IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

FIRST DISTRICT

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

Appellants,

vs.

FIRST DCA CASE NO.: 14-4380
Escambia County
L.T. CASE NO.: 2014 CA 001741

ESCAMBIA COUNTY SCHOOL BOARD; MALCOLM 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.
_____/

MALCOLM THOMAS' RESPONSE IN OPPOSITION TO APPELLANTS MOTION FOR EXPEDITED APPEAL, BRIEFING, SCHEDULE AND REVIEW BY THE COURT

Appellant's Motion for Expedited Appeal, Briefing Schedule and Review by the Court should be denied because: (1) "exceptional circumstances" for the Court's intervention do not exist, therefore Defendants should not be required to comply with an expedited schedule; (2) Appellants have been afforded due process and the minor child has applied for and will receive an appellate hearing with the

Florida High School Athletic Association prior to the expiration of the proposed briefing schedule; and (3) even under the proposed briefing schedule, Appellants' appeal is moot because the football season will be substantially completed prior to the resolution of these issues.

STATEMENT OF FACTS

For the purposes of this Motion only, Appellee Malcolm Thomas ("Thomas") adopts Appellant's "Pertinent Facts" in the interest of brevity. However, Appellant's factual summary is incomplete, thus misleading, and therefore requires supplementation.

Appellants' verified Amended and Restated Complaint for Injunction and Declaratory Relief contends that: (1) the Florida High School Athletic Association ("FHSAA" or "Association") completed its report without giving written notice to the Millers and without providing them any opportunity to correct the "erroneous" information contained therein, to present evidence, or to explain any questions in connection with his transfer to Escambia High School; and (2) that no defendant has ever contacted the Millers to inform them of inadequate or false paperwork. *Appendix, p.36, ¶19, p. 39, ¶40.* Yet, on August 28, 2014, Mrs. Miller was notified in writing of the allegations, including allegations of falsified residency documentation, notified of the summary of the district's investigation and provided

a *written response* to the allegations. *Supplemental Appendix, p. 1-13*[1] Thus, Mrs. Miller was provided notice and the opportunity to be heard prior to the District's August 30, 2014 decision to prevent Terik Miller from playing football. Mrs. Miller's written response was submitted to the Association on September 2, 2014, well before the Association's September 12, 2014 letter determining Terik Miller was ineligible. *Supplemental Appendix, p 15, ¶10.* Thus Mrs. Miller was provided notice and the opportunity to be heard prior to the Association's determination of ineligibility. Mrs. Miller admitted "some form of violation occurred but not as described." *Supplemental Appendix, p. 11.*

Appellants have timely submitted their appeal to the Association and are scheduled to appear before the Association Sectional Appeals Committee on October 7, 2014. *Supplemental Appendix, pp. 25-32*

ARGUMENT

Appellants' Motion for Expedited Appeal, Briefing, Schedule and Review by the Court should be denied because judicial intervention into the Association's eligibility determinations is not warranted under these facts, the record establishes Appellants were afforded due process and even under the proposed expedited

[1] An identical copy of the March Affidavit with exhibits was introduced at the injunction hearing, however the Affidavit and exhibits were renumbered to comport with the numbering of other items attached to the record. The Clerk of Court was closed on September 25, 2014, for Rosh Hashanah, and therefore Thomas was unable to obtain a re-numbered copy for inclusion in the referenced Supplemental Appendix.

schedule, these issues are unlikely to be resolved prior to the substantial completion of the football season. Based the record evidence, the Court should decline to exercise its discretion to permit an expedited appeal.

A. There are No "Exceptional Circumstances" Warranting Judicial Intervention in this Case Prior to the Exhaustion of Administrative Remedies

As a general rule, one seeking judicial review of administrative action must first exhaust available administrative remedies. *Florida High School Athletic Assoc. v. Melbourne Central Catholic High School*, 867 So. 2d 1281, 1286 (Fla. 5th DCA 2004). "A reviewing court may not entertain suit when the complaining party has not exhausted available administrative remedies. *Id*. The rationale behind this restriction is aptly summarized:

> The doctrine of exhaustion of administrative remedies is based on the need to avoid prematurely interrupting the administrative process, as to enable the agency or association to apply its discretion and expertise in the first instance to technical subject matter. The exhaustion doctrine promotes judicial efficiency by giving the agency or association an opportunity to correct its own mistakes, thereby mooting controversies and eliminating the need for court intervention.

Id. Where a statutory administrative remedy is provided, it "must" be exhausted before the courts will act. *Odham v. Foremost Dairies, Inc.*, 128 So. 2d 586, 593 (Fla. 1961). Here, it is unrefuted that the Association's appellate process is codified in Fla. Stat. §1006.20(7) and that Appellant's have not exhausted this statutory administrative remedy prior to bringing this action.

