



**IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT**

Case No.: 1D14-4380

Lower Tribunal Case No.: 2014-CA-001741

CYNTHIA MILLER and KEVIN MILLER,
on behalf of their minor child, TERIK MILLER,
Appellant,

v.

ESCAMBIA COUNTY SCHOOL BOARD;
MALCOM THOMAS, as Superintendent of Schools;
MICHAEL SHERRILL, as Principal of Escambia High School;
ESCAMBIA COUNTY SCHOOL DISTRICT; and
FLORIDA HIGH SCHOOL ATHLETIC ASSOCIATION, INC,
Appellees.

APPEAL FROM THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND OF THE FACTS

Chronology of Facts

In August 2013, Terik Miller (“Terik”), a minor child, attended Washington High School in Pensacola, Florida, and played football. *See Appendix at page 14-15.* During December 2013, Terik and his father, Kevin Miller (“Mr. Miller”) relocated to 5119 West Jackson Street, while their future home at 5127 West Jackson Street was being renovated. *See Appendix at page 15.* Subsequently, in January, 2014, Terik transferred to Escambia High School (“EHS”) to complete his junior year. *See Appendix at page 15.* Both the home at 5119 West Jackson Street and 5127 West Jackson Street are located in the EHS school district. *See Appendix at page 15.* Terik’s mother, Cynthia Miller (“Mrs. Miller”), resides elsewhere, to care for her mother as directed by her mother’s physician. *See Appendix at pages 38 and 153.*

Once the renovation of the home at 5127 West Jackson Street was completed, Terik and his father relocated to 5127 West Jackson Street in April 2014. *See Appendix at page 38.* In April 2014, the home at 5119 West Jackson Street was leased to a new tenant. *See Appendix at pages 155-157.* In April 2014, Terik’s father notified Gulf Power of their move to 5127 West Jackson, and Mr. Miller’s service was connected at 5127 West Jackson Street, after the renovations were complete. *See Appendix at pages 155-157.*

Terik is an excellent football player. *See Appendix at page 38.* Based on his play during his junior year, he received a scholarship offer from University of Louisiana, Lafayette. *See Appendix at page 35.* Terik has also received letters and interest from multiple major college football programs, including without limitation, Wake Forest University, North Carolina State, University of South Carolina, University of Kentucky and University of South Florida. *See Appendix at page 35.* During the spring of 2014, Terik participated in football practice, and anticipated playing in the spring football game. *See Appendix at page 39.* However, the day of the game, Terik was told he was ineligible to play in the spring game. *See Appendix at page 39.*

Unbeknownst to Terik, in March 2014, Jeff Oliver, the track coach at West Florida High School lodged a complaint against EHS with the Florida High School Athletic Association (“FHSAA”) for allegedly recruiting one of its students. *See Appendix at pages 170-171.* Mr. Oliver subsequently withdrew his complaint to the FHSAA, and Eric Smith, the principal at West Florida High School lodged a complaint with the Escambia County School District (the “School District”). *See Appendix at pages 172-174.* The School District, Escambia County School Board (the “School Board”), Malcolm Thomas, as Superintendent of Schools (“Mr. Thomas”) and/or Michael Sherrill, as Principal of Escambia High School (“Mr. Sherrill”) commenced an investigation into alleged recruiting violations at EHS

(the “Investigation”). *See Appendix at page 159.* The School District, School Board, Mr. Thomas, Mr. Sherrill and the FHSAA concede the Investigation was not perfect, and was not conducted in accordance with the rules, bylaws and policies of the FHSAA, which are dictated by Florida Statute § 1006.20. *See Appendix at pages 92-93, 96, and 135-137.*

On May 16, 2014, two School District investigators, Gary Marsh and Brian Johnson, removed Terik from his class at EHS to interrogate him in a secluded room, without his parents present. *See Appendix at page 41.* Terik’s parents were never asked to give their consent to this interrogation, and they never did consent to the interrogation. *See Appendix at pages 41-42.* The investigators never showed Terik any identification, and Terik believed the men were undercover police officers. *See Appendix at page 41.* The investigators never told Terik that his eligibility to play football was the subject of the investigation. *See Appendix at page 41.* The investigators instructed Terik that he could not tell his parents about the questioning. *See Appendix at page 41.*

When Terik advised his mother of the interrogation, she immediately went to see Mr. Sherrill, the principal at EHS. *See Appendix at pages 41-42.* After waiting for more than four (4) hours for Mr. Sherrill, she was told Mr. Sherrill did not know about the interrogation, and she would have to talk with the investigator. *See Appendix at pages 41-42.* Therefore, Ms. Miller met with Investigator Marsh,

but he was very hostile and kept telling Ms. Miller to “read your handbook”. *See Appendix at page 42.* Investigator Marsh was not referring to the FHSAA handbook, because the School District, School Board, Mr. Thomas, Mr. Sherrill and the FHSAA concede the Investigation was not conducted in accordance with the rules, bylaws and policies of the FHSAA, which are dictated by Florida Statute § 1006.20. *See Appendix at pages 92-93, 96, and 135-137.* The School District, School Board, Mr. Thomas, Mr. Sherrill and the FHSAA claim that the rules, bylaws and policies of the FHSAA, which are dictated by Florida Statute § 1006.20 do not apply to the School District, the School Board, Mr. Thomas and/or Mr. Sherrill (collectively, individually and interchangeably the “Administrators”). *See Appendix at pages 92-93, 96, and 135-137.* The Administrators claim the due process requirements added by the Florida Legislature in 2012 to Florida Statute § 1006.20 do not apply, and Terik is not entitled to this due process, because the Administrators conducted the Investigation and not the FHSAA. *See Appendix at pages 92-93, 96, and 135-137.*

