

NO. 072942

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

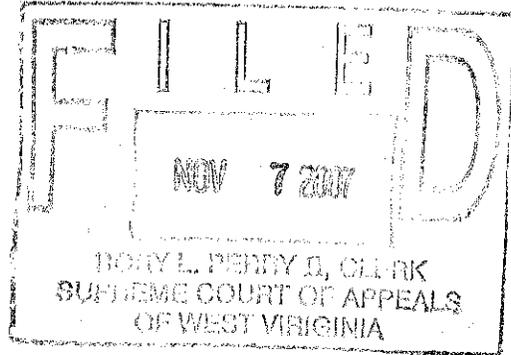
**O.J. MAYO,**

**Respondent,**

v.

**WEST VIRGINIA SECONDARY SCHOOL  
ACTIVITIES COMMISSION,**

**Petitioner.**



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**RESPONSE OF *AMICUS CURIAE* NOTRE DAME HIGH SCHOOL  
TO PETITION FOR APPEAL OF WEST VIRGINIA  
SECONDARY SCHOOL ACTIVITIES COMMISSION**

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**TABLE OF CONTENTS**

POINTS AND AUTHORITIES ..... ii

I. AS A PAROCHIAL SCHOOL, NOTRE DAME HIGH SCHOOL HAS A  
SIGNIFICANT INTEREST IN THE FINDING THAT THE WVSSAC IS A STATE  
AGENCY ..... 2

II. RELEVANT FACTS ..... 3

III. ARGUMENT ..... 6

    A. The Circuit Court’s Decision Is Based Upon An Erroneous  
    Interpretation of the *Hamilton* Case ..... 6

    B. Like the West Virginia University Foundation, the WVSSAC Is Not  
    A State Agency ..... 9

    C. As Statutorily Authorized Investors in the WVSSAC, the Finding  
    That the WVSSAC is a State Agency May Have the Effect of an  
    Unconstitutional Taking of Private School Property ..... 9

IV. CONCLUSION ..... 10

**POINTS AND AUTHORITIES**

**Cases**

*4-H Road Community Association v. West Virginia University Foundation, Inc.*,  
182 W. Va. 434, 388 S.E.2d 308 (1989) ..... 9

*Blower v. West Virginia Educational Broadcasting Authority*,  
182 W. Va. 528, 389 S.E.2d 739 (1990) ..... 7

*Hamilton v. West Virginia Secondary School Activities Commission*,  
182 W. Va. 158, 386 S.E.2d 656 (1989) ..... 3, 6

*Manchin v. West Virginia Secondary School Activities Commission*,  
178 W. Va. 699, 364 S.E.2d 25 (1987) ..... 8

*State ex rel. West Virginia Secondary School Activities Commission v. Oakley*,  
152 W. Va. 533, 164 S.E.2d 775 (1968) ..... 7

**Statutes**

W. VA. CODE §18-2-25 ..... 4

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TO: The Honorable Justices of the Supreme Court of West Virginia:

**I. AS A PAROCHIAL SCHOOL, NOTRE DAME HIGH SCHOOL HAS A SIGNIFICANT INTEREST IN THE FINDING THAT THE WVSSAC IS A STATE AGENCY.**

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Notre Dame High School (hereinafter "Notre Dame") files this brief in support of the Petitioner, West Virginia Secondary School Activities Commission (hereinafter "WVSSAC"), regarding the WVSSAC's argument that the Circuit Court of Cabell County erred in finding that the WVSSAC is a state agency. One possible impact of the Circuit Court's finding is that it may set the ground work for a later finding that parochial school involvement in the WVSSAC may constitute the prohibited State entanglement with religion.<sup>1</sup> Another possible impact of this decision is that it may amount to an unconstitutional taking of private property. Notre Dame High School takes no position and has no interest in the other four assignments of error by the Petitioner.

The following specific findings of the Circuit Court are clearly wrong:

30. Defendant WVSSAC is an organization established by W. Va. 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. Va. Code §12-6-1, *et seq.* 61 W. Va. Op. Atty. Gen. 72, 1986 WL 288932 (W. Va. A.G.).
31. The Supreme Court of Appeals has also referred to WVSSAC as a 'state' commission. *Hamilton v. West Virginia Secondary School Activities Commission*, 182 W. Va. 158, 386 S.E.2d 656 (1989) (refers to the commission as a 'statutorily created agency of the government').
32. The WVSSAC would like this court to find, under the auspices of *State ex rel. Manchin v. WVSSAC*, that the defendant is not a state agency or instrumentality of the government. 178 W. Va. 699, 364 S.E.2d 25 (1987). The WVSSAC argues, just as it did in *Manchin*, that the WVSSAC is a voluntary association of high school principals, not a state agency. The

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<sup>1</sup> Notre Dame is not conceding that, even if the WVSSAC is found to be a state agency, parochial school involvement with the WVSSAC is, in fact, unlawful under the First Amendment.

