

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF MONROE

AQUINAS INSTITUTE OF ROCHESTER,

Petitioner,

- against -

RICHARD CERONE, in his capacity as Chairman of Section V Football, EDWARD STORES, in his capacity as Executive Director of Section V Athletics, SECTION V ATHLETICS, THE NEW YORK STATE PUBLIC HIGH SCHOOL ATHLETIC ASSOCIATION, and THE NEW YORK STATE DEPARTMENT OF EDUCATION,

Respondents.

**MEMORANDUM OF  
LAW IN SUPPORT OF  
MOTION FOR A  
TEMPORARY  
RESTRAINING  
ORDER AND  
PRELIMINARY  
INJUNCTION**

Index No. 14-11987

**PRELIMINARY STATEMENT**

Jake Zembiec, a high school junior and the quarterback of Petitioner Aquinas Institute of Rochester's ("Aquinas") varsity football team, broke his wrist in the second game of the 2014 high school football season. Jake's injury healed and his treating physician declared him medically eligible to play as of October 13, 2014. Hoping to allow Jake to return to the team and the sport he loves as soon as possible and without complication, Aquinas called the Chairman of Section V Football, Dick Cerone, and asked him what the school needed to do to allow an injured athlete to play any remaining regular and post-season games. Mr. Cerone indicated that as soon as Jake was medically cleared, he could play.

In an abundance of caution and concern for Jake's health, Aquinas chose not to have him play in the last game of its regular season on October 18, 2014, even though he was eligible. Jake stood on the sidelines of that game in his jersey but did not don any equipment or enter the game. In the next game, on Sunday October 25, 2014, Jake took the field. This was the Section

V Class AA football quarterfinals between third-seeded Aquinas and sixth-seeded Pittsford Central School District. Aquinas won the game 37-20. And it was scheduled to advance and play Rush-Henrietta in the Section V Class AA semifinals on Saturday November 1, 2014.

Instead, on October 28, 2014, the New York State Public High School Athletic Association's Section V Executive Committee issued a decision that:

[T]he Aquinas High School football team must forfeit their October 25th game against Pittsford Central School District for using an ineligible player who did not meet the representation rule.

The NYSPHSAA representation rule, included in the NYSPHSAA Handbook, states that a player must be an eligible participant in three regular season football games in order to participate in the postseason. The student in question was determined not to be an eligible participant for three regular season football games; furthermore no waiver was requested of the section.

The unidentified, ineligible player is Jake. And – according to the Regulations of the Commissioner of Education (the “Commissioner’s Regulations”), Respondent NYSPHSAA’s Bylaws and Eligibility Standards (the “Eligibility Standards”), Respondent Section V’s 2014 Handbook & Directory, and the representations of the Chairman of Section V Football, Dick Cerone – Jake **was eligible** for three regular season football games. Aquinas commenced this Article 78 Proceeding challenging the October 28, 2014 Decision as arbitrary, capricious, and an abuse of discretion and seeking to have it overturned on these grounds.

However, by the time this Article 78 Petition can be heard, Aquinas will have suffered immediate and irreparable harm as a result of the wrongful October 28th Decision. Aquinas was previously scheduled to play Rush-Henrietta in the Section V Semifinal game on Saturday November 1, 2014, and, if the wrongful October 28th Determination is allowed to remain in force, Pittsford will play Rush-Henrietta on Saturday, irrevocably ending Aquinas’s 2014 football season. Thus, by this motion, Aquinas seeks a temporary restraining order and a preliminary injunction: (1) enjoining Respondents from declaring Aquinas’s October 25, 2014

victory over Pittsford a forfeit; (ii) annulling the October 28th Determination; and (iii) granting such other and further relief as this Court deems just and proper.

### **STATEMENT OF FACTS**

The facts of this proceeding are more fully set forth in the accompanying Affidavit of Anthony Bianchi, dated October 29, 2014 (the “Bianchi Aff.”), Affidavit of Michael Daley, dated October 29, 2014 (the “Daley Aff.”), Affirmation of Christopher D. Thomas, Esq., dated October 29, 2014 (the “Thomas Aff.”), and their accompanying exhibits.

### **ARGUMENT**

A petitioner is entitled to a preliminary injunction if it can demonstrate: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party’s favor. *Doe v Axelrod*, 73 N.Y.2d 748, 750 (1988). Moreover, “[a] temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.” CPLR 6301.

