

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

**at Charleston**

**No. 072942**

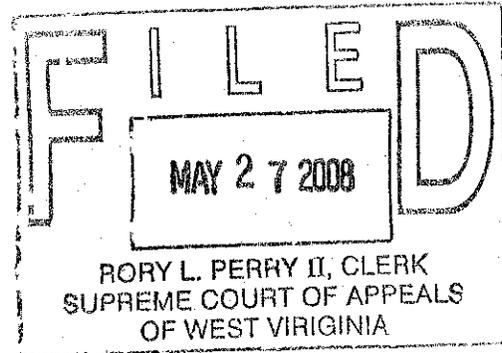
**O. J. MAYO,**

Appellee-Plaintiff below

v.

**WEST VIRGINIA SECONDARY  
SCHOOLS ACTIVITIES COMMISSION,**

Appellant-Defendant below.



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**BRIEF OF JOHN S. YELENIC AS SUPERINTENDENT OF  
THE DEPARTMENT OF SCHOOLS OF  
THE ROMAN CATHOLIC DIOCESE OF WHEELING-CHARLESTON  
AS *AMICUS CURIAE* IN SUPPORT OF  
WEST VIRGINIA SECONDARY SCHOOL ACTIVITIES COMMISSION**

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***I. Introduction***

The Roman Catholic Diocese of Wheeling-Charleston (the "Diocese") has sponsored or operated Church schools in what is now West Virginia since the 1850s. Today, from Williamson to Weirton, the Diocese sponsors more than 30 schools, with nearly 6,750 students, making it West Virginia's fourteenth largest school system.

Among them are seven high schools that are dues-paying members of the West Virginia Secondary School Activities Commission (the "WVSSAC"). Hundreds of Catholic school students participate in a wide variety of sports and extra-curricular activities that the WVSSAC sanctions and regulates. Students in Catholic schools obtain many benefits from the schools' membership in the WVSSAC. The Diocese believes that safe, well-organized athletic

competition that emphasizes sportsmanship and comity is an important part of the education that it seeks to provide.

Four Catholic high schools<sup>1</sup> filed *amici* briefs in support of the WVSSAC's petition for appeal. The Diocese itself now comes to this honorable Court on behalf of all Catholic school members of the WVSSAC, and on behalf of the Diocese of Wheeling-Charleston, as a friend of the Court, and files this brief in support of the WVSSAC's appeal from the judgment of the Circuit Court of Cabell County.

The Diocese respectfully asks this honorable Court to focus its attention on the Circuit Court's error of transforming the privilege of participating in inter-scholastic sports into a right entitled to due process protections and judicial review. The underlying premise of Judge O'Hanlon's ruling radically departs from this Court's jurisprudence. If participating in sports is a privilege, as this Court has ruled, then the lower court ought never to have reached the substantive issues in the first instance. Had the Circuit Court followed precedent, it would have dismissed this matter outright.

With precedent at hand and no new issues of law to address, this Court's task should be short work. Reversing the lower court and vacating its judgment would both resolve the issues in this case and save this Court from the rise of what would certainly be dangerous offspring.

## II. *Argument*

### A. **Introduction.**

This Court does not recognize a constitutionally protected liberty or property interest in participating in high school athletics or extracurricular activities as a matter of law. In this instance the lower court utterly failed to apply the clear precedent of this Court. That failure led

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<sup>1</sup> Central Catholic High School, of Wheeling; Charleston Catholic High School; Madonna High School, of Weirton; and Notre Dame High School, of Clarksburg.

Judge O'Hanlon to issue unnecessary findings and rulings that, if permitted to stand, would set a dangerous precedent. His Amended Order would open the door to countless legal challenges and the court's endless entanglement with inter-scholastic extracurricular activities in West Virginia.

A proper ruling according to the established precedent of this Court will reaffirm the authority of schools over students, vouchsafe the ability of all schools in West Virginia to field athletic programs and protect their fragile financial resources from the litigation of disciplinary measures and referee calls.

