

IN THE SUPREME COURT OF OHIO

OHIO HIGH SCHOOL ATHLETIC
ASSOCIATION

Appellant,

v.

ALEXXUS PAIGE

Appellee.

CASE NO. 13-1849

On Appeal from the Hamilton
County Court of Appeals,
First Appellate District

Court of Appeals
Case No. C1300024

NOTICE OF CERTIFIED CONFLICT

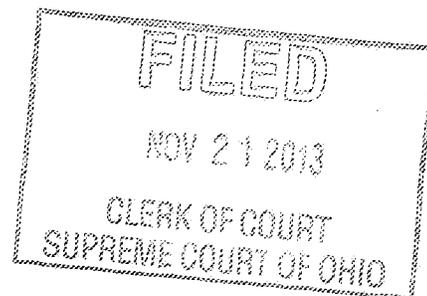
Thomas B. Bruns (0051212)
Gordon D. Arnold (0012195)
Lucinda C. Shirooni (0059047)
FREUND, FREEZE & ARNOLD
Fourth & Walnut Centre
105 E. Fourth Street, Suite 1400
Cincinnati, OH 45202-4035
Phone: (513) 665-3500
Fax: (513) 665-3503
garnold@ffalaw.com
tbruns@ffalaw.com
lschirooni@ffalaw.com

COUNSEL FOR APPELLANT, OHIO HIGH SCHOOL ATHLETIC ASSOCIATION

Christopher D. Wiest (0077931)
25 Town Center Blvd., Suite 104
Crestview Hills, KY 41017
Phone: (513) 257-1895
Fax: (859) 495-0803
chriswiestlaw@yahoo.com

James Bogen (0075696)
917 Main Street, 2nd Floor
Cincinnati, OH 45202
Phone: (513) 503-7251
Fax: (513) 241-0154
attorneybogen@yahoo.com

COUNSEL FOR APPELLEE, ALEXXUS PAIGE



Notice of Certified Conflict

Appellant, Ohio High School Athletic Association, hereby gives Notice pursuant to S. Ct. Prac. R. 8.01(A), of certification by the Court of Appeals, First Appellate District in Case No. C1300024, of a conflict pursuant to Article IV, Section 3(B)(4), of the Ohio Constitution, of the following issue for review and final determination:

Where an injunction is issued at the request of a student, which permits the student to participate in interscholastic athletics despite the Ohio High School Athletic Association's determination of ineligibility, under its Bylaw 4-7-2, Exception One, and prohibits the OHSAA from invoking its right to sanction a member school, does a live controversy still exist when: (1) the student is no longer participating in high school athletics; (2) the member school where the student participated is not a party to the appeal; and (3) the student is no longer interested in pursuing the matter on appeal?

As required by S. Ct. Prac. R. 8.01(B), the following documents are attached.

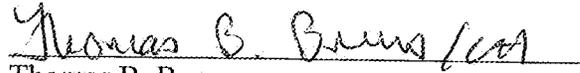
1. Judgment Entry from the First District Court of Appeals dated October 25, 2013;
2. Opinion from the First District Court of Appeals, including certification of the conflict on page 9; and
3. Directly conflicting opinion from the Second District Court of Appeals, in *Ulliman v. Ohio High School Athletic Assn.*, 184 Ohio App.3d 52, 2009-Ohio-3756, 919 N.E.2d 763 (2d Dist.).

Respectfully submitted,


Thomas B. Bruns, Counsel of Record
Gordon A. Arnold
COUNSEL FOR APPELLANT
OHIO HIGH SCHOOL ATHLETIC
ASSOCIATION

Certificate of Service

I certify that a copy of the Notice of Certified Conflict was sent by ordinary U.S. Mail to counsel for Appellee, Alexxus Paige, Christopher D. Wiest, 25 Town Center Blvd., Suite 104, Crestview Hills, Kentucky, 41017 and James Bogen 917 Main Street, 2nd Floor, Cincinnati, OH 45202, on November 21, 2013.



Thomas B. Bruns
COUNSEL FOR APPELLANT,
OHIO HIGH SCHOOL ATHLETIC
ASSOCIATION

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ENTERED
OCT 25 2013

ALEXXUS M. PAIGE, : APPEAL NO. C-130024
Plaintiff-Appellee, : TRIAL NO. A-1209427
vs. : JUDGMENT ENTRY.
OHIO HIGH SCHOOL ATHLETIC :
ASSOCIATION, :
Defendant-Appellant. : 
D104056695

This cause was heard upon the appeal, the record, the briefs, and arguments.

The appeal is dismissed and the injunction is vacated for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The Court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To the clerk:

Enter upon the journal of the court on October 25, 2013 per order of the court.

By:  _____
Presiding Judge

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ENTERED

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ALEXXUS M. PAIGE,

:

APPEAL NO. C-130024

Plaintiff-Appellee,

:

TRIAL NO. A-1209427

vs.

:

OPINION.

OHIO HIGH SCHOOL ATHLETIC
ASSOCIATION,

Defendant-Appellant.

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From is: Appeal Dismissed and Injunction Vacated

Date of Judgment Entry on Appeal: October 25, 2013

Chris Wiest ALL, PLLC, James Bogen and Christopher Wiest, for Plaintiff-Appellee,

Fruend Freeze & Arnold, Thomas B. Bruns, Gordon D. Arnold and Lucinda Shirooni, for Defendant-Appellant.

Please note: this case has been removed from the accelerated calendar.

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FISCHER, Judge.

{¶1} Defendant-appellant the Ohio High School Athletic Association (“OHSAA”) appeals from a preliminary injunction issued in favor of plaintiff-appellee, high-school-athlete Alexxus Paige. The injunction restrained the OHSAA from enforcing OHSAA Bylaw 4-7-2, under which Paige had been declared ineligible to participate in interscholastic athletics at Winton Woods High School during her senior year. It also restrained the OHSAA from taking any adverse action against Paige or Winton Woods for her participation in athletics. Because we conclude that no actual controversy currently exists between the OHSAA and Paige, we grant her motion to dismiss the appeal as moot. We also vacate that portion of the trial court’s preliminary injunction that prohibited the OHSAA from taking any adverse action against Winton Woods because Winton Woods was never a party to the lawsuit, and the trial court, therefore, lacked the authority to issue the preliminary injunction regarding Winton Woods.

{¶2} On June 1, 2012, Paige and her mother, Vivian Watkins, moved from the family’s home in the Cincinnati Public School District to an apartment in the Winton Woods School District. As a result of the move, Paige, who had attended Withrow High School for her freshman, sophomore, and junior years, enrolled at Winton Woods High School for her senior year. Both schools are members of the OHSAA.

{¶3} The OHSAA is an association of public and private high schools and junior high schools in the state of Ohio that regulates, supervises, and administers interscholastic athletic competition among its member schools. As members of the OHSAA for the 2012-2013 school year, Withrow and Winton Woods have adopted and agreed to follow the OHSAA bylaws and regulations.

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{¶4} OHSAA Bylaw 4-7-2 provides that a student who transfers from one school to another after the fifth day of her ninth grade year cannot play sports at the new school for one year from the date of enrollment unless one of the 11 exceptions applies.

Exception One provides that

[i]f, as a result of a bona fide legal change of residence made by BOTH PARENTS, the student is compelled to transfer from one public school district to another public school district, the Commissioner's Office may restore athletic eligibility at the new school provided the Commissioner's Office is satisfied that the transfer was not athletically motivated. The requirement that "both parents" make the move may be waived by the Commissioner's Office if the marriage of the parents has been or is in the process of being terminated or if the parents were never married. An Affidavit of Bona Fide Residence in the form requested by the Commissioner's Office, must be submitted along with any request for the application of this exception.

{¶5} Following Paige's transfer to Winton Woods, her mother submitted an affidavit for a bona fide legal change of residence to the OHSAA in accordance with Exception One to OHSAA Bylaw 4-7-2. Shortly thereafter, OHSAA Associate Commissioner Dr. Deborah Moore notified Winton Woods by letter that the OHSAA had determined that Paige had not met the exception because her transfer had not been compelled by a change of residence, but had been motivated by a desire to play basketball at Winton Woods. Thus, the OHSAA concluded that under Bylaw 4-7-2, Paige was ineligible to participate in athletics at Winton Woods during her senior year. Paige's mother appealed the commissioner's determination to the OHSAA Appeals Panel. Following a hearing, the Panel affirmed the commissioner's ruling.

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{¶6} On December 5, 2012, Paige filed suit in the common pleas court seeking a preliminary injunction to enjoin the OHSAA from enforcing transfer Bylaw 4-7-2 against her. The trial court held a hearing on December 7, 2012, and granted her request. It restrained the OHSAA from enforcing transfer Bylaw 4-7-2 against Paige and from taking any adverse action against Paige or nonparty Winton Woods based upon the OHSAA's determination that Paige was ineligible to participate in athletics during her senior year at Winton Woods. Paige filed an amended complaint seeking that relief on December 17, 2012. The record does not reflect service of the amended complaint upon Winton Woods. Thus, Winton Woods was never made a party to this action.

{¶7} In this appeal, the OHSAA raises five assignments of error. But before we can reach the merits of its appeal, we must determine if its appeal is moot. Paige has filed a motion to dismiss, arguing that the OHSAA's appeal is moot. "The doctrine of mootness is rooted both in the 'case' or 'controversy' language of Section 2, Article III of the United States Constitution and in the general notion of judicial restraint." *See James A. Keller, Inc. v. Flaherty*, 74 Ohio App.3d 788, 791, 600 N.E.2d 736 (10th Dist.1991) citing 1 Rotunda, Novak & Young, *Treatise on Constitutional Law: Substance and Procedure*, 97, Section 2.13 (1986). "While Ohio has no constitutional counterpart to Section 2, Article III, Ohio courts have long recognized that a court cannot entertain jurisdiction over a moot controversy." *Id.*

{¶8} A case becomes moot if at any stage there ceases to be an actual controversy between the parties. *See Miner v. Witt*, 82 Ohio St. 237, 92 N.E. 21 (1910); *see also Fortner v. Thomas*, 22 Ohio St.2d 13, 14, 257 N.E.2d 371 (1970) ("[it] has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature

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declarations or advice upon potential controversies.”). “An actual controversy is a genuine dispute between adverse parties.” *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 748, 2010-Ohio-6036, 944 N.E.2d 207, ¶ 10.

{¶9} Ohio courts have held that when an individual graduates from high school or no longer has an interest in participating in interscholastic athletic activity, an action to participate in such activity is deemed moot. See *Dankoff v. Ohio High School Athletic Assn.*, 9th Dist. No. 24076, 2008-Ohio-4559, ¶ 4; *Ulliman v. Ohio High School Athletic Assn.*, 184 Ohio App.3d 52, 2009-Ohio-3756, 919 N.E.2d 763, ¶ 28 (2d Dist.). Here, it is undisputed that Paige has graduated from Winton Woods High School and will play no more high school basketball games. Thus, the power of the OHSAA to adversely affect her rights to play interscholastic athletics has ended. Consequently, there is no live controversy regarding the transfer rule or her participation in athletics at Winton Woods. As a result, we agree with Paige that the portion of the trial court’s injunction which permitted her to participate in interscholastic athletics at Winton Woods is moot.

{¶10} The OHSAA argues, however, that the case as a whole is not moot because the trial court’s injunction also prohibited the OHSAA from taking any adverse action against Paige or Winton Woods for permitting Paige’s participation in athletics. According to OHSAA Bylaw 11-1-4, the OHSAA may sanction member schools and their athletes in the event an ineligible student athlete participates in violation of the OHSAA eligibility rules, but in accordance with an injunction or restraining order which is later vacated, stayed, reversed, or finally determined to have been unjustified. Those sanctions include: striking individual and team records and performances, forfeiting victories, returning trophies and rewards, and returning certain funding.

