STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument is requested. Oral argument would allow the attorneys for both parties to address all outstanding legal and public policy issues regarding the fundamental right of the Appellants to attend the Roman Catholic School and/or Christian School of their choice without the State forcing them to choose whether or not to accept additional financial aid because of their high scholastic achievement or play high school sports.

STATEMENT OF SUBJECT MATTER & APPELLATE JURISDICTION

This case was removed to Federal Court because of Appellants arguments pursuant to the First Amendment of the Bill of Rights of the Constitution of the United States of America applicable to the defendant, Kentucky High School Athletic Association, a state Agency of the

Commonwealth of Kentucky through the Equal Protection clause of the 14th Amendment

This Court has Appellate Jurisdiction under 28 USC Section 1291 as the judgment appealed from is the final judgment, Memoranda Opinion and Order entered April 20, 2010. The Appellants notice of Appeal was filed of record, timely, on the __day of May, 2010. The Appellants were Richard C. Evans and Nancy J. Evans as next Friends and parents of E.E.E.; Mary Ann Seger as Next friend and Parent of C.s. and Ce. S., and Evan Comer, as Next Friend and Father of E.C. The Clerk at the Sixth Circuit stated that Comer was not a party and that appellant did not make the Sixth circuit Case. also, as part of KHSAA's Removal, the straight appeal from the agency case of the Segers was also remove. The Trial Court made rulings with both case numbers thus affecting the Segers' rights in the second case of 3:09-CV-00967-C; but the Record did not show that the cases were ever consolidated, so by separate motion here in the Sixth Circuit request had been made to consolidate the cases.

STANDARD OF ISSUE PRESENTED FOR REVIEW

Did the Trial Court in upholding the Rule promulgated by the KHSAA, abridge Appellants Freedom of Religion and prohibit the free exercise thereof?

Was the rule promulgated by the KHSAA arbitrary, capricious, unfair, and discriminatory devoid of any rational basis?

STATEMENT OF THE CASE

The Kentucky High School Athletic Association, hereinafter referred to as KHSAA, is a State Agency of the Commonwealth of Kentucky that can sue and be u\sued in its own name. If a high school wants to participate in High School Sports in the Commonwealth of Kentucky they must belong to the KHSAA. For years, there has been a dichotomy between the public

schools under their control and the Roman Catholic and Christian schools under their control. This dichotomy exists because of the belief that the roman catholic Schools especially of Jefferson county namely, Trinity and St Xavier win the greater number of regular season football games; and State football championships; and other Christian and/or Catholic schools win a greater number of regular season Basketball Games and dominate in State Basketball championships such as Lexington Catholic; and Sacred Heart in the area of Girls Basketball. It is common knowledge that the Roman Catholic Schools charge significant tuition. It is further common knowledge as the facts of this case hereinafter will confirm; that there are many sources of private scholarships, financial aid, and other sources of monies to provide to those families desirous of a good Catholic or Christian education if they cannot afford the huge cost of tuition. Under the guise of alleged illegal recruitment, KHSAA drastically changed the financial structure of those students wanting to attend the Roman Catholic and Christian Schools for their fundamentally right of a good Catholic or Christian Education and also wanting to participate in High School sports. Although the rule does apply to all other non public schools and that portion of the rule will hereinafter be discussed in the legal argument of the second issue of whether or not the Rule is arbitrary, capricious, discriminatory, and unfair; and devoid of a

rational basis. Although many Jewish students attend Walden private school and at one time E.C. was a Plaintiff herein, her religious freedom was not specifically cited in the rule. Nationally, the free exercise of all religions are being prohibited and compromised throughout the United States by the same or similar rule in other states. See: Tennessee Secondary Athletic Association v Brentwood Academy 551 U.S. 291 (2007).

Bylaw 13: Financial Aid

Sec. b)"…Classification of Schools-means the classification of member schools as follows: (1) A1-Disticrt operated general program or multi-program schools; (2) D1 Kentucky Department of education operated schools (Blind and deaf); (3) F1 Federal dependent Schools; (4) Roman Catholic schools; (5) M1-Other Religious schools and (6)R1-Private non-church related schools…"

Contrary to the Opinion of the trial court any reference or operational definition of governing boards of Roman Catholic and /or Christian Schools are found separately in section f) and specifically does not include a specific reference to roman Catholic Schools.

"… Through Bylaw 13, KHSAA creates two forms of acceptable financial aid☹1) need-based financial aid, and (2) merit-based financial aid.

Need-based financial aid is awarded based on an independent amylases of the student's financial need for tuition assistance. So long as the amount of need-based aid is determined using published, objective criteria, a student may receive 100% of tuition and remain eligible to play KHSAA sanctioned sports. Merit-based aid is like an academic scholarship; it is financial aid that is based solely on academic and/or test performance. For students who accept merit aid to remain eligible to play KHSAA sports, that aid must be available to the entire student body through a competitive application process and must be awarded based on published objective criteria. Further, merit aid must be limited to 55 of the student body. Most importantly. A student may accept only up to 25% of the cost of tuition in merit-based aid. In other words, if the student accepts more than 25% of the cost of tuition in merit-based aid, the student may not play in KHSAA sanctioned sporting events…."

