

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2020 SEP 23 PM 3:33

ROBERT TYLER ALEXANDER,

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT
Copy

Plaintiff,

v.

Case No.: 20-C-830
(Judge Salango)

GOVERNOR JIM JUSTICE; THE WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN
RESOURCES; and the WEST VIRGINIA
BOARD OF EDUCATION,

Defendants.

**PLAINTIFF ALEXANDER'S COMPLAINT SEEKING TEMPORARY
RESTRAINING ORDER, PRELIMINARY INJUNCTION AND PERMANENT
INJUNCTION AGAINST STATE VIOLATION OF CONSTITUTIONAL RIGHTS**

COMES NOW Plaintiff, Robert Tyler Alexander ("Alexander"), by counsel, and for his
Complaint against the above-styled Defendants, alleges the following:

1. Alexander is a high school senior and varsity football player at George Washington High School.
2. Alexander is presently prohibited from attending school in person or participating in high school football games (and sometimes practices).
3. Alexander is not only being denied the opportunity to participate in scheduled football games, but also is also missing a short and irreplaceable window in which to attract the attention of college football recruiters and earn a college scholarship. This opportunity is not hypothetical or a fanciful wish. Alexander was recently named the West Virginia first team pre-season All-State quarterback by the Charleston Gazette-Mail. In short, the loss of his senior season

denies Alexander of what should be a memorable and enjoyable final season and significantly lessens his opportunity to earn a college scholarship— thereby adversely affecting his athletic and vocational career and life path going forward.

4. Defendants, by their respective individual and concerted actions, have prevented, and continue to prevent, Alexander from participating fully in high school football, which is an extra-curricular school activity. Defendants are referred to hereinafter collectively as “the State.”

5. The West Virginia Constitution, Article XII, Section 1, provides a fundamental constitutional right to education for our children: “The Legislature shall provide, by general law, for a thorough and efficient system of free schools.” The Supreme Court of Appeals has already held that this constitutional admonition creates a fundamental right to education. *See, e.g.,* Syl. Pt. 3, *Phillip Leon M. v. Greenbrier County Bd. of Educ.*, 199 W. Va. 400 (1996), *modified on other grounds by Cathe A. v. Doddridge Cty. Bd. of Educ.*, 200 W. Va. 521, 531–32 (1997). *See also* Syl. Pt. 3, *Pauley v. Kelly*, 162 W.Va. 672 (1979).

6. The Supreme Court of Appeals has defined the “thorough and efficient system of schools” as being one that “develops, as best the state of education expertise allows, the minds, **bodies** and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically.” *Id.* at 705. (*Emphasis added in bold*).

7. To meet these goals, **the Court further set forth legally recognized elements which our children are entitled:** (1) literacy; (2) ability to add, subtract, multiply, and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work to know his or her options; (5) work-training and advanced academic training as the child

may intelligently choose; (6) **recreational pursuits**; (7) interests in all creative arts, such as music, theatre, literature, and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society. *Id.* at 705–06. To carry out these elements, our children are entitled to “supportive services: (1) good physical facilities, instructional materials and personnel; (2) careful state and local supervision to prevent waste and to monitor pupil, teacher and administrative competency.” *Id.* (*Emphasis added in bold*).

COUNT I

DENIAL OF EQUAL PROTECTION RIGHTS UNDER STATE CONSTITUTION

8. Alexander incorporates all preceding paragraphs of this Complaint as if restated and set forth fully herein.

9. The State’s actions in responding to the COVID-19 pandemic by restricting the actions of a select group of citizens of which Alexander is a member, while others are not similarly restricted, violates Alexander’s Equal Protection Rights.

10. School-aged citizens of West Virginia have a constitutional right to a thorough and efficient education. W. Va. Constitution Art. XII, Section 1. The Supreme Court of Appeals of West Virginia has held that this right includes “recreational pursuits,” which must be construed as including—if not synonymous with—extra-curricular athletic activities. *Pauley* at 705-706. Our State Supreme Court has recognized that, although the phrase “equal protection” is not found in our state Constitution, its principles are an integral part of our constitutional law. *See, e.g., Robertson v. Goldman* 179 W.Va. 453 (1988); *State ex rel. Longanacre v. Crabtree*, 177 W. Va. 132 (1986); *Peters v. Narick*, 165 W. Va. 622 (1980); *Thorne v. Roush*, 164 W. Va. 165 (1979); *State ex rel. Harris v. Calendine*, 160 W. Va. 172 (1977); *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740 (1965); *Linger v. Jennings*, 143 W. Va. 57 (1957).

11. In prior cases, our Supreme Court has found equal protection rights to reside in various provisions of the State Constitution. *Robertson v. Goldman, supra* (art. III, § 10, due process clause); *State v. Memorial Gardens Dev. Corp.*, 143 W. Va. 182 (1957) (art. III, § 10, due process clause); *State ex rel. Longanacre, supra* (art. VI, § 39, special laws prohibited); *Peters, supra* (art. III, § 17, right to equal protection is guaranteed); *Linger, supra* (art. III, § 17, denial of justice and open courts). Specifically, in *Israel v. W. Va. Secondary School Activities Commission*, the Supreme Court of Appeals held that Equal Protection principles are “part of our Due Process Clause found in Article III, Section 10 of the West Virginia Constitution.” 182 W. Va. 454, 461 (1989). Further, the *Israel* Court held, “[t]he concept of equal protection of the laws is inherent in article three, section ten of the West Virginia Constitution, and the scope and application of this protection is coextensive or broader than that of the fourteenth amendment to the United States Constitution.” *Id.* (quoting *State ex rel. Longanacre, supra*)).