**B. West Virginia does not recognize a liberty or property interest in participating in extracurricular activities.**

O. J. Mayo filed his complaint in the Circuit Court to seek relief from his two-game suspension on the premise that the WVSSAC's rules, and the enforcement of them, denied him due process. There it is. This is the crux of the matter. This Court has plainly stated that participating in interscholastic athletics and other extra-curricular activities is not a protected liberty or property interest and is therefore not afforded due process protection:

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

Because “the threshold question” must be whether due process protections exist, and because this Court has already answered that question in the negative, Mr. Mayo’s claim should have failed at the outset. Judge O’Hanlon’s Amended Order on substantive issues was improper and contrary to law. His decision in this case should have been a simple matter, a one-paragraph dismissal order.

**C. WVSSAC’s rules are subject only to the lowest level of judicial scrutiny.**

In *Jones v. W. Va. State Bd. of Educ.*, 218 W. Va. 52, 58 (W. Va. 2005), this Court recognized that the WVSSAC may issue rules to supervise athletics and to determine who is eligible to participate. This Court held that the WVSSAC’s rules need be only rationally related to a legitimate state interest. *Jones*, 218 W.Va. at 58 (“participation in nonacademic extracurricular activities, including interscholastic athletics, does not rise to the level of a fundamental or constitutional right under article XII, § 1 of the West Virginia Constitution. Therefore, its regulation need only be rationally related to a legitimate purpose”).

In *Jones* this Court found that another rule of the WVSSAC, also related to eligibility to participate, was rationally related to the legitimate state interests of “promoting academics over athletics and protecting the economic interests of the county school systems.” *Id.* at 62. In this case, the WVSSAC determined that Mr. Mayo was ineligible because of his violations of rules that involved unsportsmanlike conduct and physical contact with an official. Encouraging sportsmanship at public sporting events, protecting the safety and respected position of adults participating in those events and teaching citizenship and consequences to teenage students are certainly legitimate interests of the education system. The rules Mr. Mayo challenged were, at least, rationally related to these interests.<sup>2</sup>

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<sup>2</sup> Judge O’Hanlon reaches a different conclusion because, rather than applying the proper ‘rationally related test,’ he analyzes the rules for due process protections. Because, as established *supra*, the WVSSAC’s rules

According to the established precedent of this Court as cited above, the ruling of the WVSSAC in this instance may not be challenged under procedural due process and, since the WVSSAC's rules themselves are, at least, rationally related to legitimate goals of the education system, Judge O'Hanlon should have dismissed the case.

**D. If permitted to stand, Judge O'Hanlon's ruling will encourage litigation among students, schools and the WVSSAC.**

Judge O'Hanlon not only failed to dismiss the case, his Amended Order used the popular but often misunderstood (and in this case misapplied) language of rights such as "fundamental fairness" and "due process" to justify his decision to wade into the depths of high school basketball.<sup>3</sup> With constant attention to and often unseemly emotional involvement in high school sports, it is beyond wishful thinking to believe that the case before the Court today will remain an isolated incident if this Court permits the Amended Order and its logic to stand. One can easily imagine the mounting costs of legal fees and additional insurance premiums as the circuit courts of West Virginia begin to entertain the circus of cases from the realm of high school sports. Catholic schools will have better things to do with their limited resources.

A new right of due process would become the foundation of trouble-making and hyper-sensitive reaction to what are now routine disciplinary matters. For example, the logic of the lower court might be used to challenge, not only the calls of officials or the enforcement of WVSSAC rules, but coaching or grading decisions that render a student ineligible to participate. Presumably, if a right to due process judicial review exists to determine eligibility for high school athletics, any decisions that impair a student's eligibility would be subject to review. If

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are not required to comply with due process, this portion of Judge O'Hanlon's reasoning is in error and without authority for the application of these principles.