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{¶11} The OHSAA argues that a live controversy exists because it has an interest in having the injunction invalidated and set aside, so that it can exercise its possible discretion to impose the penalties under Bylaw 11-1-4 upon Winton Woods and Paige. It further argues that Paige has an interest in preventing the OHSAA from erasing her own team's victories and performances. Paige, however, has no such interest as noted in the motion to dismiss this appeal. The OHSAA relies upon an opinion from the Second Appellate District, *Ulliman*, 184 Ohio App.3d 52, 2009-Ohio-3756, 919 N.E.2d 763, to support its position. But we do not find the analysis in *Ulliman* to be persuasive because the Second Appellate District engaged in no meaningful analysis of whether the OHSAA, the school, or the student had a legally cognizable interest in the outcome of the appeal.

{¶12} Notably in this case, Winton Woods was never made a party in the trial court, nor was it made a party to this appeal. Further, Winton Woods has never moved to intervene in this case, and has asserted no interest in this matter. Thus, there is no justiciable controversy or pending action between the OHSAA and Winton Woods concerning the validity or the enforcement of the trial court's preliminary injunction. Thus, we have no authority to adjudicate any potential dispute between the OHSAA and Winton Woods over the sanctions outlined in Bylaw 11-1-4. As a result, any actions the OHSAA may take against Winton Woods in the future are irrelevant in determining whether a live controversy currently exists between Paige and the OHSAA. See *Johnson v. Florida High School Activities Assn., Inc.*, 102 F.3d 1172, 1173 (11th Cir.1997); *Jordan v. Indiana High School Athletic Assn.*, 16 F.3d 785, 787-88 (7th Cir.1994); *McPherson v. Michigan High School Athletic Assn.*, 119 F.3d 453, 458, 466 (6th Cir.1997) (Nelson-Moore, J., dissenting).

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{¶13} Furthermore, no live controversy exists now between Paige and the OHSA. Paige's attorney stated during oral argument that Paige had no further interest in continuing the injunction and argued that the issues before this court are moot. Moreover, there is no indication in the record or the parties' briefs that Paige set any records or won any awards while participating under the injunction. *See Crane v. Indiana High School Athletic Assn.*, 975 F.2d 1315, 1318 (7th Cir.1992) (student's claims were not moot where the student could lose individual awards). Likewise, the record does not reveal whether there are any team records that could be stricken.

{¶14} Thus, the only remaining penalties that Paige could conceivably have an interest in avoiding are the erasure of her individual performances and the forfeiture of any team victories. There is some authority that when a student athlete represents to the trial court that he or she would be personally adversely affected if the school were penalized, an appeal is not moot despite the absence of the school as a party to the appeal. *See McPherson*, 119 F.3d at 458-459; *Sandison v. Michigan High School Athletic Assn.*, 64 F.3d 1026 (6th Cir.1995); *Pottgen v. Missouri State High School Activities Assn.*, 40 F.3d 926, 928 (8th Cir.1994). However, there is also authority that the possibility of retroactive penalties does not prevent an appeal from being moot if the only possible penalty is forfeiture of team victories and the school, like OHSA member Winton Woods in this case, is not a party to the appeal. *See Johnson*, 102 F.3d at 1173; *see also Jordan*, 16 F.3d at 788-89.

{¶15} Here, given the uncontested statements of Paige's attorney that she will not be personally adversely affected if Winton Woods were to be penalized, and the fact that application of Bylaw 11-1-4 would have a meaningful impact only on Winton Woods, a nonparty, who as a member of the OHSA has agreed to the OHSA rules, we cannot conclude that there is a tangible and substantial controversy between the parties

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with respect to the portion of the injunction enjoining the OHSAA from taking any action against Paige and Winton Woods. Moreover, it is not even clear if there will be a future controversy between the parties. The imposition of sanctions under Bylaw 11-1-4 is discretionary and thus speculative at best at this time. The OHSAA may choose, in its discretion not to sanction Winton Woods, or Paige and/or Winton Woods may choose not to protest the sanctions that are subsequently imposed. *See McPherson*, 119 F.3d at 45 (Nelson-Moore, J., dissenting). We, therefore, conclude that the OHSAA's appeal as a whole is moot. *See Johnson*, 102 F.3d at 1173; *see also Jordan*, 16 F.3d at 788-89.

{¶16} The OHSAA alternatively argues that even if this case technically meets the standard for mootness, we should not dismiss the case as moot because an exception to the mootness doctrine exists for cases that are capable of repetition, yet evade judicial review. But to meet this exception, the OHSAA must show that both of the following conditions apply: (1) the challenged action is too short in duration to be fully litigated prior to its cessation or expiration and (2) there is "a reasonable expectation that the same complaining party will be subjected to the same action again." *State ex rel. Calvary v. Upper Arlington*, 89 Ohio St.3d 229, 231, 729 N.E.2d 1182 (2000).

{¶17} We agree with the OHSAA that it has met the first prong. Here, the basketball season ended during the pendency of OHSAA's appeal. But because Paige has graduated, there is no reason to suspect that either she or her parent, the parties actually involved in this case, will again be subjected to the actions of the OHSAA. Thus, this is not an issue that is capable of repetition yet evading review. *See Dankoff v. OHSAA*, 9th Dist. Summit No. 24076, 2008-Ohio-4559, ¶ 4; *see also Johnson*, 102 F.3d at 1173. Nor do we find the resolution of the issues in the OHSAA's appeal to raise a debatable constitutional question or to be a matter of

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"great public importance." See *Schwabb v. Lattimore*, 166 Ohio App.3d 12, 2006-Ohio-1372, 848 N.E.2d 912, ¶ 12 (1st Dist.).

{¶18} Because there is no present controversy between Paige and the OHSAA, we grant her motion to dismiss the appeal as moot. And because Winton Woods is not even a nominal, much less an active party to this lawsuit, the trial court lacked the authority to issue the preliminary injunction regarding Winton Woods without prior notice and hearing from the school district. We, therefore, vacate that portion of the preliminary injunction that prohibits the OHSAA from taking any action against Winton Woods.

{¶19} We recognize that our resolution of the OHSAA's appeal conflicts with the opinion of the Second District Court of Appeals in *Ulliman v. Ohio High School Athletic Assn.*, 184 Ohio App.3d 52, 2009-Ohio-3756, 919 N.E.2d 763 (2d Dist.). We, therefore, certify to the Supreme Court of Ohio, pursuant to Section 3(B)(4), Article IV, Ohio Constitution, the following issue for review and final determination: Where an injunction is issued at the request of a student, which permits the student to participate in interscholastic athletics despite the Ohio High School Athletic Association's determination of ineligibility, under its Bylaw 4-7-2, Exception One, and prohibits the OHSAA from invoking its right to sanction a member school, does a live controversy still exist when: (1) the student is no longer participating in high school athletics; (2) the member school where the student participated is not a party to the appeal; and (3) the student is no longer interested in pursuing the matter on appeal?

Judgment accordingly.

HENDON, P.J, concurs.
CUNNINGHAM, J., dissents.

CUNNINGHAM, J., dissenting.

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{¶20} I respectfully dissent. I cannot agree with the majority that the OHSAA's appeal is moot. As a result, I would reach the merits of the OHSAA's appeal. Because Paige was afforded notice of the OHSAA's eligibility determination and an opportunity to be heard before its Appeals Panel in accordance with the OHSAA's constitution and bylaws and because the OHSAA Panel's decision denying her eligibility was not the result of mistake, fraud, collusion, or arbitrariness, I would reverse the trial court's ruling and vacate the preliminary injunction.

OHSAA and Trial Court Proceedings

{¶21} Alexxus Paige attended Withrow High School and played basketball there from the ninth through the eleventh grades. On June 1, 2012, Paige moved with her mother, Vivian Watkins, from the family's home in the Cincinnati Public School District to an apartment in the Winton Woods School District. As a result of the move, Paige enrolled at Winton Woods High School for her senior year. Both Withrow and Winton Woods are members of the OHSAA.

{¶22} The OHSAA is a nonprofit, voluntary, unincorporated association of public and private high schools and middle schools in the state of Ohio that regulates, supervises, and administers interscholastic athletic competition among its member schools. As members of the OHSAA for the 2012-2013 school year, Withrow and Winton Woods have adopted a constitution and bylaws by which they have agreed to conduct their interscholastic sports programs.

{¶23} Section 4-7-2 of the OHSAA Bylaws states that a student who transfers from one school to another after the fifth day of her ninth grade year cannot play sports at the new school for one year from the date of enrollment unless one of the eleven exceptions applies. Exception One states as follows:

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[i]f, as a result of a bona fide legal change of residence made by BOTH PARENTS, the student is compelled to transfer from one public school district to another public school district, the Commissioner's Office may restore athletic eligibility at the new school provided the Commissioner's Office is satisfied that the transfer was not athletically motivated. The requirement that "both parents" make the move may be waived by the Commissioner's Office if the marriage of the parents has been or is in the process of being terminated or if the parents were never married. An Affidavit of Bona Fide Residence in the form requested by the Commissioner's Office, must be submitted along with any request for the application of this exception.

{¶24} Upon Paige's transfer to Winton Woods, the athletic director at Winton Woods and Watkins submitted an affidavit for a bona fide legal change of residence to the OHSAA in accordance with Exception One. The OHSAA sent an email to Darren Braddix, the Athletic Director at Withrow High School, about Paige's request for an exception to the transfer prohibition. Braddix, responded as follows:

I am sure that this move was athletically motivated. There was a problem during our last tournament basketball game where she was benched for the remaining 3 qtrs and we proceeded to lose. Alexxus and the coach got into it. Her parents and the coach also got into it. From that point on she declared that she was transferring to Winton Woods and couldn't wait to play us. That is all we heard 3-4 qtr last year. Winton Woods is where most of her AAU [Amateur Athletic Union] Basketball teammates play as well

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as one of her AAU Coaches. We wish her well but [I] am sure
Alexxus would still be here if it weren't for Basketball.

{¶25} Shortly thereafter, OHSAA Associate Commissioner Deborah Moore notified Winton Woods by letter that the OHSAA had determined that Paige's decision to transfer schools had not been compelled by a change of residence, but had been motivated by a desire to play basketball at Winton Woods. Thus, the OHSAA had concluded that under Bylaw 4-7-2, Paige was ineligible to participate in athletics at Winton Woods during her senior year. Paige's mother appealed the commissioner's determination to the OHSAA Appeals Panel.

{¶26} The OHSAA Appeals Panel was established in June 2012 after a vote by OHSAA member schools authorizing the board of directors to establish an appeals panel with exclusive jurisdiction to hear eligibility appeals. The Appeals Panel is comprised of three superintendents from member schools in different parts of Ohio. The rules of conduct for eligibility appeals are set forth in the 2012-2013 OHSAA Manual under the heading "Frequently Asked Questions."

{¶27} The rules provide that the appellant or a representative of his choosing shall have the opportunity to present evidence through witnesses or documentary evidence, supporting the position as to why the appeal should be granted. The rules further state that the commissioner's office does not have subpoena power. Therefore, it is incumbent upon the appealing party to make all arrangements necessary for the attendance of any/all witnesses it desires to support its appeal. The commissioner, however, has the authority to compel the attendance of school personnel at this hearing, and may exercise that authority if it is perceived that their attendance is necessary to assist in understanding facts necessary for the disposition of the appeal.

{¶28} The rules additionally provide that the commissioner's office will be represented by members of the OHSAA staff who shall be present at and throughout the appeal, as well as the OHSAA legal counsel; that OHSAA staff and counsel will defend the decision from which the appeal is taken, and one should expect a vigorous defense of the same; and that a great deal of deference shall be given to the decision of the commissioner's office. Notwithstanding this deference, however, an appellant shall be permitted to introduce any new evidence he or she believes is relevant to their case. Likewise, the commissioner's office may introduce additional evidence in support of its decision. The rules expressly state that the burden of proof rests with the appealing party.

{¶29} At a hearing before the panel regarding Paige's eligibility, Assistant Commissioner Moore acknowledged that Watkins had made a bona fide move into the Winton Woods School District. Thus, she stated that the issue before the Panel was whether athletics had been a motivating factor for the move. Watkins, who had appeared at the hearing on her daughter's behalf without counsel, explained that she and her husband had separated, and that she and Paige had moved to an apartment in the Winton Woods School District. OHSAA staff as well as the three panel members asked Watkins specific questions about the move and whether there had been a problem between Paige and the basketball coach at Withrow.