Investigator Marsh also said he could remove any child from class because he was an employee of the School District. *See Appendix at page 42.* Therefore, Ms. Miller spoke with Mr. Thomas, who confirmed that the investigators had acted improperly. *See Appendix at page 42.* However, Mr. Thomas never told Ms. Miller that the investigation pertained to Terik’s eligibility to play football. *See*

Appendix at page 42. Again Mr. Thomas' conduct was contrary to the rules, bylaws and policies of the FHSAA, which are dictated by Florida Statute § 1006.20, but Mr. Thomas contends Florida Statute § 1006.20 and the FHSAA rules and bylaws do not apply to him. *See Appendix at pages 92-93, 96, and 135-137.*

Unbeknownst to the Millers, as of May 28, 2014, the Administrators completed an investigative report (the "Investigative Report") and concluded the coach at EHS had committed recruiting violations, and that Terik Miller and six (6) other students were ineligible to play football. *See Appendix at pages 158-167.* The Administrators apparently "sat on" the Investigative Report until July 10, 2014, when they delivered the report to the FHSAA. *See Appendix at page 67.*

On or about August 28, 2014, two days before the first EHS football game, Ms. Miller was asked to come to EHS to complete some paper work for Terik. *See Appendix at pages 43 and 314-319.* She was then handed a document describing potential FHSAA violations involving Terik. *See Appendix at pages 43 and 314-319.* After 150 days of the Investigation, Ms. Miller finally received written notification of an issue with Terik's eligibility. *See Appendix at pages 43 and 314-319.* Ms. Miller disagreed with the violations. *See Appendix at pages 43 and 314-319.* Yet, she was told that for her son to be eligible, she had to complete the form. *See Appendix at page 43.* Therefore, Ms. Miller acknowledged that her husband and Terik had moved from 5119 West Jackson Street to 5127 West Jackson Street.

See Appendix at pages 43 and 314-319. However, she denied the balance of the purported violations, and she was never shown any specific documents or facts suggesting that Terik had engaged in any wrongful conduct. *See Appendix at pages 43 and 314-319.* Moreover, the School District advised Mr. Miller and Ms. Miller, that they did not need to update their since they remained in the EHS District. *See Appendix at page 43.* Again the Administrator's actions do not comply with Florida Statute § 1006.20 or the FHSAA rules and bylaws. *See Appendix at pages 92-93, 96, and 135-137.*

Subsequently, the Administrators told Terik that he and five other students were ineligible to participate in the August 30, 2014, game. *See Appendix at page 71.* Nonetheless, Coach Willie Spears made the decision to play the six ineligible players. Coach Spears was subsequently terminated as a coach and teacher, for his insubordination because he played the six students in the game. *See Appendix at page 71.*

As of August 30, 2014, Terik had no report and no specific findings that set forth the reasons he was deemed ineligible. *See Appendix at page 40.* As prospective punishment, Terik missed the September 5, 2014, game. *See Appendix at page 44.* Terik's parents then engaged counsel, who sent a letter, dated September 11, 2014, to the School Board and Mr. Thomas. *See Appendix at pages 332-337.* That letter advised that Terik was being denied his due process because

he had been found ineligible, but Terik had never had any opportunity to review or respond to the allegations, and the Administrators appeared to be focusing on wrongful conduct of the coach, which was then causing the students irreparable harm. *See Appendix at pages 332-337.*

On September 12, 2014, the Millers commenced litigation in Escambia County Circuit Court, to obtain an injunction that would allow Terik to remain eligible since he had never received any written documentation delineating the findings of fact that purportedly supported the determination of ineligibility. *See Appendix at page 13.* An emergency hearing was then held on the afternoon of September 12, 2014. *See Appendix at page 13.* At the emergency hearing, Ms. Donna Waters appeared via telephone and advised the lower tribunal that they had received a September 12, 2014, report from the FHSAA (the “FHSAA Spears Report”). *See Appendix at page 67.* The FHSAA Spears Report focused on alleged wrongdoings of Coach Spears, and included redacted names of students that were also deemed ineligible. *See Appendix at pages 67-72.* Terik Miller was one of the students held ineligible, and the FHSAA Spears Report stated that an additional report would be issued in regard to Terik’s eligibility. *See Appendix at page 70.*

Due to the FHSAA Spears Report, counsel for the Millers had to amend the complaint and request for the injunction to add the FHSAA. *See Appendix at page*

33. Thereafter, an evidentiary hearing on the request for an injunction was scheduled for September 17, 2014. *See Appendix at page 73.* Shortly before the evidentiary hearing on September 17, 2014, counsel for the Millers received an FHSAA report dated September 16, 2014, which concluded that Terik was ineligible to participate in any athletic activities¹ (the “FHSAA Terik Report”). *See Appendix at page 76.*

At the hearing, the Administrators argued that the lower tribunal could not intervene, because Terik had not exhausted his administrative remedies. *See Appendix at pages 82-141.* The Administrators also argued that while the Investigative Report might have had issues, due process did not depend on a “perfect” investigation, and that the right to play football was not a protected right that deserved due process. *See Appendix at pages 82-141.* For some reason, the lower tribunal refused to accept any testimony, or other evidence from Terik. *See Appendix at page 133.* Rather, the lower tribunal relied upon the one-sided, erroneous Investigative Report that the Administrators had completed, and the FHSAA’s rulings which were based upon the Investigative Report. *See Appendix at pages 82-141.* The lower tribunal also took into evidence from the

¹ While the focus of this appeal is on Terik’s eligibility for football, the determination of ineligibility applies to representation of EHS in any sport, which would include sports in the spring of 2015. Accordingly, the appeal is not moot as claimed by Mr. Thomas in his opposition to the expedition of this appeal. *See Appendix at page 77.*

