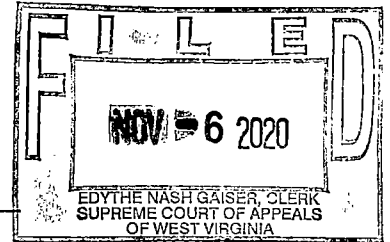


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No. 20-0870



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

**STATE OF WEST VIRGINIA, ex rel,
THE WEST VIRGINIA SECONDARY SCHOOL
ACTIVITIES COMMISSION, DAVID COTTRELL,
President, DR. GREGORY MOORE, Vice President,
BERNIE DOLAN, Executive Director, JIMMY FRASHIER,
MICHAEL KELLEY, CRAIG LEE LOY, ARTHUR
PETITTO, JIM CRAWFORD, DR. EDDIE CAMPBELL,
DR. JAMES WILSON and ROBERT DUNLEVY,
Members,**

PETITIONERS,

v.

**Circuit Court of Berkeley County
Case No. 20-P-337**

**THE HONORABLE R. STEVEN REDDING,
Judge of the Circuit Court of Berkeley County, and
EMILY BECK,**

RESPONDENTS.

**RESPONDENT EMILY C. BECK'S
RESPONSE TO PETITION FOR WRIT OF PROHIBITION**

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Counsel for Respondent

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I. QUESTION PRESENTED

Whether the Circuit Court of Berkeley County erred in granting the Respondent, Emily C. Beck's ("Ms. Beck"), request for a temporary restraining order prohibiting the Petitioner, West Virginia Secondary Schools Activities Commission ("WVSSAC"), from conducting the state AAA girls and boys soccer tournament.

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On November 2, 2020, Ms. Beck, on behalf of herself and all other similarly situated persons, filed a petition for a temporary restraining order and injunctive relief in the Circuit Court of Berkeley County. In her petition, Ms. Beck, who is an eighteen year old senior at Martinsburg High School in Berkeley County, and a member of the Martinsburg High School girls soccer team, sought to obtain an order from the circuit court to temporarily restrain the WVSSAC from proceeding with the state AAA girls and boys soccer tournament scheduled for November 6 and 7, 2020, in Raleigh County.

On November 4, 2020, the parties appeared before the circuit court for a hearing on Ms. Beck's petition.

On November 5, 2020, the circuit court entered an order granting Ms. Beck's request for a temporary restraining order and scheduling the matter for a hearing on November 12, 2020, at 2:00 p.m. This appeal followed.

B. STATEMENT OF FACTS

1. COVID-19 Restrictions Imposed on West Virginia High School Student-Athletes.

This matter arises from the restrictions imposed by the WVSSAC on West Virginia high school students' ability to participate in interscholastic sports because of the COVID-19 pandemic.

On April 27, 2020, the Governor of the State of West Virginia, Jim Justice, announced a plan to reopen government, schools, and private business following his earlier orders to cease or restrict such activities because of COVID-19. The Governor's plan, specifically Executive Order 56-20, allowed public schools to resume in-person instruction no sooner than September 8, 2020.

Subsequently, West Virginia public health experts developed a "County Alert System," which is a county-by-county color-coded system and map to monitor COVID-19 case rates throughout the state. This color-coded system results in each county being assigned a color each week based on their rate of exposure. On each Saturday, the West Virginia Department of Health and Human Services ("DHHR") determines the color of each county in West Virginia and publishes a color coded map. The map relies on one of two metrics to determine the color assigned to each county. First, the map relies on the "infection rate," which is based on the number of infected people per 100,000 residents. The second metric is "percent positivity," which is the total number of individuals who test positive divided by the total number of individuals tested. Both of these tests are averaged on either a seven day (county population greater than 16,000) or fourteen day (county population less than 16,000) basis. Colors are then assigned to each county based on the lower of the two metrics. The colors are assigned as follows:

- a. "Green" if there are "3 or FEWER CASES of INFECTION PER 100,000 or LESS THAN 3% POSITIVITY RATE;"

- b. “Yellow” if there are “3.1 - 9.9 CASES of INFECTION PER 100,000 or 3 - 3.9% POSITIVITY RATE;”
- c. “Gold” if there are 10 - 14.9 CASES of INFECTION PER 100,000 or 4 - 4.9% POSITIVITY RATE;”
- d. “Orange” if there are “15 - 24.9 CASES of INFECTION PER 100,000 or 5 - 7.9% POSITIVITY RATE;” or
- e. “Red” if there are “25 AND ABOVE CASES of INFECTION PER 100,000 or GREATER THAN 8% POSITIVITY RATE.”

