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The matter was heard on February 9, 2007, and the issues involving the requested Injunction were resolved by agreement.

On April 5, 2007 the Circuit Court entered an Order reciting the terms of the agreement of the parties. In addition, the Court's Order of April 5 struck down as unconstitutional WVSSAC Rule 127-3-8.5 – a rule not at issue in the case, and not mentioned in pleadings filed by either party. The Court also awarded Plaintiff attorney fees.

On April 16, 2007 the WVSSAC filed a Motion to Alter or Amend Judgment, Plaintiff filed a response on May 7, and the motion was heard on May 9. On May 21, 2007, the Court entered an Amended Order (1) granting the Plaintiff's request to supplement the record; (2) vacating the injunction entered on January 30, 2007 that enjoined the WVSSAC from enforcing the two-game suspension resulting from the ejection; (3) striking down WVSSAC Rule §127-3-8.5 except as it applies to injunctive relief in which a judge makes a specific finding that the restraining order or injunction was not justified; (4) striking down WVSSAC Rule §127-3-15.3 because it does not provide for an administrative review of a referee's decision to eject a student athlete; (5) finding that the WVSSAC is a statutorily-created agency of West Virginia State government; (6) awarding Plaintiff attorney fees and costs; and (7) requiring the WVSSAC to amend its rules to conform to the Amended Order.

STATEMENT OF FACTS

On January 26, 2007, during a basketball game played at the Charleston Civic Center between Huntington High School and Capitol High School, the Appellee O.J.

Mayo, a student at Huntington High School, was ejected upon receiving his second technical foul. WVSSAC Rule §127-4-3.7.3 provides that student athletes who are ejected from athletic contests are automatically suspended for an additional period -- in basketball, two additional games. Following the assessment of his second technical foul Plaintiff approached and had physical contact with a referee. Plaintiff was subject to an additional sanction for having physical contact with an official, in violation of a WVSSAC Rule which prohibits "laying hands" on a referee. (WVSSAC Rule §127-4 - 3.7.2).

On January 30, 2007, the Plaintiff filed a civil action seeking an injunction prohibiting the WVSSAC from enforcing the automatic two-game suspension stemming from Plaintiff's ejection, and on that day the Circuit Court of Cabell County, *ex parte*, ordered that the Plaintiff remain eligible to participate in interscholastic athletics until the matter could be fully heard.

The matter was set for hearing on February 9, 2007. Prior to the hearing Huntington High School determined to subject Mr. Mayo to a fourteen day suspension for having physical contact with an official. A fourteen day suspension would have resulted in Mr. Mayo missing four (4) basketball games.

In view of the action of Huntington High School, prior to the hearing the WVSSAC proposed that the injunction be vacated by agreement, and as part of the agreement represented that the WVSSAC would defer to Huntington High School on the question of the appropriate sanction for Mr. Mayo having physical contact with an official, and in addition would agree that the automatic two-game suspension stemming

from the ejection could be served concurrently with the suspension imposed by Huntington High School.

The Plaintiff declined the WVSSAC's proposal, and the matter proceeded to hearing on February 9. During a recess of the hearing Huntington High School (which was not a party to the litigation) agreed to reduce its suspension from 14 to 13 days, which would result in Plaintiff being suspended for a total of three games rather than four. At that point Mr. Mayo accepted the proposal previously offered by the WVSSAC, and the parties advised the Court that the parties had reached an agreement resolving the case, which agreement provided that the injunction be dissolved and that the automatic two game suspension stemming from Mr. Mayo's ejection would be served concurrently with the suspension imposed by Huntington High School as a sanction for having physical contact with an official.

Following the February 9th hearing the Court entered an Order on April 5, 2007, which recited the terms of the agreement, but also found that Rule §127-3-8.5 was unconstitutional, even though the rule was not been mentioned in any of the pleadings, and was not at issue between the parties. Rule §127-3-8.5 states:

"If a student is ineligible according to WVSSAC rules but is permitted to participate in interscholastic competition contrary to such WVSSAC rules but in accordance with the terms of a court restraining order or injunction and said order or injunction is subsequently vacated, stayed, reversed or finally determined by the courts that injunctive relief is/was not justified, any one of the following actions may be taken in the interest of fairness or restitution to the competing schools."

The Court held that Rule §127-3-8.5 was unconstitutional except when “a judge makes a specific finding in a final determination that the restraining order or injunction is/was not justified.” The Court also awarded Plaintiff attorney fees.