A court may intervene in an association's processes only under "exceptional circumstances" prior to the exhaustion of administrative remedies. *Melbourne*, 867 So. 2d at 1288; *see also Florida High School Athletic Association v. Marazzito*, 891 So. 2d 65 (Fla. 2d DCA 2005); *Florida High School Athletic Association v. Blanchard*, 884 So. 2d 411 (Fla. 1st DCA 2004. In *Blanchard*, this Court recognized:

> We continue to adhere to the rule that Florida courts may interfere in the internal affairs of a private association only under exceptional circumstances

Blanchard, 884 So. 2d at 411. In the absence of an exceptional circumstances, the Court must defer to the association's processes. Succinctly stated:

> **The harshness resulting from the application of a high school athletic associations eligibility rules is not grounds for judicial interference.**

Melbourne 867 So. 2d at 1288 (emphasis added).

The results of internal association processes are subject to judicial reversal only if: (1) the association's actions adversely effects substantial property, contract or other economic right ***and*** the association's own internal processes were inadequate or unfair, or if (2) the association acted maliciously or in bad faith. *Melbourne*, 867 So. 2d at 1291 (emphasis added) (*citing Nat'l Collegiate Athletic Assoc. v. Brinkworth*, 680 So. 2d 1081, 1084 (Fla. 3d DCA 1996)). There is no

evidence the Superintendent or any defendant below acted maliciously or in bad faith. While Appellants focus on the alleged procedural deficiencies, they fail to address and cannot overcome the long-standing premise that there is no right to play high school athletics. For over 70 years Florida law has held that there is no right to engage in scholastic athletics programs. *Melbourne*, 867 So. 2d at 1289 (injunction reversed; "a student's interest in participating in interscholastic sports is a mere expectation, and not a constitutionally protected property right"); *Seminole County School Board v. Downey*, 59 So. 3d 1156, 1161 (Fla. 5th DCA 2011) (injunction reversed; there is no protectable property interest in playing sports or in the loss of potential scholarships); *Florida High School Athletic Assoc. v. Marazzito*, 891 So. 2d 653 (Fla. 2d DCA 2005) (injunction reversed; in the absence of the deprivation of a substantial property, contract or other economic right, no right to challenge athletic association's eligibility determination); *Florida Youth Soccer Assoc. v. Sumner*, 528 So. 2d 4, 5 (Fla. 5th DCA 1988) (injunction reversed; there is no constitutionally protected contract, property or other economic right to play soccer. "If there is a need for a means of alleviating harsh results in cases such as that presented here, the appropriate mechanism is the Association's bylaws, which can be changed through the initiative of member schools"); *Florida High School Activities Association v. Bradshaw*, 369 So. 2d 398 (Fla. 2d DCA 1979) (injunction reversed; student had no constitutionally protected right or

privilege to participate in interscholastic sports activities and the court would not review the association's determination that the school must forfeit games because the team used an ineligible player); *Sult v. Gilbert*, 3 So. 2d 729 (1941) (courts cannot interfere with the FHSAA's actions unless some civil or contractual right is involved and that the loss of the right to play football games is not a contract or property right that authorize the court's to interfere).

It is clear that the denial of Terik Miller's ability to play high school football is not a cognizable right, and therefore, due process protections are not implicated. However, as more fully set forth below, the due process provided by the statutorily created Association appeals process has been judicially recognized as sufficient. *Melbourne*, 867 So. 2d at 1289. Nevertheless, relief from the Association's ineligibility finding is not sufficient to warrant judicial interference, and therefore, an expedited schedule in this case would unnecessarily burden the parties and the Court.

B. Appellants Have Been Provided and Have not Yet Exhausted the Statutory Appellate Remedy Implemented by the Association

Procedural due process requires both fair notice and the opportunity to be heard. *Brooks v. Walker-Brooks*, 119 So. 3d 552 (Fla. 1st DCA 2013). Here, Mrs. Miller was notified of the allegations against the Coach *and* the separate allegations of falsification lodged against her son, was provided a written summary of the District's investigation to date and was provided the opportunity to respond.