<sup>3</sup> Judge O'Hanlon's Amended Order states in Paragraph 5 that a review, by his Court, of the two-game suspension enforced pursuant to WVSSAC rules would "necessarily involve a review of the decision of the referee to assess a technical foul."

Judge O'Hanlon's ruling is allowed to stand, circuit courts, from the Diocese's perspective, would have an unwelcomed rôle in their internal affairs.<sup>4</sup>

**E. Potential liability and litigation have a chilling effect.**

Coaching high school teams and officiating high school athletic contests are often paid positions, but they are always positions not well-paid. Most coaches and officials serve because of the joy they obtain in service to youth and to sport. This Court should want to permit and encourage continuous litigation over each and every decision they make that affects a student's eligibility. If it does not reverse the lower court's decision, and correct its thinking, some of these good people might decide that their efforts are not worth the corresponding risk of being hauled into court.

This Court should preserve the now largely peaceful domain while it may.

**III. Conclusion**

Judge O'Hanlon's ruling on the substantive issues in this case was incorrect and contradictory to this Court's precedent. The decision was entirely unnecessary in light of the potential consequences of such a holding.

This Court now has an opportunity to reassert its precedent by reversing the Amended Order below and affirming that the privilege of eligibility to participate in high school athletics and extra-curricular activities, that the WVSSAC sanctions and governs, is not subject to procedural due process review. Reversal will protect the resources of local school systems, including the Catholic school system. Reversal will affirm that the Court considers the promotion of sportsmanship, the ensuring of safety and the emphasis on fair play to be legitimate

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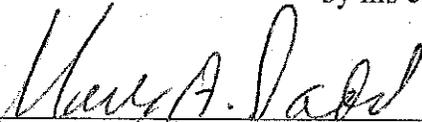
<sup>4</sup> In Catholic schools, where some rules and decisions are based upon precepts of the Faith, judicial review would be tantamount to a civil court's sitting in judgment of religious discipline and would threaten the boundaries of the free exercise of religion.

goals of the WVSSAC and West Virginia schools and school systems. Reversal will emphasize the importance of judicial restraint. Reversal will affirm this Court's support of teachers and others who help to provide students across West Virginia with opportunities in sports and other extracurricular activities.

The Diocese asks that this Court reverse and vacate the Amended Order of Judge O'Hanlon and re-assert its established precedent that participation in sports and other extracurricular activities is a privilege, the denial of which is not subject to due process review in West Virginia.

**JOHN S. YELENIC,  
AS SUPERINTENDENT OF THE DEPARTMENT OF  
CATHOLIC SCHOOLS OF THE ROMAN CATHOLIC  
DIOCESE OF WHEELING-CHARLESTON**

by his counsel



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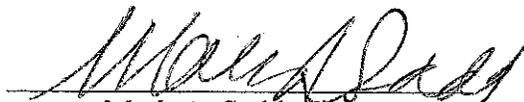
Appellant-Defendant below.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 27<sup>th</sup> day of May, 2008, he served the foregoing **MOTION OF JOHN S. YELENIC AS SUPERINTENDENT OF THE DEPARTMENT OF CATHOLIC SCHOOLS OF THE ROMAN CATHOLIC DIOCESE OF WHEELING-CHARLESTON FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF WEST VIRGINIA SECONDARY SCHOOL ACTIVITIES COMMISSION'S PETITION FOR APPEAL** and **BRIEF OF JOHN S. YELENIC AS SUPERINTENDENT OF THE DEPARTMENT OF SCHOOLS OF THE ROMAN CATHOLIC DIOCESE OF WHEELING-CHARLESTON AS *AMICUS CURIAE* IN SUPPORT OF WEST VIRGINIA SECONDARY SCHOOL ACTIVITIES COMMISSION** upon the following counsel by enclosing a true and accurate copy thereof in an envelope addressed to them at their last known address, shown below each of their names, and depositing the same, postage prepaid, in the regular United States Mail, provided below:

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