On April 16, 2007, the WVSSAC filed a Motion to Alter or Amend Judgment. On May 7, 2007, Plaintiff filed a response to WVSSAC’s Motion. The motion was heard on May 9, and on May 21 the Court entered an Amended Order (1) granting the Plaintiff’s request to supplement the record; (2) vacating the injunction entered on January 30, 2007 that enjoined the WVSSAC from enforcing the two-game suspension resulting from the ejection; (3) striking down Rule §127-3-8.5 except as it applies to injunctive relief in which a judge makes a specific finding that the restraining order or injunction was not justified; (4) striking down Rule §127-3-15.3 because there is no provision for administrative review of a referee’s decision to eject a student athlete; (5) finding that the WVSSAC is a statutorily-created agency of West Virginia State government; (6) awarding Plaintiff attorney fees and costs; and (7) requiring the WVSSAC to amend its rules to conform to the Amended Order.

ASSIGNMENT OF ERRORS

I.

The Circuit Court of Cabell County erred in holding that the WVSSAC’s failure to establish an administrative review process prior to imposing a multiple-game suspension is arbitrary and capricious, and an unconstitutional denial of due process rights.

II.

The Circuit Court of Cabell County erred by addressing WVSSAC Rule §127-3-8.5 because there was no case or controversy regarding the Rule.

III.

The Circuit Court of Cabell County erred in finding that WVSSAC Rule §127-3-8.5 is unconstitutional.

IV.

The Circuit Court of Cabell County erred in finding that the WVSSAC is a state agency established by W. Va. Code §18-2-25.

V.

The Circuit Court of Cabell County erred in awarding attorney fees and costs to the Plaintiff.

POINTS AND AUTHORITIES

I.

The lack of an administrative review process of a referee's decision to eject a student-athlete, resulting in a multiple game suspension, is not unconstitutional, not arbitrary, and not capricious.

In paragraphs 14 and 15 of its AMENDED ORDER, the Circuit Court held:

“14. 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. Balancing the mandatory, unreviewable sanction of a multiple-contest suspension against the limited resources necessary to ensure equity and an opportunity for a student-athlete to be heard results in this Court's finding that the appeal process is indeed lacking in fundamental fairness.”

“15. The Court finds that the WVSSAC's failure to establish an administrative review process to address material, substantive issues prior to imposition of a multiple-game suspension is arbitrary and capricious, and accordingly, held null and void and is hereby struck down.”

The automatic suspension required by Rule §127-4-3.7.3 is simply a consequence of a referee's decision to eject a student-athlete from a basketball game. Requiring a

hearing is to invite the courts to review a referee's judgment-call in assessing two technical fouls to a player during a game. Even the Circuit Judge acknowledged this; paragraph 5 of his Amended Order states:

"The two-game suspension resulting from a basketball player being ejected for receiving two technical fouls during a game is a portion of the sanction resulting from the decision of the game officials to assess two technical fouls. A review of the suspension would necessarily involve a review of the decision of the referee to assess a technical foul."

In Paragraph 14 of the Amended Order the Circuit Judge stated that he balanced the mandatory sanction against the resources necessary to provide a student-athlete with a hearing. However, there was no evidence in the record upon which the Court could have balanced those interests. In *Gallery v. WVSSAC* this Court declined to exercise its discretion to address technically moot issues because, with respect to collateral consequences, "on the record before us, we have no idea of the scope of those consequences, other than our speculation" and with respect to public interest in the issue, "again because of the limited record before us, we similarly have no idea of the scope of the public interest involved in the issues that were before the circuit court." 205 W.Va. 364, 367, 518 S.E.2d 368 (1999). Clearly, the record in this case is devoid of any evidentiary basis for balancing the mandatory sanction against the resources necessary to provide a student-athlete with a hearing challenging ejection from a high school athletic contest and the resulting suspension.

If such a record had been developed, it would have demonstrated the marked decline in ejections for "flagrant fouls" which has ensued following the adoption of the multi-game suspension rule. In addition, had such a record been developed it would have

demonstrated that simply obtaining qualified officials is a real problem facing high school athletics, and that establishing an administrative procedure to consider an "appeal" of a referee's decision would exacerbate that problem. Rule §127-3-15.3 recognizes the inherent difficulties the administration of high school athletics would face if student-athletes were permitted to appeal the decision of a referee to eject, with the consequent automatic suspension. Clearly the rule is rationally related to a legitimate purpose.