Administrators a transcript, and the affidavit of one of the School District Investigators. *See Appendix at page 133.* The lower tribunal refused to allow any testimony or other evidence from Terik to oppose the evidence submitted by the Administrators. *See Appendix at page 133.*

Ultimately, the lower tribunal denied the injunction and held that Terik had to exhaust his administrative remedies. *See Appendix at pages 5-12.* While the order denying the injunction acknowledged that Florida law provided various exceptions that alleviated a party from exhausting its remedies, the lower tribunal summarily held that it could not issue the injunction. *See Appendix at pages 5-12.* Therefore, as of the date of this brief, Terik has never had the opportunity to demonstrate the erroneous conclusions in the Investigative Report, or the arbitrary and capricious rulings of the FHSAA. *See Appendix at pages 5-12 and 133.* Rather, the Administrators and the FHSAA are requiring that Terik exhaust his administrative remedies by appearing at an October 7, 2014, hearing before the sectional appeals committee of the FHSAA, which entails missing two more football games. *See Appendix at page 86.* If Terik remains ineligible after the hearing on October 7, 2014, before the sectional appeals committee of the FHSAA, Terik can appeal to the Board of Directors of the FHSAA on November 23, 2014. *See Appendix at page 354.* EHS's last football game is scheduled for November 7,

2014. Therefore, pursuing the administrative remedies is futile and will result in irreparable injury.

The Reports

The Administrators compiled the Investigative Report and provided it to the FHSAA, without ever advising the Millers of their findings or the purpose of the Investigative Report. *See Appendix at page 158.* The FHSAA then relied upon the Investigative Report and issued the FHSAA Spears Report on September 12, 2014, and the FHSAA Terik Report on September 17, 2014. *See Appendix at pages 67 and 76.* The FHSAA found that Terik and six other students were ineligible based upon that Investigative Report. *See Appendix at page 70.* Yet, neither the Administrators, the FHSAA nor the lower tribunal would listen to the evidence and facts that demonstrate the Investigative Report, the FHSAA Spears Report and the FHSAA Terik Report are erroneous and misleading, as set forth below. *See Appendix at pages 39 and 133.* The following evidence and testimony would have been submitted at the hearing:

- On January 13, 2014, Jayne Senkbel signed off on Terik's New Student Checkoff Sheet for Regular School Year confirming that Terik's proof of residency was submitted and accepted by the Administrators, and he had properly submitted all enrollment documents. *See Appendix at page 154.*

- Terik, Mr. Miller and Mrs. Miller transferred Terik primarily for academic reasons to EHS. *See Appendix at page 38.*
- Terik never had any contact with EHS head football coach Willie Spears prior to enrolling at EHS. *See Appendix at page 164.*
- Mrs. Miller never had any contact with EHS head football coach Willie Spears prior to enrolling at EHS. *See Appendix at page 164.*
- Mr. Miller casually contacted EHS head football coach Willie Spears at the time of Terik's enrollment, but was immediately instructed by Coach Spears to contact school administration as directed by FHSAA Policy 37.1.3. *See Appendix at pages 165 and 474-475.*
- At no time did anyone ever pressure, urge or entice Terik or his parents to transfer Terik to EHS to play football. *See Appendix.*
- The lower tribunal incorrectly concludes that because Coach Donte Sheppard provided training to Terik, and his parents previously talked with Coach Sheppard that Terik or his parents may have been possibly urged to transfer to EHS. *See Appendix at page 10.* The lower tribunal's conclusion ignores FHSAA bylaw 9.2.4, and incorrectly adopts the conclusions instead of the facts in the one sided Investigative Report. *See Appendix at page 402.*

- Testimony and evidence from Terik at the hearing would have shown Coach Donte Sheppard provided training to Terik while Terik was in middle school, and prior to any affiliation with EHS. *See Appendix at pages 81-141, 163.* Thus, Terik attended Washington High School for 2.5 years, and did not transfer to EHS within 365 days of Coach Sheppard's training. *See Appendix at pages 81-141 and 38-39.*
- The Investigative Report incorrectly concludes that Coach Sheppard and Mr. Miller have ongoing church relationship, when in actuality the interview with Coach Sheppard states that they knew each other via church contacts. *See Appendix at pages 163 and 207.*
- Mr. Miller and Terik resided at 5119 West Jackson Street from December, 2103 until April 2014, while 5127 West Jackson Street was renovated. *See Appendix at page 38.*
- Mr. Miller and Terik have resided at 5127 West Jackson Street since April 2014. *See Appendix at page 38.*
- Mr. Miller halted his electric service on April 9, 2014, at 5119 West Jackson Street and initiated electric service on April 17, 2014, at 5127 West Jackson Street, all common actions that occur when moving. *See Appendix at pages 155-157.*

- The School District investigator observed a White Escalade at 5127 West Jackson Street. *See Appendix at page 231.*
- Terik's mother, Mrs. Miller drives that White Escalade. *See Appendix at page 231.*
- EHS admitted ten students received an impermissible benefit because they were allowed to participate without the proper football forms on file with the school administration. *See Appendix at page 69.*
- However, Terik is not listed as one of those ten students. *See Appendix at page 69.*
- At least nine of the ten students listed as receiving an impermissible benefit by not having the necessary football forms on file with the school administration remain eligible. *See Appendix at pages 69-70.*
- One of the ten students who allegedly received an impermissible benefit but remains eligible as he left EHS, has a relative employed by the School District. *See Appendix at pages 69 and 328.*
- Neither Terik nor his parents falsified any documents in connection with his enrollment at EHS, or his eligibility to participate in high school athletic competition. *See Appendix.*
- Neither the FHSAA Spears Report, nor the FHSAA Terik Report lists any evidence that is precise, explicit, lacking in confusion and of such

weight that it produces a firm belief or conviction, without hesitation, about Terik's eligibility as required by FHSAA Bylaw 1.4.33. *See Appendix at pages 67-72, 76-77 and 383.*