On September 4, 2020, by Executive Order 68-20, the Governor directed the public schools in the state to follow the County Alert System's county-by-county color-coded system maintained by the DHHR, as it relates to any limitations or prohibitions on occupancy of such educational institutions for in-person instruction and/or athletic and extracurricular activities.

Based on the Governor’s order, the West Virginia Department of Education (“WVDE”) publishes a weekly “Saturday Education Map.” This map is based on the same metrics as the weekly color-coded map issued by DHHR. Under the WVDE map, students in public schools in counties designated as either Orange or Red are not permitted to attend school in-person or compete in athletic contests. The WVSSAC, in turn, has relied upon the WVDE map to regulate the extent to which each school may participate in interscholastic sports.

2. Impact of WVSSAC’s COVID-19 Restrictions on Berkeley County High School Student-Athletes.

Since October 17, 2020, Berkeley County has been designated as “Orange” under the WVDE map. As a result, Ms. Beck and all other members of the four high school

boys and girls soccer teams in Berkeley County have not been permitted to participate in the WVSSAC state high school soccer tournament. The tournament began on October 19, 2020 with sectional play, continued with regional play on October 27, 2020, and is presently scheduled for finals on November 6 to 7, 2020. Prior to the granting of Ms. Beck's petition, the WVSSAC intended to proceed with the finals as scheduled even though none of the teams in Berkeley County had been permitted to participate in the tournament. For purposes of the tournament, the high schools in Berkeley County comprise one of eight sections in the state, each region consisting of two sections. Since the teams in Berkeley County had not been permitted to play, the WVSSAC designated the winners of the other section, the Jefferson County High School boys and girls soccer teams, as the regional champions.

The other three girls soccer regional winners are from Ohio County (Wheeling Park High School), Kanawha County (George Washington High School) and Wood County (Parkersburg South High School). Each of these schools has been able to participate in the tournament because their respective percent positivity rates have been below the orange or red color categories on the WVDE map. Again, the "percent positivity" metric is based on the total number of individuals who test positive divided by the total number of individuals tested. This metric places emphasis on the number of tests conducted. That is, the more tests conducted the more likely individuals without any symptoms or known exposure to COVID-19 will be tested, thereby lowering the percentage of positive tests. As explained recently by the Governor's "COVID-19 Czar," Dr. Clay Marsh, "more testing will drive the numbers up but eventually, the percent positive will drop." ("Gaming the COVID-19 metrics not possible, experts say," Coal

Valley News, October 14, 2020 (http://www.coalvalleynews.com/gaming-the-covid-19-metrics-not-possible-experts-say/article_d6cd2141-d48b-5351-bc4e-a1a9cad882de.html).

Thus, a particular county's percent positivity rate will be determined in large measure by the access to and availability of free testing in that county.

Testing in the individual counties appears to be left to the local Health Departments. Pursuant to the Governors Order a county health department is required to set up free testing sites within forty eight hours of a County falling into gold status and testing within twenty four hours of a County falling into orange or red status.

During the month of October, Berkeley County was Gold for October 3rd and 10th. Publicly available records, indicate that free testing was offered in Berkeley County on the following dates:

October 7 (Wednesday)-4:30 to 7:30

October 13 (Tuesday)-1:00 p.m. to 5:00 p.m.

October 14 (Wednesday)- by appointment only 8:30 a.m. to 12:30 p.m.

October 15 (Thursday) -1:00 p.m. to 5:00 p.m.

October 16 – (Friday) by appointment only 8:30 a.m. to 12:30 p.m.