The WVSSAC's failure to establish an appeal process before imposing a multiple-game is not arbitrary and capricious. Plaintiff argues that his due-process rights were violated by WVSSAC Rule §127-3-15.3, which provides that "[t]he protest of a contest or ejection will not be allowed." However, participation in interscholastic sports is not a liberty or property interest that is constitutionally protected. The issue of whether the right to participate in interscholastic athletics is "fundamental" was decisively put to rest by this Court in *Bailey v. Truby*, which held that:

"Participation in interscholastic athletics or other nonacademic extracurricular activities does not rise to the level of constitutionality protected 'property' or liberty' interest." *Bailey v. Truby*, 174 W.Va. at 20, 321 S.E. 2d 302, 314 (1984).

Moreover, this Court concluded that:

"Participation in nonacademic extracurricular activities, including interscholastic athletics, does not rise to the level of fundamental or constitutional right under the article of the State Constitution granting students the right to a thorough and efficient education, and thus, regulation of such activities need only be rationally related to a legitimate purpose." 174 W.Va. at 20, 321 S.E. 2d at 314.

Bailey v Truby makes clear that Plaintiff has no constitutionally protected interest in participating in interscholastic sports and is not entitled to any procedural due process

protections. Accordingly, the Circuit Court's conclusion that §127-3-15.3 is "repugnant to any notion of due process" is in error.

II.

There is no Case or Controversy Involving the Constitutionality of WVSSAC Rule §127-3-8

In paragraphs 16 and 28 of its AMENDED ORDER, the Circuit Court held:

"16. Although not mentioned in the Plaintiff's Complaint, the Court expressed deep concern about the possibility of Huntington High School being required under Rule 127-3-8 to forfeit basketball games in which the Plaintiff participated in pursuant to the injunction."

"28. Therefore, since it is foreseeable that the issue of the possible application of the forfeiture rule to other aggrieved parties who seek a remedy in court will arise again, the court finds that the question remains justiciable for future guidance and it is appropriate for the Court to rule on this issue. *Israel v. West Virginia Secondary Schools Activity Commission*, 182 W.Va. 454, 388 S.E.2d 480 (1989)."

The forfeiture rule (WVSSAC Rule §127-3-8) was never at issue in this case. The Plaintiff did not question the constitutionality of the forfeiture rule in this proceeding. When the Court expressed concern about the forfeiture rule, Counsel for the WVSSAC stated on the record that the forfeiture rule was not an issue in this proceeding, and that, whatever the outcome of this case, the forfeiture rule would not be invoked. But for the Court *sua sponte* having expressed concern about the possibility of Huntington High School being required to forfeit basketball games in which the Plaintiff participated pursuant to the injunction, no discussion whatsoever of the forfeiture rule would have arisen in the context of this case. "[A] court cannot adjudicate a controversy on its own motion; before it can act there must be proper application invoking the judicial power of

the Court to litigate the matter at issue." *The Board of Ed. of County of Berkeley v. W. Harley Miller, Inc.* 159 W.Va. 120, 131, 221 S.E. 2d 882 (1975).

The Circuit Court relied heavily upon *Israel* to justify issuing an opinion on the forfeiture rule. In *Israel*, a female student instituted an action challenging the WVSSAC rule prohibiting girls from participating on a boys' team when the school maintains a separate girls' team in the same or related sport. The plaintiff contended that the rule violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and equal protection principles embodied in the West Virginia Constitution. The case reached the Supreme Court of Appeals well after the plaintiff had graduated from high school and entered college, and was therefore technically moot. The Court held in Syllabus Point 1:

"Three factors to be considered in deciding whether to address technically moot issues are as follows: first, the court will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief; second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public; and third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided." *Israel*, 182 W. Va. 454, 388 S.E.2d 480.

The Court declined to dismiss *Israel* as moot, noting that the brevity of the baseball season made it is unlikely, if not impossible, to fully litigate a gender discrimination claim, holding that there were sufficient collateral consequences to justify relief, and holding that the claim was justiciable because it involved a vital public function.

The circumstances that justified the decision in *Israel* are simply not present in this case. First, the constitutionality of the rule in *Israel* was directly attacked and was the central issue in the case. In contrast, the forfeiture rule was never mentioned in the pleadings and was never an issue in this case. Second, while both high-school baseball and basketball seasons are relatively brief, the fleeting nature of a student not being able to participate because of gender is not analogous to the possibility of victories being forfeited. And third, the issue in *Israel* was gender discrimination, which is clearly an issue of compelling public interest. Had the forfeiture rule been an issue in this case (it was not), the possibility of an adjustment to a team's won – loss record, while important, is clearly not an issue of comparable magnitude to the gender-discrimination issue raised in *Israel*.