- Neither the FHSAA Spears Report, nor the FHSAA Terik Report lists any evidence that is precise, explicit, lacking in confusion and of such weight that it produces a firm belief or conviction, without hesitation, that Terik or his parents had any improper contact with any coach at EHS, as required by FHSAA Bylaw 1.4.33. *See Appendix at pages 67-72, 76-77 and 383.*
- Neither the FHSAA Spears Report, nor the FHSAA Terik Report lists any evidence that is precise, explicit, lacking in confusion and of such weight that it produces a firm belief or conviction, without hesitation, that Terik or his parents received an impermissible benefit, as required by FHSAA Bylaw 1.4.33. *See Appendix at pages 67-72, 76-77 and 383.*
- Neither the FHSAA Spears Report, nor the FHSAA Terik Report lists any evidence that is precise, explicit, lacking in confusion and of such weight that it produces a firm belief or conviction, without hesitation, that Terik or his parents falsified any document, as required by FHSAA Bylaw 1.4.33. *See Appendix at pages 67-72, 76-77 and 383.*

- The Administrators never allowed Terik or his parents to present any information, or evidence to dispute the findings of the Administrators. *See Appendix at pages 43-44.*
- The FHSAA did not allow Terik or his parents to present any information or evidence to dispute the findings of the Administrators and subsequently the FHSAA, until September 23, 2014, when they filed their appeal to the FHSAA. *See Appendix at pages 43-44.*

In sum, the Administrators, and the FHSAA have failed Terik. *See Appendix at pages 33-47.* The Administrators who agreed to be bound by the FHSAA rules, policies and bylaws disregarded those rules, policies and procedures, and claim they are not subject to the FHSAA rules, policies and procedures. *See Appendix at pages 61, 92-93, 96, and 135-137.* The FHSAA acknowledge in their bylaws that interscholastic athletic programs are designed to enhance the educational experience and each and every practice and competition is an extension of the classroom. *See Appendix at page 383.* Yet, the FHSAA is taking this educational component from Terik without due process, and without clear and convincing evidence in violation of their own rules, policies and bylaws. *See Appendix at page 411.* Finally, the lower tribunal, in denying the request for injunction, expounded on the importance of sportsmanship. *See Appendix at page 11.* In this case, Terik and his parents have shown great sportsmanship as they will

have waited more than 200 days (almost the entire football season) since this investigation began, to finally present their story. *See Appendix at page 9.*

SUMMARY OF THE ARGUMENT

The lower tribunal erred when it denied the Appellant's² request for an injunction without allowing them the opportunity to present testimony. Specifically, the lower tribunal allowed the Appellees³ to present evidence in the form of an affidavit and self-prepared transcript, but did not allow the Appellant to present testimony. Based on the one sided evidence, the lower tribunal incorrectly ruled that Terik must exhaust his administrative remedies.

The lower tribunal erred when it did not consider the exceptions to the requirement that Terik must exhaust his administrative remedies prior to asking the court to intervene. Specifically, the administrative process is not appropriate for constitutional issues of due process. Terik has a statutory right in the case at bar and therefore, the court must intervene to protect his statutory rights to due process to prevent irreparable harm. Additionally, exhausting administrative remedies is not required when the proceedings are not conducted in accordance with the rules, but are contrary to law, or where a resort to the internal remedies would be a useless undertaking, meaningless or subject the complainant to unreasonable delay or hardship.

² Appellant refers to Mr. Miller and Mrs. Miller on behalf of Terik.

³ Appellees refer to the FHSAA and the Administrators collectively.

In the case at bar, the Appellees never dispute that the eligibility investigation at the heart of this case was not conducted in accordance with Florida Statutes and the FHSAA rules, bylaws and policies. Instead, the Appellees claim that they are not required to comply with Florida Statutes and the FHSAA rules, bylaws and policies because the School District conducted the investigation and not the FHSAA. Simply put, under the Appellees argument, all of the safeguards implemented by the Florida legislature in 2012 to ensure due process for student athletes in connection with their statutory rights can be circumvented by allowing someone other than the FHSAA to conduct the investigation. In other words, the FHSAA can rely on investigations conducted without the required due process to make eligibility determinations, without following the due process requirements implemented by the Florida legislature. Surely, the Florida Legislature did not intend for school districts to bypass the 2012 statutory revisions as has occurred in the case at bar.

Finally, Terik has been subjected to egregious hardship and delay due to the Appellees non-compliance with Florida Statutes and the FHSAA rules, bylaws and policies. Any further requirements for Terik to exhaust administrative remedies are useless and futile. Therefore, Terik is entitled to an immediate injunction to prevent the irreparable harm from continuing to occur, and to therefore preserve

Terik's opportunity to engage in high school athletic competition, including football.

STANDARD OF REVIEW

The standard of review on a court's order on an injunction is a hybrid. *DePuy Orthopaedics, Inc. v. Waxman*, 95 So. 3d 928, 933-934 (Fla. 1st DCA 2012); *Bookall v. Sunbelt Rentals, Inc.*, 995 So. 2d 1116, 1117 (Fla. 4th DCA 2008). If the court denies the injunction based on factual findings, then the appellate court will not reverse the trial court's ruling, unless the trial court abused its discretion. *Depuy*, 95 So. 3d at 934; *Bookall*, 995 So. 2d at 1117. However, legal conclusions are subject to de novo review. *Depuy*, 95 So. 3d at 934; *Bookall*, 995 So. 2d at 1117.

