



West Virginia E-Filing Notice

CC-02-2020-P-337

Judge: Steven Redding

To: Barry P. Beck
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NOTICE OF FILING

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
Emily Beck v. West Virginia Secondary Schools Activities Commission
CC-02-2020-P-337

The following order - case was FILED on 11/5/2020 11:04:29 AM

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Virginia Sine
CLERK OF THE CIRCUIT
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In the Circuit Court of Berkeley County, West Virginia

Emily Beck,
Plaintiff,

vs.)

**West Virginia Secondary Schools
Activities Commission,**
Defendant

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Case No. CC-02-2020-P-337

Order Granting Temporary Restraining Order

On the 4th day of November, 2020, this matter came on before the Court for a hearing on the request of the Petitioner, Emily C. Beck (“Ms. Beck”), for a temporary restraining order prohibiting the Respondent, West Virginia Secondary Schools Activities Commission (“WVSSAC”), from conducting the state AAA girls and boys soccer tournament currently scheduled for November 6-7, 2020. Ms. Beck appeared in person and by her counsel, Barry P. Beck and Kelly A. Beck. The WVSSAC appeared by its counsel, William R. Wooton, who participated by telephone with the Court’s permission and without objection.

Upon careful consideration of the petition, response, and arguments by counsel, the Court makes the following findings of fact and conclusions of law:

1. Ms. Beck is an eighteen year old senior at Martinsburg High School in Berkeley County, and is a member of the Martinsburg High School girls soccer team. She brings this action on behalf of herself and all other similarly situated persons; that is, the other members of the Martinsburg High School girls soccer team, members of the Martinsburg High School boys soccer team, and the members of the boys and girls soccer teams at the other three high schools in Berkeley County, namely Hedgesville High School, Musselman High School, and Spring Mills High School.

2. The WVSSAC is a nonprofit organization created by W.Va. Code § 18-2-25. Pursuant to W.Va. Code § 18-2-25, every county board of education in the state, including the Berkeley County Board of Education, has delegated control, supervision and regulation of interscholastic athletic events and band activities to the WVSSAC.

3. 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.

4. 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 its 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 8% OR GREATER POSITIVITY RATE."

5. 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.

6. 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 athletic activities.

7. 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. At this time, the WVSSAC intends to proceed with the finals as scheduled even though none of the teams in Berkeley County have been able 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 have not been able to play, the WVSSAC has designated the winners of the other section, the Jefferson County High School boys and girls teams, as the regional champions.

8. 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.

9. Testing in the individual counties appears to be left to the local health departments. Pursuant to the Governor's 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 within twenty four hours of a county falling into orange or red status.

10. During the month of October Berkeley County was in gold status for the weeks of October 3rd and 10th. Free testing was offered on the following dates:

October 7 (Wednesday) 4:30 to 7:30 p.m.;

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

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

October 17 (Saturday) 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).

11. 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 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).

12. On October 24, the WVDE map again showed Berkeley County in orange status. This status was determined based upon a cutoff of test results as of Thursday October 22nd at 11:59 p.m. Free Covid-19 testing was made available on the following

dates:

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

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

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

October 30 (Friday) 1:00 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.

13. In comparison, Kanawha County has had testing available on a more widespread basis, for longer hours and at over five participating pharmacies, including four Walgreens and a Fruths Pharmacy. Like Berkeley County, Kanawha County for the weeks of October 3rd and 10th was in gold status. Free Covid-19 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 (it appears that this level of aggressive testing was to assist Kanawha County to move from its previous red status just weeks before to a status that would allow full participation in school and athletics.);

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 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.

14. In addition to the above free testing sites, the Governor announced a partnership with Walgreens pharmacy commencing Friday October 9 which offered four different testing sites in Kanawha County allowing for 10 tests at each affiliated pharmacy on three days of each week. This provided an additional 120 possible tests to be completed this week in Kanawha County. Fruths Pharmacy also offered appointment only free testing during this time.

15. 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.

16. 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 to 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 in green status.

17. 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 was available by appointment at participating Fruth pharmacies. At no time

recently has Kanawha County been below the gold status on the WVDE map. On Friday October 30th Kanawha County had an infection rate of 23.26 per 100,000 but had a positivity rate of 2.97.

18. 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 Walgreens pharmacy began offering this service and this number assumes at least twelve different days with ten slots each day being 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.

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

20. Ms. Beck argues that she and all other high school soccer athletes in Berkeley County are being denied equal protection under the law because the WVSSAC's application of the WVDE map does not take into consideration the disparity of testing availability among the counties. As a result, she argues that 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.