In *Gallery v. WVSSAC*, 205 W. Va. 364, 518 S.E.2d 368 (1999), a home-schooled student attacked the WVSSAC rule that prohibits home-schooled students from participating in interscholastic athletics. However, by the time the appeal of the Circuit Court ruling reached this Court the issue was moot because the plaintiff had enrolled in the public school system. Relying on the criteria articulated in *Israel*, this Court declined to address the technically moot issue. *Id.* at 367, 518 S.E.2d at 372. While acknowledging that there “probably would be some degree of collateral consequences from declining to assess the validity of the SSAC’s blanket ban on home-schooled students’ participation in interscholastic athletics” the Court held: “[b]ut on the record before us, we have no idea of the scope of those consequences, other than our speculation that they are probably not great.”

While the limited record in *Gallery* was a factor in this Court's determination not to decide the case, with respect to the forfeiture rule the record in this case is even more limited. In fact, there is literally no record dealing with the forfeiture rule: it was not mentioned in any pleadings, and was not raised by any litigant. Instead, the Court raised the issue on its own motion, and proceeded to rule without the benefit of any developed record whatsoever. Accordingly, there likewise is no evidentiary basis upon which any public interest in the forfeiture rule may be evaluated. And like the issue in *Gallery* (and unlike *Israel*), the forfeiture rule does not inherently evade judicial review. If the forfeiture rule was the subject of an actual case in controversy, and was challenged in the judicial system, the challenge would not become moot with the graduation of a student athlete. As the court stated in *Gallery*, "if this issue remains alive, we should expect to see another case where a live controversy is presented to this Court." *Id.*

In conclusion, the Petitioner submits that questions regarding the constitutionality of the WVSSAC's forfeiture rule are not of such magnitude, or of such significance to the public as to warrant the Court undertaking to issue what is essentially an advisory opinion. *State v. McCartney*, 159 W.Va. 829, 228 S.E. 2d 278 (1976).

III. WVSSAC Rule §127-3-8.5 is not Unconstitutional

The Circuit Judge held in paragraph 21 of its AMENDED ORDER as follows:

"21. Therefore, Rule 127-3-8.5 is struck down as unconstitutional except as it applies to restraining orders or injunctions that are specifically found by a court not to have been justified."

WVSSAC Rule §127-3-8.5 provides:

“If a student is ineligible according to WVSSAC rules but is permitted to participate in interscholastic competition contrary to such WVSSAC rules but in accordance with the terms of a Court restraining order or injunction **and said order or injunction is subsequently vacated, stayed, reversed or finally determined by the courts that injunction relief is/was not justified**, any one of the following actions may be taken in the interest of fairness or restitution to the competing schools”. (Emphasis added).

127-3-8.5.1 Require that individual or team and performance records achieved during participation by such ineligible student shall be vacated or stricken.

127-3-8.5.2 Require that team or individual victories shall be forfeited to opponent(s).

127-3-8.5.3 Require that team or individual awards earned by such individual or team be returned to the Commission.”

Petitioners would first submit that the rule is not in conflict with the Court’s holding. The Court held that the forfeiture rule is not unconstitutional with respect to restraining orders or injunctions, if the court makes a specific finding in a final determination that the restraining order was not justified. By its terms, the forfeiture rule does not come into play until a court order or injunction is subsequently vacated, stayed, reversed or finally determined by the Courts that injunctive relief was not justified. If the WVSSAC’s forfeiture rule and the forfeiture rule as modified by the Court’s ruling can be distinguished, then that may well be a distinction without a difference.

In any event, if it can be argued that there is a difference in the effect of the language in the rule and the language in the Court’s ruling, the Petitioner would submit that throughout the existence of Rule §127-3-8.5 it has always been interpreted and applied by the WVSSAC in a manner consistent with the language contained in the Court’s Order.

IV.

**The WVSSAC is not an
Administrative Agency of the State**

In its **AMENDED ORDER** The Circuit Court held in paragraphs 30 and 34 as follows:

“30. Defendant WVSSAC is an organization established by West Virginia Code §18-2-25 as an administrative agency of the state and a participating public employer in the West Virginia Public Employees Retirement System. 58 W. Va. Op. Atty. Gen 151, 1980 WL 119398 (W.Va.A.G.). The Defendant WVSSAC is a state agency whose funds may be invested in the Consolidated Investment Fund established pursuant to W.V. Code §12-6-1, et seq. 61 W. Va. Op. Atty. Gen. 72, 1986 WL 288932 (W.Va.A.G.)”

