

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

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***RE: Elvin Dempsey, III v. State of Delaware,
Delaware Interscholastic Athletic Association
C.A. No. 2606-N***

Dear Counsel:

The court has reviewed the parties' submissions in connection with the above referenced matter and has considered the various contentions made at yesterday's oral argument. For the reasons discussed below, the plaintiff's request for a temporary restraining order and a declaratory judgment is denied.

I.

The plaintiff, Elvin Dempsey, III, is a 17-year-old student currently enrolled at Christiana High School in New Castle County, Delaware. The defendant is the Delaware Interscholastic Athletic Association ("DIAA"), the official designee of the Secretary of Education with the authority to implement the Delaware Department of Education's rules and regulations governing the conduct of interscholastic athletics by and through member schools located in the State.

A departmental regulation prohibits any student from participating in interscholastic athletics after four consecutive years from the date of the student's first entrance into the ninth grade.¹ A student may obtain an exemption from the strictures of this regulation by petitioning the DIAA's board of directors for a "hardship" waiver.

According to the regulations, hardship waivers are extraordinary and exceptional relief. Any student who seeks one must make a showing at a hearing to establish the presence of a hardship by a preponderance of the evidence.²

Specifically, the DIAA rules require that the board must find:

[a] clear and direct causal relationship . . . between the alleged hardship condition and the failure of the student to complete the academic requirements for graduation within the normal period of eligibility and the loss of all or part of one of his/her opportunities to participate in a particular sports season.³

Moreover, the regulations define a hardship as:

extenuating circumstances peculiar to the student athlete caused by unforeseen events beyond the election, control, or creation of the student athlete, his/her family, or school which (1) deprive him/her of all or part of one of his/her opportunities to participate in a particular

¹ Regulation 1009.2.7.1. The DIAA regulations are codified in Title 14, Chapter 1000 of the Delaware Administrative Code. The DIAA's regulations can also be found on the Delaware Department of Education's website.

² Regulation 1006.9.1.2.

³ Regulation 1009.2.7.1.2.2.

sports season; and (2) preclude him/her from completing the academic requirements for graduation within the normal period of eligibility.⁴

Dempsey, who is now enrolled in his fifth year of high school, sought a hardship exemption in order to play basketball for Christiana High during the current school year. On November 9, 2006, the DIAA board held a hearing to examine Dempsey's request. At the hearing, Dempsey contended that his mother was involved in a serious car accident at the end of his eighth grade year. As a result, Dempsey argued, he was forced to care for his siblings and otherwise maintain the workings of the household throughout his ninth grade year (2002-03), since his mother was unable to attend to such tasks due to her injuries from the auto accident. These responsibilities allegedly led Dempsey to often be late for school and otherwise took precedence over his studies during his ninth grade year, ultimately causing him to repeat that grade.

After Dempsey presented his case, the DIAA board deliberated and then ruled against him. It found that none of the hardship criteria were satisfied. The board specifically ruled that Dempsey had not proffered sufficient evidence to carry the evidentiary burden imposed upon him by the regulations. Dempsey produced no witnesses, other than himself, to testify as to his domestic conditions during his ninth grade year. Dempsey did not substantiate the existence of his

⁴ Regulation 1009.2.7.1.2.

mother's incapacity by means of health records, a police accident report, or otherwise. He also failed to introduce attendance records to buttress his testimony regarding his tardiness or absence from school. The board also found that no causal relationship existed between Dempsey's alleged hardship and his failure to graduate within the normal four-year period. Instead, the board concluded that it was Dempsey's failure to attend summer school, along with his poor academic performance during the 2004-05 school year, that prevented him from graduating on time.

The DIAA issued its written opinion in early December 2006. Dempsey filed a complaint in the Court of Chancery on December 13, 2006 rather than appeal the DIAA's decision to the Board of Education.

II.

Dempsey seeks a temporary restraining order preventing the Board of Education from enforcing the DIAA's ruling against him. He further seeks a judgment declaring him eligible to participate in interscholastic athletics for the Christiana High basketball team during the 2006-07 season.

In support of the TRO application, Dempsey first argues that he has a colorable claim on the underlying merits of his case because the board's ruling was arbitrary and capricious. Second, Dempsey asserts that, absent injunctive relief, he

will suffer substantial and irreparable harm because he will lose an opportunity to obtain an athletic scholarship to attend college. Finally, Dempsey says that the balance of hardships weigh in his favor, since a favorable decision would cause no harm to the DIAA whereas a decision against him would necessarily preclude him from attending college or otherwise pursuing a higher education.

The DIAA urges the court to uphold the board's decision on several grounds. First, the DIAA argues that the extraordinary relief of a temporary restraining order is inappropriate because Dempsey did not proceed promptly with his initial hardship request and thus contributed to the emergency situation that now purportedly exists. Second, the DIAA argues that Dempsey does not have a colorable claim because the facts clearly show that the board's decision denying the hardship waiver was rationally and logically based upon the evidence presented at the hearing. Third, the DIAA asserts that the claimed loss of an opportunity to gain an athletic scholarship in the future is overly generalized and speculative. In particular, the DIAA argues that Dempsey's alleged harm is not cognizable since he produced no evidence that he is being actively recruited, has actually been offered a scholarship, or even that he lacks an adequate alternative to interscholastic sports (i.e. recreational leagues or intramural athletics). Fourth, the DIAA says that the balance of hardships favors denial of the temporary restraining

order since premature intervention by a court would undermine the functioning and legitimacy of an administrative body that manages and ensures uniform compliance with the Board of Education's regulations. Finally, in an argument closely intertwined with the last point, the DIAA emphasizes that the court should deny Dempsey relief because he failed to exhaust his administrative remedies before filing this suit.

III.