12. Most importantly for this present case, the *Israel* Court further held that “Equal protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner.” *Id.* at Syl. Pt. 2. Here, different groups are being treated differently: school students¹ and student athletes are being restricted while others are not. People who wish to shop still shop; people who wish to dine out still dine out; people who wish to congregate at church,

¹ Further, only public school students are being restricted in the manner discussed herein. At least some private schools in Kanawha County have had in-person classes during the time that Kanawha County public schools students have not had that option. continue to have in-person classes, even as Kanawha County has been coded as red under the State’s color-coded “School Re-Entry Map.” As one example, the Bible Center school in Kanawha County begin offering in-person classes effective September 14. In a posting on its web site as of September 17, the Bible Center School effectively acknowledges that it was in violation of the State’s color-coded “School Re-Entry Map” by holding in-person classes but requests non-enforcement—“Historically, West Virginia has deferred to the judgment of students, teachers, and their respective families in instances where private schools choose to deviate from decisions made by public schools. BSC respectfully requests our Great State do the same in this instance.”) See attached as Exhibit A.

funerals, weddings, or any other social activities still do so. Student athletes are treated far differently. Executive Order No. 68-20 restricts a constitutionally protected fundamental right—the right to a thorough and efficient education—*on its face*, by prohibiting, under certain conditions associated with a color-coded map, *all* high school athletic games and practices, while permitting assemblies for all other purposes (unless generally prohibited²), such as child care, dining,³ drinking,⁴ movie-viewing,⁵ gambling and playing bingo,⁶ crafting and other traditional “camp” activities,⁷ exercise and recreation,⁸ weddings,⁹ and attending church services.

13. Social and outdoor activity gatherings that have been permitted are subject to exceptions and have been subject to several fluctuations in the number of people permitted to gather. These actions are the State’s patchwork efforts to reduce the spread of the COVID-19 virus. However, one thing is clear—student athletes are completely and totally restricted by the State.¹⁰

² These are limited to live music, adult entertainment, carnivals (but not amusement parks), fairs, festivals, and sometimes (but not always) bars in Monongalia County. *See* Executive Order No. 51-20 (July 13, 2020).

³ At 50% occupancy. *See* Executive Order No. 40-20 (May 22, 2020).

⁴ Also at 50% occupancy. *See Id.*

⁵ *See* Executive Order No. 42-20 (June 4, 2020).

⁶ *Id.*

⁷ *See* “Guidance for Summer Camps,” issued June 10, 2020, and last updated July 8, 2020, attached as “Exhibit 2.”

⁸ *See* Executive Order No. 37-20 (May 15, 2020).

⁹ According to the Governor’s July 13, 2020, official press release, “weddings” are exempted from the 25-person limit on purely social gatherings, although finding the executive order that spells this out has proven elusive. *See* <https://governor.wv.gov/News/press-releases/2020/Pages/COVID-19-UPDATE-Gov.-Justice-reduces-social-gathering-limit%3B-closes-fairs%2C-festivals%2C-and-concerts%3B-closes-Mon-County-bars.aspx>

¹⁰ Executive Orders or other rules that are not being enforced cannot stand as evidence that Alexander is not being treated disparately. The equal protection denial results not from a restriction on a written piece of paper but from the enforcement of the restriction. For example, the State has publicly indicated to the State’s citizens that the initial stay-at-home order and mask “mandate” were subject to little or no enforcement. *See* FAQ and Summary of “Governor Issues Stay At-Home Order,” <https://dhhr.wv.gov/COVID-19/Pages/Governor-Issues-Stay-at-Home-Order.aspx> (Exhibit B), and WV Gazette article of July 6, 2020, “Gov. Justice issues order for West Virginians to wear masks.” (<https://www.wvgazettemail.com/coronavirus/wv-school-closures-extended-until-april->

14. At the time this Complaint was drafted, the Governor announced that those attending private schools might be tested and allowed to return to school, even within counties such as Kanawha that are in red. The exact details of this announcement are unknown at this time but this would be treating students who attend private school differently from public school students *within* the same county.

15. This is constitutionally intolerable facial discrimination. *See, e.g., Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993) (explaining constitutional concept of facial “neutrality” in striking down a provision discriminating against the federally protected fundamental right to the free exercise of religion). The *only* assembly restriction the State has been enforcing is the attendance of school and participation in extracurricular activities.¹¹ This will be exacerbated by the recent announcement that students who attend private school will be allowed to attend or treated differently from those who attend public school.

16. These restrictions clearly treat Alexander differently from “similarly situated persons” and does so in a “disadvantageous manner.” *Israel*, at Syl. Pt. 2. Thus, Alexander’ constitutional right to Equal Protection is being violated.

17. Wholesale regulation and restriction of extracurricular activities is subject to equal protection analysis under a strict scrutiny standard. As stated previously, the *Pauley* Court effectively recognized extra-curricular athletics as deserving of the strict scrutiny protection afforded all other components of education in its reference to “recreational pursuits.”

[30/article_bd161b5e-d60f-5ce0-a787-ab2e89273c24.html?utm_medium=social&utm_source=email&utm_campaign=user-share](https://www.wvlegis.gov/legislation/article.aspx?id=bd161b5e-d60f-5ce0-a787-ab2e89273c24.html?utm_medium=social&utm_source=email&utm_campaign=user-share) (Exhibit C)

¹¹ And even if one or more other restrictions were enforced, that does not defeat Alexander’s equal protection claim. The law recognizes it is possible for more than one class of persons to be denied equal protection by being treated disparately and adversely from a larger group of citizens.

18. Additionally, in *State ex rel. Lambert v. W. Va. State Board of Education*, the Supreme Court of Appeals addressed the constitutionality of requiring high school girls basketball teams to conduct their seasons in the fall rather than the traditional winter season (when boys play). 191 W. Va. 700, 701 (1994). Our highest court recognized: “Since the scheduling of the girls’ high school basketball season outside the time period traditionally observed as the official basketball season serves no important governmental objective, it is unconstitutional as it violates the equal protection clause set forth in Article III, § 10 of the West Virginia Constitution.” *Id.* at 707. In reaching this holding, the Court concluded that “the scheduling of girls’ basketball in the nontraditional season, as well as the access to organized practice time afforded to girls’ basketball teams constitute a mere superficial equivalency.” *Israel*, 182 W. Va. at 459, 388 S.E.2d at 485.