WVSSAC also argues, just as it did in *Manchin*, that its participation in the Public Employees' Retirement System and the Consolidated Investment Fund has no bearing on this case because such participation is governed by particular statutory definitions not applicable here. It is important that the court in *Manchin* did not ever conclude that the WVSSAC is not a state agency. It expressly narrowed its decision to a question of the WVSSAC's funds are 'moneys due the state' under W. Va. Code §12-2-2. Thus, the court is unpersuaded by the WVSSAC's reliance on *Manchin* to say that the WVSSAC is not a state agency or instrumentality.

33. What the court finds more persuasive is the fact that less than two years after its holding in *Manchin*, the Supreme Court refers to the WVSSAC as a state 'commission.' *Hamilton v. West Virginia Secondary School Activities Commission*, 182 W. Va. 158, 386 S.E.2d 656 (1989) (refers to the commission as a 'statutorily-created agency of the government').
34. Thus, the court finds that the WVSSAC is a statutorily-created agency or instrumentality of West Virginia State Government.

One problem with the Circuit Court's decision is that it ignores that the WVSSAC is and has always been a voluntary, private organization. The Circuit Court also misreads this Court's *Hamilton* decision because this Court in *Hamilton* never directly addressed the issue as to whether the WVSSAC is an agency of the government. The Circuit Court also failed to consider the analogous case where this Court found that the West Virginia University Foundation, Inc. is a private agency. The Circuit Court's decision could have a profound impact on thousands of students and parents in West Virginia because of the First Amendment issues that the Circuit Court's findings may create. Accordingly, Notre Dame urges this Court to grant the Petition for Appeal of the WVSSAC.

## **II. RELEVANT FACTS**

In 1914, St. Mary's High School of Clarksburg was founded. St. Mary's became Notre Dame High School with the building of a new school in 1955. Notre Dame, which is governed by the

Diocese of Wheeling-Charleston, has been in existence and operating continuously since 1955. In June 1977, Notre Dame joined the WVSSAC, and has been a dues-paying member since that time. Since 1977, thousands of Notre Dame students have participated in interscholastic athletics or other extra-curricular activities regulated by the WVSSAC. Last school year alone, approximately 90% of Notre Dame's students participated in events for which the WVSSAC provided the rules of participation.

In evaluating the current issue as to whether the WVSSAC is a "state agency," it is important for the Court to understand that the WVSSAC is, in fact, a voluntary association of high school and middle school principals. As reflected in the *amici curiae* brief of Wheeling Central Catholic High School and Weirton Madonna Catholic High School, the WVSSAC was first formed on June 17, 1916. It was not until 51 years later that W. Va. Code §18-2-25 was enacted. A review of that code section reflects that participation by both private and parochial schools in the WVSSAC was specifically contemplated when the statute was drafted:

§18-2-25      Authority of county boards to regulate athletic and other extra-curricular activities of secondary school; delegation of authority to West Virginia second schools activities commission; authority of commission; approval of rules and regulations by state board; incorporation; funds; participation by *private and parochial schools*.

\* \* \* \*

The West Virginia secondary school activities commission shall promulgate reasonable rules and regulations providing for the control, supervision and regulation of the interscholastic events and other extra-curricular activities of such *private and parochial* secondary schools as elect to delegate to such commission such control, supervision, and regulation, upon the same terms and conditions, subject to the same regulations and requirements and upon the payment of the same fees and charges as those provided for public secondary schools. 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.

(emphasis added).