{¶30} Watkins responded:

What happened-I'm not really sure. First of all, I'm more of a sit back and observe parent. I don't say much. The very last game of the year, Alexxus played for a minute. After the game was over, my husband and I, we went to the coach and we asked why Alexxus barely played. She started. Everybody on the bench - everybody on

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the bench was asking the same question. He stated that she wasn't focused * * * And he basically went on to say that there was some things that happened in the locker room, which I didn't really get into. He addressed it. It wasn't that big of an issue with us.

{¶31} Watkins was also asked whether it had entered her mind that by transferring schools Paige might not be able to play. Watkins replied, "No, it never entered my mind. I had no idea. No. This all - This comes completely out of the box." When the panel member further inquired if this would have changed her mind about moving, Watkins replied, "If she couldn't play? Um, probably. Because my daughter has been through enough. She enjoys basketball. But probably, I don't -." The panel member responded, "Okay. That fine." Watkins then stated, "Well probably. If I had known I was going to come up here and take the day off work, yeah, probably."

{¶32} Darren Braddix, the Athletic Director at Withrow, also appeared before the Panel. He stated that after Paige's altercation with the coach her behavior changed, and added:

And the following, I would say, quarter and a half of school, Alexis really spent the last part of that time saying, I'm transferring. I'm leaving. I'm not playing here. I don't want to be here. I'm leaving. I'm going to go to Winton Woods. I mean, she just—she was adamant that she couldn't wait to get out of there * *
* Like I said, the teammates and principals and a lot of faculty and staff—I mean a lot of what she said was heard and was said to a lot of them. So it wasn't just the athletic department. It was the entire

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school, pretty much, knew because she had it made known—I'm going to Winton Woods. I can't wait to play you guys * * *.

Braddix stated that Paige's comments along with the following facts—(1) her AAU team practiced at Winton Woods, (2) her AAU coach is a Winton Woods assistant coach, (3) several of her AAU teammates played for Winton Woods, and (4) the new coach at Withrow had reached out to Paige to smooth things over, but Paige had responded that she was “not going to feel comfortable coming back”—led Withrow administrators to believe that Paige's move to Winton Woods was athletically motivated.

{¶33} After Braddix had spoken, Watkins was given an opportunity to respond. She stated that during the end of the previous school year Paige knew they would be moving, but she didn't know where. She also said that Paige's transfer to Winton Woods had nothing to do with playing AAU basketball there. The Panel accepted a letter from Watkins, which detailed the reasons for the move. It also accepted a copy of the lease that Watkins had signed on May 17, 2012, for the apartment in the Winton Woods school district. The Panel unanimously affirmed the commissioner's ruling.

{¶34} Paige then filed suit in the common pleas court seeking a preliminary injunction to enjoin the OHSAA from enforcing the transfer eligibility rule against her and from penalizing Winton Woods for permitting her participation in athletics. The trial court held a hearing on the complaint. It permitted Paige, Watkins, Steven Sanders, Paige's AAU coach, David Lumpkins, the assistant principal and assistant girls basketball coach at Winton Woods, and OHSAA Associate Commissioner Moore to testify. At the conclusion of the hearing, the trial court granted Paige's request, finding that the OHSAA's decision to deny her

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eligibility was fraudulent, arbitrary, and mistaken; that the OHSAA had violated her fundamental due-process rights; and that Paige would be likely to succeed on the merits at trial.

{¶35} In reaching these conclusions, the trial court found that the OHSAA's determination that Paige's move had been athletically motivated was arbitrary and fraudulent because it had been based solely upon the testimony of Braddix, who had been upset that Paige had left Withrow. The trial court found that Braddix's testimony before the OHSAA and at the hearing for preliminary injunction lacked credibility because it had been based upon hearsay statements. The trial court then found that the testimony from Watson and Paige, and their witnesses' testimony as to a nonathletic motivation for the move, was more credible.

{¶36} The trial court further found that Paige was likely to succeed on the merits of her claim that the OHSAA's decision to deny her eligibility was fraudulent, arbitrary, and mistaken and that the OHSAA had violated her fundamental due-process rights. The trial court held that the OHSAA had failed to afford Paige "fundamental due process." It focused upon the fact that Paige had not been given the right to compel witnesses or to cross-examine Braddix during the OHSAA appeal hearing. Finally, the trial court found that the OHSAA had made an arbitrary or mistaken interpretation of the requirement in Exception One that "both parents" must make a bona fide legal change of residence. As a result, the trial court restrained the OHSAA from enforcing transfer Bylaw 4-7-2 against Paige and from taking any adverse action against Paige or Winton Woods based upon its determination that Paige was eligible to participate in athletics during her senior year at Winton Woods.

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The OHSAA's Appeal is Not Moot

{¶37} I agree with the majority that before we can reach the merits of the OHSAA's arguments on appeal, we must determine if the OHSAA's appeal is moot. Paige has filed a motion to dismiss the appeal on this basis, which this court deferred for resolution with the merits of the OHSAA's appeal. She argues that because the basketball season has ended and she has graduated from Winton Woods, there is nothing for this court to adjudicate and that the OHSAA's appeal is moot.

{¶38} I also agree with the majority that the general rule with respect to the issue of mootness is that an actual case or controversy must exist at all stages of appellate review. *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 748, 2010-Ohio-6036, 944 N.E.2d 207, ¶ 10. Only in rare instances such as where the question presented for review is of great public interest, concerns a constitutional question, or involves exceptional circumstances capable of repetition yet evading review, will this court decide an otherwise moot case. *Schwabb v. Lattimore*, 166 Ohio App.3d 12, 2006-Ohio-1372, 848 N.E.2d 912, ¶ 12 (1st Dist.).

{¶39} In determining whether appeals from preliminary injunctions involving the OHSAA are moot, Ohio appellate courts have looked to Sixth Circuit case law. In *Sandison v. Michigan High School Athletic Assn.*, 64 F.3d 1026, 1030 (6th Cir.1995), the Sixth Circuit held that the first part of a preliminary injunction which had permitted the plaintiffs to participate in the track season at their respective high schools was moot and did not fit within the "capable of repetition yet evading review" exception to mootness. The Sixth Circuit's holding was based on the fact that the track season had ended, and the students' graduation from high school had eliminated any reasonable possibility that they would be subject to the same action again. *Id.*

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{¶40} The Sixth Circuit concluded, however, that the case was not moot with regard to the second part of the preliminary injunction, which had prohibited the Michigan High School Athletic Association ("MHSAA") from penalizing the respective high schools for allowing the students to compete. *Id.* Based on provisions in the MHSAA's bylaws that allowed victories to be forfeited and individual performances to be erased, the Sixth Circuit concluded that the students still had an interest in preventing the MHSAA from erasing from the records both their team victories and their individual performances. *Id.*

{¶41} Two years later, in *McPherson v. Michigan High School Athletic Assn.*, 119 F.3d 453, 458, (6th Cir.1997), the Sixth Circuit, sitting en banc, followed its earlier decision in *Sandison*. It held that the first part of a preliminary injunction, which had permitted a plaintiff to participate in the basketball season at his respective high school, was moot and did not fit within the "capable of repetition yet evading review" exception to mootness. *Id.* at 459. But it concluded that the second part of the injunction, which had prohibited the MHSAA from taking "any action which would cause the school district to be penalized for Plaintiff's participation in interscholastic athletic competition," still presented a live controversy. *Id.*

{¶42} In reaching this conclusion, the court considered the student's complaint, which had requested that the district court restrain the MHSAA from "taking any action that would cause the school district to be penalized for the student's participation in interscholastic activities, including * * * requiring that any games be forfeited." *Id.* It also considered the MHSAA's bylaws, which expressly provided that if a student was ineligible, but nonetheless, allowed to play because of a court-ordered injunction that the MHSAA shall

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'require all victories to [be] forfeited to opponent,' and may vacate or strike 'that individual or team records and performances achieved during participation by such ineligible, if the injunction is subsequently reversed or finally determined by the courts that injunctive relief is not or was not justified.'

Id.

{¶43} The Sixth Circuit noted that the MHSAA had asked it to reverse the trial court's preliminary injunction and to determine that injunctive relief was not justified. Thus, the relief sought by the MHSAA in its appeal, the Court stated

would if granted, make a difference to the legal interest of the parties because the MHSAA would then be required to forfeit to Huron's opponents those team victories in which McPherson participated, and could vacate or strike the records of McPherson and his basketball team, a course of events that McPherson specifically sought to prevent in his suit, and that the district court specifically ordered was prohibited.

Id. at 458, citing *Crane v. Indiana High School Athletic Assn.*, 975 F.2d 1315, 1318 (7th Cir.1992). Thus, the court held that because the student had an interest in preventing the MHSAA from erasing his team victories and his own performance, the controversy remained live. *Id.* at 459, quoting *Sandison*, 64 F.3d at 1029.

{¶44} In *Dankoff v. Ohio High School Athletic Assn.*, 9th Dist. Summit No. 24076, 2008-Ohio-4559, the Ninth District Court of Appeals dismissed the OHSAA's appeal of an order enjoining the OHSAA from prohibiting a student from participating in athletics during his senior year. The Ninth District held that the appeal was moot because the student had graduated and there was no longer a live controversy regarding his participation in high school athletics. *Id.* at ¶ 4, relying on

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Sandison, 64 F.3d 1026. The Ninth District distinguished *Sandison*, noting that the trial court's injunction had only restrained OHSAA from preventing the student from bowling on the high school team, and nothing more. *Dankoff*, 2008-Ohio-4559, at ¶ 4, and fn. 1. Although the OHSAA had argued that a live controversy still existed because penalties could be imposed on the school under the association's bylaws, the Ninth District noted that OHSAA's bylaws in their entirety were not in the record. *Id.* The Ninth District, therefore, dismissed the appeal as moot. *Id.*

{¶45} In *Ulliman v. Ohio High School Athletic Assn.*, 184 Ohio App.3d 52, 2009-Ohio-3756, 919 N.E.2d 763 (2d Dist.), the Second District Court of Appeals held that an appeal by the OHSAA from a preliminary injunction—which had enjoined it from prohibiting Ulliman's participation in interscholastic athletics during his senior year at Catholic Central High School and from taking adverse action against Ulliman or Catholic Central for allowing Ulliman to participate—was not moot even though Ulliman had filed a notice stating that he had received surgery for a “season-ending injury” and was no longer playing high school sports. *Id.* at ¶ 28.

{¶46} The Second District held that the OHSAA's appeal was not moot because the “injunction in the present case [wa]s like the one granted in *Sandison*, [it] had enjoined [the] OHSAA from taking action against either Ulliman or Catholic Central.” *Id.* at ¶ 33. The Second District further noted that the “OHSAA [had] also submitted a complete copy of its bylaws, which provide[d] for forfeitures of all athletic contests where ineligible players ha[d] been used. Other sanctions [we]re also available including forfeiture of all championship status, fines, and return of financial receipts.” *See id.*, citing OHSAA Bylaws, 11-2-1 and 11-2-3, and OHSAA Bylaws, 12-1-1 through 12-1-4. Accordingly, the Second District held that OHSAA's

appeal was not moot, and that it would “consider OHSAA’s argument that the trial court [had] erred in issuing the injunction.” *Id.*

{¶47} In this case, it is undisputed that Paige has graduated and is no longer playing high school basketball. Thus, there is no live controversy regarding the transfer rule or her participation in athletics at Winton Woods. Therefore, the portion of the trial court’s injunction which had permitted her to play basketball is moot.

{¶48} However, in Paige’s amended complaint she specifically requested that the trial court restrain the OHSAA from not only prohibiting her from playing basketball as provided under Bylaw 4-7-2, but also from “penalizing Winton Woods for Paige playing basketball at that school” under Bylaw 11-1-4. Sanctions under Bylaw 11-1-4 could include, inter alia, the erasure of Paige’s individual game and team performances, as well as the forfeiture of team victories in which Page played.

The trial court’s judgment entry provided:

This Court hereby grants the preliminary injunction sought by Paige. As such, the OHSAA, as well as their agents, servants, employees, attorneys, and all persons in active concert and participation with them are hereby enjoined from prohibiting Paige from participation in interscholastic athletics during her senior year at Winton Woods. This court also enjoins OHSAA from taking adverse action against Allexus [sic] or against Winton Woods for allowing Allexus [sic] to participate in athletics.