19. This concept is applicable here—The State’s disparate and unequal regulation and restriction of gatherings other than school attendance and extra-curricular activities, combined with a void of enforcement of other such gatherings, presents precisely the same “superficial equivalency” our State Supreme Court found unconstitutional in *Lambert*.

20. The concept of equal justice under the law requires the State to govern impartially. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979). The sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective. *Reed v. Reed*, 404 U.S. 71, 76 (1971). *Lehr v. Robertson*, 463 U.S. 248, 265, 103 S. Ct. 2985, 2995 (1983).

21. It is a right of all West Virginia citizens to be treated equally by their government in all regards without unjustified and irrational distinctions. *See, e.g., Crawford v. W. Va. Dep’t of Corr.*, 239 W. Va. 374, 380 (2017) (challenging denial of right to workers’ compensation benefits by incarcerated prisoners who work while serving their period of confinement as

compared to employees of private employers—relief denied but not based upon classification of employees).

22. Alexander is entitled to equal protection. The State is denying Alexander that equal protection by an unjustified and irrational distinction between Alexander and the others like him. On Friday nights, while many citizens in Kanawha County do in fact shop, dine, gamble, socialize at bars or most anywhere else, Alexander is prevented from participating in a high school football game.

23. In order to withstand the strict scrutiny standard, the State must demonstrate its actions are narrowly tailored to achieve a compelling interest.

24. Alexander is without question being treated differently from others in the community. His constitutionally protected activities are being restricted; others are not. The State's actions in taking this disparate action are subject to a strict scrutiny analysis and can only survive that analysis if the State's action is narrowly tailored to a compelling state interest that is neither over- nor underinclusive. *See, e.g.,* Syl. Pt. 5, *Bd. of Educ. of Kanawha Co. v. W. Va. Bd. of Educ.*, 219 W. Va. 801 (2006); *id.* (“[A]ny denial or infringement of the fundamental right to an education for a compelling State interest must be narrowly tailored.”).

25. The State's actions here are not narrowly tailored. As such, the State's actions must be deemed unconstitutional and enjoined.

26. The color-coded “School Re-Entry Map” is not a narrowly tailored solution to satisfy a compelling state interest. The obvious state interest is curtailing and controlling the spread of COVID-19. And this interest is certainly compelling. Nevertheless, in responding to this compelling situation, the State's actions must be narrowly tailored and cannot be over or under inclusive.

27. The color-coded map was created and then announced to be the metrics that would govern when school could offer in-person school and when athletes could practice and play games. This Map has been changed numerous times, including changing the numbers and inputs that define the colors and what activities the students can do when a county moves from one to the other.¹² As COVID-10 cases have increased in a county such as Kanawha, the County has changed colors on the Map.¹³ These changes in the County's color have affected one group of people and one group only – students. The State's patchwork of Executive Orders is not narrowly tailored or rationally related to addressing the compelling interest of controlling the virus.

28. The bottom line is this: the State has a compelling interest to stop the spread of the virus, but it is unconstitutional for the reaction to be a policy that keeps Alexander and others from attending school and playing games when other citizens in Kanawha County are effectively free to gather and socialize freely. That is not a narrowly tailored solution.

29. Prohibiting high school football teams from playing games and practicing—while allowing other similar assembly and gathering of citizens—is arbitrary and capricious and bears no rational relationship to a legitimate purpose.

30. Even if the standard to which the State's actions are held is not strict scrutiny, the prohibition against participating in extracurricular sports still fails constitutional scrutiny because the action is arbitrary and capricious. *Bailey v. Bd. of Educ. of Kanawha*, 174 W. Va. 8 (1984)

¹² Recently the Map has been applied to whether nursing homes can receive visitors and even more recently to whether children can engage in travel sports. It is unclear whether those restrictions have been enforced by the State in any way.

¹³ Given the way the Map is applied and the stated implications from moving from one color to another, like orange to red, changes to the students can occur immediately. The date underlying the map is constantly changing as well. On September 16, Kanawha County was moved to red status. On September 17, the numbers were changed for September 16 and as a result it became clear that Kanawha should not have been moved into red on September 16. Nevertheless, it was and because of the way in which the Map is administered athletes like Alexander were unable to meet with their team and condition on September 16.

(challenge to county board of education requiring 2.0 grade point average upheld because the rule “bears a rational relationship to a legitimate purpose and is not arbitrary or discriminatory,” and therefore “meets the similar substantive due process standard under article III, § 10 of the West Virginia Constitution”).

31. The Supreme Court of Appeals has held in some cases—which Alexander contends are distinguishable—that participation in nonacademic extracurricular activities, including interscholastic athletics, does not rise to the level of a fundamental or constitutional right under article XII, § 1 of the West Virginia Constitution, and therefore its regulation need only be rationally related to a legitimate purpose.” *Jones v. W. Va. State Bd. of Educ.*, 218 W. Va. 52, 58 (2005), quoting *Bailey v. Truby*, 174 W. Va. 8, 23 (1984); see also *Janasiewicz v. Bd. of Educ. of Kanawha Cty.*, 171 W. Va. 423, 426 (1982) (“Equal protection requires that similarly situated classes be treated alike When there is a rational basis to distinguish between groups of individuals, not based on invidious discrimination, then different treatment does not offend equal protection provisions.”).

32. Even if the State need only show a rational basis for its decisions that restrict Alexander’s participation in high school football practice and games. The rational basis test is more forgiving, but not without limits in its deference. Distinctions cannot be arbitrary or irrational and pass scrutiny. “The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.” *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985).

