ACTIVITIES' BYLAWS RESTRICTING STUDENTS' PARTICIPATION MAY VIOLATE EQUAL PROTECTION CLAUSE, *Beck v. Missouri State High Sch. Activities Ass'n*, 837 F. Supp. 998 9E.D. Mo. 1993).

In *Beck v. Missouri State High Sch. Activities Ass'n.*, 837 F. Supp. 998 (E.D. Mo. 1993), Sean Beck instituted an action seeking injunctive and declaratory relief from the Missouri State High School Activities Association's, [hereinafter Association], bylaw restricting a transfer student's eligibility to participate in interscholastic activities for one year. *Id.* Beck, a sophomore, transferred from a public to a non-public school and wished to participate in the school's varsity basketball team. *Id.* Specifically, Beck, through his parents, alleged that the bylaw violated his Equal Protection and Due Process rights under the Fourteenth Amendment and his First Amendment right to freedom of religion and association. *Id.* at 1000. The Association moved to dismiss for lack of jurisdiction or failure to state a claim upon which relief could be granted. *Id.*

Judge Stohr of the United States District Court for the Eastern District of Missouri denied the Association's motion to dismiss on both grounds. First, the court held that jurisdiction was proper under 28 U.S.C. § 1331 because a constitutional question was at issue. Second, the court followed an Eighth Circuit case and rejected the argument that Beck's complaint failed to state a claim for which relief could be granted. *Id.* (quoting *Brendan v. Independent Sch. Dist. 742*, 477 F.2d 1292, 1297 (8th Cir. 1973). There, the court stated, "[A]t the very least, the plaintiff's interest in participating in interscholastic sports is a substantial and cognizable one . . . . " *Id.*

The court next addressed Beck's First Amendment argument that the 365 day transfer restriction was a penalty impairing his right to freely exercise his religious beliefs and freely associate with those having similar religious beliefs. *Id.* at 1002. Judge Stohr rejected both arguments.

Judge Stohr acknowledged that punishment for one's religious beliefs was indeed a free exercise violation. *Id.* However, citing *Church of Lukumi Babalu Aye v. City of Hialeah*, 114 S. Ct. 2217 (1993), the court noted that a regulation imposed for nonreligious reasons passes constitutional muster. *Id.* Because the bylaw in this

case did not reference religion, it did not interfere with Beck's exercise of his religious beliefs. *Id.* The court also noted that a regulation independent of a religious reference could offend the constitution if it unduly burdened the free exercise of religion. *Id.* (citing *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972); *Griffin High Sch. v. Illinois High Sch. Ass'n*, 822 F.2d. 671 (7th Cir. 1987). Yet, the court found that no evidence existed that Beck or his parents were unable or burdened in their ability to practice their religion. *Id.* at 1003.

In responding to Beck's argument that his freedom of association rights were restricted, Judge Stohr held that any reliance on *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) in support of that position was misplaced. *Id.* The *Pierce* court held that states could not preclude students from attending non-public schools. *Id.* (citing *Pierce*, 268 U.S. at 535). The court held that absence of such a restriction in this case makes *Pierce* inapplicable. Therefore, the court held that there was no evidence that indicated Beck's temporary restriction from varsity basketball denied him the ability to choose a specific school or associate with anyone he chooses. *Id.* at 1003. Additionally, the bylaw did not unduly interfere with Beck's or his parents' religious beliefs or their ability to select a school. *Id.*

Next, Judge Stohr quickly disposed of Beck's argument that § 238.3 was over-inclusive because it effected many transfers that did not involve harms the rule was intended to prevent. *Id.* The court stated that *In re U.S. ex rel Missouri State High Sch. Activities Ass'n*, 682 F.2d 147 (8th Cir. 1982) [hereinafter In re MSHSAA], rejected that argument and, therefore, Beck's argument also fails. *Id.*