From a procedural standpoint, injunctive relief is improper here, if for no other reason than simply because Dempsey's application is not made in conformity with the requirements of Court of Chancery Rule 65. A court should deny a request for provisional injunctive relief where there is neither a verified complaint nor a supporting affidavit.⁵ Dempsey did not file a verified complaint. Nor did he

⁵ See Ct. Ch. R. 65(a)(1), 65(b); see also *TCW Tech. Ltd. P'ship v. Intermedia Commc'ns, Inc.*, 2000 WL 1478537, at *1 n.2 (Del. Ch. Oct. 2, 2000) and DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 10-4, at 10-56 to 10-57 (2006) (stating that the complaint "should contain the requisite allegations supporting a basis for the provisional remedy as well as the ultimate claim for relief and should be verified by, or supported with an affidavit of, an individual having firsthand knowledge of the relevant facts relating to the underlying claim for ultimate relief [] Though Rule 65 requires verification of the complaint or the submission of an affidavit only in the event that the remedy sought is a preliminary injunction or an ex parte temporary restraining order, it is advisable for the applicant to submit a verified complaint or an affidavit even when a restraining order is requested on notice to the opposing party. Indeed, it is unlikely that the court would grant a restraining order in the absence of such a sworn statement.").

submit an affidavit in conjunction with his TRO application. Procedurally, therefore, that TRO application is defective.

Additionally, the doctrine of exhaustion of administrative remedies “requires that where a remedy before an administrative agency is provided, relief must be sought by exhausting this remedy before the courts will either review any action by the agency or provide an independent remedy.”⁶ This doctrine is important because it allows claims to be resolved in the first instance by agencies with a high level of relevant expertise, prevents judicial interference with agency proceedings until the proceedings have run their course, and avoids burdening the court system before judicial intervention is needed.⁷

Dempsey continues to have an effective administrative remedy via an appeal to the Board of Education as a matter of right pursuant to 14 *Del. C.* § 312.⁸ He

⁶ *Levinson v. Delaware Compensation Rating Bureau, Inc.*, 616 A.2d 1182, 1187 (Del. 1992).

⁷ *Id.*

⁸ Section 312 states in relevant part: “Any party to such a controversy may appeal to the state Board by setting forth such grievance in a petition which shall be served upon the Executive Director of the Association by certified or registered mail within 30 days after receiving notice of the decision. The state Board shall provide by rules and regulations for adequate procedures for the hearing of any such appeal and shall decide the controversy. All such appeals shall be on the record, and the state Board shall overturn the Association’s decision only if it decides that the Association’s decision was not supported by substantial evidence or was arbitrary and capricious. The decision of the state Board shall be final and not subject to further appeal.” According to the parties’ submissions, Dempsey received final mailed notice of the DIAA’s decision on December 5, 2006. Thus, if he chooses to do so, he can still initiate the administrative appeal process. Counsel for the DIAA represented at oral argument that, if the parties agree, there is an expedited process that the state Board may be willing to undertake in order to hear an appeal more promptly.

does not contend that “administrative review will be futile,” that a need exists for a prompt judicial decision because this matter concerns “public interest,” or that the issues here “do not involve administrative expertise or discretion and only [involve] a question of law”⁹ Thus, no exception to the rule requiring an exhaustion of administrative remedies excuses Dempsey’s failure to appeal the board’s decision to the appropriate authorities.

Although a “strong presumption favoring the exhaustion of administrative remedies” applies in Delaware, the application of the doctrine in a particular case remains within the discretion of the court, i.e., the exhaustion of administrative remedies is not a mandatory “jurisdictional threshold.”¹⁰ Indeed, the court can foresee a case involving interscholastic athletics when the doctrine might be less stringently applied. If the verified facts presented by a student showed, for instance, that he or she had been offered or had accepted a scholarship, that the inability to compete in the current season would jeopardize that educational grant, that the delay in seeking a hardship exemption was due to no manifest fault of the student’s own, and that the agency’s decision to deny a hardship exemption

⁹ *Levinson*, 616 A.2d at 1190.

¹⁰ *Id.*

appeared to be arbitrary or capricious, such facts could overcome the presumption favoring exhaustion on the grounds that the “interest of justice so require[d].”¹¹

This is not such an exceptional case. Dempsey has not shown that he is even being recruited to play basketball in college, much less that a rare and highly coveted scholarship for him to do so is an imminent prospect.¹² Moreover, Dempsey knew of his ineligibility no later than the end of the 2005-06 school year. There is no excuse for Dempsey to have waited this long in seeking relief from the DIAA if he wished to maintain the possibility of a timely appeal. Having done so, he must pursue the remedies available through administrative channels to their end.¹³

¹¹ *Id.*

¹² According to an affidavit submitted by the DIAA, less than 3% of high school varsity players nationwide are granted significant scholarships at the collegiate level.

¹³ The court also notes that the record is bereft of any facts that could possibly impugn the process used, or the reasoning given, by the DIAA board for its decision. Clearly, it applied the evidence it was given rationally and contemplatively to the standard required by the Board of Education’s regulations. To the extent that Dempsey did not understand the evidentiary and causation showings he was required to make at the hearing, the court is not unsympathetic. This reinforces the need for school coaches and administrators to advise student-athletes who plan to seek hardship exemptions to begin the waiver process as early as possible. It also seems incumbent upon those same coaches and administrators, as individuals who purport to act *in loco parentis* and in the student-athlete’s best interest, to fully understand the exemption process and the necessity of meeting the causation element and the preponderance of the evidence standard mentioned above in order for a strong hardship case to be presented from the outset.

IV.

For the foregoing reasons, the plaintiff's request for a temporary restraining order and declaratory relief is DENIED and the complaint is dismissed without prejudice. IT IS SO ORDERED.

Stephen P. Lamb
Vice Chancellor