33. Here, the rules preventing or restricting high school athletes from participating in school extracurricular programs are aimed at trying to curb or reduce the spread of COVID-19.

But any such rules are unquestionably arbitrary and capricious because they are applied only to a small group of people.

34. By singling out only one group of people to be treated differently with respect to permissible gatherings it is by definition arbitrary and capricious. State action that is arbitrary and capricious cannot satisfy the rational basis test.

35. The events as they have unfolded in Kanawha County over the past several weeks demonstrate that the State's actions also fail the rational basis test. The only segment of society effectively limited in their right to gather and assemble have been the students of Kanawha County. While only Kanawha County student-athletes have been prevented from playing games, and on some days restricted as to how, if at all, they can practice, Kanawha County's COVID-19 infection rates have increased. Thus, the irrationality of the misguided classification has been largely proven by recent testing data.

36. The State's irrational distinction between classes of citizens cannot stand and must be enjoined. Prohibiting Alexander from engaging in extracurricular sports while his county is in "orange" or "red" status unlawfully discriminates against Kanawha County student athletes without giving them the less restrictive option of complying with social distancing, masking, and hygiene protocols that are deemed to be sufficient for Kanawha County citizens in all other settings.

37. A Pennsylvania federal court case decided just this week shows that restrictions that plainly treat citizens disparately will fail even rational basis scrutiny. *County of Butler v. Wolfe*, Case 2:20-cv-00677-WSS, Judgment Order (W.D. Pa. Sept. 14, 2020). The *Wolfe* Court concluded that the manner in which Pennsylvania's orders divided businesses into "life-sustaining" and "non-life-sustaining" classifications for purposes of permitting the former to

remain open and requiring the latter to close, failed rational basis scrutiny—largely because the classifications were not rationally related to the effective (i.e., actual) gathering of citizens and size of those gatherings. *Id.*

38. Much like the scenario presented in *Wolfe*, the restrictions prohibiting Alexander and others similarly situated from participating in extra-curricular athletic competitions, and even practices, is not rationally related to the State’s goal of preventing the spread of COVID-19. As *Wolfe* recognized, limiting aggregation of people in some places but not others denies equal protection to those adversely affected. The same situation exists here and results in an impermissible violation of Alexander’s State Constitutional right to equal protection.

39. In sum, the challenged state action is sufficiently flawed such that it fails any scrutiny, even the least stringent rational basis review. Singling out one group of citizens to restrict from activities to fight a contagious virus, while other citizens engage in similar gatherings and socialization, is not rationally related to the stated purpose and thus also denies Alexander equal protection.

REQUEST FOR RELIEF

40. Alexander incorporates all preceding paragraphs of his Complaint as if restated and set forth in full herein.

41. Alexander is entitled to immediate injunctive relief to allow him to participate in His senior year of high school football practice and games. Justice delayed by even a few weeks in this matter is effectively justice denied.

42. An immediate temporary restraining order and preliminary injunction is needed to prevent irreparable harm to Alexander. His high school football regular season is nearly one-third

completed as of this filing. The 2020 West Virginia football season is continuing in other counties without Alexander.

43. Failure to provide immediate injunctive relief effectively denies Alexander the legal ruling and justice to which he is entitled. Alexander requests a temporary restraining order be entered immediately to remain in effect until this Court can schedule a preliminary injunction hearing.

44. The timing of obtaining the relief requested is critical. When circumstances show that "immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party" can be heard, a party may ask a court to issue, in lieu of a preliminary injunction, an *ex parte* temporary restraining order. *Camden-Clark Mem'l Hosp. Corp. v. Turner*, 212 W. Va. 752, 757 (2002).

45. Although the effect of an *ex parte* order granting a preliminary injunction remains the same under W. Va. Code § 53-5-8, a court shall grant such an injunction only if it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition. In the event that a court grants an *ex parte* temporary restraining order, then our rules state the temporary restraining order will expire in 10 days without further order of the court or agreement by the parties to extend it.

46. The granting or denial of a motion for preliminary injunction is committed to the sound discretion of this Court. The "core" of the analysis is the "comparative hardship" of the parties. *Morrissey v. W. Va. AFL-CIO*, 239 W. Va. 633, 638 (2017). This comparative hardship analysis boils down to four factors:

Under the balance of hardship test the district court must consider, in "flexible interplay," the following four factors in determining whether to issue a preliminary injunction: (1) the likelihood of irreparable harm to the

Alexander without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) Alexander's likelihood of success on the merits; and (4) the public interest.

Id.

47. (1) the likelihood of irreparable harm to the Alexander without the injunction.

The 2020 West Virginia high school football season is occurring. High schools throughout West Virginia have played multiple games. Alexander has yet to take a snap. College recruiters are currently watching many high school football players across the United States play games. Those players have an advantage over Alexander in the ability to attract the attention of college recruiters and scholarships while Alexander remains idle. If Alexander misses this opportunity it could mean that no college offers Alexander a football scholarship, or less of one than it otherwise would. It could mean that Alexander may have to pay for college on his own, including taking out loans to finance his education. And it could permanently and irreparably alter Alexander's future higher educational, vocational and financial landscape.

(2) the likelihood of harm to the defendant with an injunction.

The Defendants suffer no likelihood of harm if the Court grants the injunction. Any injunction would only mean that Alexander and those similarly situated will be treated the same as all other State citizens regarding their right to assemble and gather and participate in activities of their choosing. Recognizing the constitutional rights of a class of citizens cannot cause harm to the State. The State remains free to take actions to stop the spread of COVID-19, so long as does not do so by treating some of its citizens disparately to their detriment.

(3) Alexander's likelihood of success on the merits.

Alexander is likely to succeed on the merits. Alexander's arguments under each of the levels of constitutional rights scrutiny are sound and well supported by legal precedent. In short,

Alexander's legal position in this case is correct, and he in all probability prevail on the merits of this action.