October 17 - 8:00 a.m. to noon (These test results most likely would have been counted for the map color beginning the week of the 24th).

On October 17th the WVDE map indicated that Berkeley County was in orange status. This status was determined on the seven day rolling average with the cut-off for counting test results Thursday October 15 at 11:59 p.m. Following this status the athletic teams were no longer permitted to participate in events. Free testing was offered on the following dates:

October 18 (Sunday) -8:00 a.m. to noon

October 21 (Wednesday)- 8:30 a.m. to 12:30 p.m. (This date would have been the last date available for free testing as the results must be to DHHR by Thursday at 11:59 p.m. Generally, the turn around for the results vary with no guarantee that these results would assist the County to move out of Orange status.)

October 23- (Friday) 2:00 p.m. to 6:00 p.m.

Also, during this week one Walgreens Pharmacy offered free testing by appointment only, allowing for approximately a total of thirty tests. (10 tests per day for a period of three days during the week).

On October 24 the WVDE map again showed Berkeley County in orange status. This status was determined based upon test results as of Thursday October 22nd at 11:59 p.m. Free Covid testing was made available on the following dates:

October 25- (Sunday) 1:00p.m. to 3:00 p.m.

October 27- (Tuesday) 1:00 p.m. to 5:00 p.m.

October 29-(Thursday) 1:00 p.m. to 5:00 p.m.

October 30-(Friday)1:00 p.m. to 5:00 p.m.

October 31- (Saturday) noon to 8:00 p.m.

Again, any results after Thursday would not assist the County in moving out of Orange status.

In comparison to Berkeley County, Kanawha County has had testing available more widespread, longer hours and at over five participating pharmacies, including four Walgreens and Fruths Pharmacy. Like Berkeley County, Kanawha County on October 3rd

and the 10th was in gold status. Publicly available records show that free Covid testing in October in Kanawha County was as follows:

October 1 –(Thursday) 9:00 a.m -5:00 p.m. at one site and 11:00 a.m. to 5:00 p.m. at a second site

October 2- (Friday) 11:00 a.m. to 5:00 p.m.

October 6- (Tuesday) 9:00 a.m. to 3:00 p.m.

October 7- (Wednesday) 3:00 p.m. to 6:00 p.m. at one site and noon to 5:00 p.m. at a second site

October 9 –(Friday) 11:00 a.m. to 6:00 p.m.

October 10- (Saturday) noon to 4:00 p.m.

October 13-(Tuesday) 10:00 a.m. to 2:00 p.m.

October 14 –(Wednesday) 10:00 a.m. to 2:00 p.m.

October 15 – (Thursday) 10:00 a.m. to 2:00 p.m.

In addition to the above free testing sites, the Governor announced partnership with Walgreens pharmacy commencing Friday October 9 which offered four different testing sites in Kanawha County allowing for at least 10 tests at each affiliated pharmacy. This provided additional testing possibilities to the residents in Kanawha County. Fruths Pharmacy also offered appointment only free testing during this time.

On Saturday October 17th the WVDE School map was published and Kanawha County was green status.

Testing was offered on the following dates:

October 17 (Saturday)-10:00 a.m. to 4:00 p.m.

October 20 (Tuesday) -noon to 6:00 p.m.

October 23 (Friday)-noon to 4:00 p.m.

Again, four different Walgreen Pharmacies and Fruth Pharmacies in Kanawha County offered free testing during this week.

On October 24th the WVDE map was published and Kanawha County was gold status allowing it to proceed with in school learning and participation in athletic events as modified by the WVSSAC. Testing was offered on the following dates:

October 28 (Wednesday) 3:30 p.m.-7:30 p.m

October 30 (Friday) 9:00 a.m. to 3:00 p.m.

The published WVDE map on Saturday October 31st indicated that Kanawha County was Green status.

During the month of October Kanawha County residents were afforded at least eighty three hours of unscheduled free testing throughout the county. In addition to unscheduled testing at least three hundred and sixty free test appointments were available through the various Walgreens participating pharmacies. In addition free testing appointments were available at participating Fruth pharmacies. At no time recently was Kanawha County WVDE map below the gold status. On Friday October 30th Kanawha County had an infection rate of 23.26 per 100,000 but had a positivity rate of 2.97.