{¶49} According to the OHSAA’s bylaws, which were admitted into evidence at the hearing on the preliminary injunction, the OHSAA has the authority to impose the following sanctions upon Paige and Winton Woods if its appeal is successful in this case.

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BYLAW 11 – PENALTIES

11-1-1 Penalties for violation of the OHSAA Constitution, Bylaws and Regulations shall be imposed by the Commissioner or another administrative staff member designated by the Commissioner.

11-1-2 Penalties include: suspension, forfeiture of games, forfeiture of championship rights, probation, reclamation of expenses for the conduct of investigations and all other fees/expenses associated therewith, public censure, denial of participation or fines not to exceed \$10,000 per occurrence or such other penalties as the Commissioner deems appropriate.

11-1-4 If a lawsuit is commenced against the OHSAA seeking to enjoin the OHSAA from enforcing any or all of its Constitution, bylaws, sports regulations, decisions of the OHSAA, and an Order from a Court of proper jurisdiction is subsequently either voluntarily vacated, or stayed, or reversed or otherwise determined by the Courts that the equitable relief sought is not or was not justified, the Commissioner may impose any one or more of the following in the interest of restitution and fairness to other member school's (sic) athletes:

- a) Require that individual or team records and performances achieved during such participation be vacated or stricken.
- b) Require that team victories be forfeited to opponent.
- c) Require that team or individual awards earned during such participation be returned to the Association.

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d) Require the return of any financial receipts realized from tournament participation.

e) Impose a monetary penalty commensurate with the expense to the OHSAA for the litigation.

{¶50} The OHSAA argues, in part, that a live controversy exists because Paige has an interest in preventing the OHSAA from erasing her individual and team performances and requiring the forfeiture of her team's victories. The majority responds that Paige "... has no such interest as noted in the motion to dismiss this appeal." I must disagree. The motion to dismiss does not set forth a disclaimer of the interest Paige asserted in her amended complaint—to protect her individual and team performances and her team's record of game victories—by seeking to prevent the OHSAA from exercising its authority under Bylaw 11-1-4. Thus, a live controversy remains between Paige and the OHSAA. If this court were to grant the relief sought by the OHSAA in this appeal, the legal interests of both Paige and the OHSAA would be affected—Paige's interest in protecting her individual and team performances and the OHSAA's vindication of its governing authority.

{¶51} The majority states that Paige's attorney, during oral argument, submitted that she will not be "adversely affected" if Winton Woods were to be penalized. This court should not countenance a party's effort to abandon on appeal an interest the party specifically advanced in the trial court when the relief sought by the appealing party, if granted, would make a difference to that stated interest. Here, Paige specifically sought to enjoin the OHSAA from sanctioning or penalizing Winton Woods under its rules and was granted this relief.

{¶52} In this case, to find no live controversy as the majority does, strips the OHSAA of its opportunity to realize the relief it seeks. Here, the OHSAA seeks

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not only to vindicate its governing authority, but also to exercise its discretion to impose sanctions against its member schools under Bylaw 11-1-4—a result which Paige specifically sought to prohibit. In this appeal, by affirming Paige's claimed disinterest, the majority permits a situation whereby cases like this would always evade review.

{¶53} Furthermore, I believe the majority reads the penalties that the OHSAA may impose upon Paige too narrowly when it states that our record does not demonstrate that Paige had set any records or won any awards, and therefore, a live controversy between Paige and the OHSAA does not exist. While the penalties the OHSAA may impose can encompass the vacating or striking of any awards or records that Paige has individually earned, the OHSAA may also require that her individual "performance achieved" during her participation be vacated or stricken. Her "performance achieved" would encompass the record of statistics for any game she participated in at Winton Woods, and would include, among other things: assists, blocks, points scored, or steals.

{¶54} Likewise, the fact that Winton Woods is not a party to this appeal is irrelevant to a determination that a live controversy exists in this case. In *Ulliman*, *Sandison*, and *McPherson*, none of the schools appeared before the appellate courts, yet the courts found that a live controversy remained between the student and the athletic association. Therefore, I agree with the OHSAA that under the Second District's decision in *Ulliman* and the Sixth Circuit's opinions in *Sandison* and *McPherson*, the portion of the trial court's preliminary injunction which prohibits "OHSAA from taking adverse action against Alexus [sic] or against Winton Woods for allowing Alexus [sic] to participate in athletics," is not moot.

{¶55} I acknowledge, as pointed out by the majority, that both the Seventh and Eleventh Circuits have held that the possibility of retroactive penalties by a high school athletic association does not prevent an appeal from being moot where a possible penalty is forfeiture of team victories and the school is not a party to the appeal, and there is no evidence that the student athlete won any awards or achieved any records during their performances. See *Johnson v. Florida High School Activities Assn., Inc.*, 102 F.3d 1172, 1173 (11th Cir.1997); *Jordan v. Indiana High School Athletic Assn., Inc.*, 16 F.3d 785, 788-89 (7th Cir.1994). In those cases, however, the Seventh and Eleventh Circuits did not set forth the penalty provisions of the athletic associations. So we do not know if the penalty provisions encompassed the vacating or striking of any records of the student's individual performances. Furthermore, there is nothing to suggest that the students in those cases, like the student in *McPherson*, sought to prohibit the athletic associations from taking any action against the schools for which they participated.

{¶56} Here, however, there is no dispute that Paige participated in basketball games at Winton Woods following the trial court's issuance of the preliminary injunction. Therefore, a record of her "achievement" during those performances exists. Given that Paige specifically sought to prevent the OHSAA from taking any action to penalize Winton Woods, which would encompass erasing her own record of performance and any team victories, I believe the Sixth Circuit's analysis in *Sandison* and *McPherson* is more on point with the facts in this case.

{¶57} I would also point out that the Eighth and Tenth Circuits have, likewise, held that an athletic association's appeal of an injunction, which had permitted a student's participation in athletics, was not moot even though the student had graduated, because the student had an interest in preventing the athletic

association from erasing team victories and individual performances. *Pottgen v. Missouri State High School Activities Assn.*, 40 F.3d 926 (8th Cir.1994) (holding that although a student had graduated from high school, mooting the portion of an injunction permitting him to play high school baseball, a “live controversy still exist[ed] regarding the portion of the injunction which prohibited the MSHSAA from imposing sanctions upon a high school for whom or against whom Pottgen [had] played”); *Wiley v. Natl. Collegiate Athletic Assn.*, 612 F.2d 473, 476 (10th Cir.1979) (holding that a college track athlete’s graduation did not completely moot an injunction allowing him to compete in college athletics because his victories, records, and awards were still at issue). Thus, I cannot say that the OHSAA’s appeal is moot.

{¶58} But even assuming arguendo that the underlying controversy between Paige and the OHSAA no longer exists, I would not dismiss its appeal as moot because the issues presented in the OHSAA’s appeal involve matters of great public importance which affect virtually all public and private middle and high schools in the state that maintain programs of interscholastic athletics. Over three hundred thousand students statewide participate in sports under the OHSAA eligibility bylaws. The primary purpose of the eligibility bylaws is to provide for fair and equitable governing of student eligibility for students who participate in athletics in Ohio.

{¶59} Here, the trial court held that the OHSAA had violated a student’s due-process rights and had engaged in fraud in denying her eligibility to play basketball, and it did so by engaging in a de novo review. Resolution of this issue is vital because what is at stake is the governance authority of the OHSAA, which has an interest in protecting the integrity of its rules and vindicating the rights of its member schools, who rely on the fair application of the eligibility bylaws, as well as

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ensuring that the OHSAA not be required to litigate under a de novo review. Thus, the outcome of the case is not only important to the OHSAA, but to its member schools, and to those students who do abide by the OHSAA's eligibility rules.

{¶60} In that respect, this case is similar to *In re Suspension of Huffer from Circleville High School*, 47 Ohio St.3d 12, 546 N.E.2d 1308 (1989), where Mark Huffer appealed his suspension from Circleville High School by the Board of Education because he allegedly attended wrestling practice while under the influence of alcohol. By the time the matter had reached the Ohio Supreme Court, Huffer had graduated from high school. *Id.* at 14. The issue before the Supreme Court on appeal was whether the school board's policy on alcohol was unreasonable and overbroad. *Id.*

{¶61} The Ohio Supreme Court stated that the issue was "certainly capable of repetition, yet it may 'evade review, 'since students who challenge school board rules generally graduate before the case winds its way through the court system.' " *Id.* In reaching this conclusion, the Supreme Court did not limit its analysis to Huffer, but rather looked at students in general. The court further found that "the issue of the authority of local school boards to make rules and regulations is of great public interest." *Id.*

{¶62} Because this case involves the OHSAA's ability to make and enforce its eligibility rules and regulations among its member schools, who comprise virtually every public and private middle and high school in Ohio, this court should decide the merits of the case under the public interest exception to the mootness doctrine. Accordingly, I would deny Paige's motion to dismiss the appeal as moot and address the merits of the OHSAA's appeal.

The OHSAA's Arguments on Appeal

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{¶63} The OHSAA raises five assignments of error. In its first assignment of error, the OHSAA argues that the trial court erred in reversing the decision of the OHSAA Appeals Panel when its decision was supported by reliable, probative, and substantial evidence. In its second and third assignments of error, the OHSAA argues that the trial court erred in reversing the decision of the OHSAA Appeals Panel where the trial court conducted a de novo evidentiary hearing, and not only substituted new evidence for the evidence considered by the OHSAA Appeals Panel, but also substituted its determination as to the credibility of witnesses for the determination of the OHSAA Appeals Panel. In its fourth assignment of error, the OHSAA argues that the trial court erred by disregarding the Ohio Supreme Court's holding in *Ohio High School Athletic Assn. v. Judges of the Court of Common Pleas of Stark Co.*, 173 Ohio St. 239, 181 N.E.2d 261 (1962), by creating its own rules and standards for hearings on eligibility determinations in place of the rules and standards approved by member OHSAA schools. In its fifth assignment of error, the OHSAA argues that "the trial court erred as a matter of law in granting a preliminary injunction against the OHSAA where it had committed any of the above-listed errors." Because the OHSAA's assignments of error are interrelated, I address them together.

Standard of Review for Preliminary Injunction

{¶64} A trial court's decision granting a preliminary injunction is reviewed under an abuse of discretion standard. *Garono v. State*, 37 Ohio St.3d 171, 173, 524 N.E.2d 496 (1988). A trial court abuses its discretion when its decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶65} A party seeking a preliminary injunction must show by clear and convincing evidence: (1) a substantial likelihood that the party will prevail on the merits, (2) the party will suffer irreparable injury or harm if the requested injunctive relief is denied, (3) no unjustifiable harm to third parties will occur if the injunctive relief is granted, and (4) the injunctive relief requested will serve the public interest. *The Proctor & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267, 747 N.E.2d 268 (1st Dist.2000); *Ulliman*, 184 Ohio App.3d 52, 2009-Ohio-3756, 919 N.E.2d 763, at ¶ 34; see Civ.R. 65(B). While no one factor is to be given controlling weight, a trial court errs in granting a preliminary injunction where the plaintiff is unlikely to succeed on the merits. *Toledo Police Patrolman's Assn., Local 10, IUPA, AFL-CIO-CLC v. Toledo*, 127 Ohio App.3d 450, 469, 713 N.E.2d 78 (6th Dist.1988); see *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir.1997).

Likelihood of Success on the Merits

{¶66} The Ohio Supreme Court has held that the decisions of the tribunals of the OHSAA with respect to its internal affairs will, in the absence of mistake, fraud, collusion, or arbitrariness, be accepted by the courts as conclusive. *State ex rel. Ohio High School Athletic Assn. v. Judges of Court of Common Pleas of Stark Cty.*, 173 Ohio St. 329, 181 N.E.2d 261 (1961), paragraph three of the syllabus. Thus, in order to succeed on the merits of her claim, Paige must show by clear and convincing evidence that the OHSAA's decision was the product of fraud, mistake, collusion, or arbitrariness.