(4) the public interest.

There is a strong public interest in protecting individual Constitutional rights. There is also a strong public interest in the well-being of public school students and the development of such students into young adults who are afforded the opportunity to earn college scholarships and further their education and academic and athletic career. Of course there is a public interest in slowing the spread of COVID-19, but if prohibiting high school extra-curricular practices and games was rationally related to slowing the spread, then Kanawha County's infection rate would have gone down in recent weeks rather than increased. And the public interest lies in protecting all citizens; so restrictions deemed necessary for Alexander and those similarly situated can only truly be in the public interest if applied equally to protect all citizens.

48. Accordingly, Alexander requests the following immediate relief:

(a) A temporary restraining order against the Respondents prohibiting any enforcement of the current WV School Re-entry Map or other rules or regulations or orders that would prevent Alexander and those similarly situated from participating in West Virginia high school football games and practice until such time as the Court can take evidence and decide this case on the merits.

(b) Upon termination of or in lieu of the temporary restraining order if not granted, a preliminary injunction against the Respondents prohibiting any enforcement of the current WV School Re-entry Map or other rules or regulations or orders that would prevent Alexander and those similarly situated from participating in West Virginia high school football games and practice until such time as the Court can take evidence and decide this case on the merits.

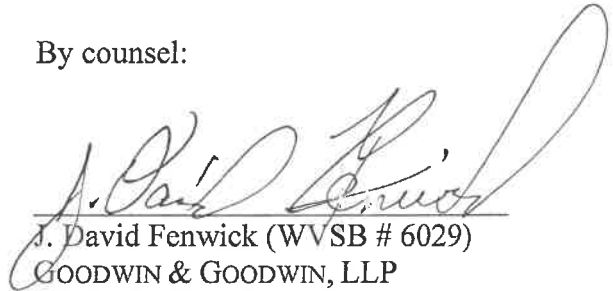
(b) An Order deeming the WV School Re-entry Map provisions and other rules or regulations or orders that prevent Alexander and those similarly situated from participating in West Virginia high school football games others as infringing on Alexander's right to equal protection under the State Constitution.

(c) Such other relief as the Court deems necessary and appropriate.

Respectfully submitted,

PLAINTIFF R. T. ALEXANDER

By counsel:

A handwritten signature in cursive script, appearing to read "J. David Fenwick", is written over a horizontal line.

J. David Fenwick (WV SB # 6029)
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Charleston, West Virginia 25301
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jdf@goodwingoodwin.com



BIBLE CENTER | SCHOOL

Start here... Go anywhere!

After much collaboration, counsel and prayer, Bible Center School (“BCS”) began offering both in-person and online education choices starting today, September 14, 2020. While the decision to offer in-person education for our students and parents differs from Kanawha County public schools’ decision otherwise, BCS believes that its approach strikes a balance between the needs of today and beyond. This is not a decision that BCS takes lightly.

Education of our future leaders is one of the most important priorities of society. If the current generation of leaders do not invest in this priority, the next generation will not possess the necessary skills to address the unprecedented challenges of tomorrow. BCS is taking extraordinary steps to mitigate the risk that in-person education may present. BCS will continue to update its safety protocols as the pandemic ensues to moderate risk to our students, staff, and their respective families.

Historically, West Virginia has deferred to the judgment of students, teachers, and their respective families in instances where private schools choose to deviate from decisions made by public schools. BCS respectfully requests that our great State do the same in this instance.

1111 OAKHURST DRIVE | CHARLESTON, WV 25314

SCHOOL: (304) 941-1704 | PRESCHOOL: (304) 941-1710 | FAX: (304) 346-0433 | BIBLECENTERSCHOOL.COM

EXHIBIT A

STATE OF WEST VIRGINIA

EXECUTIVE DEPARTMENT

At Charleston

EXECUTIVE ORDER NO. 9-20

By the Governor

WHEREAS, a State of Emergency was declared on the Sixteenth Day of March, Two Thousand Twenty for all counties in West Virginia (the "State of Emergency Declaration"), to allow agencies to coordinate and create necessary measures to prepare for and respond to the outbreak of respiratory disease caused by a novel coronavirus now known as COVID-19; and

WHEREAS, Chapter 15, Article 5, Section 6 of the Code of West Virginia authorizes the Governor to, among other things, control ingress and egress to and from a disaster area or an area where large-scale threat exists, the movement of persons within the area, and the occupancy of premises therein; and

WHEREAS, Executive Order 2-20, Executive Order 3-20, Executive Order 6-20, and Executive Order 8-20 have ordered closed or otherwise limited occupancy of businesses and establishments such as casinos, restaurants, bars, fitness centers, gymnasiums, recreation centers, barber shops, nail salons, hair salons, state park lodges, and the Hatfield McCoy Trail, all to protect public health, safety, and welfare; and

WHEREAS, further measures are necessary to protect the health, safety, and welfare of the public, to disrupt the spread of the virus, and to mitigate the impact of COVID-19, including the closure of additional businesses and facilities throughout the state; and

EXHIBIT B

WHEREAS, the Centers for Disease Control and Prevention (“CDC”) and the West Virginia Department of Health and Human Resources have recommend the public practice of social distancing, meaning staying home whenever possible and otherwise maintaining a six feet distance from other individuals, to minimize the transmission of COVID-19; and

WHEREAS, locations where people congregate unnecessarily and/or fail to follow adequate social distancing practices are therefore areas of large-scale threat and emergency; and

WHEREAS, businesses that are to remain open will need to reduce their operations to continue with minimum contact with members of the public and only essential employees, and must require proper social distancing at all times; and

WHEREAS, these measures relating to the closure of certain businesses and to limit the operation of non-essential businesses are necessary because of the propensity of the COVID-19 virus to spread via personal interactions and because of physical contamination of property due to its ability to remain on surfaces for prolonged periods of time; and

WHEREAS, it is the duty of every West Virginian to practice proper social distancing and to comply with these measures in order to protect our people, our families, and each other, against this terrible epidemic.