#### **I. AN AGENCY’S DETERMINATION IS ARBITRARY, CAPRICIOUS, AND AN ABUSE OF DISCRETION IF IT VIOLATES THE AGENCY’S OWN RULES**

“[C]ourts should not interfere with the internal affairs, proceedings, rules and orders of a high school athletic association unless there is evidence of acts which are arbitrary, capricious or an abuse of discretion.” *Section VI of N.Y. State Pub. High Sch. Ath. Ass’n v. N.Y. State Pub. High Sch. Ath. Ass’n*, 134 A.D.2d 819 (4th Dep’t 1987). However, “[a]n agency’s disregard of its own regulations is ‘completely arbitrary.’” *Marciano v. Goord*, 2006 N.Y. Misc. LEXIS 2656 (N.Y. Sup. Ct. 2006) (citation omitted). *See also Section VI of N.Y. State Pub. High Sch.*

*Ath. Ass'n*, 134 A.D.2d at 820 (annulling a NYSPHSAA decision because it violated NYSPHSAA's constitution).

The requirement that an agency strictly adhere to the plain text of its own rules is particularly important in the context of high school athletics, where students, coaches, and administrators can suffer heart-breaking losses because of NYSPHSAA's illogical and unforeseeable interpretations, applications, and – at least in this case – post hoc fabrications of its own rules. *See Robin v. N.Y. State Pub. High Sch. Ath. Ass'n*, 71 A.D.2d 1009 (2d Dep't 1979) (“[T]here would occur a complete failure of logic were we to hold high school students chargeable with knowledge of an association's rules governing their conduct in athletics absent any notice of the rules, their contents or applicability. In light of the failure of the respondent association to adduce proof of actual or constructive notice to petitioner, we find the determination that she violated the rule to be without sound basis in reason and to have been made without regard to the facts. It was a clear abuse of discretion on the part of the association and served no purpose other than to relegate an enthusiastic high school student to pariahdom, a result we may not support or condone. Under the circumstances, we grant petitioner the relief sought, rescission of the determination and penalty against her and expunction of any records relating to the ineligibility.”)

## **II. AQUINAS IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIM BECAUSE THE OCTOBER 28TH DECISION IS NOT SUPPORTED BY A SINGLE RULE GOVERNING ELIGIBILITY**

The eligibility of a student in Section V is governed by three documents: the Commissioner of Education's Regulations, NYSPHSAA's Eligibility Standards, and the Section V 2014 Handbook & Directory. The Commissioner's Regulations state: “To be eligible for sectional, intersectional or state competition . . . [f]or football, a student must be an eligible participant for a minimum of three (3) contests.” (NYSPHSAA's Eligibility Standards, Rule

#25.) The purpose of this rule is to prevent late or post-season transfers of star players or “ringers” from a school with a losing season to a school with a winning one. (*See generally* NYSPHSAA’s Eligibility Standards, Rule #30, “Transfers”). The purpose is not to keep a once-injured athlete from returning to the game in a season he already started with his original team. NYSPHSAA’s Executive Director, Robert Zayas, admitted as much in a radio interview on October 29, 2014. (*See Thomas Aff., Ex. C.*)

Inexplicably, however, Respondents have asserted that Jake was not “eligible” to participate in the October 18, 2014 game – and therefore not “eligible” for three regular season games – because he did not don his uniform during that game. There is no rule in the Commissioner’s Regulations, NYSPHSAA’s Eligibility Standards, or the Section V 2014 Handbook & Directory that requires a student to wear a uniform in order to be considered an “eligible participant.” Such a rule – if it actually existed – would be arbitrary and capricious because it bears no relationship to the purpose of the post-season eligibility rules: preventing late or post-seasons transfers of “ringers” from schools that are out of the playoffs to schools that are still in them. Respondent failed to apply their own eligibility rules to the facts of this case. For that reason, Aquinas is likely to succeed on the merits of its claim that the October 28th Decision is arbitrary, capricious, an abuse of discretion, and should be overturned.

A. THERE IS NO RULE IN THE COMMISSIONER OF EDUCATION’S REGULATIONS THAT REQUIRES A STUDENT TO DRESS FOR A CERTAIN NUMBER OF GAMES IN ORDER TO BE AN “ELIGIBLE PARTICIPANT”

The Commissioner’s Regulations define “eligible” as follows:

A pupil shall be **eligible** for senior high school athletic competition in a sport **during each of four consecutive seasons of such sport commencing with the pupil’s entry into the ninth grade and prior to graduation**, except as otherwise provided in this sub clause, or except as authorized by a waiver granted under clause (d) of this subparagraph to a student with a disability. If a board of education has adopted a policy, pursuant to sub clause (a)(4) of this subparagraph,

to permit pupils in seventh and eighth grades to compete in senior high school athletic competition, such pupils shall be eligible for competition during five consecutive seasons of a sport commencing with the pupil's entry into the eighth grade, or six consecutive seasons of a sport commencing with the pupil's entry into the seventh grade. **A pupil enters competition in a given year when the pupil is a member of the team in the sport involved, and that team has completed at least one contest. A pupil shall be eligible for interschool competition in grades 9, 10, 11 and 12 until the last day of the school year in which he or she attains the age of 19,** except as otherwise provided in sub clause (a)(4) or clause (d) of this subparagraph or in this sub clause.