The court next addressed Beck's attack that the "hardship exception" specified in the bylaw was "vague and amorphous", and therefore, arbitrary and capricious. *Id.* at 1004. Again, Judge Stohr cited *In re MSHSAA*, which found that an earlier version of the bylaw contained a definite standard narrowing its scope. *Id.* That court in *In re MSHSAA* found that "The exception can only be invoked in cases involving no choice by the student or his parents . . . The [Board] has a very narrow ambit of discretion which is constitutionally acceptable." *Id.* (citing *In re MSHSAA*, 682 F.2d at 153.) Similarly, the current version has a limitation because it is invoked only if the reasons for the transfer are non-athletic and no undue influence existed at the time of the transfer. *Id.* The current version also replaces the "no choice" language with enumerated circumstances which might constitute a hardship exception. *Id.* The court, therefore, found that the Board's range of discretion was not contrary to constitutional restrictions. *Id.*

Lastly, Beck challenged the constitutional validity of § 238.3-(a)(2) as violative of the Equal Protection Clause. *Id.* at 1004. Beck

argues that students transferring from public schools to non-public schools are treated differently than those transferring from non-public to public schools. *Id.* Judge Stohr noted that the plaintiff was correct in recognizing that a suspect class was not created, and appropriately formed his argument under a rational basis analysis, rather than heightened judicial scrutiny. *Id.*

In rejecting the plaintiff's argument that the entire § 238.3 rule should be invalidated, the court indicated that the Eighth Circuit had upheld similar constitutional challenges to a prior version of the rule. *Id.* (citing *In re MSHSAA*, 682 F.2d 147 (8th Cir. 1982). Cognizant that the primary difference in the two versions was the current version's addition of § 238.3(a)(2), the court decided to extrapolate from the opinion in evaluating only the addition. *Id.* at 1004.

Next, the court disagreed with the defendant's reliance on *Griffin High Sch. v. Illinois High Sch. Ass'n*, arguing that the transfer restriction rule in that case was identical to the one at issue in this case. *Id.* In *Griffin*, the conclusion of the court gave weight to an ad hoc committee's findings that in Illinois "private schools . . . enjoy an unfair advantage." *Id.* (citing 822 F.2d at 673.) Therefore, the court stated that the transfer rule was adjusted for this "perceived inequity" and was rationally related to that purpose. *Id.*

Judge Stohr found *Griffin* to be distinguishable because no such "private school advantage" existed in the case at bar. *Id.* at 1005. At trial, testimony was presented that public schools were geographically limited to their selection of students because enrollment was taken only from the parent's residential school district. *Id.* Also, private schools attracted students through financial incentives. *Id.* The court, however, rejected these differences as advantages. *Id.*

Specifically, the court pointed out that public schools have a larger pool which to select athletes due to a larger student population. *Id.* The court also stated that neither party had objected to the imposed attendance areas on non-public schools, a solution created by the Association and its ad hoc committee. *Id.*

Additionally, unlike *Griffin*, where the court found no equal protection problems, this Court determined that § 238(a)(2), on its face, treated differently individuals who were similarly situated. The court indicated that the bylaw could overcome a constitutional challenge if the defendant demonstrated that the rule had a legitimate purpose and was rationally related to serving that purpose. *Id.* However, Judge Stohr stressed that, at trial, no such evidence was adduced. *Id.* Rather, the court was only presented with testimony regarding a few incidents of "school-hopping" and received no adequate explanation for characterizing non-public schools with an

"advantage" over public school. *Id.* Absent such evidence in the record, and materials submitted by parties, the court concluded that it was not clear that a legitimate state interest was being protected by the bylaw. *Id.*

Next, Judge Stohr reasserted that jurisdiction was not only proper, but necessary, to the extent that an equal protection violation existed. *Id.* at 1006. The court indicated that any restructuring of MSHSAA by-laws was "better left to legislative and administrative bodies." *Id.* (citing *In re MSHSAA*, 682 F.2d at 152). The uncertainty of whether non-public schools enjoy an actual or perceived advantage supports that conclusion. *Id.* at 1006. The court indicated that a non-judicial resolution would have best served the parties. *Id.* Judge Stohr made this clear in the following statement: "Both sides seem overly concerned with whether this particular young man plays in a basketball game during the next two months, without any regard to the more fundamental underlying concern, his education." *Id.*