The trial court's opinion goes on to say that the funding source must be under the control of the member's governing board such as the Archdiocese of Louisville or the other geographical school zones as defined in the Bylaw 13.

All of our students,-- E.E.E., C.S. Ce. S.—were in the merit-based category. The trial court has found that the merit based funds received by

our Appellants having nothing to do with their ability or lack thereof to play volleyball, run cross-country and track. Simply put, there is now a finding that they were not recruited for their athletic prowess. Since none of our academic scholars were in the need-based category, it is imperative to note that internal governing boards control which student athletes receive 100 % tuition. There is admittedly no review by KHSAA from the most concentrated area of student athletes that would be illegally recruited. The need-based student athletes remain eligible by the minimum of academic standards such as a 2.0 whereas our Appellants maintain 3.5 or better grade point averages. There is no criteria as to academic performance compared to the merit-based students who just want to participate as well rounded students would to in high school sanctioned sports. At the heart of Appellants' first amendment argument is their fundamental right to control the upbringing and education of their children. This Right has been negated by the State Actor. The competition to gain admission to colleges in today's world is fierce. If two students are "even" as to admission standards, participation in high school athletics could be the deciding factor while maintaining a 4.0 average. The Appellants have had this opportunity withdrawn by KHSAA. The appellants must choose academics and merit-based aid or participation in High School sanctioned athletics. Or forfeit

their fundamental right to a Roman Catholic and/or Christian education by choosing sports, not being able to afford to attend the religious school of their choice and by reason of the State promulgated rule attend the public high schools which are usually academically vastly inferior to the Roman Catholic Schools.

Other than the two issues set out above, no other issues were decided adversely to the Appellants, but remanded by to the State Circuit Court.

STATEMENT OF FACTS

1. All Plaintiffs had to choose between merit –based aid in excess of 25% of their tuition or participation in sanctioned high school sports.
2. E.E.E. was deemed eligible to participate in high schools sports, and accepted additional financial aid in the form of the Father McGee scholarship.
3. E.E.E. was not recruited to play volleyball, but qualified for merit-based financial aid because of her high academic performance
4. E.E.E. was limited to $2500 of the Vissing Scholarship. Without the rule, she would have been entitled to unlimited merit-based aid for her entire tuition.

5. E.E.E. had to choose additional merit-based financial aid or continued participation in volleyball, a State-sanctioned sport of HSAA.
6. E.E.E. and her parents are of the Roman Catholic faith and she desired to attend Presentation High School, a Roman Catholic High School for all girls in order to receive a good Catholic Education.
7. C.S. was a senior at Presentation Academy. Her family is of the Roman Catholic faith. She desired to attend Presentation High School, a Roman Catholic all girls High School in order to receive a good Catholic education.
8. Although she abided by the Bylaw 13 as to any additional merit-based financial aid, so she could participate in cross-country, she was ruled ineligible by KHSAA. Some seven months later, KHSAA ruled her eligible. Because she was ruled ineligible even though according to Bylaw 13, she was eligible to participate in sanctioned High School sports, she filed a separate cause of action which was consolidated herein aggrieving the denial of her eligibility.
9. C.S. and her family had to choose between additional merit-based aid and participation in Cross-Country.
10. Ce.S., the younger sister of C.S., also attends Presentation Academy. She accepted additional merit-based aid and was ruled ineligible to

participate in Cross-country and track, both High School sanctioned sports of KHSAA. Because of the declaration of ineligibility of her sister who had taken no additional merit-based aid, she also appealed the denial of her eligibility in the consolidated separate action.

11. One such scholarship is the Mason scholarship. Ce.S. accepted the Mason Scholarship and was ruled ineligible. A football student accepted the Mason scholarship and his eligibility was never questioned There is abject confusion as to what merit-based financial aid over the 25% qualifies and what does not. Ce.S has maintained a high academic performance. If the football player for Desales was need-based, it didn't matter.

12. If a student at St. Xavier would have accepted additional financial aid from the VFW because of the death of his Father in the Iraqi conflict, he would have been deemed ineligible to participate in sanctioned high school sports.

13. If one of the Appellants had been offered a scholarship in addition to attending a summer camp at the Vatican she would have been ineligible to participate in high school sanctioned sports.

14. If a student attending a Jewish high School would have been offered a financial award over the 25% of his tuition in order to attend

Rabbinical School, he would have been declared ineligible to participate in high school sanctioned sports.

15. E.C. is an example of a student attending a non public (private) school, maintaining high academic achievement, accepting merit-based financial aid over 25% of her tuition and not being able to perform in high School sanctioned sports.

16. Roman Catholic is a suspected classification by being named as a wrongdoer in Bylaw 13 section b)

17. That the Trial court and KHSAA presupposes that there is no illegal recruitment in the public high schools.

SUMMARY OF ARGUMENT

ARGUMENT

I. STANDARD OF REVIEW

De Novo Review

The Appellate Court is to conduct an independent review of the entire record when the constitutional facts are at issue. See Grutter v. Bollinger, 283 F. 3d 732 (6th Cir., 2002) and cases cited therein, including Johnson v. Economic Development Corp., 241 F. 3d 501 (6th Cir., 2001) and Lemmons Med. Prof. Corp. v. Voinovich, 130 F. 3d 387 (6th Cir., 1997).

