



West Virginia E-Filing Notice

CC-02-2020-P-337

Judge: Bridget Cohee

To: Barry Beck
bpbeck@frontier.com

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 complaint was FILED on 11/2/2020 9:49:59 AM

Notice Date: 11/2/2020 9:49:59 AM

Virginia Sine
CLERK OF THE CIRCUIT
Berkeley
380 W. South Street
MARTINSBURG, WV 25401

(304) 264-1918
belinda.parsons@courtsww.gov

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

**EMILY C. BECK, on behalf of
herself and all other similarly
situated persons,**

Petitioners,

v.

CIVIL ACTION NO.: 20-P-_____

**WEST VIRGINIA SECONDARY
SCHOOLS ACTIVITIES COMMISSION,
a nonprofit organization,**

Respondent.

**PETITION FOR TEMPORARY RESTRAINING
ORDER AND INJUNCTIVE RELIEF**

In this action, the Petitioner, Emily Beck, on behalf of herself and all other similarly situated persons, is seeking a temporary restraining order and an injunction prohibiting the West Virginia Secondary Schools Activities Commission (“WVSSAC”) from conducting the state AAA girls and boys soccer playoffs and tournament until after access to free COVID-19 testing has been made available to residents of Berkeley County in a manner equal to residence of other counties in the state, or, in the alternative, until the WVSSAC adjusts the criteria for participation in secondary school activities to account for the gross disparity in public access to free COVID-19 testing between Berkeley County and other counties in the state.

PARTIES

1. The Petitioner, Emily 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, including the other members of the Martinsburg High School girls soccer team,

members of the Martinsburg High School boys soccer team, as well as 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 Respondent, 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 SSAC.

STATEMENT OF FACTS

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 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.”

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, the Petitioner, Emily 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. Upon information and belief, 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. Upon information and belief, because the teams in Berkeley County have not been able to play, the WVSSAC has designated the winner of the other section, Jefferson High School, as the regional champion.

8. Recently, most every county in the state has not been barred from participating in athletic activities 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 is largely 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.

10. During the month of October Berkeley County was Gold for October 3rd and 10th. Free testing was offered 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).

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 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).

12. 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 Tuesday would not assist the County in moving out of Orange status.

13. In comparison 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. 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 (Presumably this level of aggressive testing was to assist the County to move from their 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 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.

14. 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 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 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.

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 appointments were available by appointment 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.

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 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.

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.

BASIS FOR INJUNCTIVE RELIEF

20. 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*, 388 S.E.2d 480, 484, 182 W.Va. 454, 458 (1989).

21. The Petitioner and all other high school soccer athletes in Berkeley County are being denied equal protection under the law, through no fault of their own, 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, 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.

22. In addition, 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. However, when the Petitioner and her teammates and other teams throughout this county offered COVID negative test results prior to sectional play, the WVSSAC refused make a similar accomodation.

23. The Petitioner 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 playoffs and tournament as they will be denied the same opportunity as other high school athletes in the state. Further, the Petitioner, like the other senior high school soccer athletes in Berkeley County, will never have another opportunity to compete in the state tournament.

24. A delay in the soccer tournaments will not prejudice the WVSSAC or anyone else as similar delays have been allowed in the past, including a postponement in 1994 due to a measles outbreak in the northern portion of the state. In addition, during the COVID-19 restrictions, the WVSSAC has made *ad hoc* adjustments to the protocol such as allowing cross country teams in orange and red counties to participate in state finals subject to certain additional restrictions. Likewise, 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.

25. Because of the obvious unequal treatment of the Petitioner and all other high school soccer athletes in Berkeley County, they are likely to succeed on the merits of this action.

26. It is appropriate for the Court to decide the question presented by the Petitioner in this action because it “undisputably involves a most vital public function-- education of our youth.” *White by White v. Linkinoggor*, 176 W.Va. 410, 412, 344 S.E.2d 633, 635 (1986). (Citations omitted).

27. Per Rule 65(b) of the West Virginia Rules of Civil Procedure, counsel for Petitioner certifies that notice of this action has been provided to the WVSSAC. Specifically, immediately after filing this action, counsel for Petitioner faxed and emailed a copy of the same to the WVSSAC at (304) 428-5431 and wvssac@wvssac.org.

Wherefore, Petitioner requests that the Court grant her a temporary restraining order prohibiting the West Virginia Secondary Schools Activities Commission (“WVSSAC”) from conducting the state AAA girls and boys soccer playoffs and tournament; that the Court set a hearing on Petitioner’s request for a an injunction within ten days from the date of the temporary restraining order; that the Court then grant an injunction against the WVSSACs prohibiting it from proceeding with the state AAA girls and boys soccer playoffs and tournament until after access to free COVID-19 testing has been made available to residents of Berkeley County in a manner equal to residence of other counties in the state, or, in the alternative, until the WVSSAC adjusts the criteria for participation in secondary school activities to account for the disparity in public access to

free COVID-19 testing between Berkeley County and other counties in the state; and such other and further relief as the Court deems appropriate.

Respectfully submitted this 2nd November, 2020.

PETITIONER
BY COUNSEL

BY: /s/ Barry P. Beck

Barry P. Beck (WV Bar # 4225)
Kelly A. Beck (WV Bar # 4266)
308 W. Burke Street
Martinsburg, WV 25401
(304) 264-8870