NOW, THEREFORE, I, JIM JUSTICE, pursuant to the authority vested in me pursuant to the provisions of Chapter 15, Article 5, Section 6 and Chapter 15, Article 5, Section 1 of the Code of West Virginia, hereby **DECLARE** and **ORDER**, effective as of 8:00 PM, Eastern Standard Time, on the Twenty-fourth day of March, Two Thousand Twenty, as follows:

1. **Stay at home or your place of residence.** To preserve public health and safety, and to ensure the healthcare system in West Virginia is capable of serving all citizens in need, especially those at high risk and vulnerable to COVID-19, all individuals within the State of West Virginia are under a general stay-at-home order and are directed to stay at home or their place of residence unless performing an essential activity. An activity is essential if the purpose of the activity is one of the following:

- a. Obtaining food, medicine, and other similar goods necessary for the individual or a family member of the individual.
 - b. Obtaining non-elective medical care and treatment and other similar vital services for an individual or a family member of the individual.
 - c. Going to and from an individual's workplace if such workplace and/or work is included in the definition of Essential Businesses and Operations as outlined in Section 3, below.
 - d. Going to and from the home of a family member.
 - e. Going to and from the home of another individual who, under the terms of a parenting plan or similar agreement, is entitled to visitation with or the care of a child.
 - f. Going to and from an individual's place of worship.
 - g. Engaging in outdoor activity, provided that individuals at all times and as much as reasonably possible maintain social distancing of six feet from one another and abide by a 10-person limitation on gathering size.
2. **Non-essential businesses and operations must temporarily cease operations.** In addition to those businesses directed to close or limit occupancy pursuant to previous executive orders, all businesses and operations in West Virginia, except Essential Businesses and Operations as defined below, are required to cease all activities within the state except for such minimum basic operations as are necessary to maintain the value of the business's inventory, preserve the condition of the business's physical plant and equipment, ensure security, process payroll and employee benefits, or related functions, and the minimum necessary activities to facilitate employees of the business being able to continue to work remotely from their residences. Businesses such as home-based businesses may continue to operate, so long as any employees or contractors of such businesses perform activities from their own residences. Further, small businesses that do not invite in the general public and which have five or less employees in the office may continue to operate, but must ensure that proper social distancing and hygiene practices are maintained.
3. **Essential businesses and operations shall continue to operate.** Essential Businesses and Operations, as described below, shall remain open, and individuals may leave their

residence to provide any services or to perform any work necessary to offer, provision, supply, operate, maintain, and/or repair Essential Businesses and Operations. The term "Essential Businesses and Operations" includes those industries and workers described in the U.S. Department of Homeland Security's Cybersecurity and Infrastructure Security Agency's March 19, 2020, *Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response* and its "Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response" attached thereto (the "CISA Guidance"). In addition to those industries and workers identified in the CISA Guidance, the following industries, businesses, and/or workers employed in such industries and businesses are specifically included as Essential Businesses and Operations under this Order:

a. Healthcare, public health operations, and health insurance companies.

Healthcare, public health operations, and healthcare insurance companies include without limitation hospitals, clinics, dental offices, pharmacies, public health entities, including those that compile, model, analyze, and communicate public health information, pharmaceutical, pharmacy, medical device and equipment, and biotechnology companies (including operations, research and development, manufacture, and supply chain), managed care organizations and related entities and attendant or related services, Medicaid providers, healthcare insurers, organizations collecting blood, platelets, plasma, and other necessary materials (including organizations hosting blood drives, provided that appropriate precautions are taken, including proper social distancing and hygiene measures during any such drive), obstetricians and gynecologists, eye care centers, including those that sell or provide glasses and contact lenses, home healthcare providers, mental health and substance use providers, other healthcare facilities and suppliers and providers of any related and/or ancillary healthcare services, and entities that transport and dispose of medical materials and remains. This includes manufacturers, technicians, logistics, and warehouse operators and distributors of medical equipment, personal protective equipment, medical gases, pharmaceuticals, blood and blood products, vaccines, testing materials, laboratory supplies, cleaning, sanitizing, disinfecting, or sterilization supplies, and tissue and

paper towel products. This category of industry shall be construed very broadly to avoid any impacts to the delivery of healthcare, broadly defined. Healthcare and public health operations does not include fitness and exercise gyms, spas, salons, barber shops, tattoo parlors, and similar facilities limited or closed under previous executive order.

- b. Grocery stores and pharmacies.** Grocery stores, pharmacies, farmers' markets, farm and produce stands, supermarkets, convenience stores, and other establishments engaged in the retail sale of groceries, canned food, dry goods, frozen foods, fresh fruits and vegetables, pet supplies, fresh meats, fish, and poultry, prepared food, alcoholic and non-alcoholic beverages, any other household consumer products (such as cleaning and personal care products), specifically including their supply chain and administrative support operations. This includes stores that sell groceries, medicine, including over-the-counter medication not requiring a medical prescription, and also those that sell other non-grocery products, and products necessary to maintaining the safety, sanitation, and essential operation of residences and Essential Businesses and Operations.
- c. Food, beverage, and agriculture.** Food and beverage manufacturing, production, processing, and cultivation, including farming, livestock, seed and feed stores, fishing, baking, and other production agriculture, including cultivation, marketing, production, and distribution of animals and goods for consumption, and businesses that provide food, shelter, and other necessities of life for animals, including animal shelters, rescues, shelters, kennels, and adoption facilities. Restaurants and other facilities that prepare and serve food and/or drinks, but only for consumption off-premises, through such means as take-away, delivery, or drive-through/drive in. Schools and other entities that typically provide food services to students or members of the public may continue to do so under this Order on the condition that the food is provided to students or members of the public on a pick-up or take-away basis only. Schools and other entities that provide food services under this exemption shall not permit the food to be eaten at the site where it is provided, or at any other gathering site due to the virus's propensity to physically impact surfaces and personal property.