In the case at bar, the lower tribunal denied the injunction based on its legal conclusion that Appellant had to exhaust his FHSAA administrative appeal, prior to requesting an injunction. Accordingly, de novo review is applicable in the instant case.

ARGUMENT

I. TERIK IS NOT REQUIRED TO EXHAUST HIS ADMINISTRATIVE REMEDIES.

Contrary to the ruling of the lower tribunal, Terik should not be required to exhaust his administrative remedies for three separate and independent reasons:

- The administrative process is not the appropriate forum for deciding constitutional issues, such as due process.
- Florida law recognizes an exception to exhausting the administrative remedies when the remedies will result in delay that will create a serious risk of irreparable harm.
- Exhausting the administrative remedies is not required when the act is futile.

A. The administrative process is not the appropriate forum for deciding constitutional issues, such as due process.

Initially, Florida law establishes that constitutional challenges to agency actions are for the courts alone to determine, and are not for administrative resolution. *Metro. Dade County v. Dep't of Commerce*, 365 So. 2d 432, 435 (Fla. 3rd DCA 1978). Generally speaking, administrative agencies are not the proper forum to consider questions of constitutional rights. *Myers v. Hawkins*, 362 So. 2d 926, 929 n.4 (Fla. 1978). Administrative courts cannot impair judicial jurisdiction to determine constitutional disputes. *Dep't of Transp. v. Morehouse*, 350 So. 2d 529, 533 (Fla. 3d DCA 1977). Therefore, when defects in due process exist, the circuit court has jurisdiction to render a declaratory judgment. *Id.*

In the instant case, the Investigative Report clearly shows that Terik Miller was deprived of his right to due process, including without limitation, the following:

- As a minor child, Terik was interrogated without his parents' consent and without his parents being present. Additionally, no one told him the purpose of the interrogation.
- Terik was ruled ineligible more than 2 weeks prior to any report being issued. Therefore, Terik was being "prospectively punished" before any written explanation of his alleged wrongdoing was issued to Terik or his parents.
- Terik has been accused of falsifying documents, without ever being told the specific documents that were purportedly falsified, and without ever having an opportunity to review and respond to the allegations.
- The FHSAA report identified ten students that received an impermissible benefit, but Terik is not one of the 10 students identified as receiving an impermissible benefit. Nonetheless, he was still deemed ineligible, while nine of the other ten students have apparently remained eligible.
- Terik was never told, prior to the issuance of the final report, that he was the subject of the investigation.
- Terik has been ruled ineligible based on an Investigation that was admittedly not perfect and not in accordance with Florida law.

- Terik was never provided an opportunity to respond to the allegations by the Administrators, prior to issuance of the rulings, and release of the Investigative Report to the media.

The lower tribunal erroneously concluded that, based on *Florida High School Athletics Association v. Melbourne Central Catholic High*, 867 So. 2d 1281 (Fla. 5th DCA 2004), Terik did not have a constitutional right to participate in a high school sport, so he has no right to due process. This analysis is fundamentally flawed, and blatantly ignores Florida Statutes that were adopted in 2012 which expressly strengthened students' due process rights. *See* Florida Statutes § 1006.20. Moreover, the statutory right to engage in extracurricular activities and athletic activities is expressly stated as a student and parent right as part of the student's education. *See* Florida Statutes § 1002.20(17)(a) and (18)(a). Florida Statutes § 1002.20(17)(a) and (18)(a) provide:

(17) ATHLETICS; PUBLIC HIGH SCHOOL.—

(a) Eligibility.—Eligibility requirements for all students participating in high school athletic competition must allow a student to be eligible in the school in which he or she first enrolls each school year, the school in which the student makes himself or herself a candidate for an athletic team by engaging in practice before enrolling, or the school to which the student has transferred with approval of the district school board, in accordance with the provisions of s. 1006.20(2)(a).

(18) EXTRACURRICULAR ACTIVITIES.—In accordance with the provisions of s. 1006.15:

(a) Eligibility.—Students who meet specified academic and conduct requirements are eligible to participate in extracurricular activities.

Finally, Florida law expressly recognizes that interscholastic extracurricular student activities are an important complement to public education. *See* Florida Statutes § 1006.15(2). “Participation in a comprehensive extracurricular and academic program contributes to student development of the social and intellectual skills necessary to become a well-rounded adult.” *Id.* Without dispute, the right to a public education is a constitutionally protected right. Florida law provides an express statutory right to participate in high athletics and extracurricular activities, and confirms the vital role high athletics and extracurricular activities plays in public education. *See* Florida Statutes §§ 1002.20(17)(a), and (18)(a) and 1006.15(2).

The Fourteenth Amendment to the United States Constitution forbids the State to deprive any person of life, liberty, or property without due process of law. Similarly, the Florida Constitution provides that “[n]o person shall be deprived of life, liberty or property without due process of law.” Art. I, § 9, Fla. Const. Protected interests in property are normally “not created by the Constitution. *Goss v. Lopez*, 419 U.S. 565, 572 (1975) (internal quotes omitted). Rather, they are created and their dimensions are defined by an independent source such as state statutes or rules entitling the citizen to certain benefits.” *Id.* Furthermore:

The Due Process Clause also forbids arbitrary deprivations of liberty. “Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,” the minimal

requirements of the Clause must be satisfied. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971); *Board of Regents v. Roth*, [408 U.S. 564, 573 (1972)]. School authorities here suspended appellees from school for periods of up to 10 days based on charges of misconduct. If sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment. It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution. (emphasis added) *Goss*, 419 U.S. at 574-75.