After the statute was passed, the parochial schools of West Virginia joined the WVSSAC. The first Catholic school to join was Wheeling Central in 1971. Charleston Catholic and Notre Dame both joined in 1977. By 1981, all parochial schools were members of the WVSSAC. Therefore, for the past 26 years, all West Virginia parochial high schools have voluntarily been dues-paying members of the WVSSAC and have voluntarily agreed to be bound by the WVSSAC's rules and regulations governing sports and some other extra-curricular activities. Similarly, at least three non-Catholic private schools also belong on a voluntary basis to the WVSSAC.<sup>2</sup>

Prior to the passage of W. Va. Code §18-2-25, the parochial schools had a separate interscholastic sports competition league and tournaments. As can be determined by the above-quoted statute, it was the obvious intent of the Legislature to attempt to desegregate the parochial schools and the public schools in the sports arena. In a relatively small state like West Virginia, integrating the public and private schools only makes sense because combining them increases interscholastic competition among both private and public schools, and opens the door more broadly for students from each sector to learn from the other. It is undisputed that since the private and public schools have become integrated, both public and private school students have learned from the increased religious diversity to which they have been exposed.

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<sup>2</sup> They are Greater Beckley Christian Academy, Morgantown Trinity High School and Mercer Christian Academy.

### III. ARGUMENT

#### A. The Circuit Court's Decision Is Based Upon An Erroneous Interpretation of the Hamilton Case

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As Notre Dame reads the Circuit Court's order, the Circuit Court appears to be basing its decision that the WVSSAC is a state agency on this Court's opinion in *Hamilton v. West Virginia Secondary School Activities Commission*, 182 W. Va. 158, 386 S.E.2d 656 (1989). See the Circuit Court's findings nos. 33 and 34. However, the issue as to whether the WVSSAC is a state agency was not directly addressed in the *Hamilton* case. The issue before the Court in *Hamilton* was whether a public high school student, who had to repeat the 9<sup>th</sup> grade, could play football his senior year. The WVSSAC had passed a rule prohibiting the insidious practice of "red shirting" high school students by holding them back in school for a year in order to "gain bulk, strength and maturity." 386 S.E.2d at 658. This "corrupt and mean-spirited practice" was designed to "subvert the student's normal academic progress to unworthy and improper ends," such as making him or her "a more impressive show for coaches, parents, fans and college recruiters." *Id.* The Court held that while the intent of the WVSSAC was laudable, the WVSSAC's rule to prevent red-shirting was too broad. The Court wrote that, as the rule was written, the rule also prohibited students who were legitimately held back a year for academic reasons from participating in their senior years.

Importantly, the Court did not address specifically the issue of whether the WVSSAC was a "state agency." Nowhere in the opinion is there an analysis of whether the WVSSAC is a "state agency." Because no analysis was done, the impact on "state agency status" on parochial and private schools in the WVSSAC was not even considered. The Circuit Court's reliance upon the statement

made by Justice Neely, in *dicta*, to the effect that the Commission is a “statutorily-created agency of the government,” is simply misplaced.

More directly on point is this Court’s decision in *State ex rel. West Virginia Secondary School Activities Commission v. Oakley*, 152 W. Va. 533, 164 S.E.2d 775 (1968), where the Court held that the Circuit Court lacked jurisdiction to even consider an appeal of a decision of the WVSSAC’s review board. The Court specifically addressed, for example, whether the judicial review provisions of the State Administrative Procedures Act applied to the WVSSAC, finding that the Act did not apply. This finding is significant because judicial review provisions generally apply to state agencies.

As Wheeling Central and Weirton Madonna pointed out in their brief, when the “state agency” analysis is done, it is apparent that the WVSSAC does not meet the criteria to be considered a state agency. This Court set forth the criteria in *Blower v. West Virginia Educational Broadcasting Authority*, 182 W. Va. 528, 389 S.E.2d 739 (1990). Without belaboring the points already made by Wheeling Central and Weirton Madonna, the reasons that the WVSSAC do not meet “state agency” test as set forth in *Blower* are as follows.

First, the WVSSAC was founded in 1916, 51 years **before** being mentioned in a statute by the West Virginia Legislature. The purpose of the WVSSAC then, and the purpose now, is to control, regulate and supervise interscholastic athletics and some other extra-curricular activities.

Second, the composition of the WVSSAC’s governing board has not been established by the Legislature. Instead, W. Va. Code §18-2-25 merely authorizes public as well as private and parochial schools to volunteer to join the WVSSAC for central regulation of interscholastic athletic

and extra-curricular activities. It is the WVSSAC, not the Legislature, that has determined how the governing body of the WVSSAC is to be determined.

Third, although the WVSSAC operates on a state-wide basis, that is only because schools across the State have agreed to become members. Significantly, however, not all middle schools and high schools in West Virginia are members of and regulated by the WVSSAC.