“34. Thus, the court finds that the WVSSAC is a statutorily-created agency or instrumentality of West Virginia state government.”

Notwithstanding the Circuit Court’s ruling, the West Virginia Secondary School Activities Commission WVSSAC is a private, voluntary association of principals of West Virginia private, public and parochial schools. It was organized on June 17, 1916, and has existed continuously since that date.

The Supreme Court of Appeals squarely addressed the status of the WVSSAC in *Manchin v. WVSSAC*, and held:

“The West Virginia Secondary School Activities Commission (‘the SSAC’) has been in existence since 1916. Its members are principals (or their representatives) of secondary schools (essentially junior and senior high schools) in those counties which, through their county Board of Education, have elected to delegate control of their interscholastic athletic events and band activities to the SSAC. Parochial and private schools may also delegate to the SSAC the control of these types of extracurricular activities.” 178 W.V. 699, 700, 364 S.E. 2d 25 (1987).

This Court further held:

“From its inception in 1916 until January, 1967, the SSAC was an unincorporated association. From January, 1967 until voluntary dissolution in December, 1969, it was a corporation under the name of the West Virginia Secondary School Activities Commission, Inc. Upon dissolution of the corporation the SSAC reverted to its status as an unincorporated association.” *Id.* at 700.

While there is language in WV Code §18-2-25 (enacted in 1967) which states that the WVSSAC “is hereby established”, the WVSSAC was in existence more than fifty years prior to the enactment of that statute. Rather than “create” or “establish” an organization which had been in existence for more than fifty years, §18-2-25 simply gave county boards of education specific statutory authorization to delegate control, supervision and regulation of interscholastic athletic events and band activities to the WVSSAC. The Supreme Court of Appeals in *Manchin* dealt with the statutory language regarding the “establishment” of the WVSSAC in footnote 9, which provides:

“The Court, in *State ex rel. West Virginia Secondary School Activities Commission v. Oakley*, 152 W.V. 533, 164 S.E. 2d 775 (1968), noted that the incorporation of the SSAC (for a brief period of time) was accomplished by formation under the General Corporation Law, not by the ‘hereby established’ language of W.V. Code § 18-2-25 [1967]. The SSAC was already established as a corporation when the statute was enacted. Therefore, the statute only accorded statutory recognition to the pre-existent organization.” *Id.* 152 W.V. 535, 537, 164 S.E. 2d 777, 778. In that case the Court held that a Circuit Court lacked jurisdiction to consider an appeal of a decision of the SSAC’s Review Board. The judicial review provisions of the State Administrative Procedures Act were ruled inapplicable. **Implicit in this ruling is a determination that the SSAC was not a state agency.**” (emphasis added).

In *Blower v. West Virginia Educ. Broad. Auth.*, 182 W. Va. 528, 389 S.E.2d 739 (1990) the Court set forth the following criteria for determining whether an entity is a state agency:

“Thus, from our prior cases determining whether a particular organization is a state agency, we have examined its legislative framework. In particular, we look to see if its powers are substantially created by the legislature, and whether its governing board's composition is prescribed by the legislature. Other significant factors are whether it can operate on a statewide basis, whether it is financially dependent on public funds, and whether it is required to deposit its funds in the state treasury.” *Id.* at 530, 389 S.E.2d at 741.

The issue in *Blower* was whether the West Virginia Educational Broadcasting Authority was a state agency. Applying the analytical framework prescribed by *Blower*, it is clear that the WVSSAC is not an agency of the State. First, its powers were not substantially created by a Legislature. The WVSSAC – a voluntary association of secondary school principals – has exercised the supervision, control and regulation of interscholastic athletics in West Virginia continuously since 1916. With the enactment of WV Code §18-2-25 in 1967, the Legislature formally authorized County Boards of Education to delegate to the WVSSAC the supervision, control and regulation of interscholastic athletics. The legislation did not “substantially create” the powers of the WVSSAC.

In contrast, the EBA was created by an act of the legislature, and the creating legislation designated the EBA a “public benefit corporation.”