In sum, Judge Stohr invalidated only the exception to the transfer rule stated in § 238.3(a)(2), finding it violative of the equal protection clause. *Id.* The balance of the rule shall remain in intact, in a form similar to the rule upheld by the Eighth Circuit in *Ex rel MSHSAA. Id.*

On appeal, the United States Court of Appeals for the Eighth Circuit held that the issue was moot and could not be saved by the "capable of repetition yet evading review" exception under the mootness doctrine. *Beck v. Missouri State High Sch. Activities*, 18 F.3d 604 (1994). Therefore, the appeal was dismissed; the order and judgment were vacated and remanded with instructions. *Id.*

The appellate court first addressed the question of whether the court had jurisdiction. *Id.* at 605. The court stated that a federal court's jurisdiction is limited to actual cases and controversies under Article III of the United States Constitution. *Id.* (citing *Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1435 (8th Cir. 1993) (en banc) In a case, the issues presented may lose their life and become moot due to the passage of time or change in circumstances. *Id.* When that happens an appellate court must vacate a district court's order and judgment and remand the cases with specific instructions to dismiss. *Beck*, 18 F.3d at 605 (citing *United States v. Munsingwear*, 340 U.S. 36, 39 (1950); *Epp V. Kerrey*, 964 F.2d 754, 756 (8th Cir. 1992).

The court noted that both Beck and the Association agreed that the issue was meaningless to Beck who was now eligible to play because more than a year had passed. *Beck*, 18 F.3d at 605. Yet, the court asserted that the case should be decided on the merits because the constitutionality question is "capable of repetition yet

evading review." *Id.*

Next, the court explained that an otherwise moot case can be decided under the mootness doctrine exception "when the challenged action's length is too short to be fully litigated before its end and there is reasonable expectation that the same complaining party will be subjected to the same action again." *Id.* at 606. (citing Arkansas AFL-CIO, 11 F.3d at 1435). Applying the exception to the case at bar, there must be a reasonable expectation that the transfer rule, will return with respect to the same complaining party. *Id.* A probability of recurrence must be shown; a theoretical possibility is insufficient. *Id.* (citing *McFarlin v. Newport Special Sch. Dist.*, 980 F.2d 1209, 1211 (8th Cir. 1992).

The court rejected the Association's argument that the issue of the transfer rule could arise in cases involving students unrelated to Beck. *Beck*, 18 F.3d at 606. That argument failed to satisfy the "same complaining party requirement" of the mootness doctrine exception. *Id.* Also rejected was Beck's argument that the issue could resurface regarding the same complaining party, namely Beck's parents, because Beck's younger brother was in junior high school. Beck attempted to rely on *Walsh v. Louisiana High Sch. Athletic Assoc.*, 616 F.2d 152, 157 (5th Cir. 1980), *cert. denied*, 449 U.S. 1124, 101 S. Ct. 939, 67 L.Ed.2d 109 (1981), where it was held that a particular transfer rule could recur concerning the same complaining party because the parents had other elementary and junior high school children who would eventually attend the high school at issue. *Id.*

Unlike the children in *Walsh*, the court regarded the possibility of Beck's brother transferring and triggering the rule as merely speculative. At oral argument, Beck's attorney stated that "she 'believe[d]' Beck's parent has a younger son in public school and it is 'possible' Beck's parent could bring the same action." *Beck*, 18 F.3d at 606. The court noted that Beck's possibility of recurrence was theoretical and not a demonstrated probability. *Id.* Therefore, the court concluded that Beck's case was not within the "capable of repetition yet evading review" exception to the mootness doctrine. As a result, this case is now moot and dismissed; the order and judgment of the district court is vacated and the case is remanded with instructions to dismiss. *Id.*

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