Like the student in *Goss*, the Administrators and the FHSAA determined that Terik falsified documents in order to play football.⁴ If sustained, this allegation could seriously damage Terik's opportunities for higher education and employment. Therefore, Terik is entitled to due process rights, because the allegations in the reports could interfere with later opportunities for higher education and employment.

As the United States Supreme Court has explained, due process, "unlike some legal rules, is not a technical concept with a fixed content unrelated to time, place and circumstances." *Cafeteria & Rest. Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 895 (1961). Instead, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). See also *Borden v. Guardianship of Borden-*

⁴ The FHSAA Report does not precisely identify the specific documents that were allegedly falsified by Terik or his parents. Nonetheless, falsified documents are a basis for concluding that Terik was ineligible to play football.

Moore, 818 So. 2d 604, 607 (5th DCA 2002). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Castle v. Appalachian Tech. Coll.*, 631 F.3d 1194, 1200 (11th Cir. 2011).

Florida courts have specifically recognized the significance of due process rights in connection with education and athletics. For example, in *Florida High School Activities Association v. Bryant*, 313 So. 2d 57 (Fla. 3d DCA 1975), the court reasoned that athletics were an important and vital part of the student's life, providing an impetus to his general scholastic and social development and rehabilitation. While the court refrained from phrasing its decision on property interest language, it found that the right of a student to participate in athletics could not be taken away from the student without a fair hearing. *Id.* at 58.

In *Lee v. Florida High School Activities Association, Inc.*, 291 So. 2d 636, 638 (Fla. 3d DCA 1974) because participation in high school athletics would enhance the students chance of being admitted to college and perhaps receiving a scholarship, the FHSAA could not enforce the ineligibility determination without first allowing the student an opportunity to present his case. The court also noted that:

We hold that upon complaint of a citizen the court has the power and the duty to determine whether the citizen has been deprived of due process of law by the action of an association, such as the FHSAA

whose conduct of affairs is state action in the constitutional sense. *Id.* at 638-639.

The lower tribunal in the instant case concluded that the right to play football is not a constitutional right, but it ignored the Florida cases that still maintain that due process should apply when determining athletic eligibility, due to the significance of sports in a student's education. Furthermore, the lower tribunal failed to mention the fact that the Florida legislature specifically recognized a student's statutory right regarding participation in athletics. The lower tribunal also failed to address the recent amendments to Florida Statutes § 1006.20 in 2012, when the Florida legislature strengthened the students due process rights relating to their participation in athletics.

Florida law specifically recognizes that all students have the right to participate in athletic programs. See Fla. Stat. § 1002.20(17). Even though certain Florida cases might have previously determined that students did not have a constitutional right to participate in athletics, those case are prior to 2012, when the Florida legislature revised Florida Statutes § 1006.20 to strengthen the due process requirements to rule a student athlete ineligible. Moreover, none of the Florida cases that previously determined that students did not have a constitutional right to participate in athletics addressed Fla. Stat. § 1002.20(17) and Fla. Stat. § 1002.20(18), nor the important role and complement of extracurricular activities to the constitutional right of public education, as set forth in Fla. Stat. § 1006.15(2).

Florida students have an express right to engage in athletic activities as a part of their education. The student's right to participate in athletic competition can only be abrogated through stringent due process protections. *See Fla. High Sch. Athletics Ass'n v. Rosenberg*, 117 So. 3d 825, 826-27 (Fla. 4th DCA 2013) (holding that student had met the requirements of getting a temporary injunction in light of the fact that the Florida legislature amended section 1006.20 to strengthen the due process protections of students involved in eligibility determinations).

The Florida legislature required that if its due process mandates were not met by the FHSAA, then students should have their eligibility determined with the procedural safeguards of Fla. Stat. § 120.569 and § 120.57. *See Fla Stat. § 1006.20(2)(h)*. Due process is necessary whenever “substantial interests of a party are determined by an agency.” Fla. Stat. § 120.569(1).

In addition to the above changes to Florida law, the legislature also effected the following additional changes in 2012:

- The FHSAA bylaws governing residence and transfer shall allow the student to be eligible in the school in which he or she first enrolls each school year. Fla. Stat. § 1006.20(2)(a).
- Subsequent eligibility determinations must be made and enforced through the FHSAA's bylaws. *Id.*

Fla. Stat. § 1006.20(2)(a) provides the right of a student to be eligible at the beginning of a school year, and the right of the student to have that eligibility determined under due process protections. Therefore, Terik had the right to play football under Florida law, and had to be afforded due process before depriving him of that right to play football. The lower tribunal incorrectly fails to address the undisputed fact Terik was no longer a transfer student when the new academic school year began in August 2014.

The 2012 revisions to Florida law also provided for the following three changes:

- 1) Any person who conducts an investigation on behalf of the FHSAA must adhere to the following:
 - Investigate only those alleged violations assigned by the executive director or the board of directors. Fla. Stat. § 1006.20(e)(4)(a).
 - Allow the parent of any student being interviewed to be present during the interview. Fla. Stat. § 1006.20(e)(4)(c).

Based on the above statutory provisions passed in 2012, Florida law expressly recognizes that a student has specific rights relating to an investigation, and those rights were violated when Terik was interrogated.

- 2) A determination of ineligibility must be made in writing, setting forth the findings of fact and specific violation upon which the decision is based. Fla. Stat. § 1006.20(2)(g)(4).

Florida law provides the student a right to know the charges and specific violations on which the evidence is based. In the instant case, Terik was deemed ineligible before any report was issued, and when the FHSAA Report was ultimately issued, it failed to identify the precise details regarding the alleged falsification of records or the alleged impermissible benefit.

