings open the door to judicial review of its internal disciplinary actions against students who participate in SSAC-sanctioned activities.

It is the constitutionally protected right of CCHS under the Federal and state constitutions to enforce its religious, ethical and moral principles within the school free of state interference and judicial review. The school's voluntary membership in the SSAC does not alter these fundamental rights.

Indeed, CCHS voluntarily submits to the SSAC and the memberships in part

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<sup>2</sup> It is undisputed that the SSAC and its regulations provide a measure of internal review of the organization's sanctions. But the lower court believes they are insufficient because, among other things, they do not include the rights of administrative and judicial review: "Rule 127-3-15.3 is inequitable and violates the doctrine of fundamental fairness. The failure of the WVSSAC to establish an appeal process available before enforcement of the punishment is clearly wrong. The current regulations are repugnant to any notion of due process." See the Amended Order at ¶ 14.

because its rules of discipline are not subject to judicial review. One of the (perhaps) unintended but certainly undesirable consequences of the lower court's rulings is to dictate different treatments depending whether a member school is public or private. The following hypothetical scenarios illustrate the dichotomies:

**1. SSAC sanctions a student-athlete while CCHS does not**

In one scenario, the SSAC might sanction a student-athlete, forbidding her from competition, while CCHS does not. These circumstances present no concern because CCHS as an SSAC member voluntarily designates the SSAC to sanction her in conformance with the SSAC's regulations. A student-athlete's decision to pursue her due process rights to oppose the sanction would interfere with the school's constitutional rights.

**2. CCHS sanctions a student-athlete while the SSAC does not**

In another scenario, CCHS might sanction a student-athlete by forbidding her from inter-scholastic competition while the SSAC does not. Under Judge O'Hanlon's ruling, it now is unclear to CCHS whether the student-athlete would have a due process right to appeal the sanction because CCHS is a member of the SSAC. But it is as clear to CCHS that to submit its decision to sanction the student-athlete to due process and judicial review would be untenable to CCHS and a violation of the school's First Amendment and other rights.

**3. SSAC sanctions a student-athlete while CCHS imposes greater sanctions**

In the last scenario, the SSAC might sanction a student-athlete, forbidding her from competition in two games, while CCHS imposes even greater sanctions on her for the same infraction, barring her from three. She would be subject to the same SSAC sanctions as every other student-athlete. But, because she attends CCHS, she is still subject to the school's higher order of discipline. Thus, the circumstances would be confusing: One student, one offense and

two sanctions. It would be impossible to divide judicial review of the SSAC's sanctions from CCHS's, thus creating a dilemma for the courts.

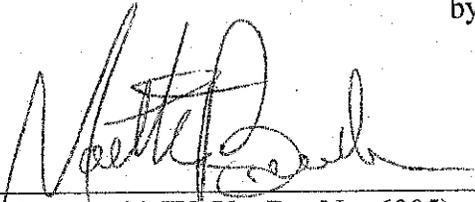
### **III. Conclusion**

This Court already has definitively ruled there is no "protected property interest" to participate in high school athletics. Judge O'Hanlon's rulings are to the contrary. Whether the SSAC is a state agency is irrelevant to that crucial issue because in the absence of a protected property interest, there is no corresponding requirement of due process and judicial review even for recognized state agents. Irrespective of these issues, Judge O'Hanlon's rulings raise considerable questions about the disparate treatment between the SSAC's public and private members, for which CCHS and others desire answers.

CCHS asks that the Court grant the Petition for Appeal to address them.

**CHARLESTON CATHOLIC HIGH SCHOOL**

by its Counsel



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