{¶67} The trial court held that Paige was likely to succeed on the merits of her claim because (1) the Appeals Panel's determination that Paige's move had been athletically motivated was arbitrary and based upon the fraudulent, hearsay testimony of Darren Braddix; (2) the OHSAA had not afforded Paige fundamental

due process; and (3) the OHSAA had made an arbitrarily and/or ~~mistaken~~ interpretation of the "both parents" requirement in Exception One.

Athletic Motivation for the Move

{¶68} The OHSAA argues the trial court erred in concluding that it had acted arbitrarily and fraudulently in holding that Paige's transfer to Winton Woods had been athletically motivated.

{¶69} The OHSAA contends that in reaching this conclusion, the trial court exceeded the scope of its review under *State ex rel. Ohio High School Athletic Assn. v. Judges of Court of Common Pleas of Stark Cty.*, 173 Ohio St. at paragraph three of the syllabus, 181 N.E.2d 261, by conducting a de novo review of the proceedings before the OHSAA, rehearing the matter as if the OHSAA proceedings had not occurred, and then substituting the new evidence from the hearing on the preliminary injunction for the evidence considered by the OHSAA Panel. The OHSAA argues that because the transcript of the hearing before the Appeals Panel contained sufficient, reliable, probative, and substantial evidence to support the Panel's finding, the trial court erred in admitting testimony and then substituting its judgment for that of the OHSAA Appeals Panel. I agree.

{¶70} A court may, in its discretion, hold a hearing on a motion for preliminary injunction. See *Executive Mgt. Servs., Inc. v. Cincinnati State Technical and Community College*, 10th Dist. Franklin No. 11AP-600, 2011-Ohio-6767, ¶ 6-12. "In determining whether a hearing is appropriate, the court must exercise its discretion, assess the nature of the allegations, and circumstances, and determine whether a hearing is warranted for that particular motion." *Id.* at ¶ 12. Civ.R. 65 is silent as to the scope of the hearing.

{¶71} In her complaint for a preliminary injunction, Paige did not allege or rely upon facts outside the proceedings before the OHSAA to support her claim that the OHSAA's decision was the product of mistake, arbitrariness, fraud, or collusion and that she had been denied due process. Had Paige made such an allegation, the trial court could have, in its discretion, chosen to hear new testimony. The trial court could have then engaged in fact finding with respect to whether the new evidence before it demonstrated that the OHSAA's decision was fraudulent, collusive, mistaken, or arbitrary.

{¶72} Absent such allegations, however, the trial court was not free to take new evidence, particularly when that evidence could have been presented to the OHSAA, and to then use that evidence de novo to substitute its judgment for that of the OHSAA. Rather, the trial court was confined to determining whether the evidence that was before the OHSAA demonstrated that its decision was fraudulent, collusive, mistaken, or arbitrary.

{¶73} Ohio appellate courts have held that a decision of the OHSAA is arbitrary when a bylaw in question has not been properly adopted by member schools of the OHSAA in compliance with OHSAA regulations or when the bylaw in question is "without determining principles." *Ulliman*, 184 Ohio App.3d 52, 2009-Ohio-3756, 919 N.E.2d 763, at ¶ 61-63. They have additionally held that an OHSAA decision is arbitrary where it "is not supported by reliable, probative, and substantial evidence and is not in accordance with the law." See *Scott v. Ohio High School Athletic Assn.*, 5th Dist. Stark No. 1999CA00269, 2000 Ohio App. LEXIS 3193, *24 (July 10, 2000), quoting *Massillon City School Dist. Bd. of Edn. v. Ohio High School Athletic Assn.*, 5th Dist. Stark No. 7247, 1987 Ohio App. LEXIS 9541 (Nov. 5, 1987).

{¶74} Here, no evidence was presented that Bylaw 4-7-2 was improperly adopted in violation of OHSAA regulations or that Exception One was without determining principles. Nor was there evidence that the OHSAA Panel's decision to deny Paige eligibility under Exception One was arbitrary and fraudulent. The record from the proceedings before the OHSAA shows that the Appeals Panel considered all the evidence before it, including the hearsay testimony by Braddix, and found evidence pointing toward a primarily athletic reason for the move to be more credible than the evidence to the contrary. Although Watkins denied that her family had any issue with the Withrow basketball coach for failing to play Paige during the last game, her statements before the Appeals Panel supported Braddix's testimony that Paige had been benched by the coach after one minute in a playoff game where she had started.

{¶75} Watkins' testimony also supported the conclusion that, although a "sit back and observe" parent, she was concerned enough to speak to the coach immediately after the game. And although Watkins denied that Paige's move to Winton Woods was motivated by the desire to play basketball there, she had no response to Braddix's description of Paige's declarations that she "was transferring to Winton Woods and couldn't wait to play us." Watkins, furthermore, told the OHSAA Panel that had she known Paige would have been ineligible to play basketball at Winton Woods, she probably would not have made the move. The Panel, moreover, had evidence before it, that Watkins had signed a lease for the apartment on May 17, 2012, while Paige was still attending Withrow High School.

{¶76} The trial court ignored this evidence before the OHSAA panel, instead focusing solely on Braddix's testimony. The trial court held that because Braddix's testimony was based upon hearsay, the OHSAA had erred in relying upon

it because it was fraudulent and arbitrary. The trial court then disregarded this evidence in light of the fact that some of it had been presented through hearsay testimony. But the OHSAA is a private association that employs an informal hearing process and is not bound by all of the rules of evidence. Thus, its decisions may be based in part on hearsay. Moreover, it was within the OHSAA's purview to consider both direct and indirect evidence and to weigh it for what it was worth.

{¶77} In granting the preliminary injunction, the trial court afforded more weight to the testimony from Paige, her mother, and her AAU and Winton Woods coaches at the hearing on the preliminary injunction, finding their testimony to be more credible than the testimony given by Braddix, and Moore's testimony as to Paige's and her mother's motivation for the move. Because the record does not support the trial court's conclusion that OHSAA's determination, that Paige's transfer to Winton Woods had been primarily for athletics, was based upon fraud or arbitrariness, the trial court erred in finding Paige likely to succeed on that claim on this basis.

Due Process

{¶78} The trial court also held that Paige had not been afforded fundamental due process. It relied upon the fact that Paige had not been entitled to compel witnesses before the Appeals Panel and she had not been entitled to cross-examine Braddix, the key antagonist to her eligibility to play at Winton Woods. But, participation in interscholastic sports is not a property right that gives rise to due-process protections under the Fourteenth Amendment to the U.S. Constitution or state constitutions. *See Menke v. Ohio High School Athletic Assn.*, 2 Ohio App.3d 244, 246, 441 N.E.2d 620 (1st Dist.1981); *Hamilton v. Tennessee Secondary School*

Athletic Assn., 552 F.2d 681, 682 (6th Cir.1976) (holding that a student's interest in interscholastic athletics falls outside due-process protections).

{¶79} But even assuming arguendo that Paige was entitled to procedural due process, there is no evidence that she was denied the process she was due. Following Winton Woods's request for an eligibility ruling, Moore, the associate commissioner, provided Winton Woods with a letter detailing the reasons for its finding that Paige was ineligible. Paige's mother, Watkins appealed the Commissioner's decision to the OHSAA Appeals Panel. Watkins appeared at the hearing on her daughter's behalf without counsel or witnesses. She gave a statement, answered questions by the OHSAA, presented documentary evidence, and was afforded an opportunity to respond to Braddix's statements at the hearing. Thus, Paige was afforded the same process during the appeals procedure that Winton Woods and Withrow, as members schools, would have been afforded. As a result, the trial court erred in finding that Paige was likely to succeed on the merits of her due-process claim that her right to fundamental due process had been violated.

"Both Parents" Requirement in Exception One

{¶80} Finally, the OHSAA argues that the trial court erred in justifying its decision to issue the preliminary injunction on the basis that the OHSAA had mistakenly interpreted the "both parents" requirement in Exception One to the transfer bylaw. I agree.

{¶81} Associate Commissioner Moore conceded at the beginning of the OHSAA Appeals hearing that Watkins had made a bona fide legal change of residence. Thus, the sole focus of the hearing was whether Paige's transfer to the Winton Woods School District had been athletically motivated. Because the OHSAA's decision to deny Paige's eligibility was based solely upon its determination

that her move had been athletically motivated, the trial court's interpretation of the "both parents" requirement in Exception One was unnecessary to a determination of the issues before it. Consequently, the trial court erred in finding Paige likely to succeed on the merits on this basis when it did not even serve as the reason for the OHSAA's decision that she did not meet the criteria for application of Exception One.

Conclusion

{¶82} Accordingly, I agree with the OHSAA that the trial court abused its discretion when it found that Paige had a likelihood of success on the merits of her claim. As a result, I need not address the remaining prongs of the preliminary injunction standard. See *Ulliman*, 184 Ohio App.3d 52, 2009-Ohio-3756, 919 N.E.2d 763, at ¶ 70. Therefore, I would sustain the OHSAA's five assignments of error, reverse the judgment of the trial court, and vacate the preliminary injunction. I further agree that the majority's determination that the OHSAA's appeal is moot directly conflicts with the Second Appellate District's opinion in *Ulliman v. Ohio High School Athletic Assn.*, 184 Ohio App.3d 52, 2009-Ohio-3756, 919 N.E.2d 763 (2d Dist.). I, therefore, support its determination that this case should be certified to the Supreme Court for review on this basis.

Please note:

The court has recorded its own entry this date.



Caution
As of: November 20, 2013 3:01 PM EST

Ulliman v. Ohio High Sch. Ath. Ass'n

Court of Appeals of Ohio, Second Appellate District, Clark County
July 31, 2009, Rendered
Appellate Case No. 08-CA-99

Reporter: 184 Ohio App. 3d 52; 2009-Ohio-3756; 919 N.E.2d 763; 2009 Ohio App. LEXIS 3196

BENJAMIN ULLIMAN, Plaintiff-Appellee v. OHIO HIGH SCHOOL ATHLETIC ASSOCIATION, Defendant-Appellant

Prior History: (Civil Appeal from Common Pleas Court). Trial Court Case No. 08-CV-1363.

Core Terms

high school, athletic, bylaws, trial court, eligibility, ineligible, preliminary injunction, interscholastic, ambiguity, enroll, custody, abuse of discretion, injunction, sport, common pleas, ninth grade, senior year, guardian, trial court's interpretation, athletic association, arbitrarily, non-public, collusion, enjoin, moot, constitutionally protected, restraining, change of custody, football, freshman

Case Summary

Procedural Posture

Appellant, the Ohio High School Athletic Association (OHSAA), sought review of a judgment from the Clark County Court of Common Pleas (Ohio), which issued a preliminary injunction (PI) in favor of appellee high school student, restraining the OHSAA from prohibiting the student's participation in interscholastic athletics during his senior year and from taking adverse action against the student or his private school (PS) due to a transfer bylaw.

Overview

The student had played football as a freshman for a particular high school. He transferred to another high school in the district where his parents resided the next school year, but he was unable to play sports due to grade ineligibility. He moved into his grandparents' home and attended the PS during his senior year, but he could not play football due to academic ineligibility. The PS was notified by the OHSAA that the student was ineligible to play for one year under the transfer bylaw. The student brought suit and the trial court granted his request for the PI based on its finding that the transfer bylaw was arbitrarily applied to the student. On appeal, the court held that the issuance of the PI was error, as the transfer bylaw was applicable to the student. Accordingly, the OHSAA had the right to enforce it against the student and the PS. There was no showing that the OHSAA's interpretation of the bylaw was inconsistent or improper, or that the application thereof was arbitrary. The student failed to prove that he had a substantial likelihood of success on the merits for purposes of warranting injunctive relief.

Outcome

The court reversed the judgment of the trial court and vacated the PI.

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HNI The standard for reviewing preliminary injunctions is that an order granting or denying

an injunction may not be reversed absent a showing of a clear abuse of discretion. An abuse of discretion connotes more than an error of law or judgment; it implies that a court's attitude is unreasonable, arbitrary or unconscionable.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN2 Trial courts must consider the following factors in deciding whether to grant preliminary injunctions: (1) Has a petitioner made a strong showing that it is likely to prevail on the merits of its appeal? Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review. (2) Has the petitioner shown that without such relief, it will be irreparably injured? (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? (4) Where lies the public interest?