Fourth, and importantly, the State does not directly fund the WVSSAC. Instead, the WVSSAC obtains its finances by way of membership dues from both public and private schools. Although public schools expend public money to join the WVSSAC, such expenditures are no different than paying public monies to private vendors that supply services to public institutions. Clearly, the receipt of public money does not cause the private vendor to become a public body.<sup>3</sup>

Finally, and relatedly, the money received by the WVSSAC does not constitute “funds due the state,” and are, instead, “quasi-public funds.” *See Manchin v. West Virginia Secondary School Activities Commission*, 178 W. Va. 699, 364 S.E.2d 25 (1987). In *Manchin*, the State Treasurer’s effort to force the WVSSAC to transfer all existing funds into to state accounts and to deposit future receipts into state accounts was rejected because the money was not “state money.” The Court recognized that the WVSSAC “is dependent upon dues from county schools [as well as private and parochial member schools] . . . and from entry fees from interscholastic athletic events and interscholastic band activities.”

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<sup>3</sup> For example, Steptoe & Johnson is hired from time to time by county boards of education to represent their interests in various issues and disputes. The receipt of public money to pay Steptoe & Johnson’s fees does make Steptoe & Johnson a public entity.

**B. Like the West Virginia University Foundation, the WVSSAC Is Not A State Agency**

In an analogous situation, this Court has ruled that the West Virginia University Foundation, Inc. was not a "state agency." See *4-H Road Community Association v. West Virginia University Foundation, Inc.*, 182 W. Va. 434, 388 S.E.2d 308 (1989). Similar to this case, the Court found that the Foundation was formed approximately 30 years before the West Virginia Board of Regents "referred to the Foundation as the university's 'primary gift solicitation agency.'" The court wrote: "While this statement may be accurate, it is not tantamount to state authorization for the creation of the entity. To assume such would require the court to ignore the Foundation's 30 prior years of existence." 388 S.E.2d at 312. Similarly, the WVSSAC was in existence for 51 years before the Legislature enacted W. Va. Code §18-2-25, and that fact should not be ignored in conducting the "state agency" analysis.

According to this Court, other factors supporting the finding that the Foundation was not a state agency were as follows: "It is not located on state property; does not utilize state employees; and selection of the board of directors, and their duties, are governed by the corporation's by-laws." *Id.* Likewise, the WVSSAC is not located on state property, does not employ state employees, and the board of directors, as well as the officers, are selected in accordance with the WVSSAC's by-laws. Thus, like the West Virginia University Foundation, the WVSSAC is not a state agency.

**C. As Statutorily Authorized Investors in the WVSSAC, the Finding That the WVSSAC is a State Agency May Have the Effect of an Unconstitutional Taking of Private School Property**

As argued by Wheeling Central and Weirton Madonna, W. Va. Code §18-2-25 specifically authorizes private schools to invest in and participate in the WVSSAC. Substantial sums of money

have been paid by private institutions over the past 36 years. Private school administrators have served in various official capacities within and on behalf of the WVSSAC. A determination that WVSSAC is a public body, which was clearly not the intent of the Legislature, could very well constitute the taking of property and property interests belonging to the private schools.

**IV. CONCLUSION**

Notre Dame High School respectfully requests that this Court grant WVSSAC's Petition for Appeal of the May 21, 2007 Amended Order of the Circuit Court of Cabell County, West Virginia. The issue of whether the WVSSAC is a "state agency" is a significant one and one that could have long-standing effect on both private and public middle and high schools. The decision could have a profound impact on the integration of public and private schools in competitive sports and extra-curricular activities as well as the benefits that have been gained thereby. Though probably inadvertent, the Circuit Court's decision threatens to disrupt the current harmony between public and private institutions in the governance of these activities, all of which may work to the detriment of thousands of West Virginia students and parents.

Dated this 5th day of November, 2007.



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**CERTIFICATE OF SERVICE**

I hereby certify that on the 5th day of November, 2007, I served the foregoing "Response of *Amicus Curiae* Notre Dame High School to Petition for Appeal of West Virginia Secondary School Activities Commission" upon all counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, in an envelopes addressed as follows:

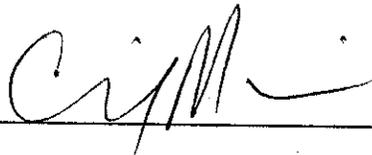
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