21. In addition, Ms. Beck argues that the WVSSAC has refused to make

modifications available to the athletes in Berkeley County that would allow them to participate in post season play. On the other hand, the WVSSAC has modified the criteria to permit other athletes to participate in post season play; for example, allowing cross country athletes to compete if they underwent individual testing. When the Petitioner and her teammates and other teams throughout this county offered COVID-19 negative test results prior to sectional play, the WVSSAC refused to make a similar accommodation.

22. In response, the WVSSAC first argues that venue is improper in Berkeley County and that consequently this Court lacks jurisdiction to grant the requested temporary restraining order because the state tournament is scheduled to be conducted in Raleigh County. The WVSSAC therefore argues that the action should have been filed in Raleigh County. Substantively, the WVSSAC argues that it does not have the authority to deviate from the restrictions imposed by the DHHR and WVDE maps. In addition, the WVSSAC argues that it would be unjust to grant the temporary restraining order because it would cost \$20,000.00 to conduct a separate tournament at a later date.

23. The Court **FINDS** that venue is proper in Berkeley County and that this Court has jurisdiction over this action. The purpose of the petition is to enjoin the actions of the WVSSAC in conducting the state high school girls and boys soccer tournaments. In general, the WVSSAC acts in every county of the state whenever it makes decisions on eligibility for participation in high school sports. In particular, the WVSSAC is acting in Berkeley County by prohibiting Ms. Beck and her fellow soccer players from participating in the tournament. Venue here is not based upon Petitioners' residency but rather because the harm alleged is occurring in Berkeley County. The Court, therefore, has the authority to enjoin the WVSSAC's actions by prohibiting it from going forward with the tournament. Furthermore, 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.

24. The Court **FINDS** that the WVSSAC does have the authority to deviate from the restrictions imposed by the DHHR and WVDE maps in determining eligibility for participation in high school sports. In that regard, the Executive Director of the WVSSAC, Bernie Dolan, confirmed that the restrictions were recently modified to allow schools in counties designated as “orange” to participate in the state cross country championships. It was also represented to the Court, and not denied by the WVSSAC, that the WVSSAC has permitted teams in counties designated “gold” to play unrestricted in post-season, whereas prior restrictions only allowed such teams to play other teams in gold status. Although the WVSSAC apparently consulted with other state officials before making those changes to the restrictions, there is nothing before the Court to indicate that the WVSSAC actions required approval by any other authority.

25. Article III, Section 10 of the West Virginia Constitution guarantees equal protection of the law. “Equal protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner.” *Israel v. West Virginia Secondary Schools Activities Commission*, 182 W.Va. 454, 458, 388 S.E.2d 480, 484 (1989).

26. The Court **FINDS** that it is required to employ a rational-basis review standard in deciding the equal protection claim in this action. *Syl. Pt. 4, Israel, supra*.

27. 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.

28. 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 WVSSCA 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.

29. “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).

30. The Court **FINDS** that Ms. Beck and all other high school soccer athletes in Berkeley County will suffer immediate and irreparable harm if the WVSSAC is not enjoined from conducting the state AAA girls and boys soccer tournament. Simply put, 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.

31. The Court **FINDS** that a delay in the soccer tournament will not harm the WVSSAC. While the WVSSAC alleges that conducting a separate tournament for the AAA teams would cost \$20,000.00, there is 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. In addition, even if the cost associated with postponing the tournament is as stated by the WVSSAC, in comparison to the harm to the Berkeley County athletes, the Court finds that such expense is not overly burdensome. 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.

32. The Court further **FINDS** that it would be in the public interest to grant the requested temporary 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. Furthermore, 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.

33. For the reasons stated herein, the Court **FINDS** that Ms. Beck is likely to succeed on the merits.

34. The Court **FINDS** that Ms. Beck should not be required to post a surety bond as there is no evidence before the Court to substantiate the alleged costs of \$20,000 to postpone the AAA soccer tournament. Furthermore, it appears to the Court that the costs of a separate, if any, could be minimized by making alternative as discussed above. Finally, Ms. Beck is an eighteen high school student. As such, requiring her to post a bond would, in effect, deny her access to the courts.

Accordingly, it is hereby **ORDERED** that the Petitioner is **GRANTED** a temporary restraining order against the WVSSAC from conducting the state AAA girls and boys soccer tournament. This matter will come on for hearing on Thursday, November 12, 2020, at 2:00 p.m. at the Berkeley County Judicial Center, 380 W. South St., Martinsburg, WV 25401 in Courtroom 3C. Should the WVSSAC continue to maintain

that the Governor, DHHR, and WVDE should be joined in this action, the WVSSAC is granted leave to submit a proposed order joining them in this action for all further proceedings.

The Clerk shall furnish attested copies of this Order to all counsel of record.

/s/ R. Steven Redding
Circuit Court Judge
23rd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.