d. Essential governmental functions. For purposes of this Order, all first responders, emergency management personnel, emergency dispatchers, legislators, judges, court personnel, jurors and grand jurors, law enforcement and corrections personnel, hazardous materials responders, child protection and child welfare personnel, housing and shelter personnel, military, and other governmental employees working for or to support Essential Businesses and Operations, and all state governmental employees deemed essential employees by their respective agency head, are categorically exempt from this Order. Essential government functions means all services provided by the State or any municipality, township, county, political subdivision, board, commission, or agency of government and needed to ensure the continuing operation of the government agencies or to provide for or support the health, safety, and welfare of the public, and including contractors performing such essential government functions. Each government body shall determine its essential government functions and identify employees and/or contractors necessary to the performance of those functions. This Order does not apply to the United States government. Nothing in this Order shall prohibit any individual from performing or accessing essential government functions.

e. Human services organizations and childcare facilities and providers. Human services operations includes without limitation long-term care facilities, day care centers, day care homes, group day care homes, residential settings and shelters for adults, seniors, children, and/or people with developmental disabilities, intellectual disabilities, substance use disorders, and/or mental illness, transitional facilities, home-based settings to provide services to individuals with physical, intellectual, and/or developmental disabilities, seniors, adults, and children, field offices that provide and help determine eligibility for basic needs including food, cash assistance, medical coverage, child care, vocational services, rehabilitation services, development centers, adoption agencies, businesses that provide food, shelter, and social services, and other necessities of life for economically disadvantaged individuals, individuals with physical, intellectual, and/or developmental disabilities, or otherwise needy individuals, and child care centers, day care centers, and those engaged in caretaking for children.

- f. Essential infrastructure.** Businesses, entities, or workers engaged in food production, distribution, fulfillment centers, storage facilities, preparation, and sale, construction (including without limitation construction required in response to this public health emergency, hospital construction, construction of long-term care facilities, public works construction, school construction, essential business construction, and housing construction), business management and maintenance, airport operations, operation, maintenance, and supply of utilities, including water, sewer, and gas, electrical (including power generation, distribution, and production of raw materials including without limitation coal and oil and natural gas), distribution centers, oil and biofuel refining, roads, highways, railroads, and public transportation, cyber and other security operations and services, flood control, solid waste and recycling collection and removal, and internet, video, and telecommunications systems (including the provision of global, national, and local infrastructure for computing services, business infrastructure, communications, and web-based services) and telecommunications workers. Essential infrastructure shall be construed broadly to avoid any impacts to essential infrastructure, broadly defined.
- g. Coal mining and coal-fired electric generation facilities.** Coal mining and coal-fired electric generation facilities, as well as all ancillary and support functions ranging from transportation, maintenance, equipment, and supply vendors.
- h. Manufacture, distribution, and supply chain for critical products and industries.** Manufacturing companies, distributors, and supply chain companies producing and supplying essential products and services in and for industries such as pharmaceutical, technology, biotechnology, healthcare, chemicals and sanitization, waste pickup and disposal, agriculture, food and beverage, transportation, energy, iron ore, steel and steel products, aluminum and aluminum products, petroleum, propane, and fuel, mining, construction, national defense, communications, as well as products used by other Essential Businesses and Operations including without limitation filters and filtration products and services.
- i. Transportation and travel related businesses and gas stations.** Travel related businesses facilitating access to or provision of essential activities or any Essential

Businesses and Operations, including without limitation , airlines, taxis, transportation network providers (such as Uber and Lyft), vehicle rental services, paratransit, and other private, public, and commercial transportation and logistics providers, travel or transport of agricultural products, foodstuffs, or related items, or other governmental travel needs, and gas stations and automobile dealers and other suppliers, auto repair, farm equipment, construction equipment, and related facilities and related facilities.

- j. Financial and insurance institutions.** Banks and banking services including without limitation ATM services, currency exchanges, consumer lenders, credit unions, appraisers, title companies, financial markets, trading and futures exchanges, payday lenders, affiliates of financial institutions, professional debt collectors and related creditor service workers, workers engaged in payment clearing and settlement, wholesale funding, and capital markets activities, entities that issue bonds, related financial institutions, institutions selling financial products, insurance companies, underwriters, agents, brokers, and related insurance claims and agency services.
- k. Hardware and supply stores.** Hardware and supply stores and businesses that sell construction, electrical, plumbing, and heating materials.
- l. Critical trades.** Building and construction tradesmen and tradeswomen, and other trades including without limitation plumbers, electricians, exterminators, filtration technicians, cleaning and janitorial staff for commercial and governmental properties, security staff, operating engineers, HVAC engineers, painting, moving, and relocation services, and other service providers who provide services that are necessary to maintain the safety, sanitation, and essential operation of residences, essential activities, and Essential Businesses and Operations.
- m. Mail, post, shipping, logistics, delivery, and pick-up services.** Post offices and other businesses that provide shipping and delivery services, and businesses that ship or deliver groceries, food, alcoholic and non-alcoholic beverages, goods, vehicles, or services to end users or through commercial channels.
- n. Religious entities.** Religious facilities, entities, and groups and religious gatherings, including weddings and funerals; provided that such gatherings should

still practice proper social distancing of six feet between persons to the greatest extent possible.