Administrative Law > Separation of Powers > Legislative Controls > Scope of Delegated Authority

HN3 The Ohio High School Athletic Association's decisions about its internal affairs will, in the absence of mistake, fraud, collusion or arbitrariness, be accepted by the courts as conclusive.

Education Law > Administration & Operation > Postsecondary School Boards > Authority of Postsecondary Boards
Education Law > Intercollegiate & Interscholastic Athletics > Athletic Associations

HN4 School boards have discretion to authorize their high schools to enter into agreements with the Ohio High School Athletic Association.

Administrative Law > Judicial Review > Standards of Review > General Overview
Administrative Law > Separation of Powers > Legislative Controls > Scope of Delegated Authority

HN5 The decisions of any kind of voluntary so-

ciety or association in disciplining, suspending, or expelling members are of a quasi judicial character. In such cases, the courts never interfere except to ascertain whether or not the proceeding was pursuant to the rules and laws of the society, whether or not the proceeding was in good faith, and whether or not there was anything in the proceeding in violation of the laws of the land.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview
Contracts Law > Contract Interpretation > Parol Evidence > General Overview

HN6 Constitutions and bylaws entered into by an association and consenting parties constitute a contract between the association and its members. Ohio courts have devoted many pages to discussions of whether contracts, ballot initiatives, statutes, or even constitutional provisions are ambiguous. However, no clear standard has evolved to determine the level of lucidity necessary for a writing to be unambiguous. When confronted with allegations of ambiguity, a court is to objectively and thoroughly examine the writing to attempt to ascertain its meaning. Only when a definitive meaning proves elusive should rules for construing ambiguous language be employed. Otherwise, allegations of ambiguity become self-fulfilling. Where ambiguity exists, parol evidence may also be considered in determining the intention of the parties to a contract.

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

HN7 In an administrative context, an abuse of discretion most commonly arises from a decision that is unreasonable. Decisions are unreasonable if they are not supported by a sound reasoning process.

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review
Education Law > Intercollegiate & Interscholastic Athletics > Student Participation

HN8 The right to participate in interscholastic athletics is not constitutionally protected. Ohio

High School Athletic Association internal affairs decisions will be accepted as conclusive, in the absence of arbitrariness.

Education Law > Intercollegiate & Interscholastic Athletics > Student Participation

HN9 The Ohio High School Athletic Association's (OHSAA) general age-limit regulation, which restricts students to eight consecutive semesters of athletic participation, has previously been upheld. The age-limit regulation may prevent some students from playing interscholastic sports. However, the fact that an occasional student may be prevented from playing does not mean that the rule is arbitrary.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN10 The elements to be weighed in granting preliminary injunctions are a petitioner's likelihood of success; the probability of irreparable harm to the petitioner if relief is not granted; the harm caused to the other parties by the issuance of a stay; and whether public interest will be served by an injunction.

Counsel: PAUL J. KAVANAGH, Springfield, Ohio, Attorney for Plaintiff-Appellee.

STEVEN L. CRAIG, Canton, Ohio, Attorney for Defendant-Appellant.

Judges: FAIN, J., FROELICH and HARSHA, JJ., concur. (Hon. William H. Harsha, judge from the Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Opinion by: FAIN

Opinion

[*54] [***765] FAIN, J.

[**P1] Defendant-appellant Ohio High School Athletic Association (OHSAA) appeals from a preliminary injunction issued in favor of plaintiff-appellee Benjamin Ulliman. The injunction restrained OHSAA from prohibiting

Ulliman's participation in interscholastic athletics during his senior year at Catholic Central High School, and from taking adverse action against Ulliman or Catholic Central for allowing Ulliman to participate.

[**P2] OHSAA contends that the trial court exceeded its authority by interfering with the management of OHSAA and its member schools, because Ulliman failed to assert a constitutionally protected property right, and because there was no showing that the OHSAA acted in excess of its powers, or that collusion or fraud [*55] existed. OHSAA further contends that the trial court's decision is against the manifest weight of the evidence, is an abuse of discretion, and is contrary to law.

[**P3] We conclude that the trial court erred in enjoining OHSAA from enforcing the transfer bylaw against Ulliman and Catholic Central. The trial court incorrectly concluded that the transfer rule did not apply to Ulliman. The court's interpretation was unreasonable, because it was not supported by the language in the OHSAA bylaws, or by the evidence presented. Ulliman also failed to establish that OHSAA acted arbitrarily in applying the transfer rule. Accordingly, Ulliman failed to prove that he had a substantial likelihood of success on the merits and that an injunction was warranted.

[**P4] The preliminary injunction is therefore Reversed and Vacated.

I

[**P5] Benjamin Ulliman filed this action in October 2008. At the time, Ulliman was living with his grandparents in Springfield, Ohio, and was enrolled as a senior at Catholic Central High School (Central). Ulliman had previously enrolled in Alter High School in Kettering, Ohio, as a freshman, and had played football for Alter. During the first semester of tenth grade, Ulliman transferred to Centerville High School, which was the district where his parents resided. He did not play sports at Centerville, due to grade ineligibility. After finishing his sophomore and junior years of high school at Centerville, Ulliman moved to his

grandparents' home in Springfield, and began participating in football practice with the Central team. He did not, however, play football for most of the fall season, because he was academically ineligible until the week of October 12, 2008.

[**P6] On October 13, 2008, OHSAA issued a letter ruling to Central. The letter indicated that Ulliman was ineligible to play for Central under OHSAA Bylaw 4-7-2, which governs student transfers. OHSAA noted that Ulliman would be ineligible to play interscholastic athletics at Central for one year from the date of his transfer. The letter cited possible exceptions to the policy -- a change of custody to another individual living in a new school district (Exception 2), or a bona fide move by one of Ulliman's parents into a new school district (Exception 3).

[**P7] Two days after this ruling, Ulliman filed a complaint against OHSAA in Clark County Common Pleas Court. Ulliman alleged in the complaint that he was unable to satisfy the custody exception because he turned eighteen years of age in July 2008, and a domestic relations court's jurisdiction over child custody terminates when a minor reaches eighteen years of age. Ulliman also alleged that he had met the [***766] requirements of the transfer rule, because he had not participated in [*56] interscholastic athletics for more than a year after transferring from Alter to Centerville High School.

[**P8] On the same day the complaint was filed, Ulliman also filed motions for a temporary restraining order and for a preliminary injunction. The trial court held a hearing the next day, and converted the procedure into a preliminary injunction hearing. The court reasoned that temporary restraining orders are generally granted ex parte, but in this case OHSAA had received notice and was present at the hearing. During the hearing, the trial court heard testimony from Deborah Moore, an OHSAA Associate Commissioner, and Matthew Ulliman, who is Benjamin Ulliman's father.

[**P9] According to the testimony and exhibits, OHSAA is a not-for-profit, private, and voluntary association of member schools, formed to promote the administration of interscholastic athletics in the State of Ohio. OHSAA has about 832 high school members and 865 junior high school members, and approximately 350,000 student athletes participate in interscholastic athletics per year.

[**P10] OHSAA has both a constitution and bylaws, and their language must be approved by a majority vote of the member high school principals. OHSAA's Board of Directors and commissioners cannot change the wording, unless a change in the Ohio Revised Code applies to a bylaw. In that event, the Board can amend the bylaw to conform with Ohio law.

[**P11] The primary purpose of the eligibility bylaws is to provide for fair and equitable governing of student eligibility for students who participate in athletics in Ohio. Moore indicated that her major responsibilities are to interpret the bylaws, provide educational support for OHSAA members, and make rulings on eligibility. In rejecting Ulliman's request for eligibility, Moore relied on Bylaw 4-7-2, and the fact that none of the eleven exceptions to the bylaw fit Ulliman's situation.

[**P12] OHSAA's Bylaws state, in pertinent part, as follows:

[**P13] "4-7-1 -- The transfer bylaws apply to all students enrolled in grades 9-12. These bylaws apply to all schools, both public and non-public.

[**P14] "4-7-2 -- If a student transfers after the first day of the student's ninth grade year or after having established eligibility prior to the start of school by playing in a contest (scrimmage, preview or regular season/tournament contest), the student will be ineligible for one year from the date of enrollment in the school to which the student transferred. A student is considered to have transferred whenever the student changes from that school in which the student was enrolled as a ninth grader to any

other school regardless of whether the school from which the student transferred or to which the student transfers is a [*57] public or non-public, member or non-member or whether the high schools are within the same district."

[**P15] Moore interpreted these bylaws to mean that once Ulliman began at Alter as a freshman, he would be ineligible for one year from the date of enrollment in any school to which he subsequently transferred, regardless of the number of years that had elapsed between transfers, and regardless of the fact that the transfer at issue was not from Alter to the school in question. Thus, Ulliman would ordinarily have been ineligible for one year after he transferred from Alter to Centerville, and would also have been ineligible for one year after he transferred from Centerville to Central, even if he had previously sat [***767] out for a year at Centerville.¹

[**P16] Moore testified that Ulliman could, in theory, have been eligible to play for Central under the following two exceptions to Bylaw 4-2-7:

[**P17] "EXCEPTION 2 -- if the student is the ward of a court-appointed guardian, and there is a subsequent change in that guardian, the student shall be eligible in the district of residence of the new guardian or at any non-public school provided the student lives with the guardian. Likewise, if the student is a child of parents who are either divorced or have had their marriage dissolved or annulled and there is a court-ordered change of custody, the student shall be eligible in the district of residence of the new custodial parent or at any non-public school provided the student lives with the new custodial parent. For purposes of this exception, the term 'parent' means the biological or adoptive parents of the student or, as the case may be, the person to whom parenting rights and responsibilities have been allocated pursuant to court order. In the event a student has been temporarily or permanently removed

from the home, 'parent' means the person or governmental agency with legal or permanent custody.

[**P18] "* * * *

[**P19] "EXCEPTION 3 -- If, and only if, either one of the parents in a Shared Parenting Plan, notwithstanding any provisions therein to the contrary, makes a physical change that results in the student's transfer, the student shall be immediately eligible insofar as transfer is concerned." Defendant's Exhibit 1, p. 46.

[**P20] According to Moore, Ulliman could be eligible under these sections if custody had been transferred to Ulliman's grandparents, or if one of Ulliman's parents (who were divorced) had physically moved to Springfield. No court had [*58] jurisdiction to change custody, however, because Ulliman became 18 years old in July 2008. Furthermore, although Ulliman's parents had entered into a shared parenting agreement in December 2007, neither parent was able to relocate to Springfield. Thus, under Moore's interpretation of Bylaw 4-7-2, Ulliman was ineligible to play interscholastic athletics at Central for a year following his enrollment there.

[**P21] Matthew Ulliman testified that his son was highly motivated to participate in sports, and that sports were very important to his son's overall well-being and attitude. In the past, Benjamin Ulliman's grades had suffered tremendously when he could not participate in sports.

[**P22] The day after the hearing, the trial court issued an entry enjoining OHSAA from prohibiting Ulliman from participation in interscholastic athletics during his senior year at Central. The court also enjoined OHSAA from taking adverse action against Ulliman or against Central for allowing Ulliman to participate in athletics.

¹ Moore did testify that Ulliman would probably have been eligible to play sports at Centerville, because Centerville was apparently the residence of his parents. See Exception 6 to Bylaw 4-7-2. But Ulliman was, despite this interpretation, ineligible while at Centerville, due to his grades.

[**P23] On the merits, the trial court concluded that Bylaw 4-7-2 does not apply to Ulliman's transfer. The court stated that the first sentence of 4-7-2 covers all high school transfers from one school to another. However, the second sentence codifies a much narrower definition of the word "transfer," and does not cover transfers that occur after an initial transfer from the school attended during the student's freshman year. Accordingly, when Ulliman moved from Centerville to Central

[***768] just prior to his senior year, he did not engage in a transfer pursuant to this narrow definition of 4-7-2. The trial court also concluded that OHSAA had acted arbitrarily, because Exception 2 could easily have applied, but for the fact that Ulliman had turned 18 years old in July 2008.

[**P24] OHSAA appeals from the preliminary injunction issued against it.

II.