By comparison, Berkeley County residents had approximately forty-eight hours of unscheduled free testing. In addition, the local health department offered two different dates of scheduled free testing and one Walgreens offered approximately one hundred and twenty pre scheduled appointments (this number may be much lower as it is unclear when the Berkeley County, Inwood pharmacy began offering this service and this number assumes at least twelve different days with ten slots each day were available).

On the same date, Friday October 30th Berkeley County had an infection rate of 19.3 per 100,000 residents but a positivity rate of 5.48.

As a result of the more widespread availability of testing in Kanawha County, nearly twice as many individuals in that county were tested than in Berkeley County. In turn, as Dr. Marsh indicated, this increase in testing predictably resulted in a lower percent positivity rate than existed prior to the greater level of testing being made available in that county. Berkeley County, however, has not had the same availability of testing opportunities, thus making it less likely that the county would achieve similar lower percent positivity rates.

Based on these facts, the circuit court granted Ms. Beck's petition. Specifically, the circuit court found that:

At this stage of the litigation, the Court **FINDS** that Ms. Beck and all other high school soccer athletes in Berkeley County have raised a significant claim that they are being denied equal protection under the law because the WVSSAC's use of the WVDE map does not take into consideration the disparity of testing availability among the counties or the absurd reality that schools in counties with much higher infection rates are not barred from playing in the tournament.

In that regard, according to the DHHR COVID-19 "County Alert System," as of November 3rd Berkeley County has an infection rate of 19.3 which is lower than three of the counties currently scheduled to travel to the tournament. Wood County, home of Parkersburg South has an infection rate of 34.72; Kanawha County, home of George Washington High School has an infection rate of 22.86; and Ohio County has an infection rate of 47.95, this last example being over double that of Berkeley County. Jefferson County, home of Jefferson High School the determined regional winner because Berkeley County athletes were denied the opportunity to participate in sectional and regional play is the only county with a lower infection rate than Berkeley County. It is 15.50. Even more ironically, the three teams from counties with higher infection rates than Berkeley County will be traveling to Raleigh County with an infection

rate of 20.25, also higher than Berkeley County. One presumes that the rationale behind the WVSSAC policy is to protect against the spread of COVID-19. Thus, by disallowing Berkeley County athletes an opportunity to participate in the State tournament, one must further presume that the WVSSAC is seeking to protect students from sister counties from being infected. Yet, the counter-intuitive result of the WVSSAC's determinations here is that Berkeley County athletes are being denied the opportunity to participate when other teams who are participating come from counties with infection rates as high as two and one half times ($2\frac{1}{2}$) that of Berkeley County (Ohio County's infection rate is 47.95 per 100,000 while Berkeley County's rate is 19.3 per 100,000). The Court finds that these determinations by the WVSSAC are arbitrary and capricious. The Court is persuaded that Ms. Beck has raised a significant claim of a violation of the equal protection law of the State.

III. SUMMARY OF ARGUMENT

First, the circuit court had jurisdiction to issue the temporary restraining order to enjoin the WVSSAC from conducting the state AAA girls and boys soccer tournament because the WVSSAC acts in every county of the state whenever it makes decisions on eligibility for participation in high school sports; the WVSSAC specifically acted in Berkeley County by prohibiting Ms. Beck and her fellow soccer players from participating in the tournament; the harm alleged is occurring in Berkeley County; and, since Ms. Beck and her fellow soccer athletes are all students in Berkeley County, it would be impracticable and unjust to require them to seek relief in Raleigh County merely because the tournament is scheduled to take place there.

Secondly, the temporary restraining order was properly granted because Ms. Beck and her fellow Berkeley County high school soccer athletes clearly demonstrated a clear likelihood of success on the merits; a reasonable likelihood of the presence of irreparable harm; the absence of any other appropriate remedy at law; the absence of harm to the WVSSAC; and a significant public interest in favor of their request.