Second, while the composition of the EBA is established by statute, and its eleven-member governing board includes four state officials and seven members appointed by the governor with the advice and consent of the senate, the composition of

the WVSSAC's governing board is established by the organization itself. More specifically, the Constitution of the WVSSAC, in that section titled "Membership," provides:

"The West Virginia Secondary School Activities Commission shall be composed of the principals or designee of those public or private secondary schools which have certified in writing to the State Superintendent of Schools that they have elected to delegate the control, supervision and regulation of their interscholastic athletic and band activities." WVSSAC Rule 127-1-4.1

And that section of the WVSSAC Constitution entitled "Administration" provides:

"5.1. The administration of the West Virginia Secondary School Activities Commission shall be vested in the secondary school principals heretofore defined as members and who shall constitute a Board of Control. Said Board of Control shall determine the regulation of interscholastic athletic and band activities among the school's represented by the members of said commission and shall have charge of all funds of said commission, and in order to expedite the regulations of said activities shall delegate and assign to the Board of Directors hereinafter constituted, and the Executive Director, hereinafter constituted and working through the Board of Directors, authority to interpret and enforce these regulations. Said Board of Control shall delegate and assign to the Board of Trustees, hereinafter constituted, the power and authority to hold title to and manage the property owned by said commission. These regulations of said commission shall be the articles, rules, explanations and interpretations which have been voted upon and approved by a majority vote of the members of the Board of Control present and voting at the annual meeting of said commission. Fifty (50) members shall constitute a quorum for the transaction of all business at said annual meeting and approved by a majority vote of the members of the Board of Control present and voting at the annual meeting of said commission.

5.2. At the annual or called meetings of the Board of Control of the West Virginia Secondary School Activities Commission each member shall have one vote on each question or proposition under consideration. A member may appoint, by a written statement to the President of said commission, the assistant principal or other member of the faculty to represent the school at meetings of the Board of Control but no such appointment shall absolve the member of his responsibility as defined in these regulations.

5.3 The Board of Control of the West Virginia Secondary School Activities Commission shall, at its annual meeting, elect officers of the commission and define their duties as provided in §127-1-6 of these regulations. The officers so elected shall be members of the Board of Directors of the West Virginia Secondary School Activities Commission with the powers and duties assigned to it by §127-1-8 of the regulations of said commission. Said Board of Directors shall be the executive body of the commission and shall administer the regulations of the commission. Further, said Board of Directors shall enforce the provisions of these regulations through the application of penalties provided under §127-6-2 of these regulations. Adjudication of disagreements and disputes among members of the commission shall be one of the chief duties of the Board of Directors. Such adjudication may, however, be appealed to the Review Board.

Third, both the EBA and the WVSSAC operate on a statewide basis. This is the only criteria set forth in *Blower* for determining whether an entity is a state agency which the WVSSAC meets, and operating statewide in and of itself cannot render an entity a state agency.

Fourth, the Activities Commission is not financially dependent upon public funds. Unlike the EBA, which receives legislative appropriations, the WVSSAC does not, and has never been the recipient of public funds. The EBA is authorized to receive property in the State's name; the WVSSAC has no such authority.

Fifth, the final criteria articulated in *Blower* for determining whether a particular organization is a state agency is whether it is required to deposit its funds in the state treasury. This Court held in *State ex rel. Manchin v. WVSSAC*:

“It is clear, therefore, that monies of the SSAC have been classified by the Legislature as ‘quasi-public funds’, not State funds. Like the funds of a parent/teacher organization, or of a county Board of Education or County Commission, and subject to similar accountability, the funds of the SSAC are not ‘monies due the State’, as set forth by the Legislature in WV Code, 12-2-2 (1983). 178 W.Va. 699, 703, 364 S.E. 2d 25, 29 (1987) (footnote omitted).

While the EBA is required to deposit its monies with the state treasurer, the monies received by the WVSSAC are quasi-public funds that do not have to be accounted for under W.Va. Code §12-2-2.

To reiterate, applying the criteria set forth in *Blower* to determine the status of an entity makes clear that the WVSSAC is not a state agency. But for the fact that it operates statewide, none of the indicia of state agency described in *Blower* are present with the WVSSAC.

The intertwining between WVSSAC and private and parochial schools also indicates the private and voluntary nature of the WVSSAC. The membership of the WVSSAC includes principals of parochial schools organized and supported by particular religions. This fact, and Circuit Court’s holding that the WVSSAC is a state agency must be reconciled with the First Amendment of the United States Constitution’s guarantees of religious freedom, and with what may be even stronger guarantees of religious freedom contained in Article 3, Section 15 of the Constitution of the State of West Virginia.