Her written statement was submitted to the Association well before their determination Terik Miller was ineligible. *See Supplemental Appendix, pp. 14-15*

Certainly, Appellants cannot claim a due process violation for the district's decision to prevent Terik Miller from playing football on August 30, 2014 and September 5, 2014 pending the Association's determination of eligibility. Appellants can offer no authority to establish a due process right before a high-school athlete can be benched. If it were so, then the courts would be flooded with dissatisfied parents seeking more playing time for their student athletes. Even if due process is required before preventing Mr. Miller from playing football, Mrs. Miller received notice and provided her written response to the allegations prior to young Mr. Miller missing a single game and well before the Association's September 12, 2014 eligibility determination. *Supplemental Appendix, p. 11.*

The Association's statutory, two-tiered appellate procedure has been judicially recognized as providing sufficient due process. *Melbourne*, 867 So. 2d at 1289. Appellants acknowledge they are scheduled to appear before the Association's Sectional Appeals Committee on October 7, 2014. *Supplemental Appendix, p.* 32. Assuming Appellants are unsuccessful there, they have yet another level of review with the Association's Board of Directors in November.[2]

[2] Assuming they do not request the expedited appeals process set forth in Fla. Stat. §1006.20(7)(f). *See Order Denying Petition for Temporary Emergency Relief, Appendix, p.9.*

Appendix, p. 9. In light of the numerous opportunities to be heard, both during the pre-determination investigation and in the quasi-judicial appellate process established by statute and implemented by the Association, it strains credulity to continue to argue the deprivation of due process.

C. Even Under the Proposed Expedited Briefing Schedule, These Issues Will Not Be Resolved Prior to the Substantial Completion of the Football Season

Appellant concedes the football season ends on November 7, 2014[3] and proposes an expedited briefing schedule that would have all briefs submitted no later than October 13, 2014, in an effort to resolve the appeal prior to the close of the football season. *Motion for Expedited Appeal, p. 5.* Appellants' argument misses the mark because even if the appeal is resolved in their favor, it would not result in the entry of a temporary injunction because no evidentiary hearing has been conducted. At most, the Court could reverse the trial court's denial of the request for an injunction and remand the case for an evidentiary hearing.

The entry of an injunction is an extraordinary remedy which should be sparingly granted. *Florida High School Athletic Assoc. v. Melbourne Central Catholic High School*, 867 So. 2d 1281, 1285 (Fla. 5th DCA 2004). A party seeking an injunction must establish: (1) a likelihood of irreparable harm and the

[3] For the purposes of this Motion, Thomas assumes this to be true, although the record cited by Appellant does not support this assertion. *Motion for Expedited Appeal, p. 4*

unavailability of adequate remedy at law; (2) a substantial likelihood of success on the merits; (3) that the threatened injury to the petitioner outweighs any possible harm to the respondent; and (4) that the granting of a temporary injunction will not harm the public interest. Absent an evidentiary hearing, the trial court cannot make the requisite findings of facts to support each element, therefore any injunction entered in the absence thereof would be invalid. *Switzer v. Switzer*, 113 So. 3d 1036, 1037 (Fla. 5th DCA 2013). Moreover, Defendants' entitlement to due process requires the opportunity to present evidence on their behalf. The need for an evidentiary hearing is further demonstrated by existing record evidence establishing due process afforded Appellants despite their repeated denials.

Accordingly, the Court should decline to exercise its discretion to expedite the appeal of this matter because even if expedited, an injunction could not be entered until the substantial completion of the football season, and in any event, no sooner than the appellate review afforded by the Association.

WHEREFORE, Superintendent Malcolm Thomas respectfully requests the Court deny Appellants' Motion for Expedited Appeal, Briefing Schedule and Review by the Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by e-mail to Robert S. Rushing, Esquire, Carver Darden, 801 W. Romana Street,

Suite A, Pensacola, FL 32502, at rushing@carverdarden.com and battles@carverdarden.com (Counsel for Plaintiff), Donna Waters, Esquire, Escambia County School Board, 75 North Pace Boulevard, Pensacola, FL 32505, at dwaters@escambia.k12.fl.us (Counsel for the Escambia County School Board), Joseph L. Hammons, Esquire, The Hammons Law Firm, 17 W. Cervantes Street, Pensacola, FL 32501, at jhammons@bellsouth.net and jlhlaw1@bellsouth.net (Counsel for Principal Sherrill), and Leonard E. Ireland, Jr., Esquire, Clayton-Johnston, P.A., 18 NW 33rd Court, Gainesville, FL 32607, at Lireland@Clayton-Johnson.com and Tbrehm@Clayton-Johnston.com (Counsel for Florida High School Athletic Association, Inc.), this 18th day of September, 2014.

/s/ J. David Marsey

Leonard J. Dietzen
Florida Bar No. 0840912
E-mail: ldietzen@rumberger.com (primary)
E-mail: docketingorlando@rumberger.com and ldietzensecy@rumberger.com (secondary)
J. David Marsey
Florida Bar No. 0010212
E-mail: dmarsey@rumberger.com (primary)
E-mail: docketingorlando@rumberger.com and dmarseysecy@rumberger.com (secondary)
RUMBERGER, KIRK & CALDWELL
A Professional Association
215 South Monroe Street, Suite 702
Post Office Box 10507
Tallahassee, Florida 32302-2507
Telephone: (850) 222-6550
Telecopier: (850) 222-8783
Attorneys for Malcolm Thomas