IV. ARGUMENT

A. The Circuit Court had Jurisdiction to Grant the Temporary Restraining Order.

The WVSSAC argues that the circuit court lacked jurisdiction in this matter because the state AAA girls and boys soccer tournament is scheduled to be conducted in another county, namely Raleigh County. This argument is based on a misapplication of this Court's ruling in *Meadows on Behalf of Professional Employees of West Virginia Educ. Ass'n v. Hey*, 184 W.Va. 75, 99 S.E.2d 657 (W. Va. 1990). In that case, the Court held that a "circuit of one county does not have the authority to enjoin the acts of citizens occurring in other counties . . ." *Id.*, Syl. Pt. 2. Based on that holding, the WVSSAC argues that Ms. Beck's petition could only be filed in Raleigh County where the tournament is scheduled to take place.

However, as found by the circuit court, "the WVSSAC acts in every county of the state whenever it makes decisions on eligibility for participation in high school sports." (Circuit Court Order, ¶ 23) More particularly, "the WVSSAC acted in Berkeley County by prohibiting Ms. Beck and her fellow soccer players from participating in the tournament." (*Id.*) As the circuit court correctly reasoned, "[v]enue here is not based upon Petitioners' residency but rather because the harm alleged is occurring in Berkeley County." (*Id.*) And, "since Ms. Beck and her fellow soccer athletes are all students in Berkeley County, it would be impracticable and unjust to require them to seek relief in Raleigh County merely because the tournament was scheduled to take place there." (*Id.*) For these reasons, the circuit court clearly did have jurisdiction to grant the temporary restraining order at issue in this case.

B. The Temporary Restraining Order was Properly Granted because Ms. Beck Clearly Demonstrated Entitlement to Such Relief.

“A preliminary injunction is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Roe v. Dep’t of Def.*, 947 F.3d 207, 219 (4th Cir. 2020), as amended (January 14, 2020) (internal quotation marks omitted). To determine whether the extraordinary remedy of a preliminary injunction is appropriate, the Plaintiff “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” four factors: “(1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff’s likelihood of success on the merits; and (4) the public interest.” *McGraw v. Imperial Mktg.*, 196 W.Va. 346, 352, 472 S.E.2d 792, 798 n.8 (1996); see also *Morrissey v. W.Va. AFL-CIO*, 239 W.Va. 633, 638, 804 S.E.2d 883, 888 (2017).

Ms. Beck and her fellow Berkeley County high school soccer athletes clearly demonstrated that they are entitled to the temporary restraining order granted by the circuit court.

First, the circuit court was correct in finding that Ms. Beck and all other high school soccer athletes in Berkeley County have been denied equal protection under Article III, Section 10 of the West Virginia Constitution, because the WVSSAC’s COVID-19 restrictions have not taken into consideration the disparity of testing availability among the counties. As a result, high school soccer athletes in counties with higher infection rates than Berkeley County, such as Kanawha County, are being allowed to play simply because the level of testing available to residents of that county has been

far greater, both in raw numbers and proportionately, than the testing available to residents of Berkeley County. Thus, the high school soccer athletes in Berkeley County have been treated in a disadvantageous manner as compared to high school soccer athletes in other counties. Furthermore, there is no rational basis for such disparate treatment. As the circuit court stated:

[A]ccording to the DHHR COVID-19 “County Alert System,” as of November 3rd Berkeley County has an infection rate of 19.3 which is lower than three of the counties currently scheduled to travel to the tournament. Wood County, home of Parkersburg South has an infection rate of 34.72; Kanawha County, home of George Washington High School has an infection rate of 22.86; and Ohio County has an infection rate of 47.95, this last example being over double that of Berkeley County. Jefferson County, home of Jefferson High School the determined regional winner because Berkeley County athletes were denied the opportunity to participate in sectional and regional play is the only county with a lower infection rate than Berkeley County. It is 15.50. Even more ironically, the three teams from counties with higher infection rates than Berkeley County will be traveling to Raleigh County with an infection rate of 20.25, also higher than Berkeley County. One presumes that the rationale behind the WVSSAC policy is to protect against the spread of COVID-19. Thus, by disallowing Berkeley County athletes an opportunity to participate in the State tournament, one must further presume that the WVSSAC is seeking to protect students from sister counties from being infected. Yet, the counter-intuitive result of the WVSSAC's determinations here is that Berkeley County athletes are being denied the opportunity to participate when other teams who are participating come from counties with infection rates as high as two and one half times (2 1/2) that of Berkeley County (Ohio County's infection rate is 47.95 per 100,000 while Berkeley County's rate is 19.3 per 100,000). The Court finds that these determinations by the WVSSAC are arbitrary and capricious.