- 3) The FHSAA bylaws may not limit the competition of student athletes prospectively for rule violations of its school or its coaches or their adult representatives. Fla. Stat. § 1006.20(2)(i).

Florida law is clear that a student should not be prospectively declared ineligible for violations by their school or their coaches. Therefore, the 2012 revision recognizes the right of a student to remain eligible for athletic programs, pending investigations, even if the school, coaches or adults violate rules. In the instant case, the Administrators disregarded the applicable law. Instead, Terik was prospectively declared ineligible before any FHSAA report was issued, and many of the facts that have been disclosed, have been disclosed immediately prior to judicial hearings.⁵

⁵ Counsel for the Millers issued demand upon the parties on September 11, 2014.

As set forth above, even if Terik might not have had a previous right to participate in sports, with due process rights (which is denied), as of 2012 the Florida legislature expressly recognized that Florida students have an express statutory right to participate in athletics, and that right cannot be taken away, without due process rights, many of which are set forth in the 2012 revisions to the statutes. Unfortunately, the lower tribunal never mentions the 2012 revisions to the statutes when it denied the request for an injunction, but apparently relied upon the *Melbourne* case to conclude a student has no right to due process.

As referenced above, the United States Supreme Court has recognized that property rights deserving due process protection are not set forth in the constitution, but are derived from statutory rights in favor of individuals. In 2012, the Florida legislature passed specific legislation that confirms the right of students to participate in athletics, and the 2012 statutes also explicitly set forth various due process rights that students are entitled to have in the school system.

Terik has been deprived of his due process rights, due to the timing of the FHSAA Report and the ruling of ineligibility. In the instant case, Terik transferred in January, 2014, and EHS completed its investigation on May 28, 2014. Terik was declared ineligible in August, 2014 by the Administrators, but the specific report finding Terik ineligible was not released until September 17, 2014. By delaying the investigation and the FHSAA report, and by proceeding without

providing timely notice to Terik or his parents, Terik has been deprived of his due process rights, and he is going to suffer irreparable injury. An administrative court lacks authority to address such due process issues, and these issues should solely be addressed by a court. For the reasons set forth above, Terik should not be required to exhaust its administrative remedies.

B. Florida law recognizes an exception to exhausting the administrative remedies when the remedies will result in delay that will create a serious risk of irreparable harm.

In addition to the constitutional reasons set forth above, other exceptions also exist so that Terik should not be required to exhaust his administrative remedies. The lower tribunal in this case specifically recognized the exceptions to the exhaustion requirement, and referenced the following:

Only under exceptional circumstances will a court intervene without the aggrieved party having exhausted the organization's remedies. Such circumstances may be found to exist where the proceedings are not conducted in accordance with the rules, but contrary to law, or where a resort to the internal remedies would be a useless undertaking, would be meaningless or would subject the complainant to unreasonable delay or hardship. *Fla. High Sch. Athletics Ass'n v. Melbourne Cent. Catholic High*, 867 So. 2d 1281, 1288 (Fla. 5th DCA 2004).

The lower tribunal then cited Fla. Stat. 1006.20(7)(f), which provides that the FHSAA will expedite the appeals process, so it can be made before the end of the applicable sports season, if possible, and incorrectly concluded Terik would not be harmed by any delay in the proceeding. However, the lower tribunal ignored the fact that the FHSAA sectional appeals committee only meets on October 7,

2014, and board of directors only meets at the end of November. As of October 7, 2014, five of the EHS's 10 football games will be over. The last football game is scheduled for November 7, 2014. Therefore, by requiring Terik to exhaust his administrative remedies, the season will be over before the administrative process is exhausted, and Terik will be irreparably harmed.

Furthermore, the Administrators continue to drag out the process, apparently in an effort to make their point as to Coach Spears.⁶ In the instant case, all facts were known prior to May 28, 2014 – which is the date of the Investigative Report. Yet, the Administrators never submitted an EL10 form seeking confirmation of Terik's eligibility, and the FHSAA did not issue any report that could be appealed until September 17, 2014, even though the investigation was completed as of May 28, 2014. Therefore, forcing Terik to wait until October 7, 2014, to proceed via the administrative process has resulted in delays that make the administrative process a futile effort, resulting in irreparable harm to Terik.

⁶ Upon information and belief, if Terik and the other players are deemed eligible, then Coach Spears will have a basis to challenge his termination from his job as a teacher and a coach at EHS, since he was fired for insubordination for playing ineligible players during the August 30, 2014 football game. The EHS football game occurred on August 30, 2014 – which is before the FHSAA Spears Report was issued on September 12, 2014. Therefore, the Administrators have a significant interest in confirming that the players remain ineligible, or the Administrators will have employment issues with Coach Spears. The Administrators' position is not in the best interest of Terik or the other students who were deemed ineligible.

C. Exhausting the administrative remedies is not required when the act is futile.

Florida law recognizes that administrative remedies must be exhausted only when the administrative remedy is available and adequate. *Cherry v. Bronson*, 384 So. 2d 169, 170 (Fla. 5th DCA 1980); *State ex rel. Dep't of General Serv. v. Willis*, 344 So. 2d 580 (Fla. 1st DCA 1977); *Northeast Airlines, Inc. v. Weiss*, 113 So. 2d 884 (Fla. 3d DCA 1959). Florida courts specifically recognize that agency errors may be so egregious or devastating that the administrative remedy is too little or too late. *Willis*, 344 So. 2d at 590. In such instances, the equitable power of a circuit court must intervene. *Id.* The instant case warrants such judicial intervention. Not only did the Administrators and the FHSAA deprive Terik of his due process rights, but they have also violated numerous statutes and bylaws, and have specifically delayed the proceedings, all apparently in an effort to terminate the employment of Coach Spears.