....

A pupil shall be **eligible** for interschool competition in a sport during a semester, provided that he is a bona fide student, enrolled during the first 15 school days of such semester, is registered in the equivalent of three regular courses, is meeting the physical education requirement, and has been in regular attendance 80 percent of the school time, bona fide absence caused by personal illness excepted.

8 NYCRR § 135.4(c)(7)(ii)(b)(emphasis added).

Under the Commissioner's Regulations, the definition of "eligible" focuses solely on a student's age and enrollment; it says nothing about wearing a uniform during a specific number of games. There is no dispute that Jake, a junior, was in the third of "four consecutive seasons of [football] commencing with [his] entry into the ninth grade and prior to graduation." He was "a member of the team in the sport involved, and that team [ ] completed at least one contest." He had not yet reached "the last day of the school year in which he [ ] attains the age of 19." "[H]e is a bona fide student, enrolled during the first 15 school days of such semester, is registered in the equivalent of three regular courses, is meeting the physical education requirement, and has been in regular attendance 80 percent of the school time, bona fide absence caused by personal illness excepted." None of these actual eligibility issues is in dispute. Thus, under the Commissioner's Regulations, Jake was clearly "eligible" for three regular season games.

B. THERE IS NO RULE IN NYSPHSAA'S ELIGIBILITY STANDARDS THAT REQUIRES A STUDENT TO DRESS FOR A CERTAIN NUMBER OF GAMES IN ORDER TO BE AN "ELIGIBLE PARTICIPANT"

The Eligibility Standards<sup>1</sup> are similarly silent on how many games a student needs to “dress” for in order to be “eligible.” Instead, the Eligibility Standards focus on a student’s age and grade (Rule #1), amateur status (Rule #2), status as a bona fide student of the high school represented (Rule #6), participation in college sports (Rule # 7), duration of competition (Rule #8), health (Rule #10), participation in professional tryouts (Rule #23), recruitment (Rule #24), sportsmanship (Rule #27), and transfer status (Rule #30). The word “uniform” is not mentioned once in the Eligibility Standards.

Jake complied with all of the rules actually contained in the Eligibility Standards throughout the 2014 football season. And Respondents have not argued otherwise. Thus, under the Eligibility Standards, Jake was “eligible” for three regular season games and eligible to play in the October 25, 2014 Section V quarterfinal game.

C. THERE IS NO RULE IN SECTION V'S HANDBOOK & DIRECTORY THAT REQUIRES A STUDENT TO DRESS FOR A CERTAIN NUMBER OF GAMES IN ORDER TO BE AN "ELIGIBLE PARTICIPANT"

Section V’s 2014 Handbook & Directory says nothing whatsoever about an individual student’s eligibility. Ultimately, therefore, Jake was an eligible participant under all three sets of applicable rules and Respondents’ October 28th Decision to the contrary is arbitrary, capricious, and an abuse of discretion.

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<sup>1</sup> The Commissioner’s Regulations allow NYSPHSAA to adopt “such additional rules **consistent** with this basic code as may be adopted by such boards relating to **items not covered specifically in this code.**” 8 NYCRR § 135.4(c)(7)(i)(a)(emphasis added). *See also Brooks v. Section V of N.Y. State Pub. High Sch. Athletic Ass’n, Inc.*, 300 A.D.2d 1094 (4th Dep’t 2002) (“The Rule was properly promulgated by NYSPHSAA pursuant to its Constitution and by authority delegated to it though the regulations of the Commissioner of Education, as an ‘additional rule’ consistent with the basic code for ‘extra class’ athletic activities as may be adopted by boards of education relating to items not covered specifically in the code.” (citations omitted)). These “additional rules” are the Eligibility Standards.