(Circuit Court Order, ¶ 28)¹

¹ In its petition, the WVSSAC relies upon the last census data from 2010 for the contention that the testing between Berkeley and Kanawha counties has not been disproportionate. In fact, the disparity in population of the two counties has dwindled since 2010. The 2019 estimates for the U.S. Census Bureau indicates that the population of Kanawha County is 178,124, a decrease from 2010 of approximately fifteen thousand people. According to the 2019 US Census Bureau the estimate population of Berkeley

Secondly, the circuit court correctly found that Ms. Beck and her fellow high school soccer athletes in Berkeley County will be irreparably harmed if the state AAA girls and boys soccer tournament are allowed to proceed as scheduled. As the circuit court found, “if the tournament is not postponed, they will never have another opportunity to compete for a state soccer title this year. Further, Ms. Beck, like the other senior high school soccer athletes in Berkeley County, will never have another opportunity to compete in the state tournament.” (Circuit Court Order, ¶ 30) In a more personal vein, the circuit explained the harm to Ms. Beck as follows:

This Judge need only reflect on his high school experiences of some four decades prior. While the memories of the day to day grind of classroom studies has slowly receded into relative obscurity, the three state championship competitions that were experienced remain as seared into memory as if they transpired yesterday. The thrill of competing against the very best, the close friendships developed, and the *esprit de corps* experienced simply cannot have a quantitative value placed upon them.

(Id.)

Lastly, the circuit court was correct in determining that the WVSSAC’s interest did not outweigh the interest of Ms. Beck or the public. While the WVSSAC alleged that conducting a separate tournament for the AAA teams would cost \$20,000.00, there is was no evidence that alternative arrangements could not be made which would ameliorate or completely eliminate such alleged costs, such as scheduling the games at the participating schools.² Furthermore, it was in the public interest to grant the temporary

County is 119,171; an increase in population of fifteen thousand people. The difference in population is more accurately fifty-six thousand people. Therefore, the WVSSAC’s reliance on 2010 population data is not reliable.

² It should be noted that the WVSSAC is incorrectly stating that postponing the state AAA girls and boys soccer tournament would impact 16 teams. In reality, however, there

restraining order. The ability to participate in high school sports is an important and integral part of our children's overall educational experience. Therefore, the public has a strong interest in seeing that students have an equal opportunity to participate in high school sports. Moreover, because this action raises significant issues concerning the WVSSAC's eligibility rules, the public has an interest in addressing those issues now since they are likely to arise again in connection with other sports such as volleyball, football and basketball.

CONCLUSION

WHEREFORE, your Respondent respectfully requests that the Petitioner's Writ of Prohibition be denied.

Respectfully submitted this 5th day of November, 2020.

RESPONDENT
BY COUNSEL

BY: /s/ Barry P. Beck
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are only eight AAA teams competing in the tournament. Ironically, this is the exact same number of teams in Berkeley County that have been prohibited from participating.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE OF WEST VIRGINIA, ex rel,
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Members,**

Petitioners,

v.

Appeal No.: 20-0870

**THE HONORABLE R. STEVEN REDDING,
Judge of the Circuit Court of Berkeley County, and
EMILY BECK,**

Respondents.

CERTIFICATE OF SERVICE

I, Barry P. Beck, counsel for the Respondent, Emily C. Beck, do hereby certify
that the foregoing **RESPONSE TO PETITION FOR WRIT OF PROHIBITION** was
served on the following persons by email this 5th day of November, 2020:

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