Terik has already been harmed, because by the date of the first administrative hearing scheduled for October 7, 2014, EHS's football season is half over. The October 7, 2014 hearing is the very first opportunity for Terik to present his side of the case. The fact that Terik was deemed ineligible as of August 30, 2014, and he will not have any opportunity to present his side of the case until October 7, 2014, demonstrates that the Administrators and the FHSAA's conduct is so egregious that the courts must intervene, to preserve equity. When an

administrative remedy is inadequate and would not provide relief commensurate with the claim or would be unreasonably delayed so as to create irreparable harm, then exhaustion of administrative remedies is not required. *Deltona Corp. v. Alexander*, 682 F.2d 888, 893 (11th Cir. 1982). *See also Pub. Util. Comm'n v. U. S.*, 355 U.S. 534 (1958).

Forcing Terik to exhaust his administrative remedies would be a futile act, as the football season will be over. Florida law recognizes that exhausting one's administrative remedies is not required when the act is futile. *See Cherry v. Bronson*, 384 So. 2d 169 (Fla. 5th DCA 1980); *Monroe County v. Gonzalez*, 593 So. 2d 1143 (Fla. 3d DCA 1992). Terik has already been harmed by being deemed ineligible, without having had any opportunity to respond to any of the allegations set forth in the Investigative Report or the FHSAA Report. Therefore, Terik Miller hereby requests that this Court issue an immediate injunction, so Terik is deemed eligible to participate in athletic activities.

II. TERIK IS ENTITLED TO AN INJUNCTION IMMEDIATELY TO PREVENT IRREPARABLE HARM, AND TO PRESERVE HIS OPPORTUNITY TO ENGAGE IN EXTRACURRICULAR ACTIVITIES, INCLUDING HIGH SCHOOL ATHLETIC COMPETITION.

As of the date of this brief, Terik has not yet had a single opportunity to challenge the erroneous and malicious allegations of the Investigative Report, the FHSAA Spears Report or the FHSAA Terik Report. Moreover, the facts set forth

in the Investigative Report, the FHSAA Spears Report and the FHSAA Terik Report demonstrate that the investigation started in March, 2014, but was not delivered to the FHSAA until July, and did not result in a report until September 12, 2014 – which is more than three months after Terik was initially declared ineligible. The intentional disregard of Florida Statutes and the FHSAA bylaws, rules and policies, the inequitable handling of other students identified in the reports as falsifying documents, and the other facts described above, demonstrate that Terik will be successful in demonstrating that he is eligible to participate in high school athletic competition, including football.

Florida law recognizes that procedures which limit extracurricular activities need to be governed by fair and objective standards. Lacking such standards, means that students and parents are not able to understand the application of such rules. *See Staten v. Couch*, 507 So. 2d 702 (Fla. 1st DCA 1987) (reversed decision of ineligibility because the rules lacked any rational basis under due process standards recognized in similar situations). In the instant situation, the Administrators have represented they do not need to follow Florida Statutes or the FHSAA rules, policies and bylaws, so the Administrators are making rules without any notice or due process rights to others. Accordingly, the improper decision regarding Terik's ineligibility needs to be reversed.

Appellant acknowledges that appellate courts do not customarily have a specific right to issue an injunction. However, Article V, Section 4(b)(3), Florida Constitution provides that appellate courts can enter an injunction when it is indispensable to the protection of the rights of the party seeking the injunction. *See Cohen v. L'Engle*, 5 So. 235 (Fla. 1888). Therefore, when an action is in violation of law, and no other adequate remedy is afforded by law, then an appellate court may enter an injunction. *See Wheeler v. Meggs*, 78 So. 685, 685-686 (Fla. 1918). As set forth above, the actions of the Appellees have been in violation of Florida Statutes and the FHSAA bylaws, rules and policies. Moreover, Terik has no adequate remedy to pursue.

Due to the likelihood of success on the merits, this Court should immediately enter an injunction to prevent the irreparable harm from occurring, and to preserve Terik's opportunity to participate in extracurricular activities, including high school athletic competition. If this Court does not immediately find Terik eligible, then by the time the lower tribunal conducts another hearing, the football season will likely be over. If, however, the Court declines to exercise its equitable powers by issuing an injunction, then Terik requests that this Court enter an order instructing the lower tribunal to immediately enter an order declaring Terik eligible to immediately participate in extracurricular activities, including high school athletic competition.

CONCLUSION

Appellees' actions are causing irreparable harm to Terik by depriving him of the right to engage in athletic sports, without the due process rights specifically set forth in the 2012 revisions to the Florida Statutes, as described above. Terik was declared ineligible more than two weeks before any factual findings were presented to him. Furthermore, the reports that allegedly support the determination that Terik was ineligible were based on an investigation that failed to comply with the Florida Statutes and the FHSAA bylaws, rules and policies, and which lacks sufficient details regarding the documents that were purportedly falsified.

Terik has no adequate remedy at law, because it would take until November 23, 2014 to exhaust his administrative remedies. Since the football season is over on November 7, 2014, Terik's right to play football will be forever lost. Accordingly, Terik requests this Court enter an immediate temporary injunction finding Terik eligible, to prevent irreparable harm, or in the alternative to enter an order instructing the lower tribunal to immediately enter an order declaring Terik eligible to immediately participate in high school athletic competition, including football, and for any all other relief this Court deems just and necessary.

Respectfully submitted this 26th day of September, 2014.

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I HEREBY CERTIFY that this appellate brief is being submitted in Times New Roman 14-point font in compliance with the font requirements of Fla. R. App. P. 9.210(a)(2).

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