The last sentence of W. Va. Code §18-2-25 reads as follows:

"Any such private or parochial secondary school shall receive any monetary or other benefits in the same manner and in the same proportion as any public secondary school."

Monetary benefits are provided to schools qualifying for state playoffs, to help defray traveling expenses. If a parochial school qualifies for a state playoff, then WVSSAC monies will be used to defray the traveling expenses of the parochial schools. If the WVSSAC were a state agency, would this not broach the question of establishing a state religion?

Moreover, the assets of the WVSSAC belong to its members, including private and parochial schools. If by judicial fiat the WVSSAC suddenly becomes a state agency, would not such a ruling amount to an unconstitutional taking of the assets of the WVSSAC's private and parochial school members?

Also, the members of the WVSSAC are not officials and employees of a state agency. As set forth in the that portion of its Constitution quoted above, the membership of the West Virginia Secondary School Activities Commission is composed of the principals of those public or private secondary schools which have elected to delegate the control, supervision and regulation of their interscholastic athletic and band activities to the WVSSAC.

While it is correct that employees of the WVSSAC participate in the West Virginia Public Employees Retirement System, that fact does not render the WVSSAC a state agency. A number of different entities which are clearly not state agencies are permitted to participate in various public retirement programs. For example, the West Virginia Association of Counties, the W.Va. Municipal League and the County Commissioners' Association are each organizations whose reasons for existence include

lobbying the legislature on behalf of their members. The employees of each of these organizations are members of the Public Employees Retirement System. But participation in the Public Employees Retirement System does not make these organizations state agencies.

Likewise, the President of the West Virginia Education Association and the President of the American Federation of Teachers for West Virginia both work full-time for their respective organizations, and receive salaries from those organizations. The Presidents of both organizations are permitted to participate in the West Virginia Teacher's Retirement System, and their years of service while working for their respective organizations and the salaries earned in that capacity count toward their pensions from the Teacher's Retirement System. *W. Va. Code* §18-7A-17(f). Such participation does not make either the West Virginia Education Association or the American Federation of Teachers for West Virginia a state agency.

The fact that employees of the WVSSAC are permitted to participate in the Public Employees Retirement System no more makes the WVSSAC a state agency than similar participation would make the West Virginia Association of Counties, the W.Va. Municipal League, the County Commissioners' Association, the West Virginia Education Association and the American Federation of Teachers state agencies

V.

An Award of Attorney Fees and Costs Is Not Warranted in this Case

The Circuit Court's award of attorney fees and court costs in this matter is predicated upon its holding that the WVSSAC is an administrative agency of the State. As discussed above, the WVSSAC is not an administrative agency of the State.

The ruling further holds that the WVSSAC “must comply with the requirements of W.Va. Code §12-2-2 governing deposits to the state fund....” Paragraph 17, Order entered April 5, 2007. The lower court’s ruling is directly contrary to this Court’s holding in *Manchin v. WVSSAC*. The deposit of monies of the WVSSAC was the central issue in *Manchin*. In that case this Court held:

“Like the funds of a parent-teacher organization, or of a County Board of Education or County Commission, and subject to similar accountability, the funds of the SSAC are not ‘monies due the state’, as set forth by the legislature in W.Va. Code, 12-2-2[1983].” 178 W.Va. 699, 703; 364 S.E.2d 25 (1987).

Parent-teacher organizations raise funds in the name of a school. For that reason, there is some public scrutiny of those funds. Just as parent-teacher organizations are not agencies of the state, even though the monies they raise are “quasi-public funds”, subject to some public scrutiny, likewise the WVSSAC is not a state agency, even though its funds are subject to some public scrutiny.

The Circuit Court cited *Nelson v. West Virginia Public Employees Insurance Board*, 171 W. Va. 445, 300 S.E.2d 86 (1982) and *State ex rel. West Virginia Highlands Conservancy, Inc. v. West Virginia Division of Environmental Protection*, 193 W. Va. 650, 458 S.E.2d 88 (1995) as authority for its award of attorney fees against a state agency. As previously stated, while the WVSSAC is not a state agency, in any event the two cases cited were instituted by plaintiffs seeking writs of mandamus. It is well-settled law in West Virginia that the prevailing party in a mandamus proceeding may be awarded attorney fees. Appellant O.J. Mayo did not seek a writ of mandamus; instead he sought

only injunctive relief. West Virginia law does not provide for the award of attorney fees in a case involving injunctive relief.