- o. Educational institutions.** Educational institutions including public and private pre-K-12 schools, colleges, and universities for purposes of facilitating distance learning, performing critical research, or performing essential functions including providing for the delivery or pick-up of food for school age children; provided that proper social distancing of six feet between persons is maintained to the greatest extent possible.
- p. Laundry services.** Laundromats, dry cleaners, industrial laundry services, and laundry service providers.
- q. Supplies to work from home.** Businesses that sell, manufacture, or supply products needed for people to work from home, including IT and telecommunications services and product companies.
- r. Supplies for Essential Businesses and Operations.** Businesses that sell, manufacture, or supply other Essential Businesses and Operations with the support of materials necessary to operate, including computers, audio and video electronics, household appliances, IT and telecommunications equipment, cybersecurity software or services, hardware, paint, flat glass, electrical, plumbing, and heating material, sanitary equipment, personal hygiene products, food, food additives, ingredients, and components, medical and orthopedic equipment, optics and photography equipment, diagnostics, food and beverages, chemicals, soaps and detergents, tent and other temporary structure suppliers, and firearm and ammunition suppliers and retailers.
- s. Home-based care and services.** Home-based care for adults, seniors, children, and/or people with developmental disabilities, intellectual disabilities, substance use disorders, and/or mental illness, including caregivers such as nannies who may travel to the child's home to provide care, and other in-home services including meal delivery.
- t. Residential facilities and shelters.** Residential facilities and shelters for adults, seniors, children, pets, and/or people with developmental disabilities, intellectual disabilities, substance use disorders, and/or mental illness.

- u. Professional services.** Professional services, such as legal services, accounting services, insurance services, real estate services (including appraisal and title services).
 - v. Media and first amendment protected speech.** Newspapers, television, radio, and other media services.
 - w. Hotels and motels.** Hotels and motels, to the extent used for lodging and delivery or carry-out food delivery.
 - x. Funeral services.** Funeral, mortuary, cremation, burial, cemetery, and related services; provided that proper social distancing of six feet between persons is maintained to the greatest extent possible.
- 4. Prohibited activities.** All places of public amusement, whether indoors or outdoors, including but not limited to locations with amusement rides, carnivals, zoos, museums, arcades, fairs, pool halls, bingo halls, malls (except where stores in a mall that have a direct outdoor entrance and exit that provide essential services and products under the terms of this Order), children's play centers, playgrounds, bowling alleys, movie and other theaters, concert and music halls, adult entertainment venues, racetracks, social clubs, and other similar businesses shall be closed.
 - 5. Avoid social gatherings.** All public and private gatherings of any number of people occurring outside a single household or living unit are prohibited, except for the limited purposes permitted by this Order. Any gathering of more than 10 people is prohibited unless exempted by this Order. Nothing in this Order prohibits the gathering of members of a household or residence.
 - 6. Intent of this Order.** The intent of this Order is to ensure that the maximum number of people self-isolate in their places of residence to the maximum extent feasible, while enabling essential services to continue, to slow the spread of COVID-19 to the greatest extent possible. When people need to leave their places of residence, whether to perform essential activities, or to otherwise facilitate authorized activities necessary for continuity of social and commercial life, they should at all times and as much as reasonably possible properly socially distance themselves from others. All provisions of this Order should be interpreted and implemented to effectuate this intent.

7. **Enforcement.** This Order may be enforced by State and local law enforcement and by state and local regulatory and/or licensing bodies to the extent possible under West Virginia law.
8. **Duration.** The provisions of this Order, and all previous executive orders relating to COVID-19, are effective until terminated by subsequent executive order.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of West Virginia to be affixed.



By the Governor

DONE at the Capitol in the City of Charleston, State of West Virginia, this Twenty-third day of March, in the year of our Lord, Two Thousand Twenty in the One Hundred Fifty-seventh year of the State.


GOVERNOR


SECRETARY OF STATE

https://www.wvgazettemail.com/coronavirus/wv-school-closures-extended-until-april-30/article_bd161b5e-d60f-5ce0-a787-ab2e89273c24.html?utm_medium=social&utm_source=email&utm_campaign=user-share

WV school closures extended until April 30

- By Ryan Quinn Staff writer
- Apr 1, 2020

West Virginia schools will remain closed at least through April 30, Gov. Jim Justice announced Wednesday.

“In following the president’s lead of closure until the end of April, there is some uncertainty with our April 20 date,” Justice said.

President Donald Trump said this week he will extend guidelines to maintain social distancing because of the coronavirus to April 30, rather than trying to reopen the country by Easter (April 12), as he earlier suggested.

This is the second time Justice has extended the statewide school closure. He originally ordered schools shuttered from March 16-27. Last week, he announced that closure would be extended by a further three weeks, to April 20.

At a Wednesday news conference, he added the roughly two-week closure extension.

Now, children are scheduled to return to classrooms on May 1, a Friday.

The governor suggested that county systems not extend their school year to make up for face-to-face class days lost to the coronavirus shutdown. Counties have been providing distance education, but it is beset with obstacles.

Not taking into account calendar extensions that might occur from days missed for other reasons, such as snow days, West Virginia public school students won’t have much school left, even if they return on May 1.

EXHIBIT C

https://www.wvgazettemail.com/coronavirus/wv-school-closures-extended-until-april-30/article_bd161b5e-d60f-5ce0-a787-ab2e89273c24.html?utm_medium=social&utm_source=email&utm_campaign=user-share

“I think, if we were only to be able to go back to school for two or three weeks, it would give a great opportunity of closure,” Justice said. “It would give a great opportunity to give instruction for the summer, so many different things for our kids and our teachers. It would still be very beneficial to have the opportunity to go back, and I’m very hopeful that we’re going to be able to do that.”

In Kanawha County, the last day of classes for every school except Piedmont Elementary, which is on a year-round calendar, is May 26.

Cabell and Monongalia counties get out even earlier, on May 22. Putnam County wraps up June 3. Berkeley County, second only to Kanawha in student population, ends May 29.

Justice said the planned last day for any county is currently June 6. He said he moved May’s primary election to June 9 because it’s the first Tuesday after they all shut down.

Schools often are used as polling places.