[**P25] OHSAA's First Assignment of Error is as follows:

[**P26] "THE TRIAL COURT ERRED IN EXCEEDING ITS AUTHORITY WHEN IT INTERFERED WITH THE MANAGEMENT OF THE OHIO HIGH SCHOOL ATHLETIC ASSOCIATION AND ITS MEMBER SCHOOLS BY ENJOINING THE OHSAA FROM PROHIBITING THE PLAINTIFF FROM PARTICIPATING IN INTERSCHOOL ATHLETICS DURING PLAINTIFF'S SENIOR YEAR AT CENTRAL WHEN THERE HAS BEEN NO CLAIM TO A CONSTITUTIONALLY PROTECTED PROPERTY RIGHT OR A SHOWING THAT THE OFFICERS ACTED IN EXCESS OF THEIR POWERS, OR THAT COLLUSION OR FRAUD IS CLAIMED TO EXIST ON THE PART OF THE OFFICERS OR A MAJORITY OF THE MEMBERS."

[**P27] Under this assignment of error, OHSAA contends that the trial court erred, because Ulliman did not allege that he had been deprived of a constitutionally protected property right. OHSAA further contends that Ulliman failed to [*59] show that OHSAA

acted in excess of its powers, or that collusion, fraud, or arbitrariness existed.

[**P28] As a preliminary matter, we note that Ulliman has not filed a brief. Instead, Ulliman filed a notice indicating that he would not be filing a responsive brief, because he had received surgery for a "season-ending injury" and was no longer playing high school sports. This raises the issue of whether this appeal is moot.

[**P29] In Dankoff v. Ohio High School Athletic Assn., Summit App. No. 24076, 2008 Ohio 4559, the Ninth District Court of Appeals dismissed OHSAA's appeal of an order enjoining OHSAA from prohibiting a student from participating in athletics during his senior year. The Ninth District held that the appeal was moot, since the student had graduated, and there was no longer a live controversy regarding his participation in high school athletics. *Id.* at P4, relying on Sandison v. Michigan High School Athletic Assn. (C.A.6 1995), 64 F.3d 1026.

[**P30] In Sandison, the Sixth Circuit Court of Appeals held that issues pertaining to the student plaintiffs were moot, and did not fit within the "capable of repetition yet evading review" exception to mootness. The Sixth Circuit's holding was based on the fact that track season had ended, and the students' graduation from high school had eliminated any reasonable possibility that they would be subject to the same action again. 64 F.3d at 1030. This is the reasoning that was applied in Dankoff.

[**P31] The Sixth Circuit also concluded, however, that the case was not moot with regard to the second branch of the preliminary injunction, which prohibited the Michigan High School Athletic Association from penalizing the high school for allowing the students to compete. *Id.* Based on provisions in the Association bylaws that allow victories to be forfeited and individual performances to be erased, the Sixth Circuit concluded that the students still had an interest in preventing the Association from erasing from the records both their

team victories and their individual performances. Id.

[**P32] In *Dankoff*, the Ninth District distinguished *Sandison*, because the trial court's injunction had only restrained OHSAA from preventing a student from bowling on the high school team. 2008 Ohio [***769] 4559, at P4, and n.1. Although OHSAA argued that penalties could be imposed on the school as well, the Ninth District noted that OHSAA's bylaws in their entirety were not in the record. Id. The Ninth District, therefore, dismissed the case as moot.

[**P33] The injunction in the present case is like the one granted in *Sandison*, because the trial court enjoined OHSAA from taking action against either Ulliman or Central. OHSAA also submitted a complete copy of its bylaws, which [*60] provide for forfeitures of all athletic contests where ineligible players have been used. Other sanctions are also available, including forfeiture of championship status, fines, and return of financial receipts. See Bylaws 11-2-1 and 11-2-3, and Bylaws 12-1-1 through 12-1-4. Accordingly, this matter is not moot, and we will consider OHSAA's argument that the trial court erred in issuing the injunction.

[**P34] *HNI* The standard for reviewing preliminary injunctions is that an order granting or denying an injunction may not be reversed "absent a showing of a clear abuse of discretion." *Garono v. State* (1988), 37 Ohio St.3d 171, 173, 524 N.E.2d 496. An abuse of discretion "connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140 (citation omitted).

[**P35] *HN2* Trial courts must consider the following factors in deciding whether to grant preliminary injunctions:

[**P36] " * * * (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? Without such a substan-

tial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review. (2) Has the petitioner shown that without such relief, it will be irreparably injured? * * * (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? * * * (4) Where lies the public interest? * * *" *Internat. Diamond Exchange Jewelers, Inc. v. U.S. Diamond & Gold Jewelers, Inc.* (1991), 70 Ohio App.3d 667, 672, 591 N.E.2d 881, quoting from *Virginia Petroleum Jobbers Assn. v. Federal Power Comm.* (C.A.D.C.1958), 259 F.2d 921, 925, 104 U.S. App. D.C. 106.

[**P37] The trial court concluded that Ulliman had proven a substantial likelihood of success because he did not engage in a "transfer," as defined by Bylaw 4-7-2, when he moved from Centerville High to Central High. Bylaw 4-7-2 provides that:

[**P38] "If a student transfers after the first day of the student's ninth grade year or after having established eligibility prior to the start of school by playing in a contest (scrimmage, preview or regular season/tournament contest), the student will be ineligible for one year from the date of enrollment in the school to which the student transferred. A student is considered to have transferred whenever the student changes from that school in which the student was enrolled as a ninth grader to any other school regardless of whether the school from which the student transferred or to which the student transfers is a public or non-public, member or non-member or whether the high schools are within the same district." Defendant's Exhibit 1, p. 45.

[*61] [**P39] The trial court concluded that the second sentence of the bylaw narrowly defines the word "transfer," confining it to situations in which a student changes from the school in which the student was enrolled as a ninth grader to any other school. Because Ulliman did not transfer from Alter High School (his ninth grade school) to Central High School, the trial [***770] court held that Ulliman did

not engage in a "transfer" for purposes of By-law 4-7-2.

[**P40] OHSAA concedes that the transfer provision could have been written more clearly. However, OHSAA says that it has consistently interpreted 4-7-2 to mean that any and all transfers after the first day of a student's freshman year trigger the one-year period of ineligibility. For example, OHSAA notes that it recently defended its transfer position in a situation where a student had attended one high school as a freshman, as a sophomore, and part of his junior year, had transferred elsewhere during his junior year, and had then transferred back into the first high school at the beginning of his senior year. See *Haineworth v. Ohio High School Athletic Assn.* (Oct. 9, 2008), Trumbull Cty. No. 2008 CV 02731, unreported. In *Haineworth*, the common pleas court concluded that the transfer bylaw is neutral on its face, is not arbitrary, and has a legitimate purpose.

[**P41] *Haineworth* is not particularly helpful, because the common pleas court did not discuss the specific facts of the case. The facts that we just mentioned are ones that OHSAA outlines in its brief -- not facts that are actually discussed by the court in its decision. More importantly, *Haineworth* does not mention the wording of the transfer bylaw, and there is no indication that the common pleas court even considered the particular point at issue in the case before us. Our research also has not disclosed other Ohio cases that have considered the wording of Bylaw 4-7-2.

[**P42] Even if OHSAA has taken a consistent position on interpretation of the bylaw, the critical issue is whether OHSAA is mistaken in its interpretation. In *State ex rel. Ohio High School Athletic Assn. v. Judges of Court of Common Pleas of Stark Cty.* (1962), 173 Ohio St. 239, 181 N.E.2d 261, the Supreme Court of Ohio held that *HN3* OHSAA's decisions about its internal affairs "will, in the absence of mistake, fraud, collusion or arbitrariness, be accepted by the courts as conclusive." *Id.* at paragraph three of the syllabus.

[**P43] *State ex rel. Ohio High School Athletic Assn.* arose from a complaint to OHSAA about "undue influence" having been exercised to induce students to move to the Canton McKinley High School district. After investigating, OHSAA prohibited two students from playing football for Canton, and also suspended Canton from interscholastic football for a year. *Id. at 242.* Upon the application of the county prosecutor, the common pleas court issued a temporary restraining order prohibiting OHSAA and various school boards from enforcing the OHSAA order. *Id. at 243.* [*62] OHSAA responded by filing a petition for a writ of prohibition, in which it sought to prohibit the common pleas court from enforcing its temporary restraining order.

[**P44] The Supreme Court of Ohio first concluded that *HN4* school boards have discretion to authorize their high schools to enter into agreements with OHSAA, and that OHSAA, as a voluntary, private association, has standing to sue regarding these matters. *Id. at 244-47.* The court then considered whether OHSAA's prohibition petition had stated a claim. In this regard, the court noted that:

[**P45] *HN5* "The decisions of any kind of voluntary society or association in disciplining, suspending, or expelling members are of a quasi judicial character. In such cases the courts never interfere except to ascertain whether or not the proceeding was pursuant to the rules and laws of the society, whether or not the proceeding was in good faith, and whether or not there was anything in the proceeding in violation of the laws of the land. * * * [quoting 4 [***771] American Jurisprudence at 466, Section 17].

[**P46] * * * *

[**P47] "The respondents do not allege any mistake, fraud or collusion. The complaint of the respondents is that the penalty imposed by the association is too harsh. There is no allegation that it is arbitrary or any contention that it is not one provided for by the constitution and rules of the association. In fact, the uncontroverted allegations, that a hearing was held, that,

following the imposition of penalty, a rehearing was granted, that everybody who wanted to be heard was heard, and that the penalty was affirmed, indicate that in no way was the action arbitrary." *Id. at 248* (citation omitted).

[**P48] The Supreme Court of Ohio concluded, therefore, that OHSAA's decision would be accepted in the absence of mistake, fraud, collusion, or arbitrariness. *Id.* Since these factors were not present, the court allowed the writ of prohibition, and prevented the common pleas court from circumventing OHSAA's order. *Id. at 249-50.*

[**P49] Unlike the factual situation in *State ex rel. Ohio High School Athletic Assn.*, the case before us involves a claim that OHSAA's action was not covered by the rules and laws of the organization. The trial court specifically found that OHSAA had mistakenly interpreted the word "transfer," based on language found in the second sentence of Bylaw 4-7-2.

[**P50] *HN6* Constitutions and bylaws entered into by an association and consenting parties constitute a contract between the association and its members. See *Internatl. Bhd. of Elec. Workers, Local Union No. 8 v. Gromnicki* (2000), 139 Ohio App.3d 641, 646. [*63] 745 N.E.2d 449, and *Ahmed v. University Hospitals Health Care System, Inc.*, Cuyahoga App. No. 79016, 2002 Ohio 1823, at P37 and n. 11. Regarding ambiguity in contracts, the Supreme Court of Ohio has said that:

[**P51] "In recent years, Ohio courts have devoted many pages to discussions of whether contracts, ballot initiatives, statutes, or even constitutional provisions are ambiguous. * * * However, no clear standard has evolved to determine the level of lucidity necessary for a writing to be unambiguous. Some courts have reasoned that when multiple readings are possible, the provision is ambiguous. * * * The problem with this approach is that it results in courts' reading ambiguities into provisions, which creates confusion and uncertainty. When confronted with allegations of ambiguity, a court is to objectively and thoroughly examine the writing to attempt to ascertain its mean-

ing. * * * Only when a definitive meaning proves elusive should rules for construing ambiguous language be employed. Otherwise, allegations of ambiguity become self-fulfilling." *State v. Porterfield*, 106 Ohio St.3d 5, 7, 2005 Ohio 3095, P11.

[**P52] Where ambiguity exists, parol evidence may also be considered in determining the intention of the parties to a contract. See, e.g., *Union Sav. Bank v. White Family Cos., Inc.*, Montgomery App. Nos. 22722, 22730, 183 Ohio App. 3d 174, 2009 Ohio 2075, at P24, 916 N.E.2d 816.

[**P53] We have examined Bylaw 4-7-2, and we find that it is ambiguous. Furthermore, while the trial court's interpretation is plausible at first glance, based on the wording of the transfer provision, the exceptions to the provision cast doubt on the trial court's interpretation, causing it, in our view, to be less tenable than OHSAA's contrary interpretation. OHSAA's evidence of intent also contradicts the trial court's interpretation, and Ulliman did not [***772] offer any parol evidence. We infer the purpose of the provision is to prevent student-athletes from "shopping" around for a school to attend based solely upon a determination of which school will best showcase the student's athletic talents, which, in turn, would promote an atmosphere of athletic recruiting at the high-school level. This purpose would best be served by a prohibition against all transfers not subject to one of the exceptions, not just an initial transfer from the school where the student began ninth grade.