In summary, the WVSSAC is a private, voluntary association of principals of various public, private and parochial secondary schools in West Virginia. It is not an agency of the State of West Virginia.

Even though it is a private, voluntary association, and not a state agency, the WVSSAC's legal status does not change the law governing the award of attorney fees. "As a general rule each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement." Syl. Pt. 2, *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986). This general rule is equally applicable to public and private litigants; there is no statutory authority for the award of attorney fees in a case such as this.

And even if there were authority for such an award, it would not be appropriate given the circumstances in this case. Plaintiff filed suit seeking to enjoin the enforcement of WVSSAC Rule §127 - 4 - 3.7.2, and was awarded a preliminary injunction during an *ex parte* hearing. Prior to a hearing on the merits of his petition the WVSSAC proposed a compromise, which would have permitted Plaintiff to serve his two-game suspension concurrently with any suspension imposed by Huntington High School for the separate infraction of having physical contact with an official. Plaintiff rejected the proposed compromise prior to the hearing, but accepted it during a recess in the hearing.

The Circuit Court's stated reason for the award of attorney fees is as follows:

"The existence of the clearly unfair and unconstitutional forfeiture rule, and the failure of the WVSSAC to take the steps necessary to enact reasonable regulations in this area are sufficient to award to the plaintiff his court costs and

reasonable attorneys' fees." Paragraph 20, Order entered April 5, 2007; Paragraph 36, Amended Order entered May 21, 2007.

As previously stated, only the Circuit Court raised any question about the forfeiture rule. The Plaintiff's complaint was limited to the rule subjecting plaintiff to an automatic two-game suspension based upon his ejection. The award of attorneys' fees in this case is clearly not warranted.

CONCLUSION

There was no evidence on the record to allow the Circuit Court to balance the resources necessary for granting student-athletes hearings to dispute ejections and suspensions with the consequences of those suspensions. Rule §127-3-15.3 is rationally related to a legitimate purpose; it simply recognizes the sound public policy of minimizing flagrant fouls, and the practical difficulties of conducting such hearings. The rule protects the judicial system from being asked to second-guess judgment calls made by referees in sporting events. In any event, Rule §127-3-15.3 does not deprive Plaintiff of any constitutionally protected due process rights. This Court has clearly held that participation in interscholastic sports does not rise to the level of constitutionally protected interest.

There is no case or controversy surrounding the constitutionality of the forfeiture rule (WVSSAC Rule §127-3-8). No party raised the issue (except the Circuit Court), the issue simply does not involve questions of great public policy, and the issue is not so fleeting in nature as to justify the Court's choosing to rule on it in this case.

WVSSAC Rule §127-3-8.5 (the forfeiture rule) is not unconstitutional. If there is a difference in the language of the rule and the limitations placed upon the rule by Court, the difference is exceedingly fine. Furthermore, the forfeiture rule has always been

interpreted and applied by the WVSSAC in a manner consistent with the Court's Amended Order.

The WVSSAC is a private organization comprised of the principals of public, private, and parochial schools. The factors specified by the Supreme Court of Appeals to be applied to determine whether an entity is a state agency clearly indicate that the WVSSAC is not an administrative agency of the state. More specifically, the WVSSAC was not created by the legislature, it is not dependent upon public funding, its composition is not determined by public law, it has no authority to receive property in the State's name, and its funds are quasi-public funds that do not have to be deposited in the state treasury and accounted for under W. Va. Code §12-2-2. W. Va. Code §18-2-25, enacted more than fifty years after the formation of the WVSSAC, simply allows county boards of education to delegate control, supervision, and regulation of interscholastic athletic events and band activities to the WVSSAC.

The Court erred in awarding attorney fees and costs to Plaintiff in this action. The award is premised on the Circuit Court's holding that the WVSSAC is a state agency. As discussed above, the WVSSAC is a private organization and not an administrative agency of the state. And notwithstanding the legal status of the WVSSAC, this is an action seeking an injunction; there is no authority under the law of West Virginia to award attorney fees and costs in this case. And even if there were such legal authority, the facts and circumstances in this case do not warrant the award of attorney fees.

In view of the radical changes in the administration of interscholastic high school athletics which are either mandated by the Amended Order of the Circuit Court of Cabell

County, or which will ensue as a consequence of the said Order, the Petitioners implore this Court to reverse and set the same aside.

West Virginia Secondary Schools Activities Commission

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