II. Motion to dismiss on the pleadings

The applicable law is : Shrout v. The TSE Group, Ky. 161 S.W. 3d 351 (2005).All allegations of the Plaintiffs(Appellants) must be taken as true. See: pg 4 footnote of the Trial Court's memorandum opinion.

III. STRICT SCRUTINY

Appellants agree with the finding as a matter of Law by the trial Court that the applicable standard or review is strict scrutiny. See: Meredith v JCPS __U.S.__ (09-515, decided June 29, 2007), Wygant v Jackson Brd of Educ. 476 U.S. 267 (1986); Church of the Lukumi Babalu Aye, Inc. v City of Hialeah 508 u. s. 520and Pierce v Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925)

Roman Catholic and other religious schools have been categorized as suspected classifications by being so named by KHSAA. Strict scrutiny

must be the standard of review of the State Actor's regulation. The Appellants and all in this classification are being discriminated against by having to choose either merit-based aid and no participation in high school sanctioned athletics, or participation in high school athletics and denial of their right to a Roman Catholic and/or Christian education. The level of discrimination renders bylaw 13 of KHSAA unconstitutional on that basis alone.

The Pierce v Society case supra has withstood the sands and challenges of time. It is still the law of the land. The trial court has correctly found as a matter of law that these appellants have a fundamentally right to control the upbringing and education of their children. With Bylaw 13, this fundamental right had been stripped away of KHSAA. No longer do parents have that choice. KHSAA has usurped it by making the Appellants choose public school and high school sports or religious school and no high school sports. In addition thereto, the Supreme court has already spoken on this very important issue. In Tennessee Secondary School Athletic Association v Brentwood Academy in discussing freedom of speech specifically stated that the absence of this First Amendment Right could "…foster an environment in which athletics are prized more highly than academics…:Id at pg 300 of the opinion. As stated, the most recent case

decided on this issue by the Supreme Court of the United States was the *Tennessee Athletic Assn. v. Brentwood Christian Academy* case. In that case, the Supreme Court of the United States upheld, in a very narrow opinion, the right of the Tennessee High School Athletic Association to discipline the Brentwood Christian Academy's basketball coach for overtly recruiting in the middle schools. The opinion, with five different concurring opinions, strongly inferred that any greater intrusion in the infrastructure of the Christian school, or for that matter, Catholic schools, would be a violation of the First Amendment through the Fourteenth Amendment.

Appellants strongly submit that their fundamental right the most important of individual liberties, their freedom of religion is at stake. "…1. The fundamental theory of liberty upon which all governments of this Union rest excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only…"Pierce Id. Pg 511 Brown v Topeka board of Education __U.S.___ is time applicable. Pierce supra is time applicable.

IV BYLAW 13 IS ARBITRAY, CAPRICIOUS, UNFAILR AND DISCRIMINATORY

The Trial Court in order to defeat Appellants' argument that bylaw 13 was arbitrary, and capricious and devoid of any rational basis used gross speculation of facts not in evidence "… The court can envision circumstances in which a student is granted more than 25% of her tuition in merit-based aid, at least in part, because of her athletic abilities…" pg 9 of memorandum opinion. This "logic" flies in the face of the Court's previous finding that the criterion for merit-based financial aid was "…based solely on academic and/or test performance…" pg 2 of memorandum opinion. A high academic performing basketball player at Lexington Catholic or Christian Academy according to the court's ruling is entitled to merit-based aid not to exceed 25%. A non academic student who is adjudged need-based and maintains a 2.0 average is entitled to 100% funding without review. The Bylaw penalizes the vast majority of high academic achieving students who as well rounded students want to play volleyball or run track or cross country, and benefits individuals who are sought to be scrutinized and limited by the rule. See: New York City Transit Auth; v Beazer 440 U.S. 568 592-593(1979)

Under a rational basis review, classification in a statute bears a "strong presumption of validity." FCC v. Beach Communications, 508 U.S. 307, 314 (1993).

Those attacking the rationality have the burden "to negative every conceivable basis
which might support it." *Id*. at 315 (citation omitted). For such an important situation
based on a constitutional challenge this is too high a burden to place on the plaintiffs. It is
easy to envision how one athlete may slip through the cracks without this arbitrary rule
and thus the plaintiffs would fail in their burden to negative the rule.
Thus, this rule should have to survive strict scrutiny review. It is discriminatory

CONCLUSION

Our most precious freedom, the freedom of religion is under attack throughout this great nation of ours. The frontal attack by State Government to take away or limit this fundamentally freedom must fail. The bylaw of KHSAA is both unconstitutional and devoid of a rational basis. To make a law penalizing high academic Roman Catholic achievers who want to play volleyball and/or run cross-country; and run track is absurd. To make these parents choose high school sports over a well rounded religious education is the ultimate violation of our most basic freedom.

God Bless America!

Respectfully submitted,

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