[**P54] *HN7* "[A]n abuse of discretion most commonly arises from a decision that was unreasonable." *Wilson v. Lee*, 172 Ohio App.3d 791, 2007 Ohio 4542, at P11, 876 N.E.2d 1312. "Decisions are unreasonable if they are not supported by a sound reasoning process." *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597. The trial court's interpretation is not based on sound reasoning, because it would allow transfers at any time and for any reason, after one transfer had occurred from the school in which a student is en-

rolled in ninth grade. If this interpretation [*64] were correct, there would be no need for OHSAA to include many of the transfer exceptions. The trial court's interpretation is also inconsistent with what we infer to be the purpose of the transfer provision. And finally, Ulliman did not present any evidence disputing or contradicting OHSAA's evidence as to the purpose and interpretation of its rules.

[**P55] As OHSAA points out in its brief, Exceptions 6, 7, and 11 contemplate situations in which a student has previously transferred, or has been granted an eligibility exception. For example, Exception 6 states that:

[**P56] "A student shall be entitled to one transfer into a public high school located in the public school district within which the student's parent residence is located except that such a transfer shall not be permitted if the student has previously utilized the superintendent's agreement which was previously set forth in exception 6 to transfer from that same public high school. "Defendant's Exhibit 1, p. 46.

[**P57] Likewise, Exception 11 allows students to become eligible if their school ceases to sponsor an interscholastic athletic program, but does not permit Exception 6 (transfer into residential district) to be used thereafter, once a transfer under Exception 11 has become effective. *Id.* at 47.

[**P58] While multiple transfers could potentially occur during a single school year, that scenario is unlikely. Moreover, OHSAA's stated goals include the protection of students and schools from exploitation, and the establishment of standards for competition and sportsmanship. Defendant's Exhibit 1, p. 27 (OHSAA Constitution, Article 2-1-1). Associate Commissioner Moore also testified that the primary purpose of the eligibility bylaws is to provide fair and equitable rules for the 350,000 Ohio students who participate in interscholastic athletics. In light of these goals, it is unreasonable to conclude that the rules only prohibit initial transfers from a student's ninth grade school to another school. Under the trial court's interpretation, students could change schools freely for

purposes of competing in a more advantageous program without running afoul of OHSAA rules, once they have made an intermediate transfer to a school other than the school in which they were enrolled in ninth grade. If the trial court's interpretation of the Rule were to stand, we can envision a scenario in which a stellar athlete might enroll in ninth grade, transfer after establishing his ninth-grade school, spend the next year in club sports and receiving individual training, and then, after the one-year restriction has run its course, freely move from school to [***773] school, based upon which school might best showcase his talents in that season's sport, or which school's athletic boosters might offer the greatest "incentives" for the star athlete to attend that school.

[**P59] The trial court also concluded that Ulliman was likely to succeed on the merits, because OHSAA acted arbitrarily in applying Exception 2. The [*65] court found that this exception would easily apply, but for the fact that Ulliman had turned 18 years old in July 2008. Exception 2 states that:

[**P60] "If the student is the ward of a court-appointed guardian, and there is a subsequent change in that guardian, the student shall be eligible in the district of residence of the new guardian or at any non-public school provided the student lives with the guardian. Likewise, if the student is a child or parents who are either divorced or have had their marriage dissolved or annulled and there is a court-ordered change of custody, the student shall be eligible in the district of residence of the new custodial parent or at any non-public school provided the student lives with the new custodial parent. For purposes of this exception, the term 'parent' means the biological or adoptive parents of the student or, as the case may be, the person to whom parenting rights and responsibilities have been allocated pursuant to court order. In the event a student has been temporarily or permanently removed from the home, 'parent' means the person or governmental agency with legal or permanent custody." Defendant's Exhibit 1, p. 46 (Bylaw 4-7-2, Exception 2).

[**P61] As a preliminary matter, we agree with OHSAA that *HNS* the right to participate in interscholastic athletics is not constitutionally protected. *Menke v. Ohio High School Athletic Assn.* (1981), 2 Ohio App. 3d 244, 246, 2 Ohio B. 266, 441 N.E.2d 620. Ulliman has also not suggested that he is a member of any constitutionally protected group. The claim of arbitrariness, therefore, is not evaluated under constitutional standards, but is governed by *State ex rel. Ohio High School Athletic Assn.*, 173 Ohio St. 239, 181 N.E.2d 261, which holds that OHSAA internal affairs decisions will be accepted as conclusive, in the absence of arbitrariness. The Ohio Supreme Court did not specifically define "arbitrariness" in this context. In *Menke*, the court of appeals rejected a claim of arbitrariness where an OHSAA rule declared Ohio non-resident students ineligible to participate in Ohio interscholastic athletics. The court noted that the rule had been adopted properly, in compliance with OHSAA regulations. 2 Ohio App.3d at 247.

[**P62] The Supreme Court of Ohio has also defined "arbitrary" in other contexts as "without adequate determining principle; * * * not governed by any fixed rules or standard." *City of Dayton ex rel. Scandrick v. McGee* (1981), 67 Ohio St.2d 356, 359, 423 N.E.2d 1095 (citation omitted). Accord *Cedar Bay Const., Inc. v. City of Fremont* (1990), 50 Ohio St. 3d 19, 22, 552 N.E.2d 202.

[**P63] No evidence was presented in the trial court to indicate that Exception 2 was improperly adopted in violation of OHSAA regulations, nor is there any evidence that Exception 2 is without adequate determining principles. While the rule may restrict students who cannot qualify for a change of custody due to their age, Ulliman failed to demonstrate that the rule is not rationally based.

[*66] [**P64] Moore, the OHSAA Commissioner, testified that OHSAA has encountered situations where students born a day or two before a cut-off are ineligible. Moore indicated that OHSAA has litigated this issue in the past, and has prevailed. Moore also stated that OHSAA has made a [***774] fundamental

change by applying waivers for children with disabilities who may be over the age limit. However, the general rule is designed to protect students to make sure they are not playing against students who are nineteen or twenty years of age. Moore denied applying the by-laws inconsistently in the present case, or performing her work arbitrarily.

[**P65] In concluding that Exception 2 is arbitrary, the trial court did not rely on facts or evidence showing irregularity in the rule-making or decision processes. The court, instead, apparently relied on its own opinion that the rule could easily cover Ulliman, but for the fact that he was 18 years old. This does not satisfy the arbitrariness requirement.

[**P66] In *Crane by Crane v. Indiana High School Athletic Assn.* (C.A.7 1992), 975 F.2d 1315, the Seventh Circuit Court of Appeals held that a state athletic association had acted arbitrarily and capriciously in applying its divorce transfer rule to a situation where the parents had changed custody of a child, who was then declared ineligible. The Seventh Circuit noted that if the rule were unambiguous or if the association had interpreted and applied the rule consistently, "no court could interfere." *Id. at 1325.* The reasons for finding arbitrary application included the fact that the rule was poorly drafted, since various key phrases were undefined. *Id.* However, the Seventh Circuit stressed that this would not have been fatal, if the association had "used the common meaning of these terms or interpreted the terms consistently." *Id.* However, testimony of the association's commissioner indicated that the association had no consistent idea what the words in the rule meant. *Id.*

[**P67] The Seventh Circuit also noted that the association's interpretation of the rule seemed to change with the situation at hand, and seemed designed to allow the association to declare students ineligible, or achieve a pre-ordained result. *Id.* Finally, the Seventh Circuit concluded that the inconsistency was aggravated by the association's failure to publish written opinions or reasoning for eligibility decisions. As a result, high schools, parents, or

students had no guidance and could not make fully-informed decisions. Id.

[**P68] The evidence presented in this case does not suggest that OHSAA acted arbitrarily, that OHSAA had no idea what the terms in Bylaw 4-7-2 and its exceptions mean, or that OHSAA applied the bylaw and its exceptions inconsistently. In fact, Moore's testimony indicates that OHSAA applies the rules consistently. There is also no evidence that OHSAA deviated from its own procedures in adopting or implementing the exception.

[*67] [**P69] As a further matter, we note that *HN9* OHSAA's general age-limit regulation, which restricts students to eight consecutive semesters of athletic participation, has previously been upheld. See *Rhodes v. Ohio High School Athletic Assn.* (N.D. Ohio 1996), 939 F.Supp. 584, 589. Like Exception 2, the age-limit regulation may prevent some students from playing interscholastic sports. However, the fact that an occasional student may be prevented from playing does not mean that the rule is arbitrary. The exceptions to Bylaw 4-7-2 provide many ways to legitimately qualify for eligibility, and OHSAA is not required to anticipate every situation. In addition, Ulliman failed to present evidence that OHSAA arbitrarily applied the custody change exception.

[**P70] We conclude that the trial court erred when it found that Ulliman had a substantial likelihood of succeeding on the merits. The remaining prongs of the preliminary injunction standard do not [***775] need to be discussed, because a finding in Ulliman's favor on the likelihood of success is required to justify "intrusion into the ordinary processes of administration and judicial review." *Internat. Diamond Exchange Jewelers, Inc.*, (1991), 70 Ohio App.3d 667, 672, 591 N.E.2d 881.

[**P71] OHSAA's First Assignment of Error is sustained.

III

[**P72] OHSAA's Second Assignment of Error is as follows:

[**P73] "THE TRIAL COURT'S ORDER ENJOINING THE OHIO HIGH SCHOOL ATHLETIC ASSOCIATION FROM PROHIBITING APPELLEE FROM (1) PARTICIPATING IN INTERSCHOLASTIC ATHLETICS DURING HIS SENIOR YEAR AT CENTRAL AND (2) TAKING ADVERSE ACTION AGAINST EITHER THE APPELLEE OR CENTRAL FOR ALLOWING THE APPELLEE TO PARTICIPATE IN INTERSCHOLASTIC ATHLETICS DURING HIS SENIOR YEAR AT SAID HIGH SCHOOL WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AN ABUSE OF DISCRETION AND CONTRARY TO LAW."

[**P74] Under this assignment of error, OHSAA contends that the trial court's decision is against the manifest weight of the evidence, an abuse of discretion, and contrary to law, because Ulliman failed to prove the elements required for a preliminary injunction by clear and convincing evidence. *HN10* The elements to be weighed in granting preliminary injunctions are: the petitioner's likelihood of success; the probability of irreparable harm to the petitioner if relief is not granted; the harm caused to the other parties by the issuance of a stay; and whether public interest will be served by an injunction. *Internat. Diamond Exchange Jewelers, Inc.*, 70 Ohio App.3d at 672.

[**P75] Ulliman's failure to prove that he is likely to succeed on the merits -- the subject of Part II of this opinion, above -- is a critical failure. This failure leads to the conclusion that the trial court's decision is against the weight of the evidence, [*68] and is an abuse of discretion. Accordingly, we need not consider the remaining portions of OHSAA's argument.

[**P76] OHSAA's Second Assignment of Error is sustained.

IV

[**P77] OHSAA's First and Second Assignments of Error having been sustained, the preliminary injunction issued against it is Reversed and Vacated.

....

FROELICH and HARSHA, JJ., concur.

(Hon. William H. Harsha, judge from the
Fourth District Court of Appeals, sitting by as-

signment of the Chief Justice of the Supreme
Court of Ohio).

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ENTERED
OCT 25 2013

ALEXXUS M. PAIGE, : APPEAL NO. C-130024
Plaintiff-Appellee, : TRIAL NO. A-1209427

vs. : JUDGMENT ENTRY.

OHIO HIGH SCHOOL ATHLETIC :
ASSOCIATION, :
Defendant-Appellant. :



This cause was heard upon the appeal, the record, the briefs, and arguments.

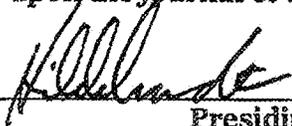
The appeal is dismissed and the injunction is vacated for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The Court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To the clerk:

Enter upon the journal of the court on October 25, 2013 per order of the court.

By: 
Presiding Judge