D. THE NFHS FOOTBALL RULES CITED BY RESPONDENTS IN SUPPORT OF THEIR OCTOBER 28TH DECISION HAVE NOTHING TO DO WITH A STUDENT'S ELIGIBILITY TO PARTICIPATE IN A GAME; THEY MERELY GOVERN THE UNIFORM AND EQUIPMENT THAT A STUDENT MUST WEAR WHILE ACTUALLY PLAYING

As previously stated, Respondents found Jake was not “an eligible participant for a minimum of three (3) contests” – as the Commissioner’s Regulations require for a student to participate in a sectional game – because he did not wear his uniform during the October 18, 2014 game. It is clear that this uniform requirement is not in any of the three documents that govern a student’s eligibility: the Commissioner’s Regulations, NYSPHSAA’s Eligibility Standards, and the Section V 2014 Handbook & Directory. So Respondents were forced to look somewhere else to defend their arbitrary and capricious ruling: the National Federation of State High School Associations (“NFHS”) football rules. But, while Section 5 of the NFHS Rules outlines the uniform and equipment a student must wear to actually participate in a football game, it does provide any guidance on who is an “eligible participant.”

Nobody is arguing the fact that, if Jake played on October 18, 2014, he would have had to wear the proper uniform and equipment. But that is not the question here. The question is whether apparel governs the overall issue of eligibility. And it obviously does not. After all, the eligibility standards listed above make no reference to clothing. The rules do not say that, to be eligible to participate, one must play in a game at all. Respondents are trying to hold Jake and Aquinas to a standard unrecognized by the rules.

E. RESPONDENTS CITED AQUINAS'S FAILURE TO OBTAIN A WAIVER AS GROUNDS FOR THE OCTOBER 28TH DECISION BUT THEIR OWN RULES PROVIDE ABSOLUTELY NO MECHANISM FOR APPLYING FOR SUCH A WAIVER

The press release announcing the October 28th Decision states “no waiver was requested of the Section.” Aquinas’s position is that no waiver was required because Jake was an eligible



participant in three regular season games. But, even if that was not the case, there is no procedure in any of Respondents' governing rules and regulations that permits a school to request, much less explains how a school would actually go about requesting, a waiver of any eligibility rule. Aquinas had no notice of any waiver procedure. And it is arbitrary and capricious for Respondents to punish Aquinas – and more importantly its student athletes – for failing to take advantage of a procedure that does not exist.

**III. A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION ARE NECESSARY TO PREVENT IMMEDIATE AND IRREPARABLE INJURY, LOSS, OR DAMAGE TO AQUINAS**

Aquinas was scheduled to play Rush-Henrietta in the Section V Semifinal game on Saturday November 1, 2014, just three days from now. If this Court does not intervene immediately, Pittsford will play Rush-Henrietta on Saturday instead. Aquinas's 2014 football season will be over. And, for Aquinas's graduating seniors, their last high school football memory will be of a court battle between administrators and lawyers. No legal remedy will be able to undo the damage to Aquinas and its student-athletes. And Aquinas has exhausted all other available remedies; the NYSPHSAA's Eligibility Standards explicitly state: "[A]ll questions pertaining to general eligibility involving a Sectional activity shall be taken directly to the Athletic Council or its designee. . . . Because of time constraints, the decision of the Athletic Council . . . will be final with no right of formal appeal to the Appeal Panel or other administrative body." (Rule #3). Thus, Aquinas will be immediately and irreparably injured if this Court does not grant the temporary restraining order and preliminary injunction requested herein.

#### **IV. THE BALANCE OF EQUITIES TIP IN AQUINAS'S FAVOR**

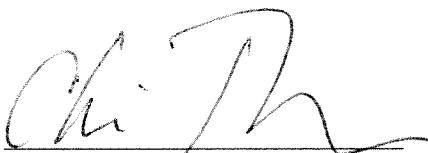
The final consideration in determining whether to issue a preliminary injunction is whether the "balance of equities" favors the requested relief. The Court must determine whether a failure to grant preliminary injunctive relief would cause greater injury to the petitioner than the imposition of the injunction would cause to the defendant. *Laro Maintenance Corp. v Culkin*, 255 AD2d 560, 561 (2d Dep't 1998). Aquinas easily meets this standard. Absolutely no harm would result to Respondents as a result of granting this relief. By contrast, as discussed above, the failure to grant preliminary relief would cause great injury to Aquinas.

#### **CONCLUSION**

Based on the foregoing, Petitioner Aquinas Institute of Rochester respectfully requests that this Court grant their motion for a temporary restraining order and for a preliminary injunction (1) enjoining Respondents from declaring Aquinas's October 25, 2014 victory over Pittsford a forfeit; (ii) annulling the October 28th Determination; and (iii) granting such other and further relief as this Court deems just and proper.

Dated: Rochester